



GENERAL TERMS AND CONDITIONS

FOR PROFESSIONAL SERVICES CONTRACTS

**COUNTY OF KAUI
LIHUE, KAUI, HAWAII**

June 2014

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GENERAL TERMS AND CONDITIONS FOR PROFESSIONAL SERVICES CONTRACTS

1. **Definitions.** Terms as used in these General Terms and Conditions, unless the context requires otherwise, shall have the following meaning:
 - a. COUNTY. The County of Kauai, State of Hawaii.
 - b. CONTRACTOR. Any individual, partnership, corporation, joint venture, limited liability company, limited liability partnership, and any other entity engaged by the County of Kauai to perform professional services under the Contract.
 - c. CONTRACT. The written agreement covering the performance of the services required for the project by the Contractor. It shall include and incorporate by reference these general terms and conditions, and, if applicable, the special provisions. It shall also include and incorporate by reference all modifications of the Contract by supplemental agreements thereto in writing and written orders of the Director and Officer-in-Charge.
 - d. DIRECTOR. The Director of Finance of the County of Kauai or his designee. The Director is the Contract Officer for the County and is charged with the authority to enter into and amend contracts. The Director also has the authority to interpret contract provisions and settle disputes.
 - e. GOODS. All property, including but not limited to equipment, equipment leases, tangible or intangible materials, supplies, printing, insurance, plans, drawings, information, work product, intellectual property, and processes, including computer systems and software, excluding land or a permanent interest in land, leases of real property, and office rentals.
 - f. HAR. The Hawaii Administrative Rules
 - g. HRS. The Hawaii Revised Statutes
 - h. MANAGING DEPARTMENT/AGENCY. The Department/Agency designated to manage the various facets of the contract to ensure the contractor's total performance is in accordance with the contractual commitments and obligations to the County are fulfilled.
 - i. OFFICER-IN-CHARGE. The Officer-in-Charge is the person named responsible for carrying out the provisions of the contract and advising the Director on contractual matters. The Officer-in-Charge for this Contract is the Managing Department/Agency Head and/or authorized representative

2. **Appropriation and Contract Execution.** The Contract shall not be binding or of any force until funds sufficient to cover the amount(s) stated have been certified and encumbered by the Director for the purpose set forth herein, and the contract document has been fully and properly signed by all of the parties thereto.
3. **Contract Coordination.** The Officer-in-Charge shall coordinate the work to be provided by the Contractor in order to complete the performance required in this Contract. The Contractor shall maintain communications with the Officer-in-Charge at all stages of the Contractor's work, and submit to the Officer-in-Charge, for resolution, any questions which may arise as to the performance of this Contract.
4. **Relationship of Parties; Independent Contractor Status and Responsibilities, Including Tax Responsibilities.**
 - a. In the performance of the Contract, the Contractor is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the requirements of this Contract; however, the County shall have a general right, from time to time, to monitor the progress of contract performance, and to determine whether, in the County's opinion, the Contractor is in compliance with the provisions of this Contract. It is understood that the County does not agree to use the Contractor exclusively, and that the Contractor is free to contract with other individuals or entities while under contract with the County.
 - b. The Contractor and the Contractor's employees and agents are not by reason of this Contract, agents or employees of the County for any purpose, and the Contractor and the Contractor's employees and agents shall not be entitled to claim or receive from the County any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to County employees.
 - c. The Contractor shall be responsible for the accuracy, completeness, and adequacy of the Contractor's performance under this Contract. Furthermore, the Contractor intentionally, voluntarily, and knowingly assumes the sole and entire liability to the Contractor's employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the Contractor, or the Contractor's employees or agents in the course of their employment.
 - d. The Contractor shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the Contractor by reason of this Contract, including but not limited to (i) income taxes, (ii) employment-related fees, assessments, and taxes, and (iii) general excise taxes. The Contractor also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform the Contract.

- e. The Contractor shall obtain a general excise tax license from the Director of Taxation, State of Hawaii, in accordance with Chapter 237, HRS, or exemption there from and shall comply with all requirements thereof.
- f. The Contractor shall be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required by Section 103-53 HRS, and Section 103D-328, HRS.
- g. The Contractor shall be solely responsible for meeting all requirements necessary to obtain the compliance document requirements of Section 103D-310 (c), HRS.

5. **Personnel Requirements.**

- a. The Contractor shall secure, at the Contractor's own expense, all personnel required to perform this Contract.
- b. The Contractor shall ensure that the Contractor's employees and agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.

6. **Nondiscrimination.** No person working under this Contract, including any subcontractor, employee, or agent of the Contractor shall engage in any discrimination that is prohibited by any applicable federal, state or county law.

7. **Novation or Change of Name.** This Contract is not transferable, or otherwise assignable without the written consent of the Director provided that a Contractor may assign monies receivable under this Contract after due notice to the County and the Contractor's right to compensation under this Contract shall not be effective unless the assignment is approved by the Director.

- a. Recognition of a successor in interest. When in the best interest of the County, a successor in interest may be recognized in an assignment agreement in which the County, the Contractor, and the transferee shall agree that:
 - (1) The transferee assumes all of the Contractor's obligations;
 - (2) The Contractor remains liable for all obligations under the Contract but waives all rights under this Contract as against the County; and
 - (3) The Contractor shall continue to furnish, and the Assignee shall also furnish all required bonds and, if required, insurance.

- b. 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.
 - c. Reports. All change of name or novation agreements effected hereunder other than by the Director shall be reported to the Director within thirty days of the date that the agreement becomes effective.
 - d. Actions Affecting More Than One Purchasing Agency. Notwithstanding the provisions of paragraphs (a)(1) through (a)(3), when a Contractor holds contracts with more than one agency of the County, the novation or change of name agreements herein authorized shall be processed only through the office of the Director.
8. **Insurance.** Contractor agrees to maintain, on a primary basis and at its sole expense, at all times during the life of the Contract, the following insurance coverages, limits, including endorsements described herein. The requirements contained herein, as well as the County's review or acceptance of insurance maintained by the Contractor is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by the Contractor under this Contract. Further, unless otherwise approved by the Director of Finance, the policy or policies of insurance maintained by the Contractor shall provide the following minimum limit(s) and coverage(s) as specified herein and be placed with an insurance carrier authorized to do business in the State of Hawaii and rated **A-VII** by A.M. Best.

The Contractor's failure to procure and or maintain insurance required under this Contract shall constitute a material breach of the Contract.

- a. **Commercial General Liability.** Contractor agrees to maintain Commercial General Liability written on occurrence form to protect the County against claims for bodily injury or death, or for damage to property, which may arise out of any products, all operations, all use, all maintenance, and all contractual liability by the Contractor or by any Subcontractor(s) or by anyone employed by any of them or by anyone for whose acts any of them may be liable. Such insurance shall include, but not be limited to, the minimum coverage or limits of liability specified hereunder, or if greater, any coverages or limit of liability required by law.

- (1) Bodily Injury and Property Damage Combined Single Limit: \$2,000,000 per occurrence/\$2,000,000 aggregate;

- (2) Personal Injury: \$1,000,000 per occurrence/\$2,000,000 aggregate;
- (3) Products and Completed Operations: \$1,000,000 per occurrence/\$2,000,000 aggregate. Products and Completed Operations coverage protecting the Contractor and Sub-Contractors must be carried for one (1) year after substantial completion of the project. Evidence of this insurance will continue to be provided on an annual basis to the County.

b. **Business Automobile Liability:** Contractor agrees to maintain Business Automobile Liability written on occurrence form for all Owned, Non-Owned, and Hired Automobiles. If the Contractor does not own automobiles, Contractor shall agree to maintain coverage for Hired and Non-Owned Auto Liability, which may be satisfied by way of endorsement to the Commercial General Liability policy or separate Business Automobile Liability. Coverage shall be for automobile contractual liability, uninsured and underinsured motorist coverage, basic no-fault and personal injury protection as required by Hawaii law with the following limits:

- (1) Bodily Injury: \$1,000,000 per person/\$1,000,000 per accident;
- (2) Property Damage: \$1,000,000 per accident.

c. **Workers' Compensation and Employers Liability:** Contractor agrees to maintain Workers' Compensation and Employers Liability in accordance with the State of Hawaii Revised Statute Chapter 386. The minimum limits of liability to be maintained are as follows:

- (1) Coverage A: Workers' Compensation - Statutory;
- (2) Coverage B: Employers Liability – \$1,000,000 Bodily Injury from Each Accident, \$1,000,000 Bodily Injury from Disease, \$1,000,000 Aggregate Bodily Injury from Disease. Self-Insurance is permitted subject to submission of a copy of the appropriate governmental authorization and qualification by the Contractor.

d. **Professional Liability (Errors and Omissions).** If professional services are required to fulfill any or all of the activities under the Agreement, the Contractor and its subcontractors shall obtain and keep in force Professional Liability Insurance (Errors and Omissions Insurance) that covers all such activities under the Agreement. Such insurance shall have these minimum limits and coverage(s):

- (1) \$1,000,000 per claim,
- (2) \$2,000,000 annual aggregate.

When a self-insured retention (SIR) or deductible exceeds \$25,000, the County reserves the right, but not the obligation, to review and request a copy of the Contractor's most recent annual report or audited financial statement. The Contractor will continue to maintain and provide evidence of this coverage to the

County for a period of three years after substantial completion of this Contract. For policies written on a “Claims-Made” basis, Contractor warrants the Retroactive Date equals or precedes the effective date of the Agreement. In the event the policy is canceled, non-renewed, switched to an Occurrence Form, retroactive date advanced; or any other event triggering the right to purchase a Supplemental Extended Reporting Period (SERP) during the life of the Agreement, Contractor or Consultant shall agree to purchase Supplement Extended Reporting Period (SERP) with a minimum reporting period not less than **two (2)** years. The requirement to purchase a SERP shall not relieve Contractor or Consultant of the obligation to provide replacement coverage.

- e. **Pollution Legal Liability Insurance.** If required, Contractor shall procure and maintain Pollution Liability with minimum limit not less than:

- (1) \$1,000,000 per claim,
- (2) \$2,000,000 annual aggregate.

The policy shall provide coverage for damages against, but not limited to, third-party liability, clean-up, corrective action including assessment, remediation and defense costs. When a self-insured retention or deductible exceeds \$25,000, the County reserves the right, but not the obligation, to review and request a copy of the Contractor’s most recent annual report or audited financial statements.

- f. **Umbrella or Excess Liability Insurance.** Contractor may satisfy the minimum liability limits required above under an Umbrella or Excess Liability policy. The minimum Umbrella limit otherwise required is \$2,000,000 per occurrence.

- g. **Waiver of Subrogation.** Contractor shall agree by entering into a Contract or Agreement with the County to a Waiver of Subrogation for each required policy herein. This Waiver of Subrogation requirement shall not apply to any policy, which includes a condition specifically prohibiting such an endorsement, or voids coverage should Contractor enter into such an agreement on a pre-loss basis.

- h. **Additional Insured:** Contractor shall agree to endorse the County of Kauai, its elected and appointed officials, officers, employees, and volunteers, as additional insured, to the Commercial General Liability, Umbrella or Excess General Liability Insurance, and Automobile Liability Insurance.

- i. **Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to and approved by the County and remain the responsibility of the Contractor. At the option of the County, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the County, its elected and appointed officials, officers, employees and volunteers; or the Contractor shall provide a financial guarantee (audited financial statement) satisfactory to the County guaranteeing payment of losses and related investigations, claim administration and defense expenses.

- j. **Certificate of Insurance.** Prior to the issuance of a Notice to Proceed for the proposed contract, Contractor shall provide the County a certificate of insurance completed by a duly authorized representative of their insurer and shall provide updated certificates of insurance upon revision or renewal of insurance policies during the term of the contract. Contractor shall also have a duly authorized representative of their insurer provide immediate written notice to the County of cancellation, material change or non-renewal by the insurer, and any appropriate endorsements. All coverage required of the Contractor will be primary and non-contributory with any insurance or self-insurance program maintained by the County

The Certificate Holder address shall read:

County of Kauai
Managing Department/Agency
Address of the Managing Department/Agency

Attention: (Name of Contact Person or Contract #

The County reserves the right to require complete certified copies of all required insurance policies, including endorsements effecting the coverage required at any time.

- k. **Right to Revise or Reject.** County reserves the right, but not the obligation, to review and revise any insurance requirement, not limited to limits, coverages and endorsements based on insurance market conditions affecting the availability or affordability of coverage; or changes in the scope of work or specifications affecting the applicability of coverage. Additionally, the County reserves the right, but not the obligation, to review and reject any insurance policies failing to meet the criteria stated herein or any insurer providing coverage due to its poor financial condition or failure to operate legally.
- 9. **Conflicts of Interest.** The Contractor represents that neither the Contractor nor any employee or agent of the Contractor, has any interest in this Contract, and agrees that no such interest, direct or indirect, that would or might conflict in any manner or degree with the Contractor's performance under the Contract shall be acquired.
 - 10. **Laws and Regulations.** The Contractor shall keep himself fully informed of all laws, ordinances, codes, rules and regulations, governmental general and development plans, setback limitations, rights-of-way, and all changes thereto, which in any manner affect the Contract and the performance thereof, including but not limited to:
 - a. Sections 19.18 and 19.19, Article XIX of the Charter of the County of Kauai, as amended, relating to Contracts and Centralized Purchasing.

- b. Chapter 92F, HRS, as amended, relating to Uniform Information Practices Act.
- c. Chapter 103, HRS, as amended, relating to expenditure of public money.
- d. Chapter 103D, HRS, and HAR, Hawaii Administrative Rules, as amended relating to Hawaii Public Procurement Code.
- e. Chapter 104, HRS, as amended, relating to wages and hours of employees on public works.
- f. Chapter 132, HRS, as amended, relating to the fire protection.
- g. Chapter 237, HRS, as amended, relating to the General Excise Tax Law.
- h. Chapter 321 through 344, HRS, as amended, relating to the Health Department.
- i. Chapter 378, HRS, as amended, relating to fair employment practices.
- j. Chapter 386, HRS, as amended, relating to workers' compensation.
- k. Chapter 396, HRS, as amended, relating to occupational safety and health.

The Contractor shall at all times observe and comply with all such present laws, ordinances, codes, rules, regulations, design standards and criteria, governmental general and development plans, setback limitations, rights-of-way, including the giving of all notices necessary and incident to the proper and lawful prosecution of the work, and all changes thereto. If any discrepancy or inconsistency is discovered between the Contract and any such law, ordinance, code, rule, regulations, design standard, design criterion, governmental general and development plans, setback limitation, rights-of-way, the Contractor shall forthwith report the same in writing to the Officer-in-Charge.

11. **Indemnification.** Subject to Article No. 12, Contractor shall indemnify, hold harmless and defend the County and its officers, employees, agents and representatives from and against all suits, actions, claims, damages and judgments of any character that may be brought against the County by whomsoever, on account of any deaths, injuries or damages sustained by any person or property, due to the acts or omissions of the Contractor, or any of its 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 obligation to indemnify the County under this section shall extend only to the Contractor's pro rata share of negligence as determined in accordance with HRS § 663-12.

In addition, Contractor shall indemnify, hold harmless and defend the County and its officers, employees, agents and representatives against any claim or liability arising from or based on the violation of any law, ordinances, codes, rules, regulations, design

standards and criteria, governmental general and development plans, setback limitation, rights-of-way, whether such violation is committed by the Contractor, subcontractors or employees of either or both.

The provisions of this Article No. 11 shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.

12. **Limitation on Obligation to Defend.** The obligation of Contractor to defend the County and its officers, employees, agents and representatives as set forth in Article No. 11 shall not apply to any contract for less than \$1,000,000 that is entered into on or after July 1, 2007 which is exclusively for services that may only lawfully be provided by a person licensed under HRS §464 (professional engineers, architects, surveyors and landscape architects). Contractor's obligation to indemnify and hold harmless the County and its officers, employees, agents and representatives as set forth in Article No. 11 shall continue in full force and effect in those instances when the Contractor has no obligation to defend the County.

No Contractor licensed under HRS §464 shall be required to defend the County and its officers, employees, agents and representatives in any lawsuit filed more than ten years beyond the substantial completion of the project which is the subject of the Contract.

13. **Modifications of Contract.**

- a. **Contract Modification.** By a written order, at any time, the Director, subject to mutual agreement of the parties to the Contract, may make modifications within the general scope of this 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 the 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 provision of the Contract.
- c. **Claim barred after final payment.** No claim by the Contractor for an adjustment hereunder shall be allowed if written agreement of the modification is not made prior to final payment under the Contract.
- d. **Claims not barred.** In the absence of 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 breach of contract.

14. **Costs and Expenses.** If applicable, any reimbursement due the Contractor for per diem and transportation expenses under this Contract, shall be subject to Chapter 3-123, (Cost Principles) of the HAR.

15. **Minimizing Congestion.** The Contractor shall undertake all necessary precautions to minimize any adverse impact the performance under this Contract may have on traffic congestion.
16. **Wages, Hours and Working Conditions of Employees Supplying Services.** The Contractor shall comply with Section 103-55, Hawaii Revised Statutes, if applicable.
17. **Indigenous and Polynesian introduced plants; use in public landscaping.** Wherein applicable, the Contractor shall make provisions for indigenous and Polynesian introduced plants as provided in Section 103D-408, HRS.
18. **Pollution Control.** Wherein applicable, the Contractor shall make provisions for pollution control as provided in Section 103D-409, HRS.
19. **Americans with Disabilities Act Requirements.** Wherein applicable, the Contractor shall comply with the provisions of HRS 103-50 Building design to consider needs of persons with disabilities.
20. **Suspension of Contract.** The County reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the Contractor in accordance with the provisions herein.
 - 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 order shall be identified specifically as a stop work order issued pursuant to this Section. Upon receipt of 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 the 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 the 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.

21. **Price Adjustment.**

- a. Price Adjustment. Any adjustment in contract price pursuant to a clause in this Contract shall be made in one or more of the following ways:
- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (2) By unit prices specified in the Contract or subsequently agreed upon;
 - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
 - (4) In such other manner as the parties may mutually agree; or
 - (5) In the absence of agreement between the parties, by a unilateral determination by the Director of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Director in accordance with generally accepted accounting principles and applicable sections of Chapters 3-123 (Cost Principles) and 3-126 (Legal and Contractual Remedies), HAR.
- b. Submission of cost or pricing data. The Contractor shall provide cost or pricing data for any price adjustments subject to the provisions of Subchapter 15, Chapter 3-122, HAR.

22. **Claims.**

- a. Claims based on actions or omissions. If any action or omission on the part of the Director or the Officer-in-Charge, 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:
- (1) Written notice required. The Contractor shall have given written notice to the Director or the Officer-in-Charge:
 - (A) Prior to the commencement of the work involved, if at that time the Contractor knows of the occurrence of the action or omission;
 - (B) Within thirty (30) days after the Contractor knows of the occurrence of such action or omission, if the Contractor did not have knowledge prior to the commencement of the work; or
 - (C) Within further time as may be allowed by the Director or the Officer-in-Charge in writing.
 - (2) Notice Content. The 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 or the Officer-in-Charge, upon receipt of such notice may rescind the action, remedy the omission, or take other steps as may be deemed advisable in the discretion of the Director or the Officer-in-Charge;
 - (3) Basis must be explained. The notice required by subparagraph 22a(1) describes as clearly as practicable, at the time, the reasons why the Contractor believes that additional compensation, damages, or an extension of time may be remedies to which the Contractor is entitled; and
 - (4) Claim must be justified. The Contractor maintains and, upon request, makes available to the Director or the Officer-in-Charge 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 the changes.
- b. Contractor not excused. Nothing herein contained, however, shall excuse the Contractor from compliance with any rules of law precluding any employee of the County and any Contractor from acting in collusion or bad faith in issuing or

performing contract modifications which are clearly not within the scope of this Contract.

- c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

23. **Confidentiality of Material.**

- a. All material given to or made available to the Contractor by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the Contractor and shall not be disclosed to any individual or organization without the prior written approval of the Director.
- b. All information, data, or other material provided by the Contractor to the County shall be subject to the Uniform Information Practices Act, Chapter 92F, HRS.

24. **Ownership Rights and Copyright.** The County shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived of by the Contractor pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the County upon expiration or termination of this Contract. The County, in its sole discretion shall have the exclusive right to copyright any product, concept or material developed, prepared, assembled or conceived of by the Contractor pursuant to this Contract.

25. **Termination for Default.**

- a. Default. If the Contractor refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract or any extension thereof, or 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 by the Director, the Director may terminate the Contractor's right to proceed with the Contract or a part of the Contract for which there has been a delay or other breach of contract. In the event of termination in whole or in part the Director may procure similar goods or services in a manner and upon terms deemed appropriate by the Director. 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 and services 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, Legal and Contractual Remedies. The County may withhold from amounts due the Contractor 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, if the Contractor has notified the Director within fifteen (15) days after the cause of the delay and the failure arises out of causes including but not limited to the following:
 - acts of God; acts of the public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if the 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 Director shall ascertain the facts and extent of the failure and, if the 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 provision entitled in fixed-price contract, "Termination for Convenience". As used in this paragraph, the term "subcontractor" means a subcontractor at any tier.

- e. Additional rights and remedies. The County's rights and remedies provided in this Contract are in addition to any other rights and remedies provided by law.

26. **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 performance. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance 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 necessary to do so.
- c. Right to Goods and Work Product. The Director may require the Contractor to transfer title and deliver to the County in the manner and to the extent directed by the Director:
 - (1) Any completed goods; and
 - (2) The partially completed goods the Contractor has specifically produced or specially acquired for the performance of the terminated part of this Contract. The Contractor shall, upon direction of the 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 the Contractor's best efforts to sell such goods. Use of this paragraph in no way implies that the County has breached the Contract by exercise of the termination for convenience provision.
- d. Compensation.
 - (1) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with the 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 26d(3).
 - (2) The Director and the Contractor may agree to a 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 under paragraph 26d(3) of this provision, and the contract price of the work not terminated.

- (3) Absent a complete agreement under subparagraph 26d(2), the Director shall pay the Contractor the following amounts, provided payments agreed to under subparagraph 26d(2) shall not duplicate payments under this subparagraph for the following:
 - (A) Contract prices for goods or services accepted under the Contract;
 - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a five percent (5%) markup on actual direct costs on such portion of the performance, such markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services, or both; provided, that if it appears that the Contractor would have sustained a loss if the entire Contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.
 - (C) Subject to the prior approval of the Director, the costs of settling and paying claims arising out of the termination of subcontracts or orders shall be pursuant to subparagraph 26b. Subcontractors shall be entitled to a markup of no more than ten percent (10%) on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with subparagraph 26d(3)(B).
 - (D) The total sum to be paid the Contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 26d(2), and the contract price of performance not terminated.
- (4) Cost claimed, agreed to, or established under subparagraphs 26d(2) and 26d(3) shall be in accordance with HAR, Chapter 3-123, Cost Principles.

27. **Federal Funds.** If this Contract is payable in whole or in part from federal funds, Contractor agrees that, as to the portion of the compensation under this Contract payable from federal funds, the Contractor shall be paid only from such federal funds received from the federal government, and shall not be paid from any other funds.

28. **Time Extensions.** If the Contract has exhausted its provision for extension of time of performance, or if the Contract does not have a provision for extension of time of performance, the Contract may be extended a period of up to 180 calendar days for each extension and shall be subject to approval by the Director.

29. **Payment Procedures; Final Payment; Tax Clearance; Contractor's Certification of Compliance.** All payments under this Contract shall be made only upon submission by Contractor of invoices specifying the amount due and certifying that (i) services requested under this Contract have been performed by the Contractor according to this Contract, or (ii) the goods and/or services have been accepted by the County, or (iii) both. Further, all payment shall be made in accordance with and subject to Chapter 40, HRS. Final payment under this Contract shall be subject to Sections 103-53 or 103D-328, HRS, as amended, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service showing that all delinquent taxes, if, any, levied or accrued under state law against the Contractor have been paid; and HAR 3-122-112 which requires a certification from the contractor affirming that the contractor has, as applicable, remained in compliance with HRS 103D-310 (c). (Note: County Schedule G-1, Contractor's Certification of Compliance for Final Payment)
30. **Interest.** Interest on amounts ultimately determined to be due to a Contractor or the County shall be payable at the statutory rate applicable to judgments against the County under Chapter 662, HRS, State Tort Liability Act, from the date the claim arose through the date of decision or judgment, whichever is later.
31. **Prompt Payment to Subcontractors.** Wherein applicable, the Contractor shall comply with the provisions of HRS 103-10.5 Prompt Payment to Contractors, to accelerate a subcontractor's or materialman's right to payment upon completion of the subcontract or the furnishing of materials.
32. **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) calendar 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 calendar days after written request for a final decision, or within such longer period as may be agreed upon in writing 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 unless the Contractor brings an action seeking judicial review of the decision in the circuit court of this State 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 circuit

court of this State 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.

33. **Remedies.** Any dispute arising under or out of this Contract is subject to Chapter 3-126, HAR.
34. **Governing Law.** The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this 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 this Contract shall be brought in a state court of competent jurisdiction in Lihue, Hawaii.
35. **Severability.** In the event that any provision of this 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 this Contract.
36. **Waiver.** The failure of the County to insist upon strict compliance with any term, provision or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the County's right to enforce the same in accordance with this Contract. The fact that the County specifically refers to one provision of the HAR and does not include another provision of the HAR in this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the County's rights or the Contractor's obligations under the HAR.
37. **Statutory or Charter Requirements.** The applicable provisions of Chapters 103 and 103D, HRS., the Kauai County Charter, 1984, as amended and the Kauai County Code 1987, as amended, shall be deemed to be a part of the Contract as though fully set forth herein.
38. **Audit of Books and Records.** The County may, at reasonable times and places, audit the books and records of the Contractor, prospective Contractor, subcontractor or prospective subcontractor, which are related to:
 - a. The cost or pricing data; and
 - b. A County contract, including subcontracts, other than a firm fixed price contract.
39. **Records Retention.** The Contractor and any subcontractors 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.
40. **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 debts 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.

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