

July 2016

DEPARTMENT OF FINANCE
COUNTY OF KAUAI



GENERAL TERMS AND CONDITIONS

FOR

GOODS AND SERVICES CONTRACTS

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Article I PREAMBLE

Section 1.01 Reference

The General Terms and Conditions of the County of Kaua'i, incorporated by reference in the solicitation document and the awarded contract, referred to as the "GTC" or "General Conditions," represent the County's policy and requirements relating to contracts as authorized by Hawaii Revised Statutes (HRS), Chapter 103D, and its promulgated rules under Hawaii Administrative Rules (HAR), Title 3, Department of Accounting and General Services (collectively referred to as the "Procurement Code").

References to HAR provisions in the GTCs are included for convenience only and may not be complete. Should any contractual term herein be inconsistent with the Procurement Code, the Procurement Code shall govern. Offerors and contractors should familiarize themselves with the Procurement Code.

Article II DEFINITION OF TERMS

This Section shall incorporate the definitions not listed herein and are contained in Hawaii Revised Statutes (HRS) 103D and Hawaii Administrative Rules (HAR), Title 3, Department of Accounting & General Services, Subtitle 11, Procurement Policy Board, Chapters 120 through 131.

Terms as used in these General Terms and Conditions, unless the context requires otherwise, shall have the following meaning:

"Addendum/Addenda" means a written document issued during the solicitation period involving changes to the solicitation documents which shall be considered and made a part of the solicitation documents and resulting contract.

"Alternative procurement method" means a procurement method used due to a waiver from the competitive sealed bids or proposals process when one or no responsive, responsible offer is received.

"Amendment" shall have the same meaning as "contract modification" or "modification" as hereafter defined.

"Award" means the notification of the County's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror.

"Best value" means the most advantageous offer determined by evaluating and comparing all relevant criteria in addition to price so that the offer meeting the overall combination that best serves the County is selected. These criteria may include, in addition to others, the total cost of ownership, performance history of the offeror, quality of goods, services, or construction, delivery, and proposed technical performance.

"Bid" means the executed document submitted by a bidder in response to an invitation for bids, or a multi-step bidding procedure.

"**Bidder**" means any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated.

"**Bid sample**" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

"**Bid form**" or "**Proposal form**" means the prescribed form or format which a offeror uses to submit his offer.

"**Bid guaranty**", "**Bid security**", "**Proposal guaranty**" or "**Proposal security**" means the security when required, furnished by an offeror with his offer to ensure that the offeror will enter into the contract with the County and execute the required contract and payment bonds covering the work contemplated, if his offer is accepted.

"**Change order**" means a written order signed by the Director, directing the Contractor to make changes which the changes clause of the contract authorizes the Director to order without the consent of the Contractor.

"**Chief Procurement Officer**" means the chief procurement officer of the County (Director of Finance) as provided in section 103D-203, HRS, or the officer's designee.

"**Contract**" means the combination of the solicitation, including the General Instructions to Offerors, the specifications, scope of work and award, the special provisions, and the general terms and conditions; the offer and any best and final offers; and any amendments to the solicitation or to the contract; and any terms implied by law.

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

"**Contract modification**" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

"**Contracting officer**" means for all projects, the Director of Finance of the County of Kaua'i, or the Director's delegated Designee.

"**Contractor**" means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the Contract with the County, and acting directly or through its agents or employees.

"**Cost analysis**" means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

"**Cost data**" means information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the Contractor in performing the Contract.

"**County**" means the County of Kaua'i, and its officers, agents, and employees.

"**Days**" means consecutive calendar days unless otherwise specified.

"**Designee**" means a person appointed by the Director of Finance or the Officer-in-Charge (OIC) to act on its behalf with delegated authority (HAR 3-121-16).

"**Director**" means the Director of Finance of the County.

"**Discussion**" means an exchange of information to promote understanding of a County's agency's requirements and offeror's proposal and to facilitate arriving at a Contract that will be the best value to the County. Discussions are not permissible in competitive sealed bidding, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

"**Division of Purchasing**" means the Division of Purchasing, Department of Finance, with delegated authority to solicit bids and proposals and award Contracts.

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

"**Guarantee**" means a formal assurance of the quality or of the length of use to be expected from a product offered or constructed.

"**HAR**" means the Hawai'i Administrative Rules of the State of Hawai'i, as amended.

"**Hazardous materials**" mean and include any and all radioactive materials, asbestos, organic compounds known as polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, hazardous wastes, toxic substances, and any and all other substances or materials defined as "hazardous materials," "extremely hazardous materials," "hazardous wastes" or "toxic substances" under or for the purposes of hazardous materials laws.

"**Hazardous materials laws**" mean and include all federal, state or local laws, ordinances, rules, regulations or codes, now or hereafter in effect, relating to environmental conditions, human health or industrial hygiene, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. section 9601, et seq., the Resource Conservation and Recovery Act, 42, U.S.C. section 6901, et seq., the Hazardous Materials Transportation Act, 42 U.S.C. section 1801, et seq., the Clean Water Act, 33 U.S.C. section 1251 et seq., the Clean Air Act, 42 U.S.C. 7401 et seq., the Toxic Substances Control Act, 15 U.S.C. section 2601 - 2629, the Safe Drinking Water Act, 42, U.S.C. sections 300F - 300J, HRS Chapter 128D, Environmental Response Law, HRS Chapter 342B, Air Pollution Control, HRS Chapter 342D, Water Pollution, HRS Chapter 342H, Solid Waste Pollution, HRS Chapter 342J, Hazardous Waste, HRS Chapter 342L, Underground Storage Tanks, Chapter 342P, Asbestos, and any similar

state or local laws or ordinances and the regulations now in effect or hereafter adopted, published or promulgated thereto.

"**HRS**" means the Hawai'i Revised Statutes of the State of Hawai'i, as amended.

"**Informal Bid**" means a quotation made under small purchase procedures, pursuant to HRS Chapter 103D-305 or a quotation made under emergency purchase procedures, pursuant to HRS Chapter 103D-307.

"**Invitation for Bids**" or "**IFB**" means all documents, whether attached or incorporated by reference, utilized for soliciting bids under the competitive sealed bidding source selection method.

"**Notice to Proceed**" or "**NTP**" means the document issued to the Contractor designating the official commencement date of the performance under the Contract.

"**Offer**" means the bid, proposal, or quotation.

"**Offeror**" means 1) any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, directly or through a duly authorized representative or agent, an offer for the goods or service contemplated; or 2) the Contractor in a negotiated contract.

"**Officer-in-Charge**" or "**OIC**" means the person responsible, or delegated designee, for carrying out the provisions of the Contract and advising the Director on contractual matters.

"**Opening**" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

"**Overhead**" means continuous or general costs occurring in the normal course of business, including but not limited to costs for labor, rent, taxes, royalties, interest, discounts paid, insurance, bonds, lighting, heating, cooling, accounting, legal fees, equipment and facilities, telephone systems, depreciation, and amortization.

"**Price analysis**" means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

"**Price data**" means factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both the General Contractor and subcontract prices.

"**Priority-Listed Offerors**" means the three or more responsive and responsible offerors who have submitted the highest ranked proposals.

"**Procurement**" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

"**Project**" means work to be performed as set forth in the Contract, including furnishing all services, labor, goods, materials, supplies, equipment and other incidentals reasonably necessary for the successful completion of work contemplated under the Contract.

"**Proposal**" means the executed document submitted by an Offeror in response to a Request for Proposals.

"**Public Purchase System**" or "**PPS**" means the County of Kaua'i electronic procurement system.

"**Purchasing agency**" means any governmental body which is authorized by HRS 103D or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods, services, or construction.

"**Quotation**" means a statement of price, terms of sale, and description of goods, services, or construction offered by a prospective seller to a prospective purchaser, usually for purchases pursuant to section 103D-305, HRS.

"**Request for Proposals**" or "**RFP**" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals under the competitive sealed proposal source selection method.

"**Responsible Bidder or Offeror**" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

"**Responsive Bidder or Offeror**" means a person who has submitted an offer which conforms in all material respects to the IFB or RFP.

"**Services**" mean the furnishing of labor, time, or effort by a Contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.

"**Solicitation**" means an invitation for bids, request for proposals, or a request for quotations, or any other document issued by the County for the purpose of soliciting bids or proposals to perform a County contract.

"**Special Provisions**" means 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 solicitations, evaluation of offers, determination of award, plus those applicable to performance by the Contractor.

Additions or revisions to the General Terms and Conditions, which shall be considered a part of the General Terms and Conditions, setting forth conditions or requirements applicable to the particular project or contract under consideration shall be included in the Special Provisions. Should any Special Provisions conflict with these General Terms and Conditions, said Special Provisions shall govern.

"**Specifications**" mean any description of the physical or functional characteristics, or of the nature of a good, service, or construction item. The term includes descriptions or any requirement for

inspecting, testing, or preparing a good, service, or construction item for delivery.

"**State**" means the State of Hawai'i.

"**Standard commercial product**" means a product or material, in the normal course of business, is customarily maintained in stock or readily available by a manufacturer, distributor, or dealer for the marketing of the product.

"**Surety**" means 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.

"**Using Agency**" means the department(s) of the County of Kaua'i who is (are) the end-user(s) of the project procured by the Division of Purchasing.

"**Warranty**" means a written statement that promises the good condition of a product and states that the maker is responsible for repairing or replacing the product for a certain period of time after its purchase

"**Work**" means the furnishing by the Contractor of all labor, services, material, equipment, and other incidentals necessary for the satisfactory performance of the Contract.

"**Working day**" means any day on the calendar, exclusive of State holidays, Saturdays, and Sundays. Unless another meaning is intended, "working days" shall mean consecutive working days.

Article III PERFORMANCE OF CONTRACT

Section 3.01 Execution of contract.

- (a) In cases where the Contract award amounts to \$25,000 or more the County may transmit a Contract to the successful Offeror for execution. The Contract shall be executed by the successful vendor and returned to the Division of Purchasing, together with a satisfactory Contract bond if required, and other supporting documents, within ten (10) days after receipt by the vendor or within such time as the Director may allow.

- (b) No such Contract shall be considered binding upon the County until the Contract has been fully and properly executed by all the parties thereto and the Director has, in accordance with Section 103D-309, HRS, 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 Director 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 Section 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.

- (c) Any agreement arising out of this solicitation is subject to the approval of the County Attorney as to form and legality, and to all further approvals that may be required by statute, regulation, rule, order, or other directive.

Section 3.02 Independent contractor.

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 County retains the general right of inspection by a designated representative in order to judge, whether in the County's sole opinion, such work is being performed by the Contractor in accordance with the terms of this agreement. Under no circumstances will the Contract be considered a contract of partnership or joint venture between the County and the Contractor.

Section 3.03 Construction of Contract.

The masculine shall be deemed to embrace and include the feminine and the singular shall be deemed to embrace and include the plural, whenever required in the context of the Contract.

Section 3.04 Compliance with Contract terms, etc.

The Contractor shall perform in conformity with the solicitation and/or other provisions forming the Contract. In the event the Contractor fails to so perform, the Director, in addition to any other recourse, reserves the right to suspend the Contractor from bidding on any or all County solicitations pursuant to Chapter 3-126, HAR.

Section 3.05 Insurance

Contractor agrees to maintain, on a primary basis and at its sole expense, at all times during the life of the Contract, the insurance coverages, limits, including endorsements, described in the Insurance Requirements of the solicitation or other procurement document.

Section 3.06 Examination of site.

- (a) When applicable, the Offeror shall examine carefully the site of the proposed work before submitting an offer. The submission of an offer shall be considered as a warranty that the Offeror has made such examination and is satisfied with the conditions to be encountered in performing the work.
- (b) Materials and equipment. The County does not assume any responsibility for the availability of any materials or equipment required under this contract. Unless otherwise specified in the solicitation, the Offeror shall be considered as having taken into account when submitting an offer the availability of materials or equipment required under the contract, except as provided for in applicable sections of the County's general conditions.

Section 3.07 Price inclusive of all applicable taxes.

Unless otherwise specified in the solicitation document, the Offeror shall include in its unit price and be responsible for paying all taxes, which shall be applicable to the goods, services, or the furnishing and sale thereof. Offerors are directed to contact the Department of Taxation of the State of Hawai'i for assistance as to whether the State of Hawai'i excise tax, the applicable use tax, or other taxes will apply to the Offeror. Offeror shall not pass through any increases in taxes to the County.

Section 3.08 Wages, Hours, and Working Conditions.

When the offer is in excess of \$25,000 for Services projects and a certification form is made a part of the solicitation, the said form shall be completed, signed by the Offeror, and submitted prior to award. Failure to submit the required certification prior to award may be grounds for disqualification of the Offeror's offer.

The certification form shall be used to certify that, if awarded the contract, the Offeror will comply with HRS §103-55, relating to Wages, hours and working conditions of employees of Contractor supplying services.

The certification form further certifies that the services to be performed will be performed under the following conditions:

- (a) Wages. The services to be rendered shall be performed by employees paid at wages or salaries not less than the wages paid to public officers and employees for similar work.
- (b) Compliance with Labor Laws. Contractor shall be responsible for and comply with all applicable labor laws of the Federal and State governments, including worker's compensation, unemployment compensation, payment of wages and safety standards.

Section 3.09 Performance and Payment Bonds.

Contract performance and payment bonds shall only be required for Goods or Services projects when specified in the Special Provisions. Offeror shall include in its price, any and all costs to meet the bonds requirement of a project.

Section 3.10 Cost and Pricing Data.

Cost or pricing data shall be in conformance with HRS 103D-312 and HAR 3-122-123, as amended.

Section 3.11 Change orders and modifications.

The Contractor will not undertake to perform the portion of the work affected by the changes until a change order or modification has been approved and issued. (Refer to Article V – MODIFICATIONS AND TERMINATION)

Section 3.12 Liquidated damages.

The Contractor understands and agrees that time is an essential factor of this Contract, and that the County will suffer material loss by reason of delays that may occur in the Contractor's performance of the work or any portions of the work within the time or times fixed in the Contract or any extensions thereto. When the Contractor is given notice of delay or nonperformance, as specified the Termination for Default clause of this Contract, and fails to cure in the time specified, the Contractor shall pay to the County, as liquidated damages for any such delays, the sum set forth in the Solicitation and/or the Contract for each and every calendar day of delay or nonperformance from the day set for cure until either the County reasonably obtains similar Goods or Services if the Contractor is terminated for default, or until the Contractor provides the Goods or Services if the Contractor is not terminated for default. The sums of each and every calendar day of delay or nonperformance shall be deducted from the Contract price. It is expressly stipulated by and between the Contractor and the County that any such sums shall be deemed and taken to be liquidated damages for the Contractor's failure to perform within the specified time and not be in the nature of a penalty. To the extent that the Contractor's delay or nonperformance is excused under "excuse for nonperformance or delayed performance" of the Termination for Default clause

of this Contract, liquidated damages shall not be due the County. The Contractor remains liable for damages caused other than by delay.

Section 3.13 Delivery.

- (a) The number of calendar days for delivery of goods or services for the completion of the Contract shall be calculated from the official commencement date as established in the Notice to Proceed or from the date of the purchase order.
- (b) Should the Contractor begin work or make delivery before the official commencement date, the Contractor understands and agrees that such work or delivery shall be considered as having been done at his own risk and expense, as a gift of services or goods, and no payment will be owed to him for such premature work or delivery.
- (c) The Contractor shall deliver the goods and furnish services at such particular location designated and in the manner specified or ordered by the Director.
- (d) Whenever equipment is specified, the Contractor shall deliver the equipment completely assembled, unless provided for otherwise.
- (e) Contract prices shall be based on delivery F.O.B. place of destination and shall include all freight, handling, delivery, and related charges.

Section 3.14 Notice to Proceed.

- (a) After the Contract is fully executed, the Officer-in-Charge will issue a written "Notice to Proceed" establishing the official commencement date. Until said Notice is issued the County may find cause for cancellation of the award and any expenses incurred before the official commencement date shall be done at the Contractor's own risk and expense.
- (b) The number of days for completion of the Contract will be calculated from the official commencement date.
- (c) In cases where the amount of the award is less than \$25,000 and a purchase order is issued, no notice to proceed will be made.

Section 3.15 Disputes.

- (a) All controversies between the County 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 Director in writing, within ninety (90) days after a written request by the Contractor for a final decision concerning the controversy; provided that if the Director does not issue a written decision within ninety (90) 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 Director 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 such decision shall be final and conclusive, unless fraudulent, or the Contractor brings an action seeking judicial review of the decision in the 5th Circuit Court of the State of Hawai'i within the six months from the date of receipt of the decision.
- (d) The Contractor shall comply with any decision of the Director and proceed diligently with performance of this contract pending final resolution by the Fifth Circuit Court of the State of Hawai'i of any controversy arising under, or by virtue of, this Contract, except where there has been a material breach of contract by the County; provided that in any event the Contractor shall proceed diligently with the performance of the contract where the Director has made a written determination that continuation of work under the contract is essential to the public health and safety.

Section 3.16 Remedies.

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

Section 3.17 County's right of offset.

The County may offset any monies or other obligations the County owes to the Contractor under this Contract, any amount owed to the County by the Contractor under this Contract, or any other Contract, or pursuant to any law or other obligation owed to the County, including, but not limited to, the payment of any fees, landfill tipping fees, taxes or levies of any kind or nature. The County shall notify the Contractor in writing of any exercise of its right of offset and the nature and amount of such offset. For the purposes of this paragraph, amounts owed to the County shall not include debits or obligations which have been liquidated by agreement with the Contractor, and that are covered by an installment payment or other settlement plan approved by the County, provided, however, that the Contractor is current, and in compliance with, and not delinquent on, any payments, obligations, or duties owed to the County under such payment or other settlement plan.

Section 3.18 Time is of the essence.

Performance of the Contract shall commence on the commencement date designated in the Notice to Proceed and shall be completed within the time specified in the contract, except as modified by mutual agreement. Contractor acknowledges that time is of the essence in the completion of the work within the designated time in the contract.

Article IV LEGAL RELATIONS AND RESPONSIBILITY

Section 4.01 Laws to be observed.

- (a) Comply with all laws. The Contractor shall at all times observe, perform, and comply with all Federal, State and local laws or ordinances, rules and regulations which in any manner affect those engaged or employed in the performance of the work, the manufacture and sale of materials and equipment required under the contract, and the conduct of the work. The Contractor shall also comply with all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the work. Any reference to such laws, ordinances, rules and regulations shall include any amendments thereto. 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 Director in writing.
- (b) Indemnification for violation of law. The Contractor shall indemnify, hold harmless and defend the County and its officers, employees, agents, and representatives from all suits, actions, claims, damages, and judgments, of any character or kind, that may arise from or which are based on the violation of any such laws, ordinances, rules and regulations, orders and decrees, whether such violation is committed by the Contractor or his subcontractor or the employee or either or both. The Contractor's attention is especially directed to Chapter 103 and 103D, HRS; Hawai'i Administrative Rules Title 3, Department of Accounting and General Services Subtitle 11, issued by the Procurement Policy Board; the Kaua'i County Charter 1984, as amended; and the Kaua'i County Code 1987, as amended. The applicable provisions of the aforementioned documents shall be deemed to be a part of the contract as though fully set forth therein.

Section 4.02 Standards of conduct.

- (a) Section 3-1.8, Contracts, Kaua'i County Code 1987, as amended, states that:
 - (i) A County agency shall not enter into any contract with an officer or an employee or with a business in which an officer or an employee has a substantial interest, involving services or property of a value in excess of one thousand dollars (\$1,000.00), unless the contract is made after competitive bidding.
 - (ii) A County agency shall not enter into a contract with a 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 one (1) year and who participated while in County office or employment in the matter with which the contract is directly concerned.

(iii) This Section shall not apply to a personal contract of employment with the County. (Sec. 20.03, Art. XX, Charter; Sec. 3-1.8, R.C.O. 1976; Ord. No. 956, August 28, 2013)

(b) For purposes of this Section, "Employee" means any nominated, appointed or elected officer or employee of the County including, but not limited to, members of boards, commissions and committees and employees under contract to the County, but excluding Council-members.

(c) All Offerors should be certain that their bids or proposals are not in violation of this Section. By submitting this offer, Offeror certifies that his offer does not pose a conflict with the above referenced County Code of Ethics. Contracts awarded shall be void if there is a violation of said Code.

Section 4.03 Warranty of title.

The Contractor shall warrant absolute title and full and clear right to sell or provide the goods or services, as specified herein, to the County and that there are no liens, claims or encumbrances of any kind on said goods or services. The Contractor shall hold the County free, clear, and harmless against any adverse claim of title.

Section 4.04 Federal excise tax.

The Offeror understands that for such items which the County of Kaua'i is exempt from the Federal Excise Tax, pursuant to the U.S. Revenue Act of 1943, the price bid shall not include such tax.

Section 4.05 Copyright

The County shall have ownership of the work product that is produced by the Contractor in the performance of work under the Contract with the County, including an unrestricted, royalty-free, nonexclusive and irrevocable license to reproduce, publish, translate or otherwise use and to authorize others to publish and use all materials obtained or produced in connection with the work hereunder, which may be copyrighted by the County.

Section 4.06 Infringement Indemnification.

If the Contractor uses or licenses any design, device, material, process, technology or any other intellectual property ("Intellectual Property") covered by patent, copyright, trademark or other intellectual property protection, the right for such use shall be procured by the Contractor from the appropriate owner. The Contractor shall indemnify and hold the City and all its officers, agents, servants and employees harmless against all claims arising from the use of any claims for infringement by reason of the use of any such Intellectual Property in connection with providing services under this Contract.

Section 4.07 Subcontracting.

Except as provided for in the final Proposal or Bid as accepted by the County, the Contractor shall not sublet or replace its subcontractors any of the work to be performed without written permission from the Director. The subcontracting shall not, under any circumstances, relieve the Contractor of the Contractor's obligation and liability under the contract with the County. All persons engaged in performing the work covered by the contract shall be considered as agents of the Contractor, and shall be subject to the provisions thereof.

Section 4.08 Assignment of antitrust claims.

Vendor and purchaser recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the Contractor vendor hereby assigns to purchaser any and all claims for such overcharges as to goods and materials purchased in connection with this order or contract, except as to overcharges which result from antitrust violations commencing after the price is established under this purchase order or contract and which are not passed on to the purchaser under an escalating clause.

Section 4.09 Indemnification.

The Contractor shall indemnify, hold harmless and defend the County and its officers, employees, agents, and representatives from all suits, actions, claims, damages, and judgements of any character that may be brought against the County by whomsoever, on account of any injuries or damages sustained by any person and property, due to the negligent acts or omissions by the Contractor, or any of his officers, employees, subcontractors, assignees, or representatives, in the performance of the contract. In the event the County and the Contractor are found to be joint tortfeasors with respect to any such injuries or damages, the Contractor's obligations to indemnify the County under this Section shall extend only to the Contractor's pro rata share of negligence as determined in accordance with Section 663-12, HRS.

Section 4.10 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 Director or his authorized representatives, either personally or as officials of the County, it being understood that in such matters, they act solely as agents and representatives of the County.

Section 4.11 Conflicting provisions.

- (a) The terms and conditions stated in this solicitation shall not apply to any transaction if the provisions conflict with any federal laws or if it shall prevent the County from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

- (b) The special provisions, specifications, General Terms and Conditions, contract documents, and all supplemental documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. Each document is intended to be complementary, and describe and provide for the complete work. In case of conflict or discrepancy within any part of the contract, the stricter requirements, including Hawai'i State Statutory requirements, shall govern. Unless it is apparent that a different order of precedence is intended, the following is the precedence list with one (i) taking precedence over two (ii), two (ii) taking precedence over three (iii), etc.:
 - (i) Contract
 - (ii) Special Provisions
 - (iii) General Terms and Conditions
 - (iv) General Instructions to Offerors
 - (v) Specifications

Section 4.12 Record retention and right to audit records.

- (a) The Contractor [or] and any subcontractor(s) shall maintain the books and records that relate to the contract and any cost or pricing data for three (3) years from the date of final payment under the Contract.
- (b) The County, at reasonable times and places, may audit the books and records of any Contractor who has submitted cost or pricing data.

Section 4.13 HRS 103-72, transcription of instructional material.

The Contractor shall comply with the provisions of HRS §103-72 wherein the County shall retain the right to transcribe and reproduce any instructional material solicited herein in Braille, large print, recording, or other media for the use of physically-disabled students, including the visually impaired, unable to use the material in conventional print and form. Such right shall include the right to make those corrections, revisions, and other modifications as may be necessary.

Section 4.14 Non-discrimination.

The Contractor or subcontractor shall not discriminate on the basis of race, religion, color, national origin, sex, sexual orientation, gender identity, age, marital status, pregnancy, parenthood, disability, or political affiliation in the performance of this Contract. Failure to comply with this requirement may be cause for termination of this Contract or such other remedy as the County deems appropriate.

Section 4.15 Responsibility of Contractor and tax clearance.

- (a) Upon award of the Contract, HRS 103D-310 specifies that all Offerors shall comply with all laws governing entities doing business in the State, including, but not limited to HRS Chapters 237, 383, 386, 392, and 393.

- (b) In addition, pursuant to HRS 103D-328 and HRS 103-53, no Contract shall be binding or effective until the Division of Purchasing confirms tax clearance from the Director of Taxation and the Internal Revenue Service. The Contractor shall provide updated tax clearances as required by the Director of Finance to comply with HRS 103-53, as amended.
- (c) As proof of compliance with the above, the Division of Purchasing shall verify Contractor compliance using Hawai'i Compliance Express (HCE), as a pre-requisite to award, for the following requirements:
 - (i) Tax Clearance from the Department of Taxation and Internal Revenue Service to demonstrate compliance with HRS 237, General Excise Tax Law, and HRS 103D-328, Tax Clearance; and
 - (ii) Compliance from the Department of Labor and Industrial Relations to verify compliance with HRS Chapters 383 (Hawai'i Employment Security Law), 386 (Worker's Compensation Law), 392 (Temporary Disability Insurance Law), and 393 (Prepaid Healthcare Act), current within six months of issuance date; and
 - (iii) Good Standing from the Department of Commerce and Consumer Affairs.

Section 4.16 Campaign contributions by State and County Contractors.

If awarded a Contract in response to this solicitation, Offeror agrees to comply with HRS 11-355. Questions regarding this statute should be directed to the State of Hawai'i Campaign Spending Commission.

Section 4.17 Service contracts in excess of \$25,000.

- (a) Before any Offeror enters into a Contract to perform services in excess of \$25,000 for the County, the Offeror shall certify that the services to be performed will be performed under the following conditions:
 - (i) **Wages.** The services to be rendered shall be performed by employees paid at wages or salaries not less than the wages paid to public officers and employees for similar work.
 - (ii) **Compliance with labor laws.** All applicable laws of the Federal and State governments relating to workers compensation, unemployment compensation, payment of wages, and safety will be fully complied with.
- (b) No Contract to perform services for the County in excess of \$25,000 shall be granted unless all the conditions of this Section are met. Failure to comply with the conditions of this Section during the period of the Contract to perform services shall result in cancellation of the Contract, unless such noncompliance is corrected within a reasonable

period as determined by the Officer-in-Charge and approved by the Director. Final payment of a Contract or release of bonds or both shall not be made unless the Officer-in-Charge, subject to approval by the Director, has determined that the noncompliance has been corrected.

- (c) It shall be the duty of the Officer-in-Charge to enforce this Section on behalf of the Director.
- (d) This Section shall not apply to: (i) Managerial, supervisory, or clerical personnel. (ii) Contracts for supplies, materials, or printing. (iii) Contracts for utility services. (iv) Contracts to perform personal services under paragraphs (2), (3), (12), and (15) of Section 76-16, (HRS), paragraphs (7), (8), and (9) of Section 46-33, (HRS) and paragraphs (7), (8), and (12) of Section 76-77, (HRS). (v) Contracts for professional services. (vi) Contracts to operate refreshment concessions in public parks, or to provide food services to educational institutions. (vii) Contracts with nonprofit institutions.

Article V MODIFICATIONS AND TERMINATION

Section 5.01 General.

If the clauses set forth in these General Terms and Conditions are plainly inappropriate for use in the proposed contract, then the Director shall make a written determination describing the changes in the Special Provisions.

Section 5.02 Contract change orders.

- (a) Generally. By written order, at any time, and without notice to any surety, the procurement officer may, unilaterally, order of the Contractor:
 - (i) Changes in the work within the scope of the contract; and
 - (ii) Changes in the time of performance of the contract that do not alter the scope of the contract work.

- (b) Adjustments of price or performance time. If any such change order increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under this Contract an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this Section shall be determined in accordance with the price adjustment Section 5.08 PRICE ADJUSTMENT. Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause. Failure of the parties to agree to an adjustment in time shall not excuse the Contractor from proceeding with the contract as changed, provided that the Director within 14 days after the changed work commences, makes such provisional adjustments in time as the County deems reasonable. The right of the Contractor to dispute the contract price or time or both shall not be waived by its performing the work, provided however, that it follows the notice requirements for disputes and claims established by the contract or these rules.

- (c) Time period for claim. Except as may be provided otherwise by section 103D-501 (b), HRS, the Contractor must file a written claim disputing the contract price or time provided in a change order within ten (10) days after receipt of a written change order under Subsection (A), unless such period for filing is extended by the Director in writing. The requirement for filing a timely written claim cannot be waived and shall be a condition precedent to the assertion of a claim.

- (d) Claim barred after final payment. No claim by the Contractor for an adjustment hereunder shall be allowed if the claim is not received by the Finance Director prior to final payment under this Contract.

- (e) Other claims not barred. In the absence of such a change order, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim as permitted under the contract or for breach of contract.

Section 5.03 Contract modifications.

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

Section 5.04 Authorization for a stop work order.

- (a) Section 5.05 Stop work orders 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.

Section 5.05 Stop work orders.

- (a) Order to stop work. The Director, 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 Subsection. 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 Director 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 Director 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.

Section 5.06 Variations in quantities for definite quantity contracts.

- (a) Variation in definite quantity contracts. Upon the agreement of the parties, the quantity of goods or services specified in this contract may be increased provided: the unit prices will remain the same except for any price adjustments otherwise applicable; the Director makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract; that there is an appropriation for any increase in quantity; that any increase after an award is tendered is requested for not later than 30 days, or as mutually agreed to, after contract execution and effected by issuance of a purchase order referencing the respective contract number.
- (b) In the event that sufficient funds are not available to issue an award for the quantity of goods or services solicited, the County reserves the right to issue an award for only those quantities that will be covered by the amount of funds appropriated. A determination of the specific items and the reduced quantities shall be made on a priority basis as determined by the County.

Section 5.07 Variations in quantities for indefinite quantity contracts.

- (a) Variations in indefinite quantity contracts. Unless provided otherwise, the quantities stated are approximate only and are subject to either increase or decrease and are stated only for the purpose of comparing bids. Should the quantities of any item be increased, the Contractor shall furnish the additional quantities at the unit prices set forth herein. Should the quantities be decreased, payment will be made on actual quantities purchased at such unit prices and the Contractor will make no claims for loss of anticipated profits or additional compensation for any increase or decrease in the quantities. The actual quantities will be determined upon completion of the work covered by the contract or purchase order.

Section 5.08 Price Adjustment.

- (a) Price adjustment methods. Any adjustment in contract price pursuant to a provision in the contract shall be made in one or more of the following ways:

- (i) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - (ii) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (iii) 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;
 - (iv) In any other manner as the contracting parties may mutually agree upon before commencement of the pertinent performance; or
 - (v) In the absence of agreement between the parties, the provisions of section 103D-501 (b)(5), HRS, shall apply.
- (b) Submission of cost or pricing data. The Contractor shall be required to submit cost or pricing data if any 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 for any price adjustment subject to the provisions of subchapter 15, chapter 3-122-123. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraphs (a)(i) through (a)(v) shall be issued within ten (10) days after agreement on the method of adjustment.

Section 5.09 Assignment or change of name.

- (a) No assignment. No County contract is transferable, or otherwise assignable, without the written consent of the Director, provided that a Contractor may assign monies receivable under a contract after due notice to the County.
- (b) Recognition of a successor in interest; assignment. When in the best interest of the County, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the County shall agree that: the transferee assumes all of the transferor's obligations; the transferor remains liable for all obligations under the contract but waives all rights under the contract as against the County; and 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 County, the Director 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.

Section 5.10 Claims based on director's actions or omissions.

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

Section 5.11 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 Director 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, the Director 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 County may procure similar goods or services in a manner and upon terms deemed appropriate. 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 Director, the Contractor shall take timely and necessary action to protect and preserve property in the possession of the Contractor in which the County has an interest.
- (c) Compensation. Payment for completed goods delivered and accepted by the County 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 the Director; if the parties fail to agree, the Director shall set an amount subject to the Contractor's rights under Chapter 3-126, HAR. The County may withhold from amounts due the Contractor such sums as the Director deems to be necessary to protect the County against loss because of outstanding liens or claims of former lien holders and to reimburse the County 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 Director 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 County in its 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.
- (e) Upon request of the Contractor, the Director shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any

one or more of the excusable causes, and that, but for the excusable cause, the Contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the County under the clause entitled in fixed-price contracts, "Termination for Convenience" and in cost-reimbursement contracts, "Termination". As used in this Section, the term "subcontractor" means subcontractor at any tier.

- (f) 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.

Section 5.12 Termination for convenience.

- (a) Termination for convenience. The Director may, when the interests of the County so require, terminate this contract in whole or in part, for the convenience of the County. The Director shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.
- (b) Contractor's obligations. The Contractor shall incur no further obligations in connection with the terminated work, and on the dates set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the County's approval. The Director may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the County. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.
- (c) Right to goods. The Director may require the Contractor to transfer title and deliver to the County in the manner and to the extent directed: any completed goods; and the partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights, hereinafter called "manufacturing material," as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this Contract.
- (d) The Contractor shall, upon direction of the Director, protect and preserve property in the possession of the Contractor in which the County has an interest. If the Director does not exercise this right, the Contractor shall use best efforts to sell such goods and manufacturing materials. Use of this Section in no way implies that the County has breached the contract by exercise of the termination for convenience clause.

(e) Compensation:

- (i) The Contractor shall submit a termination claim specifying the amounts due based on the termination for convenience together with cost or pricing data to the extent required by Subchapter 15, Chapter 3-122, HAR, bearing on such claim. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Director may pay the Contractor, if at all, an amount set in accordance with subparagraph (3) below.
- (ii) The Director and the Contractor may agree to settlement provided the Contractor has filed a termination claim supported by cost or pricing data to the extent required by Subchapter 15, Chapter 3-122, HAR, and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the County, the proceeds of any sales of goods and manufacturing materials under paragraph (C), above, and the contract price of the work not terminated.
- (iii) Absent complete agreement under subparagraph (2), the Director shall pay the Contractor the following amounts, provided payments agreed to under subparagraph (2) shall not duplicate payments under this paragraph for the following:
 - 1) Contract prices for goods or services accepted under the contract;
 - 2) Costs incurred in preparation and performing the terminated portion of the work plus a five percent markup on actual direct costs on such portion of the work, such markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided, that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 - 3) Subject to the prior approval of the Director the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to paragraph (B) of this clause. Subcontractors shall be entitled to a markup of no more than ten percent on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with clause (b) of subparagraph (3).
 - 4) The total sum to be paid the Contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of goods and manufacturing materials under Subparagraph (2), and the contract price of work not terminated.
- (f) Cost claimed, agreed to, or established under subparagraphs (2) and (3) shall be in accordance with Chapter 3-123, HAR.

Section 5.13 Termination for cost-reimbursement contracts.

Termination for cost-reimbursement contracts. The only cost recognized as allowable shall be in accordance with the cost principles set forth in Chapter 3-123, HAR, provided that if a written determination is approved by the Director, such cost principle may be modified by contract.

Section 5.14 Complaints and protests.

HRS 103D-701 Authority to resolve protested solicitations and awards, and Chapter 3-126, HAR, provides that:

- (a) Complainants should seek resolution of their complaints initially with the office that issued the solicitation. Such complaints shall be made in writing.
- (b) Protests shall be made in writing or as otherwise specified in the solicitation to the Director, and shall be filed within five (5) working days after the protestor knows or should have known of the facts giving rise therein; provided that a protest of an award or proposed award shall in any event be submitted in writing or as otherwise specified in the solicitation within five (5) working days after the posting of award of the contract either under Section 103D-302 or 103D-303, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers. A protest is considered filed when received by the Director. Protests filed after the five day period shall not be considered.
- (c) Protestors may file a protest on any phase of solicitation or award including but not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.
- (d) To expedite handing of protests, the envelope or communication should be labeled "Protest" and either served personally, sent by registered or certified mail, return receipt requested, to the Director, or as otherwise specified in the solicitation. The written protest shall include as a minimum the following:
 - (i) The name and address of the protestor;
 - (ii) Appropriate identification of the procurement, and, if a contract has been awarded, its number;
 - (iii) A statement of reasons for the protest; and
 - (iv) Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

- (e) The notice of protest shall be deemed communicated and filed within forty-eight (48) hours from the time of mailing, if mailed as provided in this Section, or communicated and filed when received personally by the Director

Article VI PAYMENT

Section 6.01 Method of payment.

- (a) Payments will be authorized by the Director after completion of performance, or delivery and acceptance by the Officer-in-Charge of all goods, and services stipulated in the contract or purchase order. Payments will be made as soon thereafter as the regular course of business will allow; provided, however, that payments shall be made no later than thirty (30) days following receipt of the statement for goods received and services completed, and that all statutory and contractual requirements for final payment are satisfied.

- (b) If, upon completion of contract, the County is unable to confirm Contractor the requisite tax clearance within six (6) months, the Director or designee, in accordance with HRS 103D-328, shall notify the department of taxation which in turn will notify the Internal Revenue Service, of amounts payable to the Contractor.”

Section 6.02 Interest.

Interest on amounts ultimately determined to be due to a Contractor or the County shall be payable at the statutory rate applicable to judgements against the County under Chapter 662, HRS, from the date the claim arose through the date of decision or judgement, whichever is later.

Section 6.03 Prompt Payment by Contractors to subcontractors.

- (a) Generally. Any money paid to a contractor shall be disbursed to subcontractor 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 procurement agency 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 Contracting Officer or the Contractor, as applicable, will be subject to a penalty of one and one-half per cent 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:

- (i) 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 HRS 103-32.1; or
- (ii) The following has occurred:
 - 1) 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 the surety, as provided for in HRS 103D-324; and
 - 2) 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; 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 Contracting Officer to the Contractor and subsequently, upon receipt from the Contracting Officer, by the Contractor to the subcontractor within the applicable time periods specified in paragraph (b) and HRS 103-10. 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 (2) years of the first violation, the Contractor shall be referred by the Contracting Officer to the Contractors license board for action under HRS 444-17(14).
- (d) A properly documented final payment request from a subcontractor, as required by paragraph (c), shall include:
 - (i) Substantiation of the amounts requested;
 - (ii) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief, that:
 - 1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the subcontract;
 - 2) The subcontractor has made payments due to its subcontractor 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

- 3) 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
- (e) The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied.
- (i) The Contracting Officer shall return any final payment request that is defective to the Contractor within seven (7) days after receipt, with a statement identifying the defect.
 - (ii) In the case of a construction contract, a payment request made by a Contractor to the Contracting 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 subcontractor 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.
- (f) The Contracting Officer shall return any final payment request that is defective to the Contractor within seven (7) days after receipt, with a statement identifying the defect.
- (g) This section shall not be construed to impair the right of a Contractor or a 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 Contracting Officer." (HAR 3-125-23)

Article VII MISCELLANEOUS

Section 7.01 Headings.

All headings are for convenience only and shall not affect the interpretation of this Contract.

Section 7.02 No waiver.

No failure of either County or Contractor to insist upon the strict performance by the other of any covenant, term or condition of this Contract, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Contract, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Contract, and each and every covenant, condition, and term hereof shall continue in full force and effect without respect to any existing or subsequent breach.

Section 7.03 Severability.

The unenforceability, invalidity, or illegality of any provision of this Contract shall not render any other provision of this Contract unenforceable, invalid, or illegal.

Section 7.04 Drafting ambiguities.

The Parties acknowledge that they have the right to be advised by legal counsel with respect to the negotiations, terms and conditions of this Contract, and the decision of whether to seek advice of legal counsel with respect to this Contract is the sole responsibility of each Party. This Contract shall not be construed in favor of or against either Party by reason of the extent to which each party participated in the drafting of the Contract.

Section 7.05 Amendments.

Neither this Contract nor any provision hereof may be changed, modified, amended or waived except by a written agreement executed by duly authorized representatives of County and Contractor. Any alleged oral amendments have no force or effect.

Section 7.06 Survival of obligations.

All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with this Contract, as well as all continuing obligations indicated in this Contract, shall survive, completion and acceptance of performance and termination, expiration or completion of the Contract.

Section 7.07 Confidentiality of services.

All services performed by Contractor, and any subcontractor(s) if applicable, including but not limited to all drafts, data, information, correspondence, proposals, reports of any nature, estimates compiled or composed by Contractor, are for the sole use of County, its agents, and employees. Neither the documents nor their contents shall be released by Contractor or any subcontractor to any third party without the prior written consent of County. This provision does not apply to information that: (1) was publicly known, or otherwise known to Contractor, at the time it was disclosed to Contractor by County; (2) subsequently becomes publicly known through no act or omission of Contractor; or (3) otherwise becomes known to Contractor other than through disclosure by County.

Section 7.08 No third party obligations.

Except as may be specifically set forth in this Contract, none of the provisions of this Contract are intended to benefit any third party not specifically referenced herein. No party other than County and Contractor shall have the right to enforce any of the provisions of this Contract.

Section 7.09 Insolvency.

If Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, Contractor agrees to furnish, by certified mail or electronic commerce method authorized by the Contract, written notification of the bankruptcy to the Division of Purchasing and the Officer in Charge responsible for administering the Contract. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of County contract numbers and contracting offices for all County contracts against which final payment has not been made. This obligation remains in effect until final payment is made under this Contract.

Section 7.10 Actions of the County in its governmental capacity.

Nothing in this Contract shall be interpreted as limiting the rights and obligations of County in its governmental or regulatory capacity.

Section 7.11 Governing law.

This Contract shall be deemed to be made under, construed in accordance with, and governed by the laws of the State of Hawai'i without regard to the conflicts or choice of law provisions thereof.

Section 7.12 Counterparts.

This Contract may be executed in one or more counterparts, each of which shall be deemed an original, and will become effective and binding on the Parties as of the date of the last signature. Delivery of counterpart may be effected by transmitting a signed signature page by emailed PDF or other mutually agreeable electronic means.

Section 7.13 Notices required under executed Contract.

Any notice required to be given by a Party to this Contract shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid (or by a recognized courier service, such as Federal Express or UPS), or (c) sent by email. Notice to the County shall be sent to the Officer-in-Charge's mailing address or email address indicated in the Contract. Notice to the Contractor shall be sent to the Contractor's mailing address or email address indicated in the Contract. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. Either Party may change its mailing address or email address by giving written notification of the change to the other Party.

APPROVED AS TO FORM AND LEGALITY:

County Attorney

Date

APPROVED:

Director of Finance

Date