

January 15, 2009

DEPARTMENT OF FINANCE
COUNTY OF KAUAI

GENERAL TERMS AND CONDITIONS

FOR

GOODS AND SERVICES CONTRACTS

NOTICE TO ALL PROSPECTIVE BIDDERS FOR GOODS AND SERVICES:

These General Terms and Conditions For Goods and Services Contracts, **hereinafter referred to as General Terms and Conditions**, dated December 1, 2000, will be made a part of all solicitations for goods and services **by reference only**. The County discontinued the practice of attaching a copy to every solicitation after **June 30, 2002**. Accordingly, all interested parties are advised to request for and to retain a copy for future use and reference. **Amendments** to the General Terms and Conditions will be made in the **Special Provision Section** of each respective solicitation.

Copies of the General Terms, dated December 1, 2000, are available upon request at no cost, and is posted on the County of Kauai website (<http://www.kauai.gov/purchasing>).

Offerors are cautioned to read and understand all the terms and conditions contained in the General Terms and Conditions. Any questions may be referred to the Division of Purchasing, County of Kauai, Ph: (808) 241-4288.

Director of Finance

DEPARTMENT OF FINANCE

County of Kauai

GENERAL TERMS AND CONDITIONS
FOR GOODS AND SERVICES CONTRACTS

December 1, 2000

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SECTION 1 - DEFINITIONS 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:

1.1 BID

Bid means any offer submitted in competitive sealed bidding or in the second phase of multi-step bidding.

1.2 BID OR PROPOSAL FORM

The prescribed form or format which a offeror uses to submit his offer.

1.3 BID OR PROPOSAL GUARANTY OR SECURITY

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.

1.4 CHANGE ORDER

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.

1.5 CONTRACT

Contract means the combination of the solicitation, including the 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.

1.6 CONTRACT BOND

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.

1.7 CONTRACT MODIFICATION

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.

1.8 CONTRACTOR

An individual, partnership, firm, corporation, joint venture or other legal entity undertaking the execution of work under the terms of the contract with the County, and acting directly or through his, their or its agents, employees or sub-contractors.

1.9 COUNTY

County means The County of Kauai.

1.10 DAYS

Days means calendar days unless otherwise specified.

1.11 DIRECTOR

The Director is the Director of Finance and the Chief Procurement Officer of the County of Kauai or designee.

1.12 GOODS

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.

1.13 OFFER

An offer means a bid or proposal as defined in Sections 1.1 BID and 1.16 PROPOSAL, in response to any solicitation.

1.14 OFFEROR

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 work, goods or services contemplated in response to a solicitation.

1.15 PRIORITY-LISTED OFFERORS

Priority-listed offerors are the three or more responsive and responsible offerors who have submitted the highest ranked proposals.

1.16 PROPOSAL

A proposal means any offer submitted in response to any solicitation, except a bid as defined in Section 1.1 BID.

1.17 PURCHASING AGENCY

Purchasing Agency means the Department of Finance, Division of Purchasing, unless otherwise specified or defined herein.

1.18 RESPONSIBLE BIDDER OR OFFEROR

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.

1.19 RESPONSIVE BIDDER OR OFFEROR

A person who has submitted a bid which conforms in all material respects to the invitation for bids or request for proposal.

1.20 SERVICES

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.

1.21 SOLICITATION

Solicitation means an invitation for bids (IFB), used in the competitive sealed bidding process or a request for proposals (RFP), used in the competitive sealed proposal process for the purpose of obtaining bids or proposals to perform a County contract.

1.22 SPECIAL PROVISIONS

The terms and conditions pertaining to the specific solicitation in which they are contained; including but not limited to terms and conditions describing the preparation of 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.

1.23 SPECIFICATIONS

A description of what the purchasing agency requires and any description of the physical or functional characteristics, or of the nature of a good, service, or construction item. The term includes descriptions of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery.

1.24 STATE

State means the State of Hawaii.

1.25 SURETY

The individual, firm, partnership or corporation other than the Contractor, which executes a bond with and for the Contractor to ensure the Contractor's acceptable performance of the contract.

1.26 WORK

The furnishing by the Contractor of all labor, services, materials, equipment, and other incidentals necessary for the satisfactory performance of the contract.

SECTION 2 - OFFER REQUIREMENTS AND CONDITIONS

2.1 COMPETENCY OF OFFEROR

Prospective offeror must be capable of performing the work for which offers are being called. Either before or after the deadline for an offer, the purchasing agency may require offeror to submit answers to questions regarding facilities, equipment, experience, personnel, financial status or any other factors relating to his ability to furnish satisfactorily the goods or services being solicited by the County. Any such inquiries shall be made and replied to in writing; replies shall be submitted over the signatures of the person who signs the offer. Any offeror who refuses to answer such inquiries will be considered non-responsive. All answers to such questions will be handled by the purchasing agency on a confidential basis and will be returned after they have served their purpose.

The purchasing agency also reserves the right to visit an offeror's place of business to inspect his facilities and equipment and to observe his methods of operation in order to facilitate evaluation of performance capabilities.

2.2 SOLICITATION FORMS

Prospective offerors will be furnished with solicitation forms which may include but not be limited to a scope of work and award, the location, description and the contract time of the contemplated work, the various quantities being requested, estimated and/or firm, and items of work to be performed or materials to be furnished, along with a schedule of items for which unit prices and/or lump sum prices are asked, depending on the type of solicitation, e.g. invitation for bids or request for proposals.

Solicitation forms must be requested from the Division of Purchasing to insure receipt of properly authorized, uniform, and complete proposals, addendum, or other information that may need to be secured from or passed on to prospective bidders. Failure to obtain solicitation forms from the Division of Purchasing may be cause for rejection of an offer.

The General Terms and Conditions, Special Provisions, Scope of Work and Award, and other documents referenced in or attached to the solicitation shall be considered a part of the offer whether attached to the solicitation or not at the time of its submission. Such documents shall not be altered in any way when the offer is submitted and any alterations so made by the offeror may be cause for rejection of the offer.

2.3 EXAMINATION OF GENERAL TERMS AND CONDITIONS, SPECIFICATIONS, SITE OF WORK, ETC

The offeror shall carefully examine the site of the contemplated work, the solicitation, General Terms and Conditions, Special Provisions, Scope of Work and Award, amendments, required contract and bond forms, etc. before submitting offers. The submission of an offer shall be considered as a warranty that the offeror has made such careful examination and is satisfied with the conditions to be encountered in performing the work and with the requirements of the solicitation, General Terms and Conditions, Special Provisions, Scope of Work and Award, amendments, and bond forms.

No extra compensation will be given by reason of the Contractor's misunderstanding or lack of knowledge of the requirements of the work to be accomplished or the conditions to be encountered in performing the work.

2.4 SUBMISSION OF QUESTIONS, CONCERNS, AND OFFERS

All questions, concerns, and offers relating to this solicitation shall be submitted in writing to:

County of Kauai
Division of Purchasing
4444 Rice Street, Rm. 303
Lihue, HI 96766

Offers shall be submitted in a sealed envelope furnished by the offeror. Said envelope shall be clearly marked with the Offeror's name, address, solicitation opening date and number. **(See Section 2.11 USE OF FACSIMILES.)**

2.5 ADDENDA AND INTERPRETATIONS

Discrepancies, omissions or doubts as to the meaning of General Terms and Conditions, Special Provisions, Scope of Work and Award, or anything relating to or made a part of the solicitation should be communicated in writing to the Director and must be received by the purchasing agency **no later than five (5) days prior to the date fixed for opening.** Any interpretation, if made, and any supplemental instructions will be in the form of written addenda to the solicitation, which will be mailed, faxed, or made available for pick up by all prospective offerors, prior to the date fixed for the opening of offers. **It shall be presumed that any addenda or interpretations so issued have been received by an offeror and such addenda or interpretations shall become a part of the contract documents.**

The County may require that the Offeror acknowledge receipt of the addendum issued.

2.6 PREPARATION OF OFFER

Proposals submitted in response to request for proposals (RFP) shall be in the format prescribed by the RFP.

Bids submitted in response to an invitation for bids (IFB) must be **prepared in ink** or typed on the form furnished by the purchasing agency in full accordance with the instructions given. **For each item, wherein applicable, the offeror shall specify the unit and total price in figures in the columns provided for that purpose and, if required, the total sum of all items being offered.**

Where the IFB involves the furnishing and delivery of goods, the price shall include the cost of delivery to the specified destination, at which point acceptance of said goods will be made by authorized personnel.

An offeror may submit only one offer in response to a solicitation. If an Offeror submits more than one offer in response to a solicitation, then all such offers shall be rejected. Similarly, an Offeror may submit only one offer for each line item (if any) of a solicitation. If an Offeror submits more than one offer per line item, then all offers for that line item shall be rejected.

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

In submitting an offer, the offeror certifies that the price submitted was independently arrived at without collusion.

All prices shall include applicable Federal, State and local taxes.

All prices shall exclude any taxes or fees for which the County is exempt.

Any illegible or otherwise unrecognizable price offer shall cause automatic rejection of the offer.

Whenever required herein, offeror shall indicate in the space provided in the solicitation the exact brand name and number of the item on which they are bidding. FAILURE TO DO SO MAY BE SUFFICIENT CAUSE FOR REJECTION OF BID.

Offers submitted in response to an IFB or RFP **shall be signed in ink** in the space provided on the bid or proposal page by (1) the owner of a sole proprietorship, (2) one or more members of a partnership, (3) one or more members or officers of each firm

representing a joint venture, (4) one or more officers of a corporation, or (5) an agent of the offeror duly authorized to submit offers on the offeror's behalf.

Evidence of the signors' authority to sign the offer document shall be submitted with the offer, ie. Corporate resolution, partnership agreement, or power of attorney.

Trade secrets or other proprietary data which are submitted with the offer and are to remain confidential shall be compiled or bound in a manner that would allow the confidential material to be readily separable. Said material shall be designated as "**confidential**", preferably in bold, red letters to noticeably call or draw the reader's attention.

All information designated by the offeror as confidential shall be subject to review and final determination by the Director of Finance and the County Attorney.

2.7 UNSOLICITED SAMPLES, DESCRIPTIVE LITERATURE, ETC.

Unless expressly requested by the solicitation, submission of unsolicited bid samples, descriptive literature, or similar material shall not be examined or tested.

2.8 BROCHURES, SPECIFICATIONS AND QUESTIONNAIRES

Whenever a questionnaire is attached to the solicitation document, Offerors shall complete and submit such questionnaire with their offer. Supporting specifications and brochures may be submitted wherein available.

The Director reserves the right to request Offerors to provide, at their own expense and within **ten (10) days** from the date of the request, all specifications and brochures regarding the item or items offered. Failure to comply with the County's request within the time specified **SHALL BE SUFFICIENT CAUSE FOR REJECTION OF THE OFFER.**

Whenever the preparation and submission of a questionnaire is required, all specifications and brochures submitted by the Offeror shall be properly annotated identifying all applicable data on the item(s) being offered and shall fully substantiate the information requested in the questionnaire. In the event the information requested in the questionnaire cannot be substantiated by the manufacturer's specifications and brochures, the manufacturer shall certify in writing that the item(s) will be manufactured in accordance with the solicitation questionnaire and manufacturer's specifications.

In answering the respective questions Offerors are warned that a response of "as specified" may not be acceptable and may also be cause for rejection of the offer. Accordingly, Offerors

are directed to avoid using phrases similar or comparable to "as specified" when answering the questionnaire.

Failure to comply with the requirements of the provisions herein **SHALL BE SUFFICIENT CAUSE FOR REJECTION OF THE OFFER.**

2.9 BRAND OR TRADE NAME OR EQUAL SPECIFICATIONS

Whenever one or more manufacturers' brand or trade name is specified, an Offeror shall base his offer on one of the specified brands. However, other manufacturers' brands may also qualify if found to be equal to or better than those specified.

The burden of proof as to whether an alternate item is equal to or superior to the item specified shall lie with the Offeror. The Offeror understands and agrees that the Officer-in-Charge reserves the sole and final right to determine whether alternate brands are equivalent to and meet indicated standards of quality.

2.10 NO SUBSTITUTION OR RESTRICTIVE SPECIFICATIONS

Whenever the specifications restrict offers to only a specific manufacturer's make or model, offers for other products will not be accepted.

2.11 USE OF FACSIMILES

The Division of Purchasing does not have a facsimile machine dedicated to the receipt of offers, intentions to offer, modifications or withdrawals. Offerors are cautioned of the potential problems that may be encountered by use of a facsimile transmission, wherein permitted, and of the risk of having said transmission rejected. Examples of problems that may be cause for rejection of a transmission follow:

- ◆ Receipt of garbled, incomplete or missing pages.
- ◆ Availability or condition of the receiving facsimile machine.
- ◆ Incompatibility between the sending and receiving facsimile machine.
- ◆ Delay in transmission or receipt of pages for any reason.
- ◆ Failure of the sender to identify the transmission as related to a specific solicitation.

Use of facsimiles shall be as follows:

- (A) Copies of documents transmitted by vendors via facsimile

machine shall be limited to intention to offer, and modifications or withdrawal of offers, pursuant to Subsection (B) and (C) respectively. **Faxed offers will not be accepted unless specifically provided for in the Special Provisions or Scope of Work and Award.**

- (B) Intention to Offer and Withdrawal of offer may be submitted by facsimile machine pursuant to the following:
 - (1) The facsimile is received whole and complete at the designated place by the time and date set for receipt of same.
 - (2) The faxed document identifies the solicitation document and is signed.
- (C) Modifications of an offer may be submitted by facsimile machine pursuant to the following:
 - (1) The facsimile is received whole and complete at the designated place by the time and date set for receipt of same.
 - (2) The faxed document identifies the solicitation document and is signed.
 - (3) The faxed document clearly states the offerors request for modification and clearly identifies the subject of the modification by item, price, quantity, etc.
 - (4) The signed original is received within two (2) working days of receipt of the facsimile.

2.12 OFFER GUARANTY AND PERFORMANCE AND PAYMENT BONDS

Unless required by the Special Provisions, Scope of Work and Award, or other documents herein, a bid or proposal security deposit, performance and payment bonds, or any other guaranty **is not required** on any offer for goods or services.

When required by the Special provisions, or Scope of Work and Award, an acceptable bid or proposal security deposit shall be in an amount equal to at least **five percent** of the base bid and additive alternates or in an amount required by the terms of the federal funding and shall be limited to: a bond in a form satisfactory to the County underwritten by a company licensed to issue bonds in this State; legal tender; or a certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, or official check drawn by, or a certified check accepted by, a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration. Certificate of deposit,

share certificate, cashier's check, treasurer's check, teller's check, official check, or certified check may be utilized only to a maximum of \$100,000, provided however, if the required security or bond amount totals over \$100,000, more than one instrument not exceeding \$100,000 each and issued by different financial institutions, may be submitted.

Offer guaranty and performance and payment bonds submitted shall be substantially the same as the respective forms situated in the Appendix and shall contain the designated signature(s) **signed in ink.**

If an offer does not comply with the security requirements, the offer shall be rejected as non-responsive, unless the failure to comply is determined by the Director, to be non-substantial pursuant to Section 3-122-223, HAR.

2.13 CERTIFICATION OF OFFEROR CONCERNING WAGES, HOURS AND WORKING CONDITIONS OF EMPLOYEES PERFORMING SERVICES

All offerors for service contracts shall comply with Section 103-55, HRS, which provides as follows:

Wages, hours, and working conditions of employees of contractors performing services. Before any offeror enters into a contract to perform services in excess of \$25,000 for any governmental agency, the offeror shall certify that the services to be performed will be performed under the following conditions:

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.

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.

No contract to perform services for any governmental contracting agency 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.

It shall be the duty of the Officer-in-Charge to enforce

this Section on behalf of the Director.

This Section shall include contracts to supply ambulance service and janitorial service.

This Section shall not apply to:

1. Managerial, supervisory, or clerical personnel.
2. Contracts for supplies, materials, or printing.
3. Contracts for utility services.
4. 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).
5. Contracts for professional services.
6. Contracts to operate refreshment concessions in public parks, or to provide food services to educational institutions.
7. Contracts with nonprofit institutions.

2.14 TAX CLEARANCE REQUIREMENTS

Offerors are required to comply with the requirements of HRS 103-53 relating to tax clearances.

Unless specifically exempted, all contracts of **\$25,000 or more** require a tax clearance from the State Director of Taxation and the Internal Revenue Service as a **prerequisite** to contract execution and prior to final payment. (see Section 7 - PAYMENT)

2.15 PRE-OPENING MODIFICATION OR WITHDRAWAL OF BIDS

Offers may be modified or withdrawn prior to the deadline for submittal of offers by the following documents:

Modification of offers: a written notice received in the office designated in the solicitation, stating that a modification to the offer is submitted; or a notice by facsimile machine pursuant to Section 2.11 USE OF FACSIMILES.

Withdrawal of offers: a written notice received in the office designated in the solicitation; or a notice by facsimile machine pursuant to Section 2.11 USE OF FACSIMILES.

2.16 RECEIPT, OPENING, AND RECORDING OF BIDS

Upon its receipt, each bid and modification(s) shall be time-stamped but not opened, and stored in a secure place by the purchasing agency until the time and date set for bid opening. Copies of bids transmitted via facsimile machine shall not be acceptable, except as provided for in the Special Provisions or Scope of Work and Award.

Bids and modification(s) with the exception of un-priced technical offers submitted in the first phase of multi-step bidding and subject to HAR, Section 3-122-22 (h), shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the IFB. The name of each bidder, the bid price(s), and such other information as is deemed appropriate by the Director or his designated representative, shall be read aloud or otherwise made available. If practicable, such information shall also be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The name(s) and address(es) of the required witnesses shall also be recorded at the opening.

The opened bids shall be available for public inspection at the time of bid opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential. Bidders shall ensure that **material so designated as confidential shall be readily separable from the bid** in order to facilitate public inspection of the non-confidential portion of the bid.

The Director, or his designated representative, shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Director or his designated representative shall inform the bidders present at the bid opening that the material designated for nondisclosure shall be subject to written determination by the County Attorney for confidentiality. If the County Attorney determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the bid opening shall be so notified in writing and the material shall be open to public inspection unless the bidder protests under Chapter 3-126, HAR.

When a purchasing agency denies a person access to a County procurement record, the person may appeal the denial to the Office of Information Practices in accordance with Section 92F-42(12), HRS.

Bids shall be unconditionally accepted without alteration or correction, except as allowed in Sections 2.18 LATE OFFERS, LATE WITHDRAWALS, AND LATE MODIFICATIONS and 2.19 MISTAKES IN BIDS.

2.17 RECEIPT AND REGISTRATION OF PROPOSALS

Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the purchasing agency until the established due date. **Proposals shall not be opened publicly**, but shall be opened in the presence of two or more procurement officials. Proposals and modifications shall be shown only to County personnel having legitimate interest in them.

Copies of proposals transmitted via facsimile machine shall not be acceptable, except as provided for in the Special Provisions or Scope of Work and Award.

After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals: the name of each offeror; the number of modifications received, if any; and a description sufficient to identify the good or service item offered.

An offeror shall request in writing nondisclosure of designated trade secrets or other proprietary data to be confidential. Offerors shall ensure that such data so designated as confidential shall be readily separable from the proposals in order to facilitate eventual public inspection of the non-confidential portion of the proposal.

The contract file may be available for public inspection upon notice of award and shall be available for public inspection after the contract is signed by all parties.

2.18 LATE OFFERS, LATE WITHDRAWALS, AND LATE MODIFICATIONS

Any notice of withdrawal, notice of modification of an offer with the actual modification, or any offer received at the place designated for receipt and opening of an offer after the time and date set for receipt and opening of offers is late.

A late offer, late modification, or late withdrawal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity. A late offer or late modification will not be considered for award and shall be returned to the bidder unopened.

A late withdrawal request shall be responded to with a statement of the reason for non-acceptance of the withdrawal.

2.19 MISTAKES IN BIDS

- (A) Correction or withdrawal of a bid because of an **obvious mistake** in the bid is permissible to the extent it is not contrary to the best interest of the County or to

the fair treatment of other bidders.

(B) A bidder may remedy a mistake in a bid discovered before the time and date set for opening by withdrawing or correcting the bid as provided in Section 3-122-28, HAR.

(C) **CORRECTIONS TO BIDS AFTER OPENING BUT PRIOR TO AWARD** may be made under the following conditions:

(1) If the mistake is attributable to an **arithmetical error**, the Director shall so correct the mistake. In case of an error in the extension of a bid price, the unit price shall govern.

(2) If the mistake is a **minor informality** which shall not affect price, quantity, quality, delivery, or contractual conditions, the Director may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made. The Finance Director shall prepare a written approval or denial in response to this request. Examples of mistakes include:

- (a) Typographical errors;
- (b) Transposition errors;
- (c) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photo copy is accompanied by other material indicating the bidder's intent to be bound.

3) If the mistake is not allowable under paragraphs (1) or (2), but is an **obvious mistake** that if allowed to be corrected or waived is in the best interest of the County or for the fair treatment of other bidders, and the Director concurs with this determination, the mistake shall be corrected or waived.

(D) **WITHDRAWAL OF BIDS AFTER OPENING BUT PRIOR TO AWARD** may be made if the mistake is attributable to an **obvious error** which shall affect price, quantity, quality, delivery, or contractual conditions, provided:

- (1) The bidder requests withdrawal by submitting proof of **evidentiary value** which demonstrates that a mistake was made; and
- (2) The Director prepares a written approval in response to this request.

If the response to the request is a denial, the

Director shall notify the bidder in writing.

(E) **CORRECTION OR WITHDRAWAL OF BIDS AFTER AWARD** is not permissible except when the Director makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

2.20 MISTAKES IN PROPOSALS

- (A) Mistakes shall not be corrected after award of contract.
- (B) When the Director knows or has reason to conclude before award that a mistake has been made, the Director shall request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn pursuant to this Section.
- (C) Once discussions are commenced or after best and final offers are requested, any priority-listed offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
- (D) If discussions are not held, or if the best and final offers have been received by the date and time due, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.
- (E) If discussions are not held, or if the best and final offers have been received by the date and time due, an offeror alleging a material mistake of fact which makes a proposal non-responsive may be permitted to withdraw the proposal if the Director or the evaluation committee determines that: the mistake is clearly evident on the face of the proposal but the intended correct offer is not; or the offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

Technical irregularities that are matters of form rather than substance evident from the proposal document, or insignificant mistakes that may be waived or corrected without prejudice to other offerors; that is, when there is no effect on price, quality, or quantity. If discussions are not held or if best and final offers have been received by the date and time due, the Director may waive such irregularities or allow an offeror to correct them if either is in the best interest of the County. Examples include the failure of an offeror to: return the number of signed proposals required by the request for proposal; sign the proposal or provide an original signature, but only if the unsigned proposal or photocopied proposal signature is accompanied by other material indicating the offeror's intent to be bound; or to acknowledge receipt of an amendment to the request for

proposal, but only if it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.

2.21 OFFER INSPECTION

Offers to competitive sealed bids may be inspected only as provided for in Section 2.16 RECEIPT, OPENING, AND RECORDING OF BIDS, and after award of contract. During the evaluation and award recommendation period, offers will not be available for inspection.

For multi-step sealed bidding, un-priced technical offers shall be open for public inspection after the contract is signed by all parties.

For competitive sealed proposals, except for confidential portions, the proposals may be made available for public inspection upon notice of award and shall be made available for public inspection after the contract is signed by all parties.

2.22 DISQUALIFICATION OF OFFERORS

An offeror shall be disqualified and his offer automatically rejected for any one or more of the following reasons: proof of collusion, in which case, all offers involved in the collusive action will be rejected and any participant to such collusion will be barred from future solicitations until reinstated; offeror's lack of responsibility and cooperation as shown by past work or services; offeror's being in arrears on existing contracts with the County or having defaulted on previous contracts; offeror's lack of proper equipment and/or sufficient experience to perform the work contemplated; offeror does not possess proper license to cover the type of work contemplated, if required; offeror's delivery of the offer after the deadline specified in the public notice calling for offers, or as amended, except as allowed in Section 3-122-29 (1), HAR, or offeror's failure to pay, or satisfactorily settle, all bills overdue for labor and material on former County contracts at the time of issuance of solicitation.

2.23 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.

2.24 STANDARDS OF CONDUCT

Section 3-1.8, Contracts, **Kauai County Code 1987, as amended**, states that:

- "(a) A County agency shall not enter into any contract with a councilman or an employee or with a business in which a councilman or an employee has a controlling interest, involving services or property of a value in excess of five hundred dollars (\$500), unless the contract is made after competitive bidding.
- (b) 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 six (6) months and who participated while in County office or employment in the matter with which the contract is directly concerned.
- (c) This Section shall not apply to a personal contract of employment with the County."

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 Councilmembers.

All offers 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.

2.25 IRREGULAR OFFERS

Offers will be considered irregular and shall be rejected for reasons including but not limited to the following: if the offer is unsigned by the offeror and there are no other accompanying material indicating the bidder's intent to be bound; if the required offer guaranty received separately from the offer is not identifiable as guaranty for a specific offer, or is received after the date and time set for the opening; if the required offer

guaranty is not in accordance with Section 2.12, OFFER GUARANTY; if the offeror or surety fails to sign the surety bond submitted as offer guaranty; if offeror fails to use a surety bond substantially in the form furnished by the County when submitting a surety bond as an offer guaranty; if the offer shows any non-compliance with applicable law or contains any unauthorized additions or deletions, conditioned, incomplete, or irregular or is in any way making the offer incomplete, indefinite, or ambiguous as to its meaning; or unbalanced offers in which the price for any item is obviously out of proportion to the prices for other items.

SECTION 3 - EVALUATION, AWARD, AND EXECUTION OF CONTRACT

3.1 EVALUATION

(A) HAWAII PRODUCTS PREFERENCE

Subchapter 1, Chapter 3-124, HAR provides as follows:

Section 103D-1002, HRS, is applicable to HRS 103D-302 and 303, pertaining to Invitation For Bids and Requests For Proposals, respectively.

In any expenditure of public funds, the Purchasing Division and the requisitioning agency shall review all purchase specifications in a bid or proposal for purchase from the Hawaii products list where such products are available, provided that the products: Meet the minimum specifications and the selling price f.o.b. job-site, unloaded, including applicable general excise tax and use tax and does not exceed the lowest delivered price in Hawaii f.o.b. job-site, unloaded, including applicable general excise tax and use tax of a similar non-Hawaii product by more than: **three per cent**, where Class I Hawaii products are involved; **five per cent** where class II Hawaii products are involved; or **ten per cent** where Class III Hawaii products are involved.

Where offers contain both Registered Hawaii and non-Hawaii products, then for the purpose of selecting the lowest bid or purchase price only, the price bid or offered for a Registered Hawaii product item shall be **decreased** by subtracting therefrom: three per cent, five per cent or ten per cent for the Class I, Class II or Class III Hawaii product items bid or offered, respectively. The lowest total bid or proposal, taking the preferences into consideration, shall be awarded the contract unless the offer provides for additional award criteria. The contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of the preferences.

This Section shall not apply whenever its application will disqualify any governmental agency from receiving federal funds or aid.

For evaluation purposes, no preference shall be considered between registered Hawaii products.

Any person desiring a preference pursuant to this subchapter, must have the product(s) qualified and registered on the Hawaii products list. The responsibility for qualification shall rest upon the person desiring the preference. The product(s) shall be found qualified and on the Hawaii products list before a

preference may be granted. Persons desiring to qualify their product(s) shall complete according to instructions and file with the administrator, the "Application for Hawaii Products Preference", which is available from the State Procurement Office, and provide all additional information required by the administrator.

(B) PRINTING, BINDING, AND STATIONERY WORK PREFERENCE

Subchapter 2, Chapter 3-124, HAR provides as follows:

Section 103D-1003, HRS, is applicable to HRS 103D-302, pertaining to Invitation For Bids.

All bids submitted for a printing, binding, and stationery contract in which all work will be performed in-state, including all preparatory work, presswork, bindery work, and any other production-related work to include storage and shipping costs, shall receive a **fifteen per cent** preference for purposes of bid evaluation.

Where bids are for work performed in-state and out-of-state, then for the purpose of selecting the lowest bid, the amount bid for work performed out-of-state shall be increased by fifteen percent. The lowest total bid, taking the preference into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria. The contract amount awarded, however, shall be the amount of the price offered, exclusive of the preference.

This Section shall not apply whenever its application will disqualify any governmental agency from receiving federal funds as aid.

(C) RECIPROCAL PREFERENCE

Subchapter 3, Chapter 3-124, HAR provides as follows:

Section 103D-1004, HRS, is applicable to HRS 103D-302, pertaining to Invitation For Bids.

To ensure fair and open competition for Hawaii businesses engaged in contracting with other states, the Director may impose a reciprocal preference against bidders from those states which apply preferences. The amount of the reciprocal preference shall be equal to the amount by which the non-resident preference exceeds any preference applied by this State.

In determining whether a bidder qualifies as a resident offeror, the definition used by the other state in applying a preference shall apply.

The contract amount shall be the amount of the price bid, exclusive of the preference.

This Section shall not apply to any transaction if the provisions of the Section conflict with any Federal laws.

(D) RECYCLED PRODUCTS PREFERENCE

Subchapter 4, Chapter 3-124, HAR, provides that:

Section 103D-1005, HRS, is applicable to HRS 103D-302, pertaining to Invitation For Bids. Solicitations issued under said Section and consistent with Section 3-124-22, HAR, shall contain a notice stating that a price preference will be given to recycled products. This price preference will be at least **five per cent** of the bid price, and will be used for bid evaluation, as specified in Section 3-124-25, HAR.

When a purchase specifies recycled products only or when recycled products only are offered, the price preference shall not apply.

Offerors requesting a preference shall submit a completed certification form, as required by Section 3-124-23, HAR, with each offer. Previous certifications shall not apply unless allowed by the solicitation.

The contract amount of any contract awarded shall be the original price bid exclusive of any preference applied.

This Section shall not apply whenever its application will disqualify any governmental agency from receiving federal funds or aid.

(E) SOFTWARE DEVELOPMENT BUSINESSES PREFERENCE

Subchapter 5, Chapter 3-124, HAR, provides that:

Section 103D-1006, HRS, is applicable to HRS 103D-302 and 303, pertaining to Invitation For Bids and Requests For Proposals, respectively.

Solicitations issued by a governmental agency pursuant to Section 103D-302 or 103D-303, HRS, shall contain a notice stating that a price preference will be given to Hawaii software development businesses. This price preference will be **ten per cent** of the bid price, and will be used for bid evaluation.

Offerors requesting a preference shall submit a completed certification form, as required by Section 3-124-33, HAR, with each offer. Previous certifications shall not apply unless allowed by the solicitation.

Any offeror who fails to indicate that it is a Hawaii software development business will be presumed to be a non-Hawaii software development business and the offeror's proposal or bid will be increased by ten per cent for purposes of evaluation.

Where an offer contains both Hawaii software development businesses and non-Hawaii software development businesses, than for the purpose of determining the lowest evaluated price, the original offer price for the non-Hawaii software development businesses shall be increased by ten per cent.

The contract amount of any contract awarded shall be the offer price, exclusive of any preferences.

This Section shall not apply whenever the application will disqualify any governmental agency from receiving federal funds or aid.

(F) TAXPAYER PREFERENCE

Section 103D-1008, HRS, and Subchapter 7, Chapter 3-124, HAR, are applicable to HRS 103D-302 pertaining to Invitation For Bids and provides that:

Any taxpaying bidder shall qualify for the tax preference by submitting a valid tax clearance certificate issued by the State Department of Taxation and the Internal Revenue Service to the purchasing agency.

The price submitted by the tax exempt bidder shall be **increased by the applicable retail rate of the Hawaii general excise tax and applicable use tax** to determine the evaluated price for award purposes. Provided that the contract amount of any contract awarded shall be the original price bid, exclusive of any preferences used in evaluating the bid.

This Section shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid.

(G) QUALIFIED COMMUNITY REHABILITATION PROGRAMS PREFERENCE

Section 103D-1009, HRS, and Subchapter 8, Chapter 3-124, HAR, are applicable to HRS 103D-302 and 303 pertaining to Invitation For Bids and Requests For Proposals, respectively, and provides that:

Organizations listed in the Partners In Employment Program List issued by the State Procurement Office qualify for a preference. Others desiring a preference shall submit with their offer the "Certificate of Eligibility to Claim a Preference as a Qualified Community Rehabilitation

Program." (Said Form is available, upon request, at the Division of Purchasing.)

In evaluating offers for goods, services, or construction, the prices submitted by a non-community rehabilitation program shall be **increased by five percent.**

The awarded contract amount shall be the amount of the price offered, exclusive of any preference.

Contracts awarded under this Section to qualified community rehabilitation programs shall be exempt from the wages provisions of HRS 103-55.

(H) MULTIPLE PREFERENCES

Should more than one preference apply, the evaluated price shall be based on application of the applicable preferences in the order specified below:

- (1) Hawaii Products, HRS 103D-1002.
- (2) Taxpayer Preference, HRS 103D-1008.
- (3) Hawaii Software Development Businesses, HRS 103D-1006.
- (4) Recycled Products, HRS 103D-1005.
- (5) Reciprocal Preference, HRS 103D-1004.
- (6) Printing, Binding, and Stationery Work, HRS 103D-1003.
- (7) Qualified Community Rehabilitation Program Preference, HRS 103D-1009.

(I) LOW TIE BIDS

Section 3-122-34 LOW TIE BIDS, HAR, provides that:

Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

At the discretion of the Director, award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State;

Award the contract to the bidder who received the previous award, and continue to award succeeding contracts to the same bidder as long as all low bids are identical.

If no permissible method will be effective in resolving

tie bids and a written determination by the Director is made so stating, award may be made by drawing lots.

3.2 AWARD

(A) Award, if any, will be made **within sixty (60) days** after the opening of offers, unless stated otherwise, and the prices quoted by the offeror shall remain firm for the **sixty (60)** day period. Unless otherwise provided, each individual item or group of items will be awarded to the **lowest** responsive, responsible offeror whose offer complies with all the solicitation requirements. In determining the responsive and responsible offeror, offers will be evaluated not only on the amounts thereof, but on all factors relating to the satisfactory performance of the contract. Products must be of a quality and nature that will meet the needs and purposes of the intended use and must conform to all requirements prescribed in the specifications. The offeror must have the ability to perform as called for in the contract terms. The County shall be the sole judge of product or vendor capability. The successful vendor will be notified by letter that the offer has been accepted and that the vendor is being awarded the contract; **provided that if the amount of the award is less than \$25,000.00, a purchase order incorporating the terms and conditions herein, may be issued.**

(B) Awards will be posted in the Division of Purchasing, 4444 Rice Street, Rm. 303, Lihue, HI 96766, for a period of five (5) working days. Any protests regarding the solicitation must be filed within the five (5) working day posting period.

(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.

(D) If the offer is rejected or if the vendor to whom the contract was awarded fails to enter into the contract and furnish satisfactory security, if applicable, the Director may award the contract to the next lowest responsive, responsible offeror or may publish another call for offers; provided in the case of only one remaining responsive, responsible offeror, the Director may negotiate with such bidder to reduce the scope of work, if available funds are exceeded, and to award the contract at a price which reflects the reduction in the scope of work.

(E) **The Director further reserves the right to cancel the contract award at any time prior to issuance of the Notice to Proceed without any liability to the awardee and to any other offeror.**

(F) **The solicitation may be cancelled or the offers may be rejected, in whole or in part, when in the best interest of the County, as provided in Subchapter 11, Chapter 3-122, HAR.**

3.3 EXECUTION OF CONTRACT

(A) In cases where the contract award amounts to \$25,000 or more the County shall forward a formal contract to the successful offeror for execution. The contract shall be signed by the successful vendor and returned, together with a satisfactory contract bond if required, and other supporting documents, within **ten 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) In any contract involving not only County but supplemental funds from the State or Federal government, this Section shall be applicable only to that portion of the contract price as is payable out of County funds. As to the portion of the contract price that is expressed in the contract to be payable out of State or Federal funds, the contract shall be construed to be an agreement to pay the portion to the Contractor, only out of State or Federal funds to be received, respectively, either from the State or Federal government, or both. This Subsection shall be liberally construed so as not to hinder or impede the County in contracting for any project involving financial aid from the State or Federal government.

3.4 NOTICE TO PROCEED

After the contract is fully executed, the Officer-in-Charge or the Director 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.

The number of days for completion of the contract will be calculated from the official commencement date.

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.

3.5 DELIVERY

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.

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.

The Contractor shall deliver the goods and furnish services at such particular location designated and in the manner specified or ordered by the Director.

Whenever equipment is specified, the Contractor shall deliver the equipment completely assembled, unless provided for otherwise.

3.6 CONTRACT BOND

(A) The requirement for contract performance and payment bonds, if any, shall be stated in the Special Provisions or Scope of Work and Award of the solicitation.

(B) When required, a performance bond and a payment bond shall be delivered by the Contractor to the County at the same time the executed contract is delivered. Each amount of the performance and payment bonds shall not exceed **fifty per cent** of the amount of the contract price; provided, for contracts where contract price cannot be determined at the time of award, the amounts of the bonds shall be as stated in the solicitation.

(C) The acceptable performance and payment bonds are the same as the acceptable bid or proposal security deposit specified in Section 2.12 OFFER GUARANTY. If a surety bond is submitted for either the performance or payment bond, in addition to the form prescribed, a power of attorney for the surety's attorney-in-fact executing the bond shall be provided.

Wherein required the bond forms for performance, payment, and acknowledgement shall be substantially as provided in the attached exhibits and shall contain the original signature(s) signed in ink.

3.7 FAILURE TO EXECUTE CONTRACT

If the offeror to whom a contract is awarded shall fail or neglect to enter into the contract and to furnish satisfactory security as required by Section 3.6 CONTRACT BOND within **ten days** after receipt of contract documents or within such further time as the Director may allow, the purchasing agency shall pay the amount of offeror's bid or proposal security deposit, as required under Section 2.12 OFFER GUARANTY, into the County General Fund. The Director may thereupon award the contract to the next lowest responsive, responsible offeror or may call for new offers, whichever method is determined to be in the best interest of the County.

3.8 RETURN OF OFFER GUARANTIES

All security deposits submitted as required by Subchapter 24, Chapter 3-122, HAR, shall be retained until the successful offeror enters into contract and furnishes satisfactory security or if the contract is not awarded or entered into, until the Director's determination is made to publish another call for offers. At such time, all security deposits, except surety bonds, will be returned.

3.9 SUBMISSION OF INSURANCE CERTIFICATION

(A) The requirement for insurance, if any, shall be stated in the Special Provisions or Scope of Work and Award of the solicitation.

(B) The Contractor agrees to deliver to the County, when contract documents are executed, a certificate of insurance evidencing any and all insurance required by the Special Provisions or Scope of Work and Award. Said certificate shall contain an endorsement that such insurance may not be cancelled except upon thirty days notice to the County. It shall also contain a statement to the effect that the County of Kauai is named additional insured under the policy(ies).

(C) Failure of the Contractor to provide and keep in force insurance policy(ies) as required shall be regarded as material default under this Contract, entitling the County to exercise any or all of the remedies provided in this Contract for a default of the Contractor.

SECTION 4 - PERFORMANCE OF CONTRACT

4.1 CONTRACT ADMINISTRATION

It is expressly understood and agreed that the Contractor is an independent Contractor, with the authority to control and direct the performance and details of the work and services herein contemplated; however, the County retains the general right of inspection by a designated representative in order to judge, whether in the County's opinion, such work is being performed by the Contractor in accordance with the terms of this agreement.

4.2 COMPLIANCE WITH CONTRACT TERMS, ETC

The work shall be completed in conformity with the solicitation and 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 contracts pursuant to Chapter 3-126, HAR.

4.3 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 Section 6 - MODIFICATIONS AND TERMINATIONS OF CONTRACTS FOR GOODS AND SERVICES)

4.4 DELIVERY EXTENSIONS

In the case of contracts for the purchase of goods, the delivery date or the maximum number of days for delivery will be specified by the County in its solicitation requirements, and all goods must be delivered within the time specified. However, the Contractor will not be held responsible for delay due to fire, flood, riot, labor disturbances, war, shortage of transportation, act of God or other reason beyond his control, provided that he notifies the County of such delay and the reason therefor as soon as practicable after its occurrence and requests extension prior to the specified date of delivery. Requests for extension of time shall be made to the Director, in writing, and shall be accompanied by documents such as the Contractor's purchase order, manufacturer's acknowledgement, shipping manifest and any other documents substantiating that the causes for delay were beyond the control of the Contractor. The county shall be the sole judge of whether such delay is truly beyond the control of the Contractor and whether extension will be granted.

The Contractor understands and agrees that the granting of any extension of the contract completion date shall not be deemed

a waiver of the County's right to terminate the contract or to assess liquidated damages, wherein applicable, for other reasons or additional delays not specified in the specific terms of any contract extension.

SECTION 5 - LEGAL RELATIONS AND RESPONSIBILITY

5.1 LAWS TO BE OBSERVED

(A) The Contractor shall at all times observe 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.

(B) The Contractor shall protect and indemnify the County and all its officers, agents and employees against any claim or liability arising from or based on the violation of any such laws, ordinances, rules and regulations, orders and decrees, whether such violation is committed by the Contractor or his subcontractor or the employee or either or both. If any discrepancy or inconsistency is discovered in the contract for the work in relation to any such laws, ordinances, rules and regulations, orders or decrees, the Contractor shall forthwith report the same to the Director in writing.

The Contractor's attention is especially directed to Chapter 103 and 103D, HRS; Hawaii Administrative Rules Title 3, Department of Accounting and General Services Subtitle 11, issued by the Procurement Policy Board; the Kauai County Charter 1984, as amended; and the Kauai 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.

5.2 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.

5.3 FEDERAL EXCISE TAX.

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

5.4 PATENTED ARTICLE

The Contractor will be required to, and shall hold the County and its duly authorized representatives harmless against all demands, claims, actions, suits or liabilities arising from the use of any patented article, patented process or patented appliance used in connection with the contract. Any royalties due or becoming due for the use of any patented article or process shall be paid by the Contractor and shall be deemed to be included within the proposal amount and contract price.

5.5 SUBCONTRACTING AND ASSIGNING

The Contractor shall not subcontract any of the work to be performed under his contract with the County, nor shall he assign the contract to any other person or firm without written permission from the Director, and no subcontract or assignment made without such permission will be recognized. No subcontract shall, under any circumstances, relieve the Contractor of his obligation and liability under his contract with the County, and all persons engaged in performing the work covered by the contract shall be considered employees of the Contractor.

5.6 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 order or contract and which are not passed on to the purchaser under an escalating clause.

5.7 RESPONSIBILITY FOR DAMAGE CLAIMS

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.

5.8 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.

5.9 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.

5.10 CONFLICTING PROVISIONS

In the event of any actual, potential, express or implied conflict between the Special Provisions and the General Terms and Conditions, the Special Provisions shall prevail and control. The offeror understands and agrees that in the event of any actual, potential, express or implied conflict between any provision in any contract document and Chapter 103D or Chapter 103, HRS, as amended, and their implementing rules, the latter statutory or administrative rule provisions shall control.

5.11 RECORDS RETENTION AND RIGHT TO AUDIT RECORDS

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.

The County, at reasonable times and places, may audit the books and records of any contractor who has submitted cost or pricing data.

SECTION 6 - MODIFICATIONS AND TERMINATIONS OF CONTRACTS

6.1 GENERAL

(A) 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.

6.2 CONTRACT CHANGE ORDERS

(A) A change order is a written order signed by the Director, directing the Contractor to make changes which the "change clause" of the contract **authorizes the Director to order without the consent of the Contractor.**

- (1) Change clause. By written order, at any time, and without notice to any surety, the Director may, unilaterally, order of the Contractor: Changes in the work within the scope of the contract; and 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 6.8 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 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.

6.3 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:

- (1) Drawings, designs, or specifications, for the goods to be furnished;
- (2) Method of shipment or packing;
- (3) Place of delivery;
- (4) Description of services to be performed;
- (5) Time of performance (i.e., hours of the day, days of the week, etc.);
- (6) Place of performance of the services; or
- (7) 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.

6.4 AUTHORIZATION FOR A STOP WORK ORDER

(A) Section 6.5 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 consecutive days** and shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the Contractor for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the Contractor for minimizing costs.

(C) As soon as feasible after a stop work order is issued: (1) The contract will be terminated; or (2) The stop work order will be canceled or extended in writing beyond the period specified in the order.

(D) In any event, some such action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a **supplemental agreement**. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

6.5 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 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 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.

6.6 VARIATIONS IN QUANTITIES FOR DEFINITE QUANTITY CONTRACTS

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.

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.

6.7 VARIATIONS IN QUANTITIES FOR INDEFINITE QUANTITY CONTRACTS

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 undersigned bidder 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 undersigned bidder 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.

6.8 PRICE ADJUSTMENT

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:

- (A) By agreement on a fixed price adjustment before commencement of the pertinent;
- (B) By unit prices specified in the contract or subsequently agreed upon **before commencement of the pertinent performance;**
- (C) By the costs attributable to the ~~event~~ **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;**
- (D) In **any** other manner as the **contracting** parties may mutually agree **upon before commencement of the pertinent performance;** or
- (E) In the absence of agreement between the parties, **the provisions of section 103D-501 (b) (5), HRS, shall apply.**

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.** A fully executed change order or other document **permitting billing for the adjustment in price under any method listed in paragraphs (1) (A) through (1) (D) shall be issued within ten days after agreement on the method of adjustment.**

6.9 NOVATION 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.

(D) 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.

(E) Actions affecting different County agencies. Notwithstanding the provisions of Subsections (A) through (C), all novation or change of name agreements herein authorized shall be processed only through the office of the Director.

6.10 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:

(1) The Contractor shall have given written notice to the Director or designee:

(a) Prior to the commencement of the work involved, if at that time the Contractor knows of the occurrence of such action or omission; or (b) Within **thirty 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; or (c) Within such further time as may be allowed by the Director in writing.

(2) 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;

- (3) 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
- (4) 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.

6.11 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 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 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.

6.12 LIQUIDATED DAMAGES

(A) The following is for goods or services contracts when it is difficult to determine with reasonable accuracy the amount of damage to the County due to delays caused by late Contractor performance or nonperformance.

- (1) Liquidated damages. When the Contractor is given notice of delay or nonperformance as specified in Section 6.11 (A), TERMINATION FOR DEFAULT, and fails to cure in the time it is agreed or specified, the Contractor shall pay to the County

the dollar amount specified in the liquidated damages provision of the **Special Provisions**, if any, per calendar day from date 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. To the extent that the Contractor's delay or nonperformance is excused under Section 6.11 (D), Excuse for nonperformance or delayed performance, liquidated damages shall not be due the County. The Contractor remains liable for damages caused other than by delay.

(B) If the contract will not have a termination for default clause and the liquidated damages are to be assessed for reasons other than delay, the Director may approve the use of any appropriate liquidated damages clause.

6.13 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.

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.

(D) Compensation:

- (1) 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.
- (2) 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.
- (3) 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:
 - (a) Contract prices for goods or services accepted under the contract;
 - (b) 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;
 - (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 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).

(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 goods and manufacturing materials under Subparagraph (2), and the contract price of work not terminated.

(4) Cost claimed, agreed to, or established under subparagraphs (2) and (3) shall be in accordance with Chapter 3-123, HAR.

6.14 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.

6.15 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 to the Director, and shall be filed in duplicate within five 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 within five 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 should be labeled "Protest" and either served personally or sent by registered or certified mail, return receipt requested, to the Director. The written protest shall include as a minimum the following:
 - (1) The name and address of the protestor;
 - (2) Appropriate identification of the procurement, and, if a contract has been awarded, its number;
 - (3) A statement of reasons for the protest; and
 - (4) Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the 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 hours from the time of mailing, if mailed as provided in this Section, or communicated and filed when received personally by the Director.

6.16 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 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 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 circuit court of the 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.

6.17 REMEDIES

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

SECTION 7 - PAYMENT

7.1 METHOD OF PAYMENT

Payments will be authorized by the Director after completion of performance or delivery and acceptance by the Officer-in-Charge of all materials, 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. **Final payment** will not be made **for contracts of \$25,000 or more**, in any event, without a **tax clearance** from the **State of Hawaii Director of Taxation and the U.S. Internal Revenue Service** certifying that all taxes levied or accrued under State statutes against the Contractor have been paid and if applicable, the written consent to the surety on the Contractor's bond.

If, upon completion of contract, the Contractor fails to provide 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.

7.2 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.