

**GENERAL TERMS AND CONDITIONS
OF CONTRACTS FOR PROFESSIONAL SERVICES
FOR THE BOARD OF WATER SUPPLY,
CITY AND COUNTY OF HONOLULU**

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GENERAL TERMS AND CONDITIONS OF CONTRACTS FOR PROFESSIONAL SERVICES FOR THE BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU

These General Terms and Conditions of Contracts for Professional Services for the Board of Water Supply, City and County of Honolulu ("BWS") ("General Conditions") represent the policy of the BWS, as this term is defined below, relating to professional services.

ARTICLE 1 – DEFINITIONS; ADMINISTRATIVE RULES AND STATUTES

1.1 Definitions

"Addendum" means a written document issued by the Contracting Officer or his/her designee involving changes to the Solicitation that shall be considered and made a part of the Solicitation and the Contract.

"Agreement" means that certain "Agreement for Professional Services" entered into by the BWS and Contractor in connection with the services that are the subject of the Solicitation.

"Amendment" means modification.

"BWS" means the Board of Water Supply, City and County of Honolulu, State of Hawaii.

"Change Order" means a written order signed by the Contracting Officer or, when delegated by the Contracting Officer, by the Officer-in-Charge directing Contractor to make changes with or without the consent of Contractor.

"City" means the City and County of Honolulu, State of Hawaii.

"Contract" means all documents covering the professional services for which an award is made to Contractor. It shall include the Agreement, the Solicitation, these General Conditions, and any documents or publications, addenda, amendments, and change orders, whether attached thereto or incorporated by reference.

"Contracting Officer" means the Manager and Chief Engineer of the BWS.

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

"Contractor's Responsive Document" means all submissions by Contractor in response to a Solicitation.

"Days" means consecutive calendar days unless otherwise specified.

"Design and plans" means any and all designs, plans, construction drawings, specifications, cost estimates, work schedules, proposals, studies, reports and other items.

"Designee" means a person appointed by the Contracting Officer or the Officer-in-Charge to act on his/her behalf with delegated authority.

"General Conditions" means these General Terms and Conditions of Contracts for Professional Services for the Board of Water Supply, City and County of Honolulu.

"HAR" means the Hawaii Administrative Rules.

"HRS" means the Hawaii Revised Statutes of the State of Hawaii.

"Intellectual Property" shall mean: (1) all inventions (whether patentable or unpatentable and whether or not reduced to practice), all improvements thereto, and all patents, including patent applications, and patent disclosures, together with all reissuances, continuations, continuations-in-part, revisions, extensions, and reexaminations thereof; (2) all marks, whether protected under any law, including trademarks, service marks, trade dress, logos, slogans, trade names, and corporate names, together with all translations, adaptations, derivations, and combinations thereof and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith; (3) all writings and other works subject to copyright protection under the federal Copyright Act, including all copyrighted works, copyrightable works, all copyrights, and all applications, registrations, and renewals in connection therewith; (4) all mask works and all applications, registrations, and renewals in connection therewith; (5) all trade secrets and confidential business information (including ideas, research and development, know-how, formulas, compositions, manufacturing, distribution, and production processes and techniques, technical data, designs, drawings, specifications, customer information and lists, and supplier information and lists, current and potential client information and lists, current and potential travel industry businesses information and lists, pricing and cost information, business and marketing plans and proposals, and financial information and forecasts); (6) all computer software (including data, disks, licenses and related documentation); (7) all other proprietary and intangible rights and assets, whether actual or potential; and (8) all copies and tangible embodiments of any of the foregoing (in whatever form or medium).

"Manager" means the Manager and Chief Engineer of the BWS.

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

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

"Officer-in-Charge" means the Contracting Officer or the Contracting Officer's delegated designee.

"Pre-Existing Intellectual Property" shall mean any Intellectual Property that is not Work Product.

"Professional Design Services" means professional services provided by an architect, landscape architect, professional engineer, or surveyor as Section 464-1, HRS, defines those terms.

"Professional Services" means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, or any other practice defined as professional pursuant to section 415A-2, HRS, other laws of the State of Hawaii, or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook.

“**Solicitation**” means the request for proposals, invitation for bids, notice inviting persons to submit a current statement of qualifications and an expression of interest, or other method by which the BWS sought to select a contractor to provide the services that are the subject of the Contract, including all associated and related documents, such as addenda and instructions to bidders.

“**Subcontractor**” means any person who enters into an agreement with Contractor to perform a portion of the work for Contractor.

“**Work Product**” shall mean all materials, work product, works of authorship, studies, data, charts, diagrams, methodologies, processes, descriptions, reports, layouts, videotapes, computer programs, work papers, projections, ideas, inventions and Intellectual Property of any kind that are developed, prepared, assembled, or conceived, in whole or in part, by Contractor and/or its employees, subcontractors, representatives, consultants or agents in the course of providing services pursuant to the Contract or otherwise in connection with the Contract.

1.2 HAR and HRS.

- A. The Public Procurement Code (HRS Chapter 103D) and the Hawaii Administrative Rules, Title 3, Department of Accounting and General Services, State of Hawaii, govern the procurement of goods and services and are by reference incorporated herein and made a part of the Contract.
- B. Wherever "chief procurement officer" appears in the HAR, it shall mean the Manager.
- C. Wherever "head of the purchasing agency" and "procurement officer" appear in the HAR, both shall mean the Officer-in-Charge or his/her authorized designee(s).

ARTICLE 2 – CONTRACTOR’S REPRESENTATIONS

2.1 License. Contractor represents that Contractor is a business entity that is experienced and skilled in the type of work described in the Contract and that, if required by law, Contractor is licensed by the State of Hawaii to engage in the type of work required by the Contract and is in compliance with all applicable laws and regulations precedent thereto.

2.2 Contractor’s Warranty. By the act of submitting Contractor’s Responsive Document for the proposed contract, Contractor warrants that:

- A. Contractor is validly authorized to do business under and by virtue of the laws of the State of Hawaii, and is currently in good standing thereunder;
- B. Contractor and all subcontractors intended to be used by Contractor have carefully and thoroughly reviewed the Solicitation and have found it complete and free from ambiguities and sufficient for the purpose intended;
- C. Contractor has investigated and examined carefully the Solicitation and understands the character of the project;

- D. Contractor and all workers, employees, and subcontractors intended to be used are skilled and experienced in the type of services that are the subject of the Solicitation;
- E. Neither Contractor nor any of Contractor's employees, agents, suppliers, or subcontractors have relied upon any verbal representations from the BWS, its employees, or agents, including architects, engineers or consultants, in assembling Contractor's Responsive Document;
- F. The Contractor's Responsive Document is based solely upon the Solicitation and properly issued written addenda and not upon any other written or verbal representation; and
- G. The cautious delivery and performance by Contractor of the Contract will not: (1) violate the provisions of any law; (2) constitute a default under Contractor's Certificate of Incorporation or By-Laws; or (3) result in a conflict with, violation of, or default under any judgment, order, decree, indenture, or other instrument or document to which Contractor is a party.

2.3 Independent Price Determination. Contractor certifies that the price included in Contractor's Responsive Document was independently arrived at without collusion.

2.4 Additional Contractor Representations.

- A. Contractor represents that Contractor has no obligations, commitments, or impediments of any kind that will limit or prevent performance of work as required by the Contract.
- B. Contractor represents that, to the best of its knowledge, there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of work as required by the Contract.
- C. Contractor represents that, to the extent required by law, the execution, delivery, and performance of this Contract, and Contractor's directors, shareholders, and officers have, duly approved all transactions related thereto by Contractor, and Contractor has the authority to take all necessary actions to fully perform this Contract.

2.5 Payment of Taxes. Contractor will pay, when due, all taxes relating in any way to moneys received by Contractor under or in connection with the Contract.

ARTICLE 3 - AWARD AND EXECUTION OF CONTRACT

3.1 Award of Contract. The Officer-in-Charge shall notify Contractor of its selection to render the services for the project. Said notice shall not be construed to be authorization to proceed with the performance of services under the Contract. On any individual award totaling less than \$25,000, the Officer-in-Charge reserves the right to award the contract by purchase order. Also, on any individual award on a price commitment agreement, where the estimated total purchase expenditure for the duration of the agreement is less than \$25,000, the Officer-in-Charge reserves the right to award the contract by letter. Award by purchase order or award by letter shall result in a binding contract between the parties without further action by either the Contractor or the BWS. The contract, whether awarded by purchase order or letter, shall be performed in accordance with the terms set

forth in the Solicitation and the General Conditions. For awards made by purchase order or by letter the Officer-in-Charge may waive any requirement for security for faithful performance that may be required under the Solicitation.

3.2 Proof of Compliance with Laws.

- A. Offeror shall, upon award of the contract, furnish proof of compliance with the requirements of §103D-310(c), HRS:

HRS Chapter 237, tax clearance;
HRS Chapter 383, unemployment insurance;
HRS Chapter 386, workers' compensation;
HRS Chapter 392, temporary disability insurance;
HRS Chapter 393, prepaid health care;
- B. Prior to award of the contract, Offeror shall register online at <http://vendors.ehawaii.gov> to acquire a "Certificate of Vendor Compliance." The HCE provides current compliance status as of the issuance date. The "Certificate of Vendor Compliance" indicating that vendor's status is compliant with the requirements of Section 103D-310(c), HRS, shall be accepted for both contracting purposes and final payment. Vendors will be required to pay an annual fee of \$12.00 to the Hawaii Information consortium, LLC (HIC).

3.3 Execution of Contract.

- A. If Contractor is an individual or partnership, Contractor shall cause the Contract to be signed before a notary public.
- B. If Contractor is a corporation, Contractor shall: (1) cause the Contract to be signed and sealed before a notary public who shall acknowledge the person signing and his/her title; and (2) affix to the Contract a corporate resolution by Contractor or other instrument vesting the signatory with authority to sign the Contract on Contractor's behalf.
- C. If Contractor is a joint venture comprised of two or more corporations, Contractor shall: (1) cause the Contract to be signed and sealed before a notary public who shall acknowledge the person signing on behalf of each corporation comprising the joint venture and his/her title; and (2) affix to the Contract a corporate resolution by each corporation comprising the joint venture or other instrument vesting each signatory with authority to sign the Contract on behalf of the respective corporations that comprise the joint venture.
- D. If performance and payment bonds are required, such documents shall be executed in the same manner above.
- E. The signed Contract and bonds, if any bonds are required, shall be returned together with evidence of insurance coverage as may be required, to the Officer-in-Charge for further processing, within ten (10) days after notification of the award.

3.4 Contract Not Binding Unless Funds Available.

- A. Neither the Contract nor any Change Order thereto shall be binding or of any force and effect without an endorsement by the Manager 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 or the Change Order.

- B. **Exceptions to Endorsement Requirement.** The endorsement requirement described in the preceding paragraph shall not apply to the following situations:
1. If the Contract is a multi-term contract pursuant to section 3-122-149, HAR, the Manager 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 current fiscal year or remaining portion of the current fiscal year of the first term of the multi-term contract. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds from sources that are identified in writing.
 2. If the Contract is one under which the total amount to be paid to Contractor cannot be accurately estimated at the time the Contract is to be awarded.
 3. If there is no direct expenditure of public funds by the BWS to Contractor.
 4. **Certification of a Portion of Funds.** Certification of a portion of the total funds required for a Contract or Change Order may be permitted when an immediate solicitation or amendment to a Contract will result in significantly more favorable contract terms and conditions to the BWS than a solicitation or amendment made at a later date; provided that certification for partial funding shall be permitted only if the Manager states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues. All Contracts and Change Orders partially funded shall be enforceable only to the extent to which funds have been certified as available.
- C. **Contracts Involving Federal Funds.**
1. In any contract involving not only State, City, or BWS funds but also supplemental funds from the Federal government, or involving one hundred percent (100%) Federal funds, this section shall be applicable only to that portion of the contract amount obligated and payable out of State, City, or BWS funds; however, this provision shall be liberally construed so as not to hinder or impede the BWS in contracting for any project involving financial aid from the Federal government.
 2. Unless otherwise specified, Contractor, by submittal of a bid and acceptance of an award, agrees that payment of that portion of the contract amount that is supplemented or funded entirely by Federal funds shall be payable upon receipt of those Federal funds.
- D. In the event that any contract modification, change order, or adjustment results in an increase in the total project budget or total contract budget, the Officer-in-Charge shall not execute or make any contract modification, Change Order, or adjustment in contract price unless sufficient funds are made available therefor,

or the scope of the project or Contract is adjusted so as to permit the degree of completion that is feasible within the existing project budget or contract project; provided, that with respect to the validity, as to Contractor, of any executed contract modification, or adjustment in contract price that Contractor has reasonably relied upon, it shall be presumed that there has been compliance with the section.

3.5 Commencement of Work. Work shall not commence until all of the following have occurred:

- A. The Contract has been executed;
- B. To the extent required under Section 3.4, the Manager has issued an endorsement certifying that funds for the Contract are available; and
- C. The Officer-in-Charge has issued a Notice to Proceed or the executed Contract specifies the official commencement date of the performance under the Contract.

ARTICLE 4 - PERFORMANCE

4.1 Prosecution of the Work. Contractor shall be available upon reasonable demand to discuss the progress of the services being performed under the Contract. Contractor shall also remain available through any applicable alternative means of contact, such as pager or cellular phone, in the event of an emergency or other event that necessitates immediate communication with Contractor. All questions arising during the performance of the Contract which must be resolved by the Officer-in-Charge shall be brought to the Officer-in-Charge's immediate attention.

Contractor shall direct its work to relate appropriately to, and in accordance with, established principles, practices and standards for such work. Contractor shall, if applicable, direct its work to relate appropriately to, and in accordance with, established engineering, planning and/or architectural design principles and practices for good exterior appearance, and the natural and man-made environment.

Contractor shall furnish sufficient technical supervision and administrative personnel to insure the proper performance of the services under the Contract.

Contractor shall be responsible for the accuracy of all computations and completeness of all studies, designs, and plans.

All notes, deliverables, plans, specifications, calculations, field notes, and other data produced in the performance of the Contract shall be the property of the BWS.

The Officer-in-Charge shall have access, at all reasonable times, to all notes, designs, drawings, tracings or other technical data pertaining to the services being performed under the Contract for the purpose of inspection and making copies of them. Upon completion of the services under the Contract, any or all of such notes, studies, designs, drawings, tracings or other technical data shall be delivered and surrendered to the Officer-in-Charge on demand, provided that copies of notes, studies and other technical data may be delivered and surrendered instead of the originals.

4.2 Authority of the Officer-in-Charge and the Manager. The decisions of the Officer-in-Charge shall be final and binding upon parties unless the same are fraudulent or

capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or are not supported by substantial evidence, provided that decisions on questions or disputes relating to the acceptance of the services performed under the Contract, suspension or termination of the Contract, extension of time, reduction or increase in the compensation of Contractor and payment shall become final and binding upon all parties only upon approval of the Manager, and provided further that nothing herein shall be construed as making final and binding any decision of the Officer-in-Charge and/or Manager on a question of law. Pending final decision of any dispute or question, Contractor shall proceed diligently with the performance of services under the Contract in accordance with the decision of the Officer-in-Charge and/or Manager.

- 4.3 Cooperation by Contractor.** Contractor shall cooperate and coordinate with other contractors who may be employed by the BWS on the same or related projects of the BWS, and to the extent possible, shall avoid interference therewith, and shall cooperate with the other contractors so as to avoid unnecessary delay or hindrance in the performance of their respective contracts. Any difference or conflict that may arise between Contractor and the other contractors of the BWS shall be resolved by the Officer-in-Charge, whose decision shall be final and binding.
- 4.4 Contractor's Place of Business.** Contractor shall maintain, for the duration of the Contract, a permanent place of business within the State where Contractor may be served notice and legal process.
- 4.5 Laws; Regulations.** Contractor shall keep itself fully informed of all laws, ordinances, codes, rules and regulations, governmental general and development plans, setback limitations, rights-of-way, and all changes thereto, that in any manner affect the Contract and the performance thereof. Contractor shall comply with all such laws, ordinances, codes, rules and regulations, governmental general and development plans, setback limitations, rights-of-way, including the giving of all notices necessary and incident to the proper and lawful prosecution of the work, and all changes thereto. If any discrepancy or inconsistency is discovered between the Contract and any such law, ordinance, code, rule, regulation, design standard, design criterion, governmental general and development plans, setback limitation, or rights-of-way, Contractor shall forthwith report the same in writing to the Officer-in-Charge.
- 4.6 Cooperation by the BWS.** The BWS shall, without cost to Contractor, through the Officer-in-Charge, cooperate fully with Contractor and will promptly place at the disposal of Contractor all available pertinent information that the BWS may have in its possession. The Officer-in-Charge will certify the accuracy of certain information in writing whenever it is possible and reasonably necessary to do so. The BWS makes no representations or warranties regarding any information that is not certified as accurate and takes no responsibility therefor, and Contractor shall rely on such information at Contractor's own risk.
- 4.7 Review by the Officer-in-Charge.** The Officer-in-Charge shall review all submittals and other work and data required to be made by Contractor and reject or approve such submittals in their entirety or approve the same subject to such deletions, additions, and revisions as the Officer-in-Charge may deem necessary and proper.
- 4.8 Subcontracting.** Contractor shall not subcontract all or any part of the services under the Contract without the prior written consent of the Officer-in-Charge. Any consent by the Officer-in-Charge to subcontract or otherwise dispose of any portion of the Contract shall not be construed to relieve Contractor of any responsibility for the performance of the Contract.

4.9 Relationship of Parties; Independent Contractor Status.

- A. In the performance of services required under the Contract, Contractor is an “independent contractor,” with the authority and responsibility to control and direct the performance and details of the work and services required under the Contract; provided, however, that the BWS shall have a general right to inspect work in progress and to determine whether, in the BWS’s opinion, the services are being performed by Contractor in compliance with the Contract.
- B. Contractor and its employees and agents are not by reason of this Contract, agents or employees of the BWS for any purpose, and Contractor and its employees and agents shall not be entitled to claim or receive from the BWS any vacation, sick leave, retirement, workers’ compensation, unemployment insurance, or other benefits provided to BWS employees.
- C. Contractor shall be responsible for the accuracy, completeness, and adequacy of Contractor’s performance under the Contract. Furthermore, Contractor intentionally, voluntarily, and knowingly assumes the sole and entire liability to Contractor’s employees and agents, and to any individual not a party to this Agreement, for all loss, damage, or injury caused by Contractor or Contractor’s employees, agents, or subcontractors in the course of their employment.
- D. Contractor shall be responsible for payment of all applicable federal, state, and county taxes and fees that may become due and owing by Contractor by reason of this Agreement, including but not limited to: (i) income taxes; (ii) employment related fees, assessments, and taxes; and (iii) general excise taxes. Contractor is also responsible for obtaining all licenses, permits, and certificates that may be required in order to perform the services required by this Contract.
- E. Contractor shall obtain a general excise tax license from the Department of Taxation of the State of Hawaii in accordance with section 237-9, HRS, and shall comply with all requirements thereof. Contractor shall obtain a tax clearance certificate from the Director of Taxation of the State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under State law against Contractor have been paid and submit the same to the BWS prior to commencing any performance under this Agreement. Contractor shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under section 103-53, HRS, section 103D-328, and 3-122-112, HAR.
- F. Contractor is responsible for securing all employee-related insurance coverage for Contractor and Contractor’s employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

4.10 Intellectual Property.

- A. **Work Product.** Contractor acknowledges and agrees that all Work Product is the property of the BWS, and all ownership, right, title, and interest therein have vested and shall vest solely with the BWS and is and shall be deemed to be a “WORK MADE FOR HIRE” under United States Copyright Laws (17 U.S.C. Section 101 et seq.) and other applicable laws. To the extent that title to any such Work Product may not, by operation of law, vest in the BWS, or such works may not be considered to be works made for hire, Contractor hereby irrevocably

assigns to the BWS all ownership, right, title, and interest that Contractor may have in such Work Product, without additional compensation and free of all liens and encumbrances of any type. Contractor represents and warrants to the BWS that the BWS is and shall be the exclusive owner of the Work Product and all proprietary rights relating thereto, and Contractor shall defend, indemnify, and hold harmless the BWS and its employees, officers, agents, and assignees from and against any infringement or claim of infringement relating thereto. Contractor will promptly disclose to the BWS all Work Product when made or developed. Contractor agrees to give the BWS or any person designated by the BWS any reasonable assistance required to perfect and enforce the BWS's rights in such Work Product, and Contractor agrees to execute and assist in the preparation of any document that the BWS may consider necessary or helpful in obtaining or maintaining any patents, copyrights, registrations, or other proprietary rights in the Work Product. Contractor shall deliver all Work Product to the BWS upon expiration or termination of the Contract.

- B. **Pre-Existing Intellectual Property.** If Contractor is required or desires to use any Pre-Existing Intellectual Property in connection with performing the services that are the subject of the Contract, Contractor shall procure the right for such use on behalf of itself and for the BWS from the owner or owners of the Pre-Existing Intellectual Property. Any royalties, license fee, or other payment associated with the right to use the Pre-Existing Intellectual Property shall be paid by Contractor and shall be considered to be originally included within Contractor's Responsive Document and the contract price.

ARTICLE 5 – MODIFICATIONS

- 5.1 **Modifications of Contracts.** The BWS may at any time make such modifications in the Contract, and the services, designs and plans, or studies prepared by Contractor, as the Officer-in-Charge deems necessary and advisable. Such modifications shall be made by a supplemental agreement in writing or by a written order of the Manager; provided that modifications by such a written order shall be limited to modifications in the scope of services and in the designs, plans, and studies; and provided further that modifications involving no reduction or increase in compensation of Contractor may be made by written order of the Officer-in-Charge.

5.2 **Change Order.**

- A. The Officer-in-Charge, with the approval of the Manager, may at any time, and without notice to any surety, unilaterally, order of Contractor:
1. Changes in the work within the scope of the Contract; and
 2. Changes in the time of performance of the Contract that does not alter the scope of the contract work.
- B. If any change order increases or decreases Contractor's cost of, or the time required for, performance of any part of the work under the Contract, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with Section 5.6 entitled "Price Adjustment," or as negotiated. Failure of the parties to agree to an adjustment shall not excuse Contractor from proceeding with the Contract as changed, provided that the

Officer-in-Charge promptly and duly makes the provisional adjustments in payment or time for the direct costs of the work as the BWS deems reasonable. The right of Contractor to dispute the contract price or time or both shall not be waived by its performing the work; provided, however, that Contractor must follow the written notice requirements for disputes and claims established by the Contract or these General Conditions.

- C. Within ten days after receipt of a written change order, unless the period is extended by the Officer-in-Charge in writing, Contractor shall respond with a claim for an adjustment. The requirement for a timely written response cannot be waived and shall be a condition precedent to the assertion of a claim.
- D. **Claim Barred after Final Payment.** No claim by Contractor for an adjustment hereunder shall be allowed if written response is not given prior to final payment under the Contract.
- E. **Claims Not Barred.** In the absence of a change order, nothing in this subsection shall be deemed to restrict Contractor's right to pursue a claim under the Contract or for breach of contract.

5.3 **Modifications.**

- A. By written order, the Officer-in-Charge, with the approval of the Manager, may at any time, and without notice to any surety, subject to mutual agreement of the parties to the Contract and all appropriate adjustments, make modifications within the general scope of the 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. If any modification increases or decreases Contractor's cost of, or the time required for, performance of any part of the work under the Contract, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with Section 5.6 entitled "Price Adjustment" or as negotiated.
- C. **Claim Barred after Final Payment.** No claim by Contractor for an adjustment hereunder shall be allowed if written agreement of modification is not made prior to final payment under the Contract.

- D. **Claims Not Barred.** In the absence of a contract modification, nothing in this subsection shall restrict Contractor's right to pursue a claim arising under the Contract or for breach of the Contract

5.4 Variations in Definite Quantities. Upon the agreement of the parties, the quantity of goods or services or both specified in the Contract may be increased by a maximum of ten percent (10%) provided the unit prices will remain the same except for any price adjustments otherwise applicable and the Officer-in-Charge 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.

5.5 Order to Stop Work.

- A. The Officer-in-Charge may, with the approval of the Manager, by written order to Contractor, at any time, and without notice to any surety, require Contractor to stop all or any part of the work called for by the Contract. ***This order shall be for a specified period not exceeding sixty days*** after the order is delivered to 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 an order, 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 Officer-in-Charge, with the approval of the Manager, shall either:

1. Cancel the stop work order, or
2. Terminate the work covered by the order as provided in Section 9.2 entitled "Termination for Default" or Section 9.3 entitled "Termination for Convenience."

- B. **Cancellation or Expiration of the Order.** If a stop work order issued under this subsection is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, 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 Contractor's cost properly allocable to, the performance of any part of the Contract; and
2. Contractor asserts a claim for such an adjustment ***within thirty days*** after the end of the period of work stoppage; provided that, if the Officer-in-Charge decides that the facts justify such action, any claim asserted may be received and acted upon at any time prior to final payment under the Contract.

- C. **Termination of Stopped Work.** If a stop work order is not canceled and the work covered by the order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowable by adjustment or otherwise.

- D. **Adjustment of Price.** Any adjustment in contract price made pursuant to this

clause shall be determined in accordance with Section 5.6 entitled "Price Adjustment."

5.6 Price Adjustment.

- A. Any adjustment in contract price pursuant to a clause in the Contract shall be made in one or more of the following ways:
1. By agreement on a fixed price adjustment before recommencement of the pertinent performance before commencement of the pertinent performance;
 2. By unit prices specified in the Contract or subsequently agreed upon before commencement of the pertinent performance;
 3. By the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon before commencement of the pertinent performance;
 4. In such other manner as the parties may mutually agree upon before commencement of the pertinent performance; or
 5. In the absence of agreement between the parties, in accordance with the provisions of section 103D-501(b)(5), HRS, and applicable sections of Chapters 3-122, 125, and 126, HAR, shall apply.

Contractor shall provide cost or pricing data for any price adjustments subject to the provisions of section 103D-312, HRS, and chapter 3-122, subchapter 15, HAR.

5.7 Cost and Pricing Data.

- A. For any adjustment exceeding \$100,000, Contractor shall submit cost or pricing data and certification of that data except as provided for in the following paragraph. Certification shall be in the form attached herein as Exhibit "A." For adjustments less than \$100,000, the Officer-in-Charge may, upon written determination that the circumstances warrant submission of cost or pricing data, require cost or pricing data.
- B. Cost or pricing data are not required if the price is based on: (1) contract unit prices; (2) adequate competition, as in receiving bids or quotations from various subcontractors or suppliers for changed work; (3) established catalogue prices or market prices; or (4) prices set by law or regulation. However, the Officer-in-Charge may request cost or pricing data if the Officer-in-Charge considers that such price is not reasonable.

5.8 Assignment of Contract; Name Change.

- A. **Assignment of Contract Generally.** Subject to Sections 5.8(B) and 5.8(C) of these General Conditions, Contractor shall not assign any of Contractor's duties, obligations, or interests under the Contract without the prior written consent of the BWS.

- B. **Assignment of Contract to Successor in Interest.** When in the best interest of the BWS and upon written consent by the Contracting Officer, a successor in interest may be recognized in an assignment agreement in which the assignor, the assignee, and the BWS agree that:
1. The assignee assumes all of the assignor's obligations under the Contract;
 2. The assignor remains liable for all obligations under the Contract but waives all rights under the Contract as against the BWS; and
 3. The assignor shall continue to furnish, and the assignee shall also furnish, all required bonds.
- C. **Name Change.** If Contractor requests to change the name in which it holds a contract with the BWS, the Contracting Officer 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 Contractor to effect such a change of name. The agreement shall specifically indicate that no other terms and conditions of the Contract are thereby changed.

5.9 **Claims Based on the Officer-in-Charge's Actions or Omissions.**

- A. If any action or omission on the part of the Officer-in-Charge or designee of such officer, requiring performance changes within the scope of the Contract constitutes the basis for a claim by Contractor for additional compensation, damages, or an extension of time for completion, Contractor shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, Contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:
1. Contractor shall have given written notice to the Officer-in-Charge;
 - a. ***Prior to the commencement*** of the work involved, if at that time Contractor knows of the occurrence of the action or omission;
 - b. ***Within thirty days after*** Contractor knows of the occurrence of the action or omission, if Contractor did not have knowledge prior to the commencement of the work; or
 - c. Within such further time as may be allowed by the Officer-in-Charge in writing.
 2. This notice shall state that Contractor regards the act or omission as a reason that may entitle Contractor to additional compensation, damages, or an extension of time. The Officer-in-Charge or designee of such officer, upon receipt of the notice, may rescind the action, remedy the omission, or take other steps as may be deemed advisable in the discretion of the Officer-in-Charge or designee of such officer;
 3. The notice required by paragraph (1) shall describe as clearly as practicable, at the time, the reasons why Contractor believes that additional compensation, damages, or an extension of time may be

remedies to which Contractor is entitled; and

4. Contractor shall maintain and, upon request, make available to the Officer-in-Charge within a reasonable time detailed records, to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with the changes.
- B. Nothing herein contained, however, shall excuse Contractor from compliance with any rules of law precluding any BWS officers or employees and any contractors from acting in collusion or bad faith in issuing or performing change orders that are clearly not within the scope of the Contract.
 - C. Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with Section 5.6 entitled "Price Adjustment."

ARTICLE 6 – TIME AND DELAYS

- 6.1 **Time.** Time is of the essence for the Contract. Performance of the services under the Contract shall be commenced on the date designated in the Notice to Proceed or in the Contract, and the services as required in the Contract shall be completed within the number of days or on the date specified.
- 6.2 **Delay.** If any excusable delay occurs, it shall be dealt with in accordance with Section 9.2(C) entitled "Excuse for Nonperformance or Delayed Performance." No extension of time however, shall be granted unless the written application therefor stating in detail Contractor files the cause or causes of delay with the Officer-in-Charge **within fifteen (15) days** after the commencement of the delay. No such extension shall be deemed a waiver of the right of the Officer-in-Charge to require the completion of services under the Contract within the time required herein as so extended by the specific terms of such extension or extensions, nor a waiver of right to terminate the Contract for any other or additional delay not covered by the specific terms of such extension or extensions. The Manager upon the recommendation of the Officer-in-Charge shall determine the number of days of each extension of time.
- 6.3 **Extension of Time.** If the Contract has exhausted its provision for extension(s) of time of performance, or if the Contract does not include a provision for extension(s) of time of performance, the Contract may be extended upon approval of the Manager, provided:
 - A. The period of each extension is for one hundred eighty (180) calendar days or less;
 - B. The Officer-in-Charge makes a written determination that it is not practical to award another contract at the time of the expiration of the Contract for reasons including, but not limited to, the following:
 1. A new contract cannot be executed by the time the Contract expires; or
 2. The need for the good or service is short term
 - C. All parties agree to the extension of time of performance; and
 - D. The price or conditions of the Contract remain the same as the original Contract,

or as amended per the Contract; or if not the same or as amended, they are fair and reasonable.

- 6.4 Liquidated Damages.** The amount of damage to the BWS as a result of failure to complete performance of specified services under the Contract within the time fixed or any extension thereof, exclusive of overhead expenses, being certain but difficult, if not impossible to ascertain, Contractor agrees to pay the sum stated in the Contract as liquidated damages, and not by way of penalty, for every calendar day of delay until the services are completed and accepted, or a reasonable time has expired for completion and acceptance of the services remaining to be performed.

When Contractor is given notice of delay or nonperformance as specified in Section 9.2 entitled "Termination for Default" and fails to cure in the time it is agreed or specified, Contractor shall pay to the BWS the amount specified in the Contract per calendar day from the date set for cure until either the Officer-in-Charge reasonably obtains similar goods or services if Contractor is terminated for default, or until Contractor provides the goods or services if Contractor is not terminated for default. To the extent that Contractor's delay or nonperformance is excused under Section 9.2(C) entitled "Excuse for Nonperformance or Delayed Performance," liquidated damages shall not be due to the BWS. Contractor remains liable for damages caused other than by delay.

ARTICLE 7 - COMPENSATION

- 7.1 Compensation.** Contractor shall be paid the amount stated in the Contract or the amount determined in accordance with the special provisions, whichever is lower, as full compensation for the performance of the services under the Contract.
- 7.2 No Reimbursement.** The BWS shall not provide any reimbursement for the cost of developing or presenting Contractor's Responsive Document.
- 7.3 Progress Payment.** Contractor's compensation shall be paid as set forth in the Contract.
- 7.4 Acceptance and Final Payment.** The Officer-in-Charge shall approve and accept completion of the Contract upon the satisfactory fulfillment of the terms of the Contract and compliance on Hawaii Compliance Express.
- A. In the event equipment is provided under the Contract, which received prior approval from the Manager, Contractor shall also provide a written list of equipment installed or provided, listing the description, make, model, serial number, cost, and location of the equipment or room number in which the equipment is located.
- For purposes of this subsection, "equipment" means any item such as a water heater that can be removed with a hand tool, or like an air conditioner, is capable of being moved or transferred to another location, and is accessible to tagging with an identification number.
- B. Acceptance by Contractor of the final payment shall constitute payment in full for all services performed under the Contract.
- 7.5 Authority to Withhold Money Due or Payable.** The Officer-in-Charge may withhold such amounts from the money due or to become payable under the Contract to

Contractor, or any assignee under Section 5.8 entitled "Assignment of Contract; Name Change," as may be necessary to protect the BWS against liability or to satisfy the obligations of Contractor to the City, State Department of Taxation, Internal Revenue Service, and to employees, subcontractors and material suppliers who have performed labor or furnished material and equipment under the Contract and may make such payments from such amounts as may be necessary to discharge such obligations and protect the BWS.

7.6 Retainage.

- A. In accordance with HRS 103-32.1, the Officer-in-Charge may determine the need for retainage of a portion of the monthly payments to Contractor or payments made upon completion of phases of the Contract to insure the proper performance of the Contract; provided that the sum withheld shall not exceed five percent (5%) of the amount due to Contractor and that after fifty percent (50%) of the Contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the Officer-in-Charge may continue to withhold as retainage, sums not exceeding five percent (5%) of the amount due to Contractor.
- B. For federally funded contracts, the amount of retainage shall be the amount allowed by federal regulations.

7.7 Prompt Payment to Subcontractors.

- A. Any money, other than retainage, paid to Contractor shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes on which the BWS has withheld payment; and
- B. Upon final payment to Contractor, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.

7.8 Payment for Reimbursable Expenses.

Payment requests for all reimbursable expenses shall be accompanied and supported by receipted invoices for all charges. The BWS must approve of all reimbursable expenses in writing. Payment for reimbursable items shall be made for allowable costs in accordance with the Hawaii Administrative Rules, Title 3, Department of Accounting and General Services, Chapter 3-122, Subchapter 15, cost or pricing data, and Chapter 3-123, cost principles.

Reimbursable amounts stated in the Contract shall not be exceeded without a contract amendment. Any balance remaining from the reimbursable expense funds at the completion of the Contract shall revert to the BWS.

ARTICLE 8 – INSURANCE; INDEMNIFICATION

8.1 Insurance.

- A. For purposes of this Section 8.1 only, "BWS" and "Board of Water Supply" shall mean the Board of Water Supply, City and County of Honolulu, and their respective elected and appointed officials, employees, agents, consultants, and construction managers.
- B. **Required Coverages.** Contractor shall procure or cause to be procured and maintain (as provided herein), at no cost to the BWS, during the life of this contract and any extensions thereof, or until such time as action against Contractor or subcontractor for death, injuries, losses and damages is barred by the provisions of Chapter 657, HRS, whichever is longer, the following types of insurance to cover the operations under the Contract, and all other insurance that may be required under the laws, ordinances or regulations of any governmental authority:
1. **Workers Compensation and Employers Liability Insurance.** Contractor shall maintain workers compensation and employers liability insurance. Workers compensation coverage shall be in accordance with State statutes. Employers liability and/or commercial excess limits shall be not less than \$1,000,000 each accident or otherwise as set forth in the special provisions.
 2. **Commercial General and Umbrella / Excess Liability Insurance.** Contractor shall maintain commercial general liability (CGL) and if necessary commercial umbrella /excess insurance with a limit of not less than \$1,000,000 each occurrence, and general aggregate or otherwise as set forth in the special provisions. CGL insurance shall be written on ISO occurrence form, CG 00 01 (or a substitute form providing equivalent coverage), and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). The BWS shall be included as an additional insured under the CGL, using ISO additional insured endorsement CG 20 10 (or equivalent), and under the commercial umbrella / excess, if any. The policy(ies) shall contain a waiver of subrogation in favor of the BWS.
 3. **Business Automobile and Umbrella / Excess Liability Insurance.** Contractor shall maintain business automobile liability or equivalent, (including no-fault coverage) and if necessary, commercial umbrella / excess liability insurance with a limit of not less than \$1,000,000 each accident or otherwise as set forth in the special provisions. Such insurance shall cover liability arising out of any automobile (including owned, hired, and non-owned automobiles) used by Contractor in the performance of the Contract. Business auto coverage shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, with appropriate Hawaii endorsements, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the current editions. The BWS shall be included as an additional insured under the Business Automobile Liability using ISO additional insured endorsement (or equivalent).
 4. **Professional Liability Insurance.** Contractor shall maintain professional liability insurance with limits of not less than \$1,000,000 per

claim/annual aggregate, or otherwise as set forth in the special provisions, covering Contractor and Contractor's employees and agents for liability arising out of errors, omissions, or negligence in the performance of professional services under the Contract. Such insurance shall remain in full force and effect continuously for the period of design and construction of the work.

5. Contractor shall be solely responsible for any and all loss or damage to Contractor's or any Subcontractor's equipment, tools, and other personal property, and Contractor may at its own option purchase insurance to cover such property and equipment at no cost to the BWS.
- C. **General Conditions.** The following general conditions are applicable to all insurance herein required, unless otherwise specified above:
1. Except for Professional Liability insurance required in Section 8.1(B)(4) of these General Conditions, Contractor waives all rights against the BWS and the City for recovery of damages to the extent such damages are covered by the insurance required herein.
 2. All insurance required herein shall apply as primary insurance with respect to all insureds for claims arising from Contractor's acts or omissions, and any other insurance or self-insurance programs afforded to the BWS shall be excess and non-contributing;
 3. All insurance required herein shall be provided by insurers authorized to do business in the State of Hawaii and with a current Best's rating of not less than A-, or otherwise as approved by the BWS.
 4. Except for Professional Liability insurance required in Section 8.1(B)(4), all insurance required herein shall be written on an "Occurrence" form of policy, unless otherwise specifically approved by the BWS.
- D. **Subcontractors Insurance.** Contractor shall either:
1. Include all subcontractors as insureds under all insurance set forth in Section 8.1(B) of these General Conditions; or
 2. Cause each subcontractor employed by Contractor to purchase and maintain insurance of the types specified above. Contractor shall obtain and maintain evidence of each subcontractor's insurance, and if requested by the BWS, Contractor shall furnish copies of certificates of insurance evidencing coverage for each subcontractor.
- E. **Cross-Liability Coverage.** If Contractor's liability policies do not contain the standard ISO separation of insureds provision, or a substantially similar clause, they shall be endorsed to provide cross-liability coverage.
- F. Contractor is responsible for paying any portion of any loss not covered because of the operation of any deductible applicable to the insurance required herein. If the BWS and/or the City are damaged by the failure of Contractor to maintain insurance as required in this paragraph, then Contractor shall bear all reasonable costs properly attributable to that failure.

G. **Evidence of Insurance.**

1. Upon execution of the Contract by Contractor, Contractor shall furnish BWS with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with insurance requirements set forth in Sections 8.1(B)(1), 8.1(B)(2), and 8.1(B)(3) of these General Conditions.
2. Prior to commencing the work, Contractor shall furnish the BWS with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance required under Section 8.1(B)(4) of these General Conditions.
3. With respect to continuing insurance as required under Section 8.1(B)(4) of these General Conditions, Contractor shall provide certificate(s) of insurance evidencing such coverage at the time of final payment, and thereafter whenever requested by the BWS.
4. All certificates shall provide for sixty (60) days written notice to the BWS prior to the cancellation or material change of any insurance referred to therein.
5. Contractor shall provide certified copies of all insurance policies required above within ten (10) days of the BWS's written request for said copies.
6. Failure of the BWS to demand such certificate or other evidence of full compliance with these insurance requirements or failure of the BWS to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor's obligations to maintain such insurance.
7. Prior to starting the Work, the Contractor shall furnish the BWS with certificates of insurance, acceptable to the BWS evidencing that the Contractor and all subcontractors have the required insurance coverage. Each of the insurance policies (or the certificates of insurance evidencing such insurance policies in the event that the Contractor provides proof of insurance by means of such certificates of insurance in lieu of true and correct copies of each required insurance policy) shall provide that such policy may neither be canceled nor the coverage thereunder reduced (whether or not requested by the Contractor) except upon sixty (60) days prior written notice to the BWS of such cancellation or reduction, sent to the BWS by certified or registered mail, postage prepaid. The words "endeavor to" and "failure to mail such notice shall impose no obligation for liability..." are unacceptable. These two (2) phrases must be crossed out.

H. **Endorsements; Other Requirements.**

Commercial General and Umbrella / Excess Liability Insurance and Business Automobile and Umbrella / Excess Liability Insurance shall:

1. Name the "Board of Water Supply, City and County of Honolulu" and the "City and County of Honolulu" as additional insureds. "Board of Water Supply" shall mean the Board of Water Supply, its elected and appointed

officials, employees, agents, consultants, and construction managers. "City and County of Honolulu" shall mean the City and County of Honolulu, its elected and appointed officials, employees, agents, consultants, and construction managers;

2. Show the certificate holder as the Board of Water Supply, 630 South Beretania Street, Honolulu, Hawaii, 96843; and
3. Include the Contract and project numbers, and name of the project.

I. **Failure to Maintain Required Insurance.**

1. Failure to maintain the required insurance may result in termination of this Contract at the BWS's option.
2. If Contractor fails to maintain the insurance as set forth herein, the BWS shall have the right, but not the obligation, to purchase said insurance at Contractor's expense.

J. **No Representation of Coverage Adequacy.** By requiring insurance herein, the BWS does not represent that the coverage and limits will necessarily be adequate to protect Contractor, and such coverage and limits shall not be deemed as a limitation on Contractor's liability under the indemnities granted to the BWS and/or the City under this Contract.

K. The BWS reserves the right to require additional kinds or amounts of insurance as the BWS may reasonably determine is appropriate based on a change in circumstances or conditions relevant to the Contract.

8.2 Indemnification.

- A. The Contractor shall perform the work as an independent Contractor and shall indemnify and hold harmless the BWS, the City, and all of their officers, employees or agents, from any and all deaths, injuries, losses and damages to persons or property, and any and all claims, demands, suits, action and liability therefor including reasonable attorney fees and cost of defense, caused by error, omissions or negligence in the performance of the contract by the Contractor or the Contractor's subcontractors, agents and employees and this requirement shall survive the termination of the contract.
- B. **Workers' Compensation Law.** Contractor shall hold harmless the BWS, the City, and all of their elected and appointed officials, officers, consultants, representatives, volunteers, agents, and employees, and the construction manager, from all suits, actions, or claims of any character brought on account of any claims or amounts arising or recovered under the Workers' Compensation Law or any other law, by-law, ordinance, order, or decree.
- C. **Intellectual Property.** Contractor shall indemnify and hold harmless the BWS, the City, and all of their elected and appointed officials, officers, consultants, representatives, volunteers, agents, and employees against any liability, claims, demands, or causes of action of any nature whatsoever related to or involving Pre-Existing Intellectual Property used by Contractor in connection with providing the services that are the subject of the Contract, and agrees at Contractor's expense to defend any legal or other action brought against the BWS, the City,

and their elected and appointed officials, officers, consultants, representatives, volunteers, agents, and employees founded upon any such liability, claim, demand, or cause of action, and pay any attorneys' fees incurred by the BWS, the City, and their elected and appointed officials, officers, consultants, representatives, volunteers, agents, and employees in connection therewith.

- D. The provisions of this Section 8.2 shall remain in full force and effect notwithstanding the expiration or early termination of the Contract.

ARTICLE 9 – TERMINATION

- 9.1 Right of the BWS to Terminate.** The BWS shall have the right to suspend performance of the services under the Contract or terminate the Contract in whole or in part at any time by written notice to Contractor. If the termination is for reasons other than default of Contractor as provided in Section 9.2, Contractor shall be compensated in accordance with Section 9.3 entitled "Termination for Convenience."
- 9.2 Termination for Default.** If Contractor refuses or fails to perform any of the provisions of the Contract with such diligence as will ensure its completion within the time specified in the Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of the Contract, the Officer-in-Charge may notify Contractor in writing of the delay or nonperformance, and ***if not cured in ten (10) days*** or any longer time specified in writing by the Officer-in-Charge, the Officer-in-Charge may, with the approval of the Manager, terminate Contractor's right to proceed with the Contract or a 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 Manager may procure similar goods or services in a manner and upon terms deemed appropriate by the Manager. 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.

Notwithstanding the above, in the event the Contract is terminated, in whole or in part, by the BWS as the result of a default by Contractor, the BWS may secure, on any terms and in any manner that the BWS deems appropriate, supplies, materials, equipment and/or services similar to those required under the work terminated. Contractor shall be liable to the BWS for any excess costs for such similar supplies, materials, equipment and/or services, and the BWS may withhold and apply any monies due or to become due to Contractor under the Contract for the completion of the work and/or for the payment of an additional contractor or contractors. This provision shall survive the termination of the Contract. In case an additional contract or contracts let after such termination for default are let in an amount or amounts in excess of the amount remaining available for the Contract in the hands of the BWS, free from all claims by laborers or material providers for work performed or materials furnished for the Contract prior to the termination for default or any deductions authorized by the terms hereunder or the Contract in favor of the BWS, then Contractor shall deposit, within ten (10) days from the receipt of each notice of any such reletting, to the credit of the BWS, solely for the prosecution and completion of the work, a sum of money equal to such excess; and in case the BWS desires to complete the work in any other manner than by contract, then Contractor shall deposit within ten (10) days from the receipt of each notice of the final completion of the work, to the credit of the BWS, the amount of any excess cost occasioned by such completion over the amount available under the Contract in the hands of the BWS, free from all claims or deductions as aforesaid, all without prejudice to any other or additional rights or remedies the BWS may have against Contractor under the terms hereunder or

the Contract or under any applicable law, statute, ordinance, rule, regulation or other standard or requirement.

- A. **Contractor's Duties.** Notwithstanding termination of the Contract and subject to any directions from the Manager or the Officer-in-Charge, Contractor shall take timely and necessary action to protect and preserve property in the possession of Contractor in which the BWS has an interest.
- B. **Compensation.** Payment for completed goods delivered and accepted by the BWS shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by Contractor and the Officer-in-Charge; if the parties fail to agree, the Manager, upon recommendation of the Officer-in-Charge, shall set an amount subject to Contractor's rights under chapter 3-126, HAR. The BWS may withhold from amounts due to Contractor such sums as the Manager deems to be necessary to protect the BWS against loss because of outstanding liens or claims of former lien holders and to reimburse the BWS for the excess costs incurred in procuring similar goods and services.
- C. **Excuse for Nonperformance or Delayed Performance.** Except with respect to defaults of subcontractors, Contractor shall not be in default by reason of any failure in performance of the Contract in accordance with its terms, if Contractor has notified the Officer-in-Charge ***within fifteen (15) days*** after the cause of the delay and the failure arises out of causes including but not limited to: acts of God; acts of the public enemy; acts of any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if the failure arises out of causes similar to those set forth above, 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 Contractor to meet the contract requirements.
- D. Upon request of Contractor, the Officer-in-Charge shall ascertain the facts and extent of the failure, and, if the Officer-in-Charge determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, Contractor's progress and performance would have met the terms of the Contract, the completion date or delivery schedule shall be revised accordingly, subject to the rights of the BWS under Section 9.3 entitled "Termination for Convenience." As used in this paragraph, the term "subcontractor" means subcontractor or sub consultant at any tier.
- E. **Additional Rights and Remedies.** The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law.

9.3 Termination for Convenience. The Manager may, upon recommendation of the Officer-in-Charge, when the interests of the BWS so require, terminate the Contract in whole or in part, for the convenience of the BWS. The Manager shall give written notice of the termination to Contractor specifying the part of the Contract terminated and when termination becomes effective.

- A. **Contractor's Obligations.** Contractor shall incur no further obligations in connection with the terminated work, and on the dates set in the notice of termination, Contractor will stop work to the extent specified. Contractor shall

also terminate outstanding orders and subcontracts as they relate to the terminated work. Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the BWS's approval. Contractor may be directed to assign Contractor's right, title, and interest under terminated orders or subcontracts to the BWS. Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

B. Right to Goods.

1. Contractor may be required to transfer title and deliver to the BWS in the manner and to the extent directed by the Officer-in-Charge or the Manager: 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 Contractor has specifically produced or specially acquired for the performance of the terminated part of the Contract.
2. Contractor shall, upon direction of the Officer-in-Charge, protect and preserve property in the possession of Contractor in which the BWS has an interest. If the Officer-in-Charge does not exercise this right, Contractor shall use Contractor's best efforts to sell such goods and manufacturing materials. Use of this section in no way implies that the BWS has breached the Contract by exercise of the termination for convenience clause.

C. Compensation.

1. Contractor shall submit a termination claim specifying the amounts due because of 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 Contractor fails to file a termination claim ***within one (1) year*** from the effective date of termination, payment may be made to Contractor, if at all, in accordance with paragraph (3) below.
2. A settlement may be agreed to by both parties provided 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 BWS, the proceeds of any sales of goods and manufacturing materials under Section 9.3(B) entitled "Right to Goods," and the contract price of the work not terminated.
3. Absent complete agreement under paragraph (2), Contractor shall be paid the following amounts, provided payments agreed to under paragraph (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 preparing to perform and performing the terminated portion of the work plus a five percent (5%) markup on actual direct costs on such portion of the work (the markup

shall not include anticipatory profit or consequential damages), less amounts paid or to be paid for accepted goods or services; provided that if it appears that 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 Manager the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Section 9.3(A) entitled "Contractor's Obligations." Subcontractors shall be entitled to a markup of no more than ten percent (10%) on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with Section 9.3(C)(3)(b).
 - d. The total sum to be paid to Contractor under this paragraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under Section 9.3(B) entitled "Right to Goods," and the contract price of work not terminated.
4. Costs claimed, agreed to, or established under Section 9.3(C)(2) and Section 9.3(C)(3) shall be in accordance with Chapter 3-123, HAR.

ARTICLE 10 – CONTRACT DISPUTES AND CONTROVERSIES

10.1 Final Decision.

- A. When a controversy cannot be resolved by mutual agreement between the Officer-in-Charge and Contractor, the Manager shall, upon recommendation by the Officer-in-Charge, after written request by Contractor for a final decision, promptly issue a written decision.
- B. Any such decision shall be final and conclusive, unless fraudulent, or unless Contractor brings an action seeking judicial review of the decision in a circuit court of this State ***within the six (6) months*** from the date of receipt of the decision.
- C. The Manager shall issue a written decision within the following time limitations:
 - 1. For claims not exceeding fifty thousand dollars (\$50,000): ninety (90) calendar days after receipt of the claim.
 - 2. For claims exceeding fifty thousand dollars (\$50,000): ninety (90) calendar days after receipt of the claim; provided that if a decision is not issued within ninety (90) calendar days, the Manager shall notify Contractor of the time within which a decision will be made.
- D. If the Manager fails to issue a decision on a claim not exceeding fifty thousand dollars (\$50,000) within ninety (90) calendar days after receipt, or does not issue a decision within the time promised for a claim in excess of fifty thousand dollars (\$50,000), Contractor may proceed as if an adverse decision had been received.

- 10.2 Payment.** The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payments shall be without prejudice to the rights of either party or where such payments are required to be returned by a subsequent decision, interest on such payments shall be paid at the statutory rate from the date of payment.
- 10.3 Claims Against Contractor.** All controversies involving claims asserted by the BWS against Contractor that cannot be resolved by mutual agreement shall be the subject of a decision by the Manager, upon recommendation by the Officer-in-Charge.
- 10.4 Continued Performance of the Contract.** Contractor shall comply with any decision of the Manager and proceed diligently with performance of the Contract pending final resolution by a circuit court of this State of any controversy arising under, or by virtue of, the Contract, except where there has been a material breach of contract by the BWS; provided that in any event Contractor shall proceed diligently with the performance of the Contract where the Manager has made a written determination that continuation of work under the Contract is essential to the public health and safety.
- 10.5 Remedies.** Any dispute arising under or out of the Contract is subject to chapter 3-126, HAR. The procedures and remedies provided for shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension, or debarment proceeding, or in connection with a contract controversy, to resolve their claims or differences. The contested case proceedings set out in chapter 91, HRS, shall not apply to protested solicitations and awards, debarments or suspensions, or the resolution of contract controversies.

ARTICLE 11 - COST OR PRICING DATA

- 11.1 Cost or Pricing Data.** Pursuant to chapter 3-122, subchapter 15, HAR, cost or pricing data may be required as determined by the Officer-in-Charge or by chapter 3-122, subchapter 15, HAR, along with the certification of current cost or pricing data, substantially in the form attached hereto as Exhibit "A."
- 11.2 Definition of Cost or Pricing Data.** Cost or pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of a prospective contractor's judgment about future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all facts that can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include such factors as:
- A. Vendor quotations;
 - B. Nonrecurring costs;
 - C. Information on changes in production methods and in production or purchasing volume;
 - D. Data supporting projections of business prospects and objectives and related operations costs;

- E. Unit cost trends such as those associated with labor efficiency;
- F. Make or buy decisions;
- G. Labor union contract negotiations; and
- H. Information on management decisions that could have a significant bearing on costs.

11.3 Submission. When cost or pricing data are required, they shall be submitted to the Officer-in-Charge prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Officer-in-Charge. Such data shall either be actually submitted or specifically identified in writing. Contractor is required to keep such submission current until the negotiations are concluded.

11.4 Certification. Contractor shall provide written certification as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of the date of reaching agreement on price.

11.5 Miscellaneous Provisions. If a prospective contractor refuses to supply the required data, the Manager, upon recommendation of the Officer-in-Charge, shall determine in writing whether to disqualify the noncomplying contractor, to defer award pending further investigation, or to enter into the contract. If, after award, a contractor refuses to supply the required data, the Officer-in-Charge shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under chapter 3-126, HAR.

The certificate of cost or pricing data is not to be construed as a representation as to the accuracy of Contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which Contractor's judgment is based.

The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

11.6 Defective Cost or Pricing Data. If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or not current as of the date stated in the certificate, the BWS is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount.

In determining the amount of a downward adjustment, Contractor shall be entitled to an offsetting adjustment of any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the BWS's claims for overstated cost or pricing data arising out of the same pricing action.

If Contractor and the Officer-in-Charge cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the Officer-in-Charge shall set an amount in accordance with provisions of this section and Contractor may appeal this decision as a contract controversy under chapter 3-126, HAR.

ARTICLE 12 - SEXUAL HARASSMENT POLICY

- 12.1 General.** Contractor must comply with the requirements of Section 1-18 of the Revised Ordinances of Honolulu (ROH) regarding sexual harassment. Contractor shall have and enforce a policy prohibiting sexual harassment. Contractor's sexual harassment policy must set forth the same or greater protection than those contained or required by the ordinance.
- 12.2 Applicability.** ROH § 1-18 is applicable to Contractor's business and includes:
- A. Prohibitions against an officer's or employee's sexual harassment of the following:
 - 1. Another officer or employee of the employer;
 - 2. An individual under consideration for employment with the employer; or
 - 3. An individual doing business with the employer.
 - B. A provision prohibiting a management or supervisory officer or employee from knowingly permitting a subordinate officer or employee to engage in the sexual harassment prohibited under paragraph (1) above;
 - C. A prohibition against retaliation towards an officer, employee, or individual who has complained of sexual harassment, conducted an investigation of a complaint, or acted as a witness during an investigation of a complaint;
 - D. A prohibition against a malicious false complaint of sexual harassment by an officer, employee, or individual;
 - E. Provisions allowing an officer, employee, or individual to make a sexual harassment complaint to an appropriate management, supervisory, or personnel officer or employee;
 - F. Procedures for investigating a sexual harassment complaint in an unbiased, fair, and discreet manner with appropriate safeguards to maintain confidentiality and protection from embarrassment;
 - G. A provision requiring the use of the "reasonable person of the same gender standard" to determine if sexual harassment has occurred. Under the standard, sexual harassment shall be deemed to have occurred if the alleged offender's conduct would be considered sexual harassment from the perspective of a reasonable person of the same gender as the alleged victim. If the alleged victim is a woman, the "reasonable person of the same gender standard" shall be equivalent to, and may be called, the "reasonable woman standard";
 - H. Disciplinary actions which may be imposed on an officer or employee who committed a prohibited act; and
 - I. For an employer with at least five employees, a provision requiring the annual viewing of a video on the sexual harassment policy by each

management or supervisory officer or employee.

- 12.3 Policy Term.** The policy required under this section shall be in effect for at least the duration of Contractor's Contract with the BWS.
- 12.4 Pledge and Acceptance.** The action of Contractor signing the Contract shall constitute Contractor's acceptance of and pledge to comply with the provisions for the sexual harassment policy as required by ROH § 1-18.

ARTICLE 13 – GENERAL PROVISIONS

- 13.1 Governing Law and Jurisdiction.** The laws of the State of Hawaii shall govern the validity of the Contract and any of the Contract's individual terms or provisions, as well as the rights and duties of the parties to the Contract. Any action at law or in equity to enforce or interpret the provisions of the Contract shall be brought in a court of competent jurisdiction in Honolulu, Hawaii. Contractor consents to the exercise of personal jurisdiction over Contractor by the courts of the State of Hawaii.
- 13.2 Severability.** If any term or provision of the Contract is found to be illegal, unenforceable, or in violation of law, then, notwithstanding such term or provision, all other terms or provisions of the Contract shall remain in full force and effect. When possible, however, the Contract shall be interpreted so as to reflect the intentions of the parties as indicated by the provision or term in question.
- 13.3 Nondiscrimination.** No person performing work under this Contract, including any subcontractor, employee, or agent of Contractor, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law. Contractor shall be an equal opportunity employer. The Contractor shall comply with all applicable requirements set forth in Federal and State laws and regulations relative to the Age Discrimination Act of 1975 (42 USC 6102); Title VI (42 USC 2000d) of the Civil Rights Act of 1964, as amended; and Equal Employment Opportunity (Executive Order 11246, as amended) that provide for non-discrimination in federally assisted programs.
- 13.4 Conflicts of Interest.** Contractor represents that neither Contractor nor any employee or agent of Contractor presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with Contractor's performance under the Contract.
- 13.5 Confidentiality of Material**
- A. All material given to or made available to Contractor by virtue of the Contract, which is identified as proprietary or confidential information, will be safeguarded by Contractor and shall not be disclosed to any individual or organization without the prior written approval of the BWS.
 - B. All information, data, or other material provided by Contractor to the BWS shall be subject to the Uniform Information Practices Act, chapter 92F, HRS, as modified by chapter 323F, HRS. All information, data, or other material that Contractor regards as proprietary or confidential shall be expressly designated as such by Contractor prior to submission to the BWS.
 - C. The provisions of this Section 13.6 shall remain in full force and effect notwithstanding the expiration or early termination of the Contract.

13.6 Confidentiality of Personal Information

A. Definitions.

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

1. Social security number;
2. Driver's license number or Hawaii identification card number; or
3. Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, BWS, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

B. Confidentiality of Material.

1. All material given to or made available to the Contractor by the BWS by virtue of this Contract that is identified as personal information shall be safeguarded by the Contractor and shall not be disclosed without the prior written approval of the BWS.
2. Contractor agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
3. Contractor agrees to implement appropriate "technological safeguards" that are acceptable to the BWS to reduce the risk of unauthorized access to personal information.
4. Contractor shall report to the BWS in a prompt and complete manner any security breaches involving personal information.
5. Contractor agrees to mitigate, to the extent practicable, any harmful effect that is known to Contractor because of a use or disclosure of personal information by Contractor in violation of the requirements of this paragraph.
6. Contractor shall complete and retain a log of all disclosures made of personal information received from the BWS, or personal information created or received by Contractor on behalf of the BWS.

C. Security Awareness Training and Confidentiality Agreements.

1. Contractor certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.

2. Contractor certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
 - a. The personal information collected, used, or maintained by the Contractor will be treated as confidential;
 - b. Access to the personal information will be allowed only as necessary to perform the Contract; and
 - c. Use of the personal information will be restricted to uses consistent with the services subject to this Contract.
 - d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the BWS learns of a material breach by Contractor of this paragraph by Contractor, the BWS may at its sole discretion:
 1. Provide an opportunity for the Contractor to cure the breach or end the violation; or
 2. Immediately terminate this Contract.

In either instance, the Contractor and the BWS shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

E. Records Retention.

1. Upon any termination of this Contract, Contractor shall pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the BWS.
2. The Contractor and any subcontractors shall maintain the files, books, and records, that relate to the Contract, including any personal information created or received by the Contractor on behalf of the BWS, and any cost or pricing data, for three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall not be disclosed without the prior written approval of the BWS. After the three (3) year retention period has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS.

13.7 Publicity. Contractor shall not refer to the BWS, the City, or any office, agency, or officer thereof, or any BWS and/or City employee, or the services provided under this Contract, in any of Contractor's brochures, advertisements, or other publicity. All inquiries and communications by the media or other members of the public to Contractor about the subject matter of this Contract shall be referred to the BWS.

13.8 Records Retention. Contractor and any subcontractors shall maintain the books and records that relate to the services performed or provided pursuant to the Contract for four (4) years from the date of final payment under the Contract.

13.9 Entire Agreement. The Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the BWS and

Contractor. The Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the BWS and Contractor other than as set forth or as referred to herein.

- 13.10 Waiver.** The failure of the BWS to insist upon the strict compliance with any term, provision, or condition of the Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the BWS's right to enforce the same in accordance with the Contract.
- 13.11 No Party Deemed Drafter.** No party shall be deemed to be the drafter of the Contract. The Contract is the product of arms length negotiations between the parties and therefore shall be deemed to have been drafted jointly by the parties.
- 13.12 Headings.** The headings of paragraphs in these General Conditions are for convenience only. They form no part of the Contract and shall not affect its interpretation.
- 13.13 Construction.** All words used in the singular shall extend to and include the plural. All words used in the plural shall extend to and include the singular. All words used in any gender shall extend to and include all genders.
- 13.14 Campaign Contributions by State or County Contractors.** Contractors are hereby notified of the applicability of Section 11-355, HRS, which states that campaign contributions are prohibited from a State and county government contractor during the term of the contract if the contractor is paid with funds appropriated by the legislative body between the execution of the contract through the completion of the contract.

EXHIBIT “A”

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in section 3-122-122, HAR, and submitted pursuant to section 3-122-125, HAR; either actually or by specific identification in writing to the Officer-in-Charge in support of *

* _____

are accurate, complete, and current as of ** . _____
(Month, day, year)

This certification includes the cost or pricing data supporting any advance agreement(s) between the Offeror and the Board of Water Supply that are part of the proposal.

Firm: _____

Signature: _____

(Print name & title of person signing)

Date of execution***: _____

* Describe the project and reference (i.e. project name, contract number, change order number, etc.).

** The date should be a mutually determined date prior to but as close as possible to the date when price negotiations were concluded and the price was agreed upon.

*** Date of execution should be as soon as practical after the date when price negotiations were concluded and the contract price was agreed upon.

(This document shall be signed, sealed, and notarized.)