

GENERAL TERMS AND CONDITIONS

FOR

PROFESSIONAL SERVICES

CONTRACTS

BOARD OF WATER SUPPLY

COUNTY OF KAUA‘I

LIHU‘E, KAUA‘I, HAWAI‘I

January 1, 2019

Table of Contents

- 1. **Definitions**..... 1
- 2. **Award and Execution of the Contract**..... 1
 - a. Appropriation and Contract Execution; and State and/or Federal Funds. 1
 - b. Insurance. 2
 - c. Notice to Proceed. 3
- 3. **Relationship of Parties; Independent Contractor Status**..... 3
 - a. Independent Contractor..... 3
- 4. **Contractor’s Representations; Responsibilities; and Related Contractor Services**..... 4
 - a. License. 4
 - b. Contractor’s Warranty..... 4
 - c. Taxes. 5
 - d. Personnel Requirements..... 5
 - e. Contractor’s responsibilities..... 6
 - f. Best Information Available..... 6
 - g. Related Contractor Services..... 6
- 5. **Performance**..... 6
 - a. Contract Coordination..... 6
 - b. Work Product; Copyright..... 7
 - c. Laws and Regulations..... 8
 - d. Indemnification..... 9
 - e. Limitation on Obligation to Defend..... 9
 - f. Personal Liability of Public Officials..... 10
 - g. Time is of the essence for the Contract..... 10
 - h. Delivery..... 10
 - i. Payment..... 10
- 6. **Modifications of the Contract**..... 11
 - a. Contract Modification..... 11
 - b. Change Orders..... 12
 - c. Assignment or Change of Name..... 13
 - d. Stop Work Order..... 13
 - e. Price Adjustment..... 14
 - f. Claims..... 16

g.	Time Extensions.....	17
h.	No Oral Amendments.	17
7.	Liquidated Damages.	17
8.	Termination.	17
a.	Termination for Default.	17
b.	Termination for Convenience.	19
9.	Contract Disputes and Controversies.	21
a.	Decision of the Manager and Chief Engineer.	21
b.	Time Limitations.....	21
c.	Delivery of Final Decision.	21
d.	Final and Conclusive Decision.	21
e.	Contractor to Continue Performance.	22
f.	Claims Against the Contractor.	22
g.	Remedies.....	22
10.	Miscellaneous.	22
a.	Actions of the Board in its Governmental Capacity.	22
b.	Americans with Disabilities Act Requirements.	22
c.	Audit of Books and Records.	22
d.	Board's Right of Offset.	22
e.	Campaign Contributions by Contractors.....	23
f.	Confidentiality.	23
g.	Conflicts of Interest.....	23
h.	Costs and Expenses.....	23
i.	Counterparts and Electronic Signatures.	24
j.	Drafting Ambiguities.	24
k.	Governing Law.....	24
l.	Indigenous and Polynesian introduced plants; use in public landscaping.	24
m.	Insolvency.	24
n.	Minimize Congestion.	24
o.	No Third Party Obligations.....	25
p.	Nondiscrimination.....	25
q.	Notices.....	25

r. Order of Precedence 25

s. Pollution Control..... 25

t. Records Retention. 25

u. Severability. 25

v. Statutory or Charter Requirements..... 25

w. Survival of Obligations. 26

x. Waiver..... 26

11. SPO Form-22 Cert. of Compliance for Final Payment..... 27

1. **Definitions.**

The terms used in these General Terms and Conditions for Professional Services Contracts (“General Terms”) shall have the same meaning as in the Hawai‘i Revised Statutes (“HRS”), 103D, and the Hawai‘i Administrative Rules (“HAR”), Title 3, Subt. 11. The terms used herein shall have the following meaning:

BOARD. Means the Board of Water Supply, County of Kaua‘i and the Department of Water, County of Kaua‘i and its officers, agents, and employees.

COUNTY. Means the County of Kaua‘i, State of Hawai‘i.

CONTRACT. Means the written agreement covering the performance of the services required for the project by the Contractor. It shall include and incorporate by reference these General Terms, and, if applicable, the special provisions. It shall also include and incorporate by reference all Contract Modifications of this Contract.

DAYS. Means consecutive calendar days unless otherwise specified.

MANAGER AND CHIEF ENGINEER. Means the Manager and Chief Engineer of the Department of Water or an authorized designee. The Manager and Chief Engineer is the Chief Procurement Officer for the Department of Water and is delegated and charged with the authority and responsibilities of the Chief Procurement Officer pursuant to Hawai‘i Revised Statutes, 103D and the Hawai‘i Administrative Rules, Title 3, Subtitle 11.

PROCUREMENT OFFICER. Means any person with delegated authority to enter into and administer contracts and make written determination with respect thereto. The term includes an authorized representative acting within the limits of authority. The delegated authority is received from the chief procurement officer directly. The Procurement Officer shall mean and include the Head of the Purchasing Agency and the Contract Administrator, unless indicated otherwise.

SPECIAL PROVISIONS. Means the terms and conditions pertaining to the specific solicitation in which they are contained; including but not limited to terms and conditions describing the preparation of solicitations, evaluation of offers, determination of award, plus those applicable to performance by the Contractor. Additions or revisions to these General Terms setting forth conditions or requirements applicable to the particular project or contract under consideration shall be included in the Special Provisions.

2. **Award and Execution of the Contract.**

a. Appropriation and Contract Execution; and State and/or Federal Funds.

(1) Execution of Contract. The Contract shall be executed by the successful Offeror and returned to the Department with a satisfactory contract bond, if required, and other

required documents within ten (10) days after receipt by the Offeror or within such time as the Manager and Chief Engineer may allow.

- (2) **Contract Not Binding Unless Funds Available.** No contract nor any Change Order or Modification thereto shall be binding, or of any force and effect, without an endorsement by the Waterworks Controller certifying that there is an appropriation sufficient to cover the amount of the contract; provided that if the contract is a multi-term contract, the Waterworks Controller shall only be required to certify that there is an appropriation or balance of an appropriation sufficient to cover the amount required to be paid under the contract during the fiscal year or remaining portion of the fiscal year of each term of the multi-year contract. This shall not apply to any contract under which the total amount to be paid to the Contractor cannot be accurately estimated at the time the contract is to be awarded.
- (3) **Contracts Utilizing State and/or Federal Funds.** A contract which is supplemented by state and/or federal funds, paragraph (2) above shall be applicable only to that portion of the contract price as is payable out of Board funds. The Contract shall be construed to be an agreement to pay the portion of the Contract payable out of state and/or federal funds to the Contractor, only out of state and/or federal funds to be received from the state and/or federal government when the state and/or federal funds are so received by the Board. The Contract shall not be construed as a general agreement by the Board to pay said portion out of any funds other than those which are received from the state and/or federal government. This paragraph shall be liberally construed so as not to hinder or impede the Board in contracting for any project involving financial aid from the state or federal government.
- (4) **Contracts Utilizing One-Hundred Percent (100%) Federal Funds.** A contract which is funded one-hundred percent (100%) by federal funds shall be construed as an agreement to pay the contract price only out of federal funds to be received by the Board from the federal government when the federal funds are so received. The Contract shall not be construed as a general agreement to pay such amount at all events out of any funds other than those which are received from the federal government.

b. Insurance.

- (1) Contractor agrees to maintain, on a primary basis and at its sole expense, at all times during the life of the Contract, the insurance coverages, limits, including endorsements described and required in the Contract Documents. The requirements contained therein, as well as the Board's review or acceptance of insurance maintained by the Contractor is not intended to and shall not in any manner limit or qualify the liabilities or obligations assumed by the Contractor under this Contract. Further, unless otherwise approved by the Manager and Chief Engineer, the policy or policies of insurance maintained by the Contractor shall provide the minimum limit(s) and coverage(s) as specified in the Contract

Documents and be placed with an insurance carrier authorized to do business in the State of Hawaii and rated A-VII by A.M. Best.

- (2) Concurrent with the execution of the contract, Contractor shall provide the Department a certificate of insurance completed by a duly authorized representative of their insurer certifying that the liability coverage(s) is written on an occurrence form. Immediately upon becoming aware that its insurance will be cancelled, non-renewed, or materially changed, Contractor will notify Department by providing written notice.
- (3) Failure to secure and maintain the required insurance shall be considered a material breach of this Contract.

c. Notice to Proceed.

- (1) No work related to or arising by virtue of this Contract shall commence until the Contract has been duly executed and a written Notice to Proceed has been issued to the Contractor.
- (2) After the Contract is fully executed, the Procurement Officer will issue a written Notice to Proceed establishing the official commencement date. Until the Notice to Proceed is issued the Board may find cause for cancellation of the award and any expenses incurred before the official commencement date shall be done at the Contractor's own risk and expense and no payment will be owed to the Contractor for such premature work or delivery.
- (3) The number of days for completion of the Contract will be calculated from the official commencement date as established in the written Notice to Proceed or from the date of the purchase order.
- (4) Where the amount of the award is such that a purchase order is used, no notice to proceed will be issued.

3. **Relationship of Parties; Independent Contractor Status.**

a. Independent Contractor.

- (1) In the performance of this Contract, the Contractor is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the requirements of this Contract; however, the Board shall have a general right, from time to time, to monitor the progress of contract performance, and to determine whether, in the Board's opinion, the Contractor is in compliance with the provisions of this Contract. It is understood that the Board does not agree to use the Contractor exclusively, and that the Contractor is free to contract with other individuals or entities while under contract with the Board.

- (2) The Contractor and the Contractor's employees and agents are not by reason of this Contract, agents or employees of the Board for any purpose, and the Contractor and the Contractor's employees and agents shall not be entitled to claim or receive from the Board any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to Board employees.
- (3) The Contractor shall be responsible for the accuracy, completeness, and adequacy of the Contractor's performance under this Contract. Furthermore, the Contractor intentionally, voluntarily, and knowingly assumes the sole and entire liability to the Contractor's employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury arising from or related to the Contractor, or the Contractor's employees or agents, in the course of their performance of this Contract.
- (4) 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. **Contractor's Representations; Responsibilities; and Related Contractor Services.**

- a. 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 Hawai'i to engage in the type of work required by the Contract and is in compliance with all applicable laws and regulations precedent thereto.
- b. Contractor's Warranty. By executing this Contract, Contractor warrants that:
 - (1) Contractor is authorized to do business under and by virtue of the laws of the State of Hawai'i, and is currently in good standing thereunder;
 - (2) Contractor and all subcontractors intended to be used by Contractor have carefully and thoroughly reviewed the Contract Documents and have found those to be complete, free from ambiguities, and sufficient for the purpose intended;
 - (3) Contractor has investigated and examined carefully the Contract Documents and understands the character of the project and the scope of work under this Contract;
 - (4) Contractor's execution of this Contract, including Contractor's offer, was not based on any verbal representations from the Board; but rather, solely upon the solicitation and properly issued written addenda and not upon any other written or verbal representation; and

- (5) Contractor's cautious delivery and performance of the Contract will not:
- i. Violate the provisions of any law;
 - ii. Constitute a default under Contractor's Certificate of Incorporation or By-Laws; or
 - iii. 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.
- (6) Contractor represents that Contractor has no obligations, commitments, or impediments of any kind that will limit or prevent performance of work as required by this Contract. Further, 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.
- (7) 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.

c. Taxes.

- (1) The Contractor shall be responsible for the payment of all applicable federal, state, and county taxes and fees which may become due and owing by the Contractor, relating in any way to this Contract, including but not limited to (i) income taxes, (ii) employment-related fees, assessments, and taxes, and (iii) general excise taxes. The Contractor is also responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
- (2) The Contractor shall be solely responsible for meeting all requirements necessary to obtain the compliance document requirements of 103D-310(c), HRS, including but not limited to, obtaining a general excise tax license from the Director of Taxation, State of Hawai'i, in accordance with Chapter 237, HRS or exemption therefrom and shall comply with all requirements thereof.
- (3) The Contractor shall be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required by 103-53, HRS and 103D-328, HRS.

d. Personnel Requirements.

- (1) The Contractor shall secure, at the Contractor's own expense, all personnel required to perform this Contract.

- (2) The Contractor shall ensure that the Contractor's employees, workers, agents, and subcontractors are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.
- e. Contractor's responsibilities. The Contractor shall perform the services under this Contract with that degree of care, skill, and diligence generally accepted as typical of the industry in the performance of such services as contemplated by the Contract at the time such services are rendered. The Contractor shall consult with the Board to ascertain the requirements of the project and shall confirm such requirements with the Board. The Contractor covenants and agrees that it shall be responsible and accountable for the accuracy, completeness, and adequacy of the Work Product. Work Product prepared by the Contractor shall be approved by the Board. The Contractor understands and agrees that such approval by the Board shall not be construed to relieve the Contractor of responsibility for correcting any errors or discrepancies which may become apparent after approval has been given, nor shall such approval be construed to relieve the Contractor of the responsibility for conformance with all applicable engineering, architectural, design, or surveying standards and criteria, laws, plans, and established principles and practices, whichever is applicable.
- f. Best Information Available. The information provided by the Board to the Contractor is based on the best information available to the Board. Contractor is required to exercise its professional judgment and notify the Board if any of the information provided is inaccurate. The Contractor shall not take advantage of any apparent error or omission in the information and/or designs and plans furnished by the Board. Should the Contractor discover such an error or omission, it shall immediately notify the Board in writing. The Board will then take such steps as it may deem necessary to correct any errors or omissions.
- g. Related Contractor Services. The Contractor shall work closely with the Board and affected utilities and agencies that provide operational support and services to the Board. The Contractor shall assume responsibility for organizing and completing the Project. The Contractor shall endorse all plans, estimates, and research and analysis furnished to the Board. Such endorsement shall consist of the name and signature of the Contractor and where applicable, the signature and stamp of the person licensed under 464, HRS in the State of Hawai'i for the work.

5. **Performance.**

- a. Contract Coordination. The Procurement Officer shall coordinate the work to be provided by the Contractor in order to complete the performance required in this Contract. The Contractor shall maintain communications with the Procurement Officer at

all stages of the Contractor's work, and submit to the Procurement Officer, for resolution, any questions which may arise as to the performance of this Contract.

b. Work Product; Copyright.

- (1) All Work Product is the property of the Board and all ownership, right, title, and interest of the Work Product has vested and shall vest solely with the Board and deemed "works made for hire." To the extent that title to any such Work Product may not, by operation of law, vest in the Board, or such Work Product may not be considered to be works made for hire, Contractor hereby irrevocably assigns to the Board 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. The Board, in its sole discretion shall have the exclusive right to copyright any work product, concept, or material developed, prepared, assembled, or conceived of by the Contractor pursuant to this Contract.
- (2) Warranty; Indemnity. Contractor represents and warrants to the Board that the Board 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 Board from and against any infringement or claim of infringement relating thereto.
- (3) Reasonable Assistance. Contractor will promptly disclose to the Board or any person designated by the Board all Work Product when made or developed, and provide any reasonable assistance required to perfect and enforce the Board's rights in such Work Product, and Contractor agrees to execute and assist in the preparation of any document that the Board may consider necessary or helpful in obtaining or maintaining any patents, copyrights, registrations, or other proprietary rights in the Work Product.
- (4) 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 Board. 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 deemed included within Contractor's offer and the contract price.
- (5) Delivery of Work Product. All such material shall be delivered to the Board upon expiration or termination of this Contract.
- (6) "Intellectual Property" means: (1) all inventions (whether or not patentable and whether or not reduced to practice), all improvements thereto, and all patents, including patent applications, and patent disclosures, together with all reissues, 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).

- (7) “Work Product” means 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 the Contractor, its employees, subcontractors, representatives, consultants, and agents in the course of providing the services pursuant to the Contract or otherwise in connection with the Contract.

c. Laws and Regulations.

- (1) The Contractor shall be fully informed of, and observe and comply with all laws, ordinances, codes, rules, and regulations, as amended; 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, which in any manner affect this Contract and the performance thereof, including but not limited to:

- Section 19.18, Article XIX of the Charter of the County of Kaua‘i, as amended, relating to Contracts.
- Chapter 92F, HRS, as amended, relating to Uniform Information Practices Act.
- Chapter 103, HRS, as amended, relating to expenditure of public money.
- Chapter 103D, HRS, and HAR, Hawaii Administrative Rules, as amended relating to Hawai‘i Public Procurement Code.
- Chapter 104, HRS, as amended, relating to wages and hours of employees on public works.
- Chapter 132, HRS, as amended, relating to the fire protection.

- Chapter 237, HRS, as amended, relating to the General Excise Tax Law.
- Chapter 321 through 344, HRS, as amended, relating to the Health Department.
- Chapter 378, HRS, as amended, relating to fair employment practices.
- Chapter 386, HRS, as amended, relating to workers' compensation.
- Chapter 396, HRS, as amended, relating to occupational safety and health.
- Department of Water, County of Kaua'i, Rules and Regulations, as amended.
- Water System Standards 2002, as amended.

(2) If any discrepancy or inconsistency is discovered between this Contract and any such law, ordinance, code, rule, regulations, design standard, design criterion, governmental general and development plans, setback limitation, or rights-of-way, the Contractor shall immediately report the same in writing to the Procurement Officer.

d. Indemnification.

(1) Subject to the Limitation on Obligation to Defend, Contractor shall indemnify, hold harmless, and defend the Board from and against all suits, actions, claims, damages, and judgments of any character that may be brought against the Board by whomsoever, on account of any deaths, injuries, or damages sustained by any person or property, due to the acts or omissions of the Contractor, or any of its officers, employees, subcontractors, assignees, agents, or representatives, arising from or related to the performance of this Contract. In the event the Board and the Contractor are found to be joint tortfeasors with respect to any such injuries or damages, the Contractor's obligation to indemnify the Board under this paragraph (d)(1) shall extend only to the Contractor's pro rata share of negligence as determined in accordance with 663-12, HRS.

(2) In addition, Contractor shall indemnify, hold harmless, and defend the Board against any claim or liability arising from, related to, or based upon the violation of any law, ordinances, codes, rules, regulations, design standards and criteria, governmental general and development plans, setback limitation, and rights-of-way, whether such violation is committed by the Contractor, subcontractors, or officers, employees, subcontractors, assignees, agents, or representatives of either or both.

(3) The duty to indemnify, hold harmless, and defend the Board applies whether or not prompt written notice of any losses for which the Board may make a claim is given to the Contractor, where the Contractor knew or had reason to know of such claim.

(4) The indemnity provisions of this subsection, Indemnification, and Work Product shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.

e. Limitation on Obligation to Defend.

- (1) The obligation of Contractor to defend the Board as set forth in the Indemnification provision shall not apply to any contract for less than \$1,000,000 that is entered into on or after July 1, 2007 which is exclusively for services that may only lawfully be provided by a person licensed under 464, HRS (professional engineers, architects, surveyors and landscape architects). The Contractor's obligation to indemnify and hold harmless the Board as set forth in the Indemnification provision shall continue in full force and effect in those instances when the Contractor has no obligation to defend the Board.
 - (2) No Contractor licensed under 464, HRS shall be required to defend the Board in any lawsuit filed more than ten (10) years beyond the final payment of the project which is the subject of this Contract.
- f. Personal Liability of Public Officials. In carrying out any of the provisions of this Contract or in exercising any power or authority granted by this Contract, there shall be no liability upon the Manager and Chief Engineer or such authorized representatives, either personally or as officials of the Board, it being understood that in such matters, they act solely as agents and representatives of the Board.
- g. 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 from the date of the purchase order, and the services shall be completed within the number of days indicated in the Notice to Proceed or purchase order, or on the date specified.
- h. Delivery.
- (1) The Contractor shall deliver the goods and furnish services at such particular location designated and in the manner specified or ordered by the Contract or by written direction from the Chief Procurement Officer.
 - (2) Whenever equipment is specified, the Contractor shall deliver the equipment completely assembled, unless provided for otherwise.
 - (3) Contract prices shall be based on delivery F.O.B. place of destination and shall include all freight, handling, delivery, and related charges.
- i. Payment.
- (1) Payment Procedures; Final Payment; Tax Clearance; Contractor's Certification of Compliance. All payments under this Contract shall be made only upon submission by Contractor of invoices specifying the amount due and certifying that (i) services requested under this Contract have been performed by the Contractor according to this Contract, or (ii) the goods and/or services have been accepted by the Board, or (iii) both. Further, all payment shall be made in accordance with and subject to Chapter 40, HRS. Final payment under this

Contract shall be subject to 103-53 or 103D-328, HRS, as amended, which require a tax clearance from the Director of Taxation, State of Hawai‘i, and the Internal Revenue Service showing that all delinquent taxes, if, any, levied or accrued under state law against the Contractor have been paid; and 3-122-112, HAR which requires a certification from the Contractor affirming that the Contractor has, as applicable, remained in compliance with 103D-310(c), HRS. (Note: Contractor is advised to use SPO Form-22 Cert. of Compliance for Final Payment attached hereto)

- (2) Interest. Interest on amounts ultimately determined to be due to a Contractor or the Board shall be payable at the statutory rate applicable to judgments against the Board under Chapter 662, HRS, State Tort Liability Act, from the date the claim arose through the date of decision or judgment, whichever is later.
- (3) Prompt Payment to Subcontractors. Where applicable, the Contractor shall comply with the provisions of 103-10.5, HRS, Prompt Payment to Contractors, to accelerate a subcontractor’s or materialman’s right to payment upon completion of the subcontract or the furnishing of materials.

6. **Modifications of the Contract.**

- a. Contract Modification. By a written order, at any time, the Manager and Chief Engineer, subject to mutual agreement of the parties to the Contract, may make modifications within the general scope of this Contract.
 - (1) Adjustments of price or time for performance. If any modification increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under the Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment provision of this Contract.
 - (2) Claim barred after final payment. No claim by the Contractor for an adjustment hereunder shall be allowed if written agreement of the modification is not made prior to final payment under the Contract.
 - (3) Claims not barred. In the absence of a contract modification, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim under this Contract for breach of contract.

b. Change Orders.

- (1) Generally. By written order, at any time, and without notice to any surety, the Procurement Officer may, unilaterally, order of the Contractor:
- (2) Changes in the work within the scope of the contract; and
- (3) Changes in the time of performance of the contract that do not alter the scope of the contract work.
- (4) Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly.
 - i. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause included pursuant to 3-125-12, HAR. Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause included pursuant to 3-125-12(1)(E), HAR.
 - ii. Failure of the parties to agree to an adjustment in time shall not excuse the Contractor from proceeding with the Contract as changed, provided that the Procurement Officer, within fourteen (14) days after the changed work commences, makes the provisional adjustments in time as the Procurement Officer deems reasonable.
 - iii. The right of the Contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work; provided, however, that it follows the written notice requirements for disputes and claims established by this Contract.
- (5) Time period for claim. Except as may be provided otherwise by 103D-501(b), HRS, the Contractor must file a written claim disputing the contract price or time provided in a change order within ten (10) days after receipt of a written change order, unless such period for filing is extended by the Procurement Officer in writing. The requirement for filing a timely written claim cannot be waived and shall be a condition precedent to the assertion of a claim.
- (6) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if the claim is not received by the Procurement Officer prior to final payment under this Contract.
- (7) Other claims not barred. In the absence of such a change order, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim under the contract or for breach of contract.

c. Assignment or Change of Name.

- (1) This Contract is not transferable, or otherwise assignable, without the written consent of the Manager and Chief Engineer; provided that a Contractor may assign monies receivable under this Contract after due notice to the Board and the Contractor's right to compensation under this Contract shall not be effective unless an assignment agreement is duly executed by the Manager and Chief Engineer.
- (2) Recognition of a successor in interest. When, in the best interest of the Board, a successor in interest may be recognized in an assignment agreement in which the Board, the Contractor, and the transferee shall agree that:
 - i. The transferee assumes all of the Contractor's obligations;
 - ii. The Contractor remains liable for all obligations under this Contract but waives all rights under this Contract as against the Board; and
 - iii. The Contractor shall continue to furnish, and the transferee shall also furnish all required bonds and, if required, insurance.
- (3) Change of name. When a Contractor requests to change the name in which it holds a contract with the Board, the Manager and Chief Engineer shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting Contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.
- (4) Reports. All changes effectuated by this subsection (c), shall be reported to the Manager and Chief Engineer within thirty days of the effective date of such change.

d. Stop Work Order.

- (1) The Board reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the Contractor in accordance with the provisions herein.
- (2) Order to stop work. The Procurement Officer may, by written order to the Contractor, at any time, and without notice to any surety, require the Contractor to stop all or any part of the work called for by this Contract. This order shall be for a specified period not exceeding sixty (60) days after the order is delivered to the Contractor, unless the parties agree to any further period. Any order shall be identified specifically as a stop work order issued pursuant to these General

Terms and 3-125-6, HAR. Upon receipt of an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:

- i. Cancel the stop work order; or
 - ii. Terminate the work covered by such order as provided in the “termination for default clause” or the “termination for convenience clause” of this Contract.
- (3) Cancellation or expiration of the order. If a stop work order issued is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and this Contract shall be modified in writing accordingly, if:
- i. The stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this Contract; and
 - ii. The Contractor asserts a claim for such an adjustment within thirty (30) days after the end of the period of work stoppage; provided that, if the Manager and Chief Engineer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this Contract.
- (4) 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.
- (5) Adjustment of price. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this Contract.

e. Price Adjustment.

- (1) Price Adjustment. Any adjustment in contract price pursuant to a clause in this Contract shall be made in one or more of the following ways:
- i. By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - ii. By unit prices specified in this Contract or subsequently agreed upon before commencement of the pertinent performance;

- iii. By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in this Contract or subsequently agreed upon before commencement of the pertinent performance;
- iv. In such other manner as the parties may mutually agree before commencement of the pertinent performance; or
- v. In the absence of agreement between the parties, by a unilateral determination by the Manager and Chief Engineer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Manager and Chief Engineer in accordance with generally accepted accounting principles and applicable sections of Chapters 3-123 (Cost Principles) and 3-126 (Legal and Contractual Remedies), HAR.
- vi. For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty percent (20%) of the actual costs for overhead and profit on work done directly by the Contractor and ten percent (10%) on any subcontractor's billing to the Contractor for the Contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A change order shall be issued within fifteen (15) days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The Procurement Officer shall return any documentation that is defective to the Contractor within fifteen (15) days after receipt, with a statement identifying the defect; or
- vii. For change orders with value exceeding \$50,000 by a unilateral determination by the Board of the costs attributable to the events or situations under clauses with adjustment of profit or fee, all as computed by the Board in accordance with applicable sections of the rules adopted under 103D-601, HRS, and subject to the provisions of part VII. When a unilateral determination has been made, a unilateral change order shall be issued within ten (10) days. Costs included in the unilateral change order shall allow for twenty percent (20%) of the actual costs for overhead and profit on work done directly by the contractor and ten percent (10%) on any subcontractor's billing to the Contractor for the Contractor's overhead and profit. Upon receipt of the unilateral change order, if the Contractor does not agree with any of the terms or conditions, or the adjustment or non-adjustment of the contract price, the Contractor shall file a notice of intent to claim within thirty (30) days after the receipt of the written unilateral change order. Failure to file a protest within the time specified shall constitute agreement on the part of the Contractor with the terms,

conditions, amounts, and adjustment or non-adjustment of the contract price set forth in the unilateral change order.

- (2) Submission of Cost or Pricing Data. The Contractor shall provide cost or pricing data for any price adjustments subject to the provisions of Chapter 3-122, Subchapter 15, Cost or Pricing Data, HAR.

f. Claims.

- (1) Claims based on actions or omissions. If any action or omission on the part of the Procurement Officer, requiring performance changes within the scope of this Contract constitutes the basis for a claim by the Contractor for additional compensation, damages, or an extension of time for completion, the Contractor shall continue with performance of this Contract in compliance with the directions or orders of such officials, but by so doing, the Contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:
- (2) Written notice required. The Contractor shall have given written notice to the Procurement Officer:
 - i. Prior to the commencement of the work involved, if at that time the Contractor knows of the occurrence of the action or omission;
 - ii. Within thirty (30) days after the Contractor knows of the occurrence of such action or omission, if the Contractor did not have knowledge prior to the commencement of the work; or
 - iii. Within further time as may be allowed by the Procurement Officer in writing.
- (3) Notice Content. The notice shall state that the Contractor regards the act or omission as a reason which may entitle the Contractor to additional compensation, damages, or an extension of time. The Procurement Officer, upon receipt of such notice may rescind the action, remedy the omission, or take other steps as may be deemed advisable in the discretion of the Procurement Officer;
- (4) Basis must be explained. The notice required above describes as clearly as practicable, at the time, the reasons why the Contractor believes that additional compensation, damages, or an extension of time may be remedies to which the Contractor is entitled; and
- (5) Claim must be justified. The Contractor maintains and, upon request, makes available to the Procurement Officer 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.

- (6) Contractor not excused. Nothing herein contained, however, shall excuse the Contractor from compliance with any rules of law precluding any employee of the Board and any Contractor from acting in collusion or bad faith in issuing or performing contract modifications which are clearly not within the scope of this Contract.
- (7) Price adjustment. Any adjustment in the price made pursuant to this Claims provision shall be determined in accordance with the Price Adjustment provision.
- g. Time Extensions. If this Contract has exhausted its provision for extension of time of performance, or if this Contract does not have a provision for extension of time of performance, this Contract may be extended a period of up to 180 days for each extension and shall be subject to approval by the Manager and Chief Engineer.
- h. No Oral Amendments. Any alleged oral amendments or modifications to the Contract or alleged modifications that did not comply with the procedures set forth in Modifications of the Contract shall have no force or effect.

7. **Liquidated Damages.**

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

8. **Termination.**

a. Termination for Default.

- (1) If the Contractor refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this

Contract or any extension thereof, or otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this Contract, the Procurement Officer may notify the Contractor in writing of the delay or non-performance and, if not cured in ten (10) days or any longer time specified in writing by the Procurement Officer, the Procurement Officer may terminate the Contractor's right to proceed with this Contract or a part of this Contract for which there has been a delay or other breach of contract. In the event of termination in whole or in part the Procurement Officer may procure similar goods or services in a manner and upon terms deemed appropriate by the Procurement Officer. The Contractor shall continue performance of this Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

- (2) Contractor's duties. Notwithstanding termination of this Contract and subject to any directions from the Procurement Officer, the Contractor shall take timely and necessary action to protect and preserve property in the possession of the Contractor in which the Board has an interest.
- (3) Compensation. Payment for completed goods and services delivered and accepted by the Board shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the Contractor and the Procurement Officer; if the parties fail to agree, the Procurement Officer shall set an amount subject to the Contractor's rights under Chapter 3-126, HAR, Legal and Contractual Remedies. The Board may withhold from amounts due the Contractor as the Procurement Officer deems to be necessary to protect the Board against loss because of outstanding liens or claims of former lien holders and to reimburse the Board for the excess costs incurred in procuring similar goods and services.
- (4) Excuse for nonperformance or delayed performance. Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, if the Contractor has notified the Procurement Officer within fifteen (15) days after the cause of the delay and the failure arises out of causes including but not limited to the following:

acts of God; acts of the public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.
- (5) 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 in paragraph (4), Excuse for nonperformance or delayed performance, the Contractor shall not be deemed to be in default, unless the goods or services to be furnished by the subcontractor were obtainable from other sources in sufficient

time to permit the Contractor to meet the contract requirements. Upon request of the Contractor, the Procurement Officer shall ascertain the facts and extent of the failure and, if the Officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the Contractor's progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of the Board under the "Termination for Convenience" provision. As used in this paragraph (5), the term "subcontractor" means a subcontractor at any tier.

- (6) Additional rights and remedies. The Board's rights and remedies provided in this Contract are in addition to any other rights and remedies provided by law.

b. Termination for Convenience.

- (1) The Procurement Officer may, when the interests of the Board so require, terminate this Contract in whole or in part, for the convenience of the Board. The Procurement Officer shall give written notice of the termination to the Contractor specifying the part of this Contract terminated and when termination becomes effective.
- (2) Contractor's obligations. The Contractor shall incur no further obligations in connection with the terminated work and on the dates set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the Board's approval. The Procurement Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the Board. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.
- (3) Right to Goods and Work Product. The Procurement Officer may require the Contractor to transfer title and deliver to the Board in the manner and to the extent directed by the Procurement Officer:
 - i. Any completed goods and Work Product; and
 - ii. The partially completed goods and Work Product the Contractor has specifically produced or specially acquired for the performance of the terminated part of this Contract. The Contractor shall, upon direction of the Procurement Officer, protect and preserve property in the possession of the Contractor in which the Board has an interest. If the Procurement Officer does not exercise this right, the Contractor shall use the Contractor's best efforts to sell such goods. Use of this subsection (3),

Right to Goods and Work Product, in no way implies that the Board has breached this Contract.

(4) Compensation.

- i. The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, to the extent required by subchapter 15, Chapter 3-122, HAR, bearing on such claim. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the Contractor, if at all, an amount set in accordance with subparagraph (iii).
- ii. The Procurement Officer and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data to the extent required by subchapter 15, Chapter 3-122, HAR, and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the Board, the proceeds of any sales of goods under paragraph (3), Right to Goods and Work Product, and the contract price of the work not terminated.
- iii. Absent a complete agreement under subparagraph (ii), the Procurement Officer shall pay the Contractor the following amounts, provided payments agreed to under subparagraph (ii) shall not duplicate payments under this subparagraph (iii) for the following:
 1. Contract prices for goods or services accepted under the Contract;
 2. Costs incurred in preparing to perform and performing the terminated portion of the performance plus a five percent (5%) markup on actual direct costs on such portion of the performance, such markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services, or both; provided, that if it appears that the Contractor would have sustained a loss if the entire Contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.
 3. Subject to the prior approval of the Manager and Chief Engineer, the costs of settling and paying claims arising out of the termination of subcontracts or orders shall be pursuant to subsection (2) Contractor's obligation. 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 the immediately preceding clause.

4. The total sum to be paid the Contractor under this subparagraph (iii) shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph (ii), and the contract price of performance not terminated.

- iv. Cost claimed, agreed to, or established under subparagraphs (ii) and (iii) shall be in accordance with HAR, Chapter 3-123, Cost Principles.

9. **Contract Disputes and Controversies.**

- a. Decision of the Manager and Chief Engineer. All controversies between the Board and the Contractor which arise under or are by virtue of this Contract and which are not resolved by mutual agreement shall be decided by the Manager and Chief Engineer in writing within ninety (90) days after a written request by the Contractor for a final decision concerning the controversy; provided that if the Manager and Chief Engineer does not issue a written decision within ninety days after written request for a final decision, or within such longer period as may be agreed upon in writing by the parties, then the Contractor may proceed as if an adverse decision had been received.
- b. Time Limitations. The Manager and Chief Engineer shall issue a written decision within the following time limitations:
 - (1) For claims not exceeding fifty thousand dollars: ninety days after receipt of the claim.
 - (2) For claims exceeding fifty thousand dollars: ninety days after receipt of the claim; provided that if a decision is not issued within ninety days, the Manager and Chief Engineer shall notify the Contractor of the time within which such officer will make the decision. The reasonableness of this time period will depend on the size and complexity of the claim and the adequacy of the Contractor's supporting data and other relevant factors.
 - (3) If the Procurement Officer fails to issue a decision within the allowed, the Contractor may proceed as if an adverse decision has been received.
- c. Delivery of Final Decision. The Manager and Chief Engineer shall immediately furnish a copy of the decision to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.
- d. Final and Conclusive Decision. Any such decision shall be final and conclusive, unless fraudulent, or unless the Contractor brings an action seeking judicial review of the

decision in the circuit court of this state within six (6) months from the date of receipt of the decision.

- e. Contractor to Continue Performance. The Contractor shall comply with any decision of the Manager and Chief Engineer and proceed diligently with performance of this Contract pending final resolution by the circuit court of this State of any controversy arising under, or by virtue of, this Contract, except where there has been a material breach of contract by the Board; provided that in any event the Contractor shall proceed diligently with the performance of this Contract where the Manager and Chief Engineer has made a written determination that continuation of work under this Contract is essential to the public health and safety.
- f. Claims Against the Contractor. All controversies involving claims asserted by the Board against the Contractor that cannot be resolved by mutual agreement shall be the subject of a decision by the Manager and Chief Engineer, upon recommendation by the Procurement Officer.
- g. Remedies. Any dispute arising under or out of this Contract is subject to Chapter 3-126, HAR.

10. **Miscellaneous.**

- a. Actions of the Board in its Governmental Capacity. Nothing in this Contract shall be interpreted as limiting the rights and obligations of the Board in its governmental or regulatory capacity.
- b. Americans with Disabilities Act Requirements. Where applicable, the Contractor shall comply with the provisions of 103-50, HRS, Building design to consider needs of persons with disabilities.
- c. Audit of Books and Records. The Board may, at reasonable times and places, audit the books and records of the Contractor, prospective Contractor, subcontractor or prospective subcontractor, which are related to:
 - (1) The cost or pricing data submitted under 3-122-122 through 3-122-130, HAR; and
 - (2) A Board contract, including subcontracts, other than a firm fixed price contract awarded pursuant to Chapter 122, subchapters 5 through 10, HAR; and
 - (3) Any claim for additional compensation or for changes.
- d. Board's Right of Offset. The Board may offset any monies or other obligations the Board owes to the Contractor under this Contract, any amount owed to the Board by the Contractor under this Contract, or any other contract, or pursuant to any law or other obligation owed to the Board, including, but not limited to, the payment of any fees, landfill tipping fees, taxes or levies of any kind or nature. The Board shall notify the

Contractor in writing of any exercise of its right of offset and the nature and amount of such offset. For the purposes of the Board's Right of Offset, amounts owed to the Board shall not include debts or obligations which have been liquidated by agreement with the Contractor, and that are covered by an installment payment or other settlement plan approved by the Board, provided, however, that the Contractor is current, and in compliance with, and not delinquent on, any payments, obligations, or duties owed to the Board under such payment or other settlement plan.

- e. Campaign Contributions by Contractors. Contractors are hereby notified of the applicability of 11-355, HRS, which prohibits campaign contributions from a state and county government contractor during the term of the contract if payment, in whole or in part, is made with funds appropriated by the legislative body.
- f. Confidentiality.
 - (1) All material given or made available and all services performed by the Contractor, and any subcontractor(s) if applicable, including but not limited to all drafts, data, information, correspondence, proposals, reports of any nature, estimates compiled or composed by the Contractor, are for the sole use of the Board. Neither the documents nor their contents shall be released by the Contractor or any subcontractor to any third party without the prior written consent of the Board irrespective of whether such material was identified as proprietary or confidential. The Contractor shall familiarize itself with 5 U.S.C.A. § 552 concerning the public release of geological and geophysical information and data, including maps, concerning wells and tanks.
 - (2) This Confidentiality provision does not apply to information that: (1) was publicly known, or otherwise known to Contractor, at the time it was disclosed to Contractor by Board; (2) subsequently becomes publicly known through no act or omission of Contractor; or (3) otherwise becomes known to Contractor other than through disclosure by Board.
 - (3) All information, data, or other material provided by the Contractor to the Board shall be subject to the Uniform Information Practices Act, Chapter 92F, HRS.
- g. Conflicts of Interest. The Contractor represents that neither the Contractor nor any employee or agent of the Contractor, has any interest in this Contract, and agrees that no such interest, direct or indirect, that would or might conflict in any manner or degree with the Contractor's performance under this Contract shall be acquired.
- h. Costs and Expenses. All costs and expenses and, if applicable, any reimbursement due the Contractor under this Contract, shall be subject to Chapter 3-123, HAR, Cost Principles and 103D-312, HRS, Cost or Pricing Data. If, after award, the Procurement Officer requests the submission of cost or pricing data and the Contractor refuses to supply the required data, the Procurement Officer shall determine in writing whether to further investigate any price adjustment, not to allow any price adjustment, or to set the

amount of any price adjustment, subject to the Contractor's rights under chapter 3-126, HAR.

- i. Counterparts and Electronic Signatures. This Contract may be executed in one or more counterparts, each of which shall be deemed an original, and will become effective and binding on the Parties as of the date of the last signature. Where the Board has used an electronic procurement system to process the procurement of this Contract, the execution of this Contract will be via such electronic system. Where the Board has not used the electronic procurement system, the Board is capable of executing this Contract in electronic format and the Contractor is encouraged, where permitted, to electronically execute the Contract. Such execution will be acceptable to the Board where the Contractor has used the appropriate security procedures that can accurately attribute electronic records or electronic signatures to the individuals that created them. If the Contract requires bond(s), Contractor must submit originals to the Board in hardcopy.
- j. Drafting Ambiguities. The parties acknowledge that they have the right to be advised by legal counsel with respect to the negotiations, terms, and conditions of this Contract, and the decision of whether to seek advice of legal counsel with respect to this Contract is the sole responsibility of each party. This Contract shall not be construed in favor of or against either party by reason of the extent to which each party participated in the drafting of the Contract.
- k. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract shall be governed by the laws of the State of Hawai'i. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Līhu'e, Hawai'i.
- l. Indigenous and Polynesian introduced plants; use in public landscaping. Where applicable, the Contractor shall make provisions for indigenous and Polynesian introduced plants as provided in 103D-408, HRS.
- m. Insolvency. If Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, Contractor agrees to furnish, by certified mail or electronic commerce method authorized by this Contract, written notification of the bankruptcy to the Board and the Procurement Officer. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of the Board contract number against which final payment has not been made. This obligation remains in effect until final payment is made under this Contract.
- n. Minimize Congestion. The Contractor shall undertake all necessary precautions to minimize any adverse impact the Contractor's performance under this Contract may have on traffic congestion.

- o. No Third Party Obligations. Except as may be specifically set forth in this Contract, none of the provisions of this Contract are intended to benefit any third party not specifically referenced herein. No party other than the Board and the Contractor shall have the right to enforce any of the provisions of this Contract.
- p. Nondiscrimination. No person working under this Contract, including any subcontractor, employee, or agent of the Contractor shall engage in any discrimination that is prohibited by any applicable federal, state, or county law. Failure to comply with this requirement may be cause for termination of this Contract or such other remedy as the Manager and Chief Engineer deems appropriate.
- q. Notices. Any notice required to be given by a party to this Contract shall be (a) delivered personally; or (b) sent by United States first class mail, postage prepaid (or by a recognized courier service, such as Federal Express or UPS); or (c) sent by email. Notice to the Board shall be sent to the mailing address or email address for the Procurement Officer as indicated in this Contract. Notice to the Contractor shall be sent to the Contractor's mailing address or email address as indicated in this Contract. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. Either party may change its mailing address or email address by giving written notification of the change to the other party.
- r. Order of Precedence. The Contract Documents and all supplemental documents are essential parts of the Contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for the complete work. In case of conflict or discrepancy within any part of the Contract, the stricter requirements, including statutory requirements, shall govern. Unless it is apparent that a different order of precedence is intended, the order of precedence shall be 1) Contract; 2) Exhibits; 3) Special Provisions; and 4) General Terms. If any provision of these General Terms is in conflict with any provision in the Hawai'i Administrative Rules, Chapter 103D, and 103, HRS, those provisions shall control and supersede the provisions in these General Terms.
- s. Pollution Control. Where applicable, the Contractor shall make provisions for pollution control as provided in 103D-409, HRS.
- t. Records Retention. The Contractor and any subcontractors shall maintain the books and records that relate to this Contract and any cost or pricing data for three (3) years from the date of final payment under this Contract.
- u. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court of competent jurisdiction, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.
- v. Statutory or Charter Requirements. The applicable provisions of Chapters 103 and 103D, HRS, the Kauai County Charter, 1984, as amended, and the Kauai County Code 1987, as amended, shall be deemed to be a part of this Contract as though fully set forth herein.

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

- x. Waiver. The failure of the Board to insist upon strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the Board's right to enforce the same in accordance with this Contract. The fact that the Board specifically refers to one provision of HRS or HAR and does not include another provision of HRS or HAR in this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the Board's rights or the Contractor's obligations under HRS or HAR.

11. **SPO Form-22 Cert. of Compliance for Final Payment.**

CERTIFICATION OF COMPLIANCE FOR FINAL PAYMENT
(Reference §3-122-112, HAR)

Reference: _____
(Contract Number) (IFB/RFP Number)

_____ affirms it is in
(Company Name)

compliance with all laws, as applicable, governing doing business in the State of Hawaii to include the following:

1. Chapter 383, HRS, Hawaii Employment Security Law – Unemployment Insurance;
2. Chapter 386, HRS, Worker’s Compensation Law;
3. Chapter 392, HRS, Temporary Disability Insurance;
4. Chapter 393, HRS, Prepaid Health Care Act; and

maintains a “Certificate of Good Standing” from the Department of Commerce and Consumer Affairs, Business Registration Division.

Moreover, _____
(Company Name)

acknowledges that making a false statement shall cause its suspension and may cause its debarment from future awards of contracts.

Signature: _____

Print Name: _____

Title: _____

Date: _____