

1. REPRESENTATIVE OF THE RCUH

The Technical Representative of the Contracting Officer is Mr. Alan Y. Tarumoto, University of Hawaii Facilities Management Office, telephone 808-956-3676, alantaru@hawaii.edu.

2. EXAMINATION OF PLANS AND SPECIFICATIONS

The Contractor shall examine carefully the bid, plans, specifications, and contract forms. By signing the contract, the contractor certifies an understanding as to the conditions to be encountered, as to the character, quality and quantities of work to be performed, and labor, material, and equipment to be furnished, and as to the requirements of the specifications. No additional compensation will be granted because of the lack of knowledge or misunderstanding of all the requirements of the work to be accomplished.

3. CONDITIONS AT SITE

The Contractor shall visit the site and examine the conditions of same and be aware or satisfied as to the character and amount of work to be performed as called for by the specifications. No additional allowance will be granted because of lack of knowledge of such conditions. Contractors shall arrange for an appointment by calling Mr. Alan Y. Tarumoto of the UH Facilities Management Office at 808-956-3676 on any normal working day, Monday through Friday, after 9:00 a.m., but not later than 4:00 p.m.

4. INSURANCE

Contractor shall maintain General Liability insurance acceptable to the RCUH in full force and effect throughout the term of this contract. The policy or policies of insurance maintained by the Contractor shall provide Combined Single Limit Coverage (bodily injury and property damage) in the amount of \$1,000,000 per occurrence and \$2,000,000 per project aggregate. Insurance shall be in force the first day of the term of this contract.

Each insurance policy required by this contract shall contain the following three clauses:

- a. "This insurance shall not be cancelled, limited in scope of coverage or non-renewed until after THIRTY (30) days' written notice has been given to the RCUH."
- b. "It is agreed that any insurance maintained by the RCUH will apply in excess of, and not contribute with, insurance provided by this policy."
- c. "The University of Hawaii and RCUH is added as an insured as respects operations performed for the University of Hawaii and RCUH."

Clauses b and c are waived for any professional liability/errors and omissions liability insurance.

Worker's Compensation Insurance - Contractor shall obtain worker's compensation insurance for all persons whom they employ in carrying out the work under this contract. This insurance shall be in strict conformity with the requirements of the most current and applicable State of Hawaii Worker's Compensation Insurance laws in effect on the date of the execution of this contract and as modified during the duration of the contract.

Auto Liability Insurance - Contractor shall obtain Auto Liability Insurance covering all owned, non-owned and hired autos with coverage of not less than \$1,000,000 per occurrence for Bodily Injury

(per person); not less than \$1,000,000 per occurrence for Bodily Injury (per accident); and not less than \$1,000,000 per occurrence for Property Damage. The required limit of insurance may be provided by a single policy or with a combination of primary and excess policies.

All insurance described herein shall be primary and cover the insured for all work to be performed under the contract, all work performed incidental thereto or directly or indirectly connected therewith, including traffic detour work or other work performed outside the work area and all change order work.

Contractor agrees to deposit with the RCUH, on or before the effective date of this contract, certificates of insurance necessary to satisfy the RCUH that the insurance provisions of this contract have been complied with and to keep such insurance in effect and the certificates therefore on deposit with the RCUH during the entire term of this contract.

The RCUH shall retain the right at any time to review the coverage, form, and amount of the insurance required hereby. If, in the opinion of the RCUH, the insurance provisions in this contract do not provide adequate protection for the RCUH, the RCUH may require the Contractor to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The RCUH's requirements shall be reasonable but shall be designed to assure protection from and against the kind and extent of the risks which exist at the time a change in insurance is required.

The RCUH shall notify the Contractor in writing of changes in the insurance requirements; and if the Contractor does not deposit copies of acceptable insurance policies with the RCUH incorporating such changes within SIXTY (60) days of receipt of such notice, this contract shall be in default without further notice to the Contractor and the RCUH shall be entitled to all legal remedies.

The procuring of such required policy or policies of insurance shall not be construed to limit the Contractor's liability hereunder nor to fulfill the indemnification provisions and requirements of this contract. Notwithstanding said policy or policies of insurance, the Contractor shall be obligated for the full and total amount of any damage, injury, or loss arising from its acts or omissions with respect to this contract.

#### 5. BUILDER'S RISK INSURANCE

The Contractor shall take out a policy of builder's risk insurance in the amount equivalent to the contract amount, with the RCUH named as a loss payee under each policy, covering all work, labor, and materials furnished by such Contractor and its subcontractors against loss by fire, windstorm, lightning, explosion and other perils covered by the Extended Coverage Endorsement, and vandalism and malicious mischief.

The insurance policy shall contain the following:

"This insurance shall not be cancelled, limited in scope of coverage or non-renewed until after THIRTY (30) days' written notice has been given to the RCUH."

"All rights of subrogation are hereby waived against the University of Hawaii, RCUH and the State of Hawaii, their officers, employees, and agents."

A standard loss payee clause naming the RCUH as loss payee.

Contractor agrees to deposit with the Financial Support Services Manager of RCUH, on or before the effective date of this contract, a certificate of insurance as evidence that such insurance provisions of this contract have been complied with and to keep such insurance in effect and the

certificates thereof on deposit with the RCUH during the entire term of this contract.

6. INTENT OF PLANS AND SPECIFICATIONS

It is intended that the plans and specifications shall include all work necessary for the proper completion of the work. The Contractor shall comply with the obvious intent and meaning of these specifications which shall be construed to include all labor and materials, measures and modes of work necessary to complete work herein specified in a workmanlike manner and to the satisfaction of the RCUH. In case of any discrepancy in the plans and specification, the matter shall be immediately submitted to the RCUH without whose decision said discrepancy shall not be adjusted by the Contractor.

7. PERMITS AND LICENSES

The Contractor shall obtain and pay for all necessary permits licenses, and give all notices required for the execution of the work.

8. CONTRACTOR'S LICENSES

In accordance with Section 444-9, Hawaii Revised Statutes, no person shall act, or assume to act, or advertise, as a general engineering contractor, general building contractor or specialty contractor without a license previously obtained under and in compliance with the provisions of Chapter 444, Hawaii Revised Statutes, and the rules and regulations of the Contractor's License Board.

9. LISTING OF JOINT CONTRACTORS AND/OR SUBCONTRACTORS

All bidders shall include name and nature of scope of work to be performed by each person or firm to be engaged by the bidder as a Joint Contractor or subcontractor in the performance of the contract as required by and specified on the bid pages. The form is provided and made a part of the bid form. All specialty work which the bidder is licensed to perform and has identified in its bid that it will perform, shall perform the work with its own employees. The list shall not be changed or altered after bid opening without the written consent of the RCUH.

10. LAWS AND REGULATIONS

This is a federal funded construction contract and as such is governed by applicable federal law and regulations including the following:

Equal Employment Opportunity – Executive Order 11246, "Equal Employment Opportunity", as amended by E.O. 11375 and as supplemented by regulations at 41 CFR part 60, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.

Copeland "Anti-Kickback" Act (18 U.S.C.874 and 40 U.S.C. 276c)- The Act provides that each contractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled.

Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7) – Contractors are required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week.

Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)-Under the law, contractor shall compute the wages of every mechanic and laborer on the basis of a standard work week of

40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1 ½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week.

Rights to Inventions Made Under a Contract or Agreement – Rights to any invention resulting under this contract shall be governed by 37 CFR part 401.

Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended – Contractor shall comply with cited clean air and water pollution acts.

Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) – The contractor shall sign a certification attesting to their compliance with the cited law prior to execution of an agreement.

Debarment and Suspension (E.O.s 12549 and 12689) – The contractor shall sign a certification attesting to the compliance with the cited Executive Order(s) prior to execution of a contract.

The Contractor’s attention is also directed to the following statutes in Hawaii Revised Statutes:

- Chapter 104                    Wages and Hours of Employees on Public Works
- Chapter 237                    Tax Clearance
- Chapter 376                    Industrial Safety
- Chapter 377                    Hawaii Employment Relations Act
- Chapter 383                    Hawaii Employment Security Law
- Chapter 386                    Worker’s Compensation Law
- Chapter 387                    Wage and Hour Law
- Chapter 388                    Payment of Wages
- Chapter 392                    Temporary Disability Insurance
- Chapter 393                    Prepaid Health Care
- Chapter 396                    Occupational Safety and Health
- Chapter 425                    Partnerships
- Chapter 444                    Contractors

By signing the contract, the Contractor certifies that the statutes have been read and are understood. If applicable, the Contractor shall comply with the provisions and acknowledges any rights the RCUH has under these laws.

The Contractor further agrees that the U.S. Comptroller General, University of Hawaii, RCUH, or any of their duly authorized representatives shall have access to, and the right to inspect or audit any directly pertinent books, documents, papers and records of the Contractor or any Subcontractor involving transactions related to this contract.

11. PREVAILING WAGE REQUIREMENTS APPLICABLE TO ALL CONTRACTS FOR CONSTRUCTION OF PUBLIC WORKS IN EXCESS OF \$2,000 (INCLUDING ALTERATIONS,

REPAIR, PAINTING AND DECORATING)

In accordance with the provisions of the Davis Bacon Act and Chapter 104, Hawai'i Revised Statutes, the following shall be complied with by the Contractor, Subcontractor and others who are connected with this job.

Federal law (40 U.S.C. 276a to a-7) provides that laborers and mechanics employed on federal funded construction contracts exceeding \$2,000 shall be entitled to minimum wages and any increases specified in a wage determination made by the Secretary of the U.S. Department of Labor. It is the responsibility of the Contractor to keep current of all changes to the prevailing wage rates.

All laborers and mechanics engaged in the performance of this contract on the job site shall be paid prevailing wages not less than those determined by the Secretary of the U.S. Department of Labor to be the prevailing wages for corresponding classes of laborers and mechanics on any project of similar character in the State. Wage determinations are issued periodically by the U.S. Department of Labor and can be found at the following website:

<http://www.gpo.gov/davisbacon/hi.html>.

All rates are subject to change.

The prevailing wages shall be periodically increased during the performance of the contract in an amount equal to the increase in the prevailing wages for those kinds of work as periodically determined by the Secretary of the U.S. Department of Labor. Notwithstanding the provisions of the original contract, if the prevailing wage has increased, the rate of pay of laborers and mechanics on a public work project shall be raised accordingly.

Payroll records for all laborers and mechanics working at the site of the work shall be maintained by the General Contractor and its Subcontractors, if any, during the course of the work and preserved for a period of three years thereafter. Such records shall contain the name and address of each employee, the employee's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. Such records shall be made available for inspection by the Research Corporation of the University of Hawaii or any authorized representative thereof who may also interview employees during working hours on the job.

A certified copy of all payrolls shall be submitted weekly to the RCUH Technical Representative. The General Contractor shall be responsible for the submission of certified copies of the payrolls of all Subcontractors. The certification shall affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates contained in the wage determination decision of the Secretary of the U.S. Department of Labor attached to this contract, and that the classification set forth for each laborer or mechanic conforms with the work performed by the laborer or mechanic.

The rates of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the job site, and a copy of the rates of wages required to be posted shall be given to each laborer and mechanic employed under the contract by the Contractor at the time each laborer and mechanic is employed, except that where there is a collective bargaining agreement, the Contractor does not have to provide employees with the wage rate schedules.

No laborer or mechanic employed on the job site shall be permitted or required to work on any Saturday, Sunday and legal holiday of the State, or in excess of EIGHT (8) hours on any other day unless the laborer or mechanic receives compensation for all hours worked on any Saturday, Sunday and legal holiday of the State, or in excess of EIGHT (8) hours on any other day at a rate not less than one and one half times the basic hourly rate of pay. For the purposes of determining

overtime compensation under this sub-section, the basic hourly rate of any laborer or mechanic shall not be less than the basic hourly rate determined by the Secretary of the U.S. Department of Labor to be the prevailing basic hourly rate for corresponding classes of laborers and mechanics on projects of similar character in the State.

The Contractor or Subcontractor shall pay all mechanics and laborers employed on the job site, unconditionally and not less often than once a week, and without deduction or rebate on any account, except as allowed by law, the full amounts of their wages including overtime, accrued to not more than five (5) working days prior to the time of payment, at wage rates not less than those deemed to be prevailing, regardless of any contractual relationship which may be alleged to exist between the Contractor or Subcontractor and laborers and mechanics

The RCUH may withhold from the Contractor so much of the accrued payment as may be necessary to pay the laborers and mechanics the difference between the prevailing wages required by the contract and the wages received by such laborers mechanics.

If the RCUH finds that any laborer or mechanic employed on the job site by the Contractor or any Subcontractor has been or is being paid wages at a rate less than the prevailing rate required by this contract or the specifications, or has not received full overtime compensation, the RCUH may, by written notice to the Contractor, terminate the Contractor's right, or the right of any Subcontractor, to proceed with the work or with the part of the work in which the required wages or overtime compensation have not been paid and may complete such work or part by contract or otherwise, and the Contractor and its sureties shall be liable to the RCUH for any excess costs occasioned thereby.

For further information on this Act, the Contractor shall refer to the Davis Bacon Act and Chapter 104, Hawaii Revised Statutes.

12. MATERIALS AND EQUIPMENT

Unless otherwise specifically provided for in the specifications, all equipment, materials and articles incorporated in the work covered by this contract are to be new and of the best grade of its respective kind for the purpose. The RCUH does not guarantee that the specified or pre-qualified product listed in the drawings and technical specifications are available at the time of bid or during the contract period.

All material and equipment not conforming to the requirements of these contract documents, whether in place or not, shall be rejected and removed immediately from the site of work unless otherwise permitted by the RCUH in writing. No rejected material or equipment which has subsequently been made to conform shall be used unless and until written acceptance has been given by the RCUH. If the Contractor fails to comply forthwith with any order of the RCUH made under the provisions of this clause, the RCUH shall have the authority to remove and replace non-conforming materials and equipment and charge the cost of removal and replacement to the Contractor.

13. SUBSTITUTIONS TO BE APPROVED IN ADVANCE

The manufacturer and model number of items identified in the TECHNICAL SPECIFICATIONS and PLANS are used as a measure of quality, style, appearance, and performance. Any brand or manufacture of equal or better quality to that specified will be considered for acceptance by the RCUH upon submission of a written request for approval of the proposed substitution with manufacturer's literature or brochures containing technical data on the proposed items being offered. Samples shall be submitted by the bidder for inspection by the RCUH.

Bidders shall send requests to the Technical Representative designed in SPECIAL PROVISION

S-1, no later than 4:00 p.m. on the date designated in the NOTICE TO BIDDERS.

The RCUH may reject or deny any substitution that it may, in its discretion deem unequal, and the findings in this regard shall be accepted by the bidders as final and binding.

A bid which includes a substitution shall be considered only if the substitution has been approved in advance by the RCUH.

14. WORKING DIRECTIVES

After award of contract and prior to the start of work, the Contractor shall submit a schedule of work and proposed sequence of work to the RCUH for approval. No deviation from the approved schedule will be permitted without written approval.

All work shall be scheduled with the RCUH. All work shall be expedited to shorten the shutdown time as much as possible. The work shall be coordinated and planned in a manner which will permit operation of University facilities without interruption.

The contractor shall perform all work with extreme care to avoid damage to existing construction and installations. The existing building will be in use during the construction period. The Contractor shall make all necessary provisions to keep interferences to a minimum as to the scheduling of work and storage of materials. Scheduling and performance of work shall be done in such a manner as to cause the least possible inconvenience to personnel using the building and least possible interferences with the activities in and around the building.

In the event the Contractor submits and the RCUH receives an accelerated schedule (shorter than the contract time), such will not constitute an agreement to modify the contract time or completion date, nor will the receipt, acceptance or approval of such a schedule incur any obligation by the RCUH. The RCUH will not be responsible if the Contractor does not meet its accelerated schedule.

15. REMOVAL OF DEFECTIVE NON-CONFORMING AND UNAUTHORIZED WORK

All work which has been rejected as not conforming to the requirements of the contract shall be remedied or removed and replaced by the Contractor in an acceptable manner and no compensation will be allowed for such removal or replacement. Any work done beyond the work limits shown on the Plans and Technical Specifications or established by the RCUH or any additional work done without written authority will be considered as unauthorized and will not be paid for. Work so done may be ordered removed at the Contractor's expense.

Scheduling Corrective Work – The Contractor shall perform its corrective or remedial work at the convenience of the RCUH and shall obtain the RCUH's approval of its schedule.

Failure to Correct Work – If the Contractor fails to promptly commence to correct any defects of any nature within TEN (10) calendar days of any written order of the RCUH made under this clause, and thereafter to expeditiously complete the correction of said defects, the RCUH shall have the authority, without further notice to the Contractor or surety and without termination of contract, to cause defective work to be remedied or removed and replaced, and unauthorized work to be removed, at the Contractor's expense, and to deduct the costs from the monies due or to become due the Contractor under the contract.

16. WORKMANSHIP AND CHARACTER OF WORKERS

All work to be executed shall be of the highest quality and performed by skilled workmen in the best workmanlike manner. Any worker employed on the project by the Contractor or by any

subcontractor who the RCUH deems incompetent, careless, insubordinate, or otherwise objectionable shall at the written request of the RCUH, be removed forthwith by the Contractor or subcontractor employing such worker and shall not be employed again in any portion of the work without the written consent of the RCUH. Should the Contractor or subcontractor continue to employ, or again employ such person or persons on the project, the RCUH may withhold all payments which are or may become due, or the RCUH may suspend the work until its orders are followed, or both.

17. INSUFFICIENT WORKERS

A sufficient number of workers shall be present to ensure the work is accomplished at an acceptable rate. In addition, the proper ratio of apprentice to journey worker shall be maintained to ensure the work is properly supervised and performed. In the event that the RCUH finds insufficient workers are present to accomplish the work at an acceptable rate of progress or if a adequate number of journey workers are not present and not corrective action is taken by the Contractor after being informed in writing, the RCUH may terminate the contract as provided for under the Default clause of the contract.

18. COOPERATION BETWEEN CONTRACTOR AND THE RCUH

During the contract period, the existing buildings and grounds will be occupied by the University. Therefore, while the new work is under construction, the Contractor shall confine its operations, materials, and equipment within the immediate vicinity of the new work and shall prearrange or schedule with the RCUH for all disruptive noise-producing construction activities so as not to unreasonably obstruct or interfere with any phase of activities of the University

19. SUPERVISION OF WORK

The Contractor shall provide a competent superintendent, satisfactory to the RCUH, on the work at all times during progress of the work with authority to act for the Contractor. The Contractor shall also provide an adequate staff to coordinate and expedite its work properly and shall at all times maintain competent supervision of its work and that of its subcontractors to ensure compliance with contract requirements.

20. MODIFICATION OF CONTRACT

This Agreement may be modified by a Supplemental Agreement, which is accomplished by the mutual agreement of the parties and includes, but is not limited to, such changes as term extensions to the contract and change in scope of work. This agreement may be modified by a Change Order, which includes administrative and non-substantive changes, and is accomplished by written order signed by an authorized RCUH representative.

21. PROTECTION OF PERSONS AND PROPERTY

Contractor shall provide adequate, clearly marked and/or lighted barricades or warning signs at all open trenches, excavation and contract work areas for the protection of the work and safety of the users and the public.

22. PROTECTION OF PROPERTY AND BUILDINGS

The Contractor shall take all necessary precautions during the progress of the work to protect the buildings as well as adjoining property, roadways, walkways, trees, lawns, landscape, and buildings from damage and injury and shall promptly repair any such damage to the satisfaction of the RCUH, at no cost to the RCUH.



23. INTERRUPTION OF AIR CONDITIONING (A/C) AND ELECTRICAL SERVICE

The contractor shall schedule interruption of A/C and electrical services in such a manner so as to minimize such interruption to University operations. Air Conditioning interruptions shall be permitted only on Saturdays, Sundays, and holidays. Electrical interruptions shall be permitted only on Saturdays and holidays. The Contractor shall notify the RCUH, in writing, at least FIFTEEN (15) days in advance of any proposed interruption and shall obtain the approval of the RCUH prior to the interruption. Scheduled interruptions of electrical service shall not exceed TWELVE (12) hours.

24. PARKING

All Contractor's company vehicles (including vehicles with logos), needing access to the University of Hawaii Haleakala High Altitude Observatory Site where the Pan-STARRS observatories are located are required to park within the boundaries of the UH land. Maps will be provided to the Contractor clearly delineating those boundaries.

25. WATER AND ELECTRICITY

The Contractor will be allowed to use electricity for construction purposes without charge. The Contractor is responsible for providing water for construction purposes.

26. SANITARY FACILITIES

The Contractor will be permitted to use the existing sanitary facilities at the Pan-STARRS observatory site.

27. EQUIPMENT ACCESS

The RCUH shall keep the area around the equipment reasonably clear so that the Contractor will have access to the equipment and so as not to limit or impair the ability of the Contractor to perform the services.

28. MONITORING OF WORK

An inspector, designated by RCUH's representative will make daily observation of the work at the site. The Contractor shall direct all inquiries, technical or administrative, to said inspector during construction.

29. REMOVAL OF DEBRIS AND CLEANUP

The Contractor shall, as directed during the progress of the work, remove and properly dispose of resultant dirt and debris and keep the premises reasonably clear. Before the work shall be considered completed, all equipment and unused materials provided for the work shall be removed and the building and premises will be in a neat and broom-clean condition.

30. INSPECTION

All materials, equipment and workmanship shall be subject to inspection at any and all times during the period of installation. The RCUH has the right to reject defective or non-conforming material, equipment and workmanship. Rejected materials and equipment shall be promptly removed from the job site and satisfactorily replaced. Rejected workmanship shall be satisfactorily corrected.

31. ACCEPTANCE

Upon completion of the job, the Contractor shall notify the RCUH in writing, to arrange for final inspection and acceptance. Final payment will not be made until acceptance of work by the RCUH.

32. GUARANTEE OF WORK

- A. Except as otherwise specified in the Technical Specifications, all work shall be guaranteed by the Contractor against defects resulting from the use of defective or inferior materials, equipment or workmanship for ONE (1) year from the date of final project acceptance.
- B. If, within any guarantee period, repairs, replacements or modifications are required as a result of the use of any materials, equipment or workmanship which is inferior, defective or not in accordance with the terms of this contract, the Contractor shall within FIVE (5) consecutive working days and without expense to the RCUH:
  - 1) Take corrective action to cure all defects identified by the RCUH; and
  - 2) Repair all damage to RCUH or University property occasioned by the defective condition. If any such property cannot be satisfactorily repaired or restored, the Contractor shall replace it.
- C. Whenever a manufacturer's guarantee on any product used in the performance of this contract exceeds ONE (1) year, such guarantee shall become a part of this contract. The Contractor shall complete the warranty form in the name of the RCUH and submit such form to the manufacturer within the time required to validate the warranty. The Contractor shall submit to the RCUH a photocopy of the completed warranty form as evidence that such warranty form was filed with the manufacturer.
- D. If there is any conflict between the terms of this section and the terms contained in the Technical Specifications, the terms of the Technical Specifications shall be controlling.

33. PROGRESS PAYMENTS TO CONTRACTOR

The RCUH will pay the contract price as hereinafter provided.

The Contractor will be allowed progress payments on a monthly basis upon preparing the Contractor's Request for Progress Payment form and submitting it to the RCUH. The monthly payment shall be based on the items of work satisfactorily completed and the value thereof at unit prices and/or lump sum prices set forth in the contract as determined by the RCUH and shall be subject to compliance with SPECIAL PROVISION 11, PREVAILING WAGE REQUIREMENTS, of the contract.

If requested by the RCUH, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments.

In the event the Contractor or any Subcontractor fails to submit certified copies of payrolls in accordance with SPECIAL PROVISION 11, PREVAILING WAGE REQUIREMENTS, of the contract, the RCUH may retain the amount due for items of work for which payroll affidavits have not been submitted on a timely basis notwithstanding satisfactory completion of the work until such records have been duly submitted. The Contractor shall not be due any interest payment

for any amount thus withheld.

Partial Payment for Materials - The Contractor shall also be allowed partial payments to the extent of NINETY PERCENT (90%) of the manufacturer's, supplier's, distributor's or fabricator's invoice cost of accepted materials to be incorporated in the work on the following conditions:

- 1) The materials are delivered and properly stored at the site of Work; or
- 2) For special items of materials accepted by the RCUH, the materials are delivered to the Contractor or subcontractor(s) and properly stored in an acceptable location within a reasonable distance to the site of Work.

Partial payments shall be made only if the RCUH finds that:

- 1) The Contractor has furnished bills of sale for the materials or otherwise demonstrates clear title to such materials and that it will be utilized on the work covered by this contract.
- 2) The materials are insured for their full replacement value to the benefit of the RCUH against theft, fire, damages incurred in transportation to the site, and other hazards.
- 3) The materials are not subject to deterioration.
- 4) In case of materials off the project site, the materials are not commingled with other materials not to be incorporated into the project.

All material and work covered by progress payments made shall thereupon become the sole property of the RCUH, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the RCUH to require the fulfillment of all of the terms of the contract.

#### 34. PROMPT PAYMENT TO SUBCONTRACTORS

- A. Any money paid to a Contractor for work performed by subcontractor shall be disbursed to such subcontractor within TEN (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes on which the RCUH has withheld payment.
- B. Upon final payment to the Contractor, full payment to the subcontractor, shall be made within TEN (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
- C. All sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by the RCUH to the Contractor and subsequently, upon receipt from the RCUH by the Contractor, to the subcontractor within the applicable time periods specified in subsection 34.B and Section 103-10 HRS.
  - 1) Where a subcontractor has provided evidence to the Contractor of satisfactorily

completing all work under the subcontract and has provided a properly documented final payment request as described in subsection 34.E; and

- a) Has provided to the Contractor an acceptable performance and payment bond for the project executed by a surety company authorized to do business in the State, as provided in Section 53, RETAINAGE; or
- b) The following has occurred:

A period of NINETY (90) days after the day on which the last of the labor was done or performed and the last of the material was furnished or supplied has elapsed without written notice of a claim given to Contractor and the surety, as provided for in Section 103D-324 HRS, and

The subcontractor has provided to the Contractor:

An acceptable release of retainage bond, executed by a surety company authorized to do business in the State, in an amount of not more than two times the amount being retained or withheld by the Contractor.

Any other bond acceptable to the Contractor; or

Any other form of mutually acceptable collateral.

- D. If the RCUH or the Contractor fails to pay in accordance with this section, a penalty of one and one-half per cent per month shall be imposed upon the outstanding amounts due that were not timely paid by the responsible party. The penalty may be withheld from future payment due to the Contractor, if the Contractor was the responsible party. If a Contractor has violated subsection 34.B three or more times within TWO (2) years of the first violation, the Contractor shall be referred by the RCUH to the Contractor License Board for action under Section 444-17(14) HRS.
- E. Final Payment Request. A properly documented final payment request from a subcontractor, as required by subsection 34.C, shall include:
  - 1) Substantiation of the amounts requested;
  - 2) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief, that:
    - a) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the subcontract;
    - b) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section;
    - c) The payment request does not include any amounts that the

subcontractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract; and

- d) The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied.
- F. The RCUH shall return any final payment request that is defective to the Contractor within SEVEN (7) days after receipt, with a statement identifying the defect.
- G. A payment request made by a Contractor to the RCUH that includes a request for sums that were withheld or retained from a subcontractor and are due to a subcontractor may not be approved under subsection 34.C unless the payment request includes:
- 1) Substantiation of the amounts requested; and
  - 2) A certification by the Contractor to the best of the Contractor's knowledge and belief, that:
    - a) The amounts requested are only for performance in accordance with the specifications, terms and conditions of the contract;
    - b) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the contract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
    - c) The payment request does not include any amounts that the Contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.
- H. The RCUH shall return any final payment request that is defective to the Contractor within SEVEN (7) days after receipt, with a statement identifying the defect.
- I. This section shall not be construed to impair the right of a contractor or a subcontractor at any tier to negotiate and to include in their respective subcontracts provisions that provide for additional terms and conditions that are requested to be met before the subcontractor shall be entitled to receive final payment under subsection 34.C of this section; provided that any such payments withheld shall be withheld by the RCUH.

### 35. FINAL PAYMENT

Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed invoice and after the Contractor shall have furnished the RCUH with a Tax Clearance Certificate, a SPO Form-22, Certification of Compliance for Final Payment, all specified closing documents and a release of all claims against the RCUH and University arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release.

### 36. VALUE ENGINEERING INCENTIVE

The following clause is applicable only if this contract exceeds \$100,000. Whenever VECP is mentioned in the following paragraphs, it shall mean "Value Engineering Change Proposal"

(VECP).

This clause applies to all VECP initiated and developed by the Contractor for changing the drawings, designs, specifications, or other requirements of this contract. This clause does not, however, apply to any VECP unless it is identified as such by the Contractor at the time of its submission to the RCUH.

All VECP must:

- 1) Result in a savings to the RCUH in the project cost of at least four thousand dollars (\$4,000) by providing less costly items than those specified herein without impairing any of their essential functions and characteristics such as service life, reliability, economy of operation, ease of maintenance, and necessary standardized features of the completed work;
- 2) Require, in order to be applied to this contract, a modification to this contract; and
- 3) Not adversely impact on the performance schedule or the contract completion date.

VECP Required Information - The VECP will be processed expeditiously and in the same manner as prescribed for any other proposal which would likewise necessitate issuance of a contract modification. As a minimum, the following information will be submitted by the Contractor with each proposal:

- 1) A description of the difference between the existing contract requirement and the VECP, and the comparative advantages and disadvantages of each;
- 2) An itemization of the requirements of the contract which must be changed if the VECP is adopted and a recommendation as to how to make each such change;
- 3) An itemized estimate of the reduction in performance costs that will result from adoption of the VECP taking into account the costs of implementation by the Contractor, including any amounts attributable to subcontracts, and the basis for the estimate;
- 4) A prediction of any effects the VECP would have on other costs to the RCUH, such as RCUH/University furnished property costs, of related items, and costs of maintenance and operation over the anticipated life of the material, equipment, or facilities as appropriate; the construction schedule, sequence and time; and bid item totals used for evaluation and payment purposes;
- 5) A statement of the time by which a modification adopting the VECP must be issued so as to obtain the maximum cost reduction during the remainder of this contract, noting any effect on the contract time; and
- 6) The dates of any previous submissions of the VECP, the numbers of any RCUH/University contracts under which submitted and the previous actions by the RCUH/University, if known.

Required Use of Licensed Architect or Engineer - When, in the judgment of the RCUH, a value engineering change proposal alters the design prepared by a registered professional architect or engineer, the Contractor shall ensure the changes to be prepared are by or under the supervision of a registered professional architect or engineer, and stamped and so certified.

Unless and until a modification applies a VECP to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract. The RCUH shall not be liable for any delays in acting upon, or for any failure to act upon any proposal submitted pursuant to this clause.

The decisions of the RCUH as to the acceptance of any VECP under this contract shall be final.

Acceptance of VECP - The RCUH may accept in whole or in part any VECP submitted pursuant to this clause by issuing a modification which will identify the VECP on which it is based. Prior to issuance of the modification, the Contractor shall submit complete final contract documents similar to those of the original contract showing the accepted changes and the new design and features as well as the following:

- 1) Design calculations;
- 2) The design criteria used; and
- 3) A detailed breakdown of costs and expenses to construct or implement such revisions.
- 4) The change order will identify the final VECP on which it is based.

VECP Price Adjustments - If a VECP submitted pursuant to this clause is accepted under this contract, an equitable adjustment in the contract price and in any other affected provisions of this contract shall be made in accordance with this clause and "change order" clause of this contract. The equitable adjustment shall first be established by determining the effect on the Contractor's cost of implementing the change (including any amount attributable to subcontracts), and to the RCUH's charges to the Contractor for architectural, engineering, or other consultant services and the staff time required to examine and review the proposal. The contract price shall then be reduced by the total estimated decrease in the cost of performance minus FIFTY PERCENT (50%) of the difference between the amount of such total estimated decrease and any ascertainable costs to the RCUH which must be incurred to apply the VECP to this contract.

The Contractor may restrict the RCUH's right to use any sheet of a VECP or of the supporting data, submitted pursuant to this clause, in accordance with the terms of the following legend if it is marked on such sheet as follows:

"This data or information or both shall not be disclosed outside the RCUH/University, or be duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate this value engineering change proposal submitted under said clause.

"This restriction does not limit the RCUH's right to use information contained in this data if it is or has been obtained from another source, or is otherwise available, without limitations. If such a proposal is accepted by the RCUH by issuance of a modification under the 'change order' clause of said contract after the use of this data in such an evaluation, the RCUH shall have the right to duplicate, use and disclose any data

pertinent to the proposal as accepted, in any manner and for any purpose whatsoever, and have others so do."

In the event of acceptance of a VECP, the RCUH shall have all rights to use, duplicate or disclose in whole or in part in any manner and for any purpose whatsoever, and to have or permit other to do so, any data or information or both reasonably necessary to fully utilize such proposal.

The Contractor shall submit with each VECP all required information and provide all additional information as may be required by the RCUH to evaluate and implement the VECP. The cost for preparing the VECP shall be the Contractor's responsibility, and any part of the Contractor's cost for implementing the change shall be due only when the proposal is accepted and change order issued.

If the services of the University's/RCUH's architects, engineers or contracted design professional is necessary to review and evaluate a VECP, the cost thereof shall be paid for by the Contractor.

Each VECP shall be evaluated as applicable to this contract, and past acceptance on another University's/RCUH's project for a similar item shall not be automatic grounds for approval.

The method by which the Contractor will share a portion of the cost savings from an accepted VECP shall be for this contract only, and no consideration shall be made for future acquisition, royalty type payment or collateral savings.

Contract modifications made as a result of this clause will state that they are made pursuant to it.

37. SUBSTITUTION OF LISTED SUBCONTRACTORS

Substitution of listed subcontractor will be allowed only after contract award and only if the subcontractor:

- A. Fails, refuses or is unable to enter into a subcontract; or
- B. Becomes insolvent; or
- C. Has its contractor's license suspended or revoked; or
- D. Has defaulted or has otherwise breached the subcontract in connection with the subcontracted work; or
- E. Is unable to comply with the other requirements of law applicable to contractors, subcontractors and public works projects.

Requests to substitute a listed subcontractor shall be submitted to the Procurement Officer for approval and the General Contractor shall include:

- A. A copy of the subcontractor's written release request to the General Contractor (if applicable);
- B. A written release from the affected subcontractor acknowledging that it unconditionally is indemnifying the General Contractor, the RCUH and the University of Hawaii from any liens and/or claims which may be brought as a result of the requested change;



- C. A written acknowledgement agreeing to hold the RCUH and the University harmless and to indemnify the University and the RCUH for all claims, liabilities, or damages whatsoever, including attorney's fees arising out of or related to the approval or disapproval of the substitution request;
- D. A written acknowledgement that the requested change shall be at no additional cost to the RCUH and the University; and
- E. A written acknowledgement that it will not use its request to change subcontractor(s) as a basis for requesting a time extension to the performance period specified in the contract.

38. PURCHASE ORDER

The RCUH will issue a purchase order upon execution of contract in the amount specified in the contract.

39. BID SECURITY

If the total amount of the item(s) bid is \$25,000 or more, a bid security is required and shall be submitted in accordance with GENERAL PROVISION 8, BID SECURITY.

40. MATERIAL SAFETY DATA SHEETS (MSDS)

The Contractor shall submit to the Technical Representative SIX (6) copies of the Material Safety Data Sheet (MSDS) for each chemical product prior to it being provided or used under this contract. No chemical products shall be provided or used without prior approval by the RCUH. MSDS's shall be submitted within TWO (2) weeks of the date of Notice to Proceed. Failure to submit MSDS's may result in suspension of work for which no additional compensation and/or extension of time will be granted or in cancellation of the contract.

41. CHANGES

- A. Change order - The RCUH, at any time, and without notice to any surety, in a signed writing (field order or bulletin) designated or indicated to be a change order, may make changes in the work within the scope of the contract as may be found to be necessary or desirable. Such changes shall not invalidate the contract or release the sureties, and the Contractor will perform the work as changed, as though it had been part of the original contract. Minor changes in the work may be directed by the RCUH at no change in contract price or time.
- B. Adjustments of price – Any adjustment in contract price made pursuant to this clause shall be in accordance with RCUH pricing guidelines. The final change order cost shall be subject to revision based on an audit by the RCUH of the Contractor's cost proposal. Failure of the parties to agree to the change order cost shall not excuse the Contractor from proceeding with the contract as changed.
- C. Cost or Pricing Data - Upon request by the RCUH, with its cost proposal(s), Contractors shall submit supporting documentation (original invoices, quotations, bills of sale, cancelled checks, receipts, etc.) to substantiate substantive costs contained in the cost proposals for any change order work contemplated or performed. Upon request by the RCUH, Contractors shall also submit additional supporting documentation for line item

costs which the RCUH deems questionable. If the Contractor refuses or fails to comply with such requests within the time specified by the RCUH, a finding of "unsatisfactory" shall be noted in the Contractor's overall performance evaluation and the RCUH may, by written notice to the Contractor, declare the Contractor to be in breach pursuant to Special Provision 48 Default, of the contract.

- D. Adjustments of time for performance - If any change order results in a bona fide increase or decrease in the time required for performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made and the contract modified in writing accordingly for the direct costs of the work as changes as the RCUH deems reasonable. The right of the Contractor to dispute the contract price or time or both shall not be waived by its performing the work, provided however, that it follows the notice requirements for disputes and claims established by the contract.
- E. Time period for claim - Within THIRTY (30) days after receipt of a written change order under subparagraph 41.A, Change Order, unless the period is extended by the RCUH in writing, the Contractor shall file a notice of intent to assert a claim for an adjustment. The requirement for timely written notice cannot be waived and shall be a condition precedent to the assertion of a claim.
- F. Claim barred after final payment - No claim by the Contractor for an adjustment hereunder shall be allowed if written notice is not given prior to final payment under this contract.
- G. Claims not barred - In the absence of a change order, nothing in this clause shall restrict the Contractor's right to pursue a claim arising under the contract or for breach of contract.

#### 42. SUSPENSION OF WORK

- A. Suspension of work order. The RCUH may, by written order, suspend the performance of the work, either in whole or in part for periods as it may deem necessary for any cause, including but not limited to:
  - 1) Weather or soil conditions considered unsuitable for prosecution of the work;
  - 2) Failure on the part of the Contractor to:
    - a) Correct conditions unsafe for the general public or for the workers;
    - b) Carry out orders given by the RCUH;
    - c) Perform the work in strict compliance with the provisions of the contract;  
or
    - d) Provide adequate supervision on the jobsite.
  - 3) Whenever a redesign that may affect the work is deemed necessary by the RCUH;
  - 4) Unacceptable noise or dust arising from the construction even if it does not violate any law or regulation; or
  - 5) The convenience of the RCUH.

- B. Partial and total suspension. Suspension of work on some but not all items of work shall be considered a "partial suspension." Suspension of work on all items shall be considered "total suspension." The period of suspension shall be computed from the date set out in the written order for work to cease until the date of the order for work to resume.
- C. Reimbursement to Contractor. In the event that the Contractor is ordered by the RCUH in writing as provided herein to suspend all work under the contract in accordance with above Paragraph A, subparagraphs (3), (4), or (5), the Contractor may be reimbursed for actual money expended towards the project during the period of suspension. No allowance will be made for anticipated profits.
- D. Cost adjustment. If the performance of all or part of the work is suspended for reasons beyond the control of the Contractor, an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such suspension, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension:
- 1) To the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor; or
  - 2) For which an adjustment is provided for or excluded under any other provision of this contract.
- E. Claims for adjustment. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the provisions on changes and claims for adjustment. Claims for compensation shall be filed in writing with the RCUH within THIRTY (30) days after the date of the order to resume work or the claims will not be considered. Together with the claim, the Contractor shall submit substantiating documents covering the entire amount shown on the claim. The RCUH shall take the claim under consideration and may make such investigations as are deemed necessary and shall be the sole judge as to the equitability of the claim and its decision shall be final.
- F. No adjustment. No provision of this clause shall entitle the Contractor to any adjustments for delays due to failure of surety, for suspensions made at the request of the Contractor, for any delay required under the contract, for suspensions, either partial or whole, made by the RCUH under the provisions in Paragraph A, subparagraph (2).

#### 43. DIFFERING SITE CONDITIONS

- A. Notification - The Contractor shall promptly, and before such conditions are disturbed, notify the RCUH of:
- 1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or
  - 2) Unknown physical conditions at this site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.
- B. Adjustments of price or time for performance - After receipt of such notice, the RCUH

shall promptly investigate the site, and if it is found that such conditions do materially so differ and cause an increase in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, 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 in accordance with the price adjustment clause of this contract.

- C. Timeliness of claim - No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in this clause; provided, however, that the time prescribed therefore may be extended by the RCUH in writing.
- D. No claim after final payment - No claim by the Contractor for an adjustment thereunder shall be allowed if asserted after final payment under this contract.
- E. Knowledge - Nothing contained in this clause shall be grounds for an adjustment in compensation if the Contractor had actual knowledge of the existence of such conditions prior to the submission of bids.

#### 44. DIFFERING SITE CONDITIONS – CONTRACTOR'S RESPONSIBILITY

Except for subsurface and latent conditions, the Contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials and equipment, labor, and other facilities required because of any differing conditions (physical or otherwise) shall be wholly at the Contractor's own cost and expense, anything in this contract to the contrary notwithstanding.

#### 45. PRICE ADJUSTMENT FOR CONSTRUCTION CONTRACTS

- A. Price adjustment. Any adjustment in contract price pursuant to a change or claim in this contract shall be made in one or more of the following ways:
  - 1) By agreement on a fixed price adjustment before commencement of the pertinent performance;
  - 2) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
  - 3) Whenever there is a variation in quantity for any work covered by any line item in the schedule of costs submitted by the Contractor pursuant to contractual pre-work submittal requirements, by the RCUH, at its discretion, adjusting the lump sum price proportionately;
  - 4) By the costs attributable to the event or situation covered by the change, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
  - 5) In such other manner as the parties may mutually agree upon before commencement of the pertinent performance or;
  - 6) In the absence of agreement between the two parties:

- a. For change orders with a value not exceeding \$50,000 by documented actual costs of the work, allowing for overhead and profit as set forth in Section 45.C. 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 RCUH shall return any documentation that is defective to the Contractor within Fifteen (15) days after receipt, with a statement identifying the defect or;
  - b. For change orders with value exceeding \$50,000 by a unilateral determination by the RCUH of the reasonable and necessary costs attributable to the event or situation covered by the change, plus appropriate profit or fee, all as computed by the RCUH in accordance with applicable sections of Chapters 3-123 and 3-126 of the Hawaii Administrative Rules, and Section 45.C. When a unilateral determination has been made, a unilateral change order shall be issued within Ten (10) days. Upon receipt of the unilateral change order, if the Contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or 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 adjustments or nonadjustment of the contract time or the contract price set forth in the unilateral change order.
- B. Cost or Pricing Data. Contractor shall provide and certify cost or pricing data for any price adjustments subject to the provisions of Section 103D-312 H.R.S.
- C. Allowances for overhead and profit.
- 1) In determining the cost or credit to the RCUH resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office, branch office and field overhead, and related delay impact costs) and profit combined, shall not exceed the percentages set forth below:
    - (a) For the Contractor, for any work performed by its own labor forces, TWENTY PERCENT (20%) of the cost;
    - (b) For each subcontractor involved, for any work performed by its own forces, TWENTY PERCENT (20%) of the direct cost; and
    - (c) For the Contractor or any subcontractor, for work performed by their subcontractors, TEN PERCENT (10%) of the amount due the performing subcontractor.
  - 2) Not more than three (3) markup allowance line item additions not exceeding the maximum percentage shown above will be allowed for profit and overhead, regardless of the number of tier subcontractors.
  - 3) The allowance percentages will be applied to all credits and to the net increase of direct costs where work is added and deleted by the changes.
  - 4) Line-item pricing shall be consistent with and in accordance with the terms and conditions set forth in GENERAL PROVISIONS 30, FORCE ACCOUNT WORK.

46. NOVATION OR CHANGE OF NAME

- A. No assignment. No RCUH contract is transferable, or otherwise assignable, without the written consent of the RCUH provided that a Contractor may assign monies receivable under a contract after due notice to the RCUH.
- B. Recognition of a successor in interest; assignment. When in the best interest of the RCUH, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the RCUH shall agree that:
- 1) The transferee assumes all of the transferor's obligations;
  - 2) The transferor remains liable for all obligations under the contract but waives all rights under the contract as against the RCUH; and
  - 3) The transferor shall continue to furnish, and the transferee shall also furnish, all required bonds.
- C. Change of name. When a Contractor requests to change the name in which it holds a contract with the RCUH, the procurement officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting Contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.
- D. Reports. All change of name or novation agreements effected hereunder other than by the RCUH shall be reported to the RCUH within THIRTY (30) days of the date that the agreement becomes effective.
- E. Actions affecting more than one purchasing agency. Notwithstanding the provisions of Paragraph B, Recognition of a successor in interest; assignment; when a Contractor holds contracts with more than one University department, the novation or change of name assignments herein authorized shall be processed only through the Procurement Officer.

47. CLAIMS BASED ON ORAL DIRECTIVES FOR CONSTRUCTION CONTRACTS

- A. Any oral order, direction, instruction, interpretation or determination from the RCUH which, in the opinion of the Contractor, causes any change, can be considered as a change only if the Contractor gives the RCUH written notice of its intent to treat such oral order, direction, instruction, interpretation or determination as a change directive. The written notice must be delivered to the RCUH before the Contractor acts in conformity with the oral order, direction, instruction, interpretation or determination, but not more than FIVE (5) days after delivery of the oral order to the Contractor. The written notice shall state the date, circumstances, whether a time extension will be requested, and source of the order that the Contractor regards as a change. The written notice may not be waived and shall be a condition precedent to the filing of a claim by the Contractor. Unless the Contractor acts in accordance with this procedure, any oral order shall not be treated as a change and the Contractor waives any claim for an increase in the contract time or contract price related to such work.
- B. Not more than FIVE (5) days after receipt of the written notice from the Contractor the RCUH shall issue a change order for the subject work if the RCUH agrees that it

constitutes a change. If no change order is issued in the time established, it shall be deemed a rejection of Contractor's claim for a change. If the Contractor objects to the RCUH's refusal to issue a change order, it shall file a written protest with the RCUH within THIRTY (30) days after delivery to the RCUH of the Contractor's written notice of its intention to treat the oral order as a change. In all cases the Contractor shall proceed with the work. The protest shall be determined as provided in the disputes and claims section of the contract.

#### 48. DEFAULT, DELAY, AND TIME EXTENSION

- A. Default. If the Contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, fails to complete said work within such time, or commits any other substantial breach of this contract, and further fails within SEVEN (7) consecutive calendar days after receipt of written notice from the RCUH to commence and continue correction of such refusal or failure with diligence and promptness, the RCUH may, by written notice to the Contractor, declare the Contractor in breach and terminate the Contractor's right to proceed with the work or such part of the work as to which there has been delay or other breach of contract. In the event the RCUH may take over the work and perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plants as may be on the site of the work and necessary therefore. Whether or not the Contractor's right to proceed with the work is terminated, the Contractor and the Contractor's sureties shall be liable for any damage to the RCUH resulting from the Contractor's refusal or failure to complete the work within the specified time period.
- B. Liquidated damages upon termination. If fixed and agreed liquidated damages are provided in the contract, and if the RCUH so terminates the Contractor's right to proceed, the resulting damage will consist of the liquidated damages for the time as may be required for final completion of the work.
- C. Liquidated damages in absence of termination. If fixed and agreed liquidated damages are provided in the contract, and if the RCUH does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.
- D. Time extension. The Contractor's right to proceed shall not be so terminated nor shall the Contractor be charged with resulting damage if:
- 1) The delay in the completion of the work arises from causes such as: acts of God; acts of the public enemy; acts of the RCUH/UNIVERSITY and any other governmental entity in either a sovereign or contractual capacity; acts of another Contractor in the performance of a contract with the RCUH; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; unusually severe weather; delays of subcontractors due to causes similar to those set forth above; or shortage of materials; provided, however, that no extension of time will be granted for a delay caused by a shortage of materials, unless the Contractor furnishes to the RCUH proof that the Contractor has diligently made every effort to obtain such materials from all known sources, and further proof that the inability to obtain such materials when originally planned did in fact cause a delay in final completion of the entire work which could not be compensated for by revising the sequence of the Contractor's operations; and
  - 2) The Contractor, within TEN (10) days from the beginning of the delay (unless the

RCUH grants a further period of time before the date of final payment under the contract), notifies the RCUH in writing of the causes of delay. The RCUH shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in the judgment of the RCUH, the findings of fact justify such an extension.

- E. Additional rights and remedies. The rights and remedies of the RCUH provided in this contract are in addition to any other rights and remedies provided by law.

49. TERMINATION FOR CONVENIENCE

- A. Terminations. The RCUH may, when the interest of RCUH so requires, terminate this contract in whole or in part, for the convenience of the RCUH. The RCUH shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.
- B. Contractor's obligations. The Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the RCUH's approval. The RCUH may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the RCUH. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.
- C. Right to construction and goods. The RCUH may require the Contractor to transfer title and deliver to the RCUH in the manner and to the extent directed by the RCUH:
- 1) Any completed construction; and
  - 2) The partially completed construction, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "construction material") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The Contractor shall protect and preserve property in the possession of the Contractor in which the RCUH has an interest. If the RCUH does not exercise this right, the Contractor shall use best efforts to sell such construction, goods, and construction materials in accordance with the standards of Section 490:2-706, HRS. This in no way implies that the RCUH has breached the contract by exercise of the termination for convenience clause.

- D. Compensation.
- 1) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, bearing on such claim. If the Contractor fails to file a termination claim within one (1) year from the effective date of termination, the RCUH may pay the contractor, if at all, an amount set in accordance with subparagraph (3), item (b).
  - 2) The RCUH and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the RCUH,



the proceeds of any sales of construction, goods, and construction materials under clause subparagraph (3), item (c), and the contract price of the work not terminated.

- 3) Absent complete agreement under subparagraph (2), the RCUH shall pay the Contractor the following amounts, provided payments under subparagraph (2) shall not duplicate payments under this paragraph, for the total (without duplication of any items) of:
  - a) The cost of all contract work performed prior to the effective date of the notice of termination 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 completed portions of the work; provided, however, 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 the loss;
  - b) Subject to the prior approval of the RCUH, the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph B, 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 cost paid in accordance with subparagraph (3), item (a) and;
  - c) The total sum to be paid the Contractor under this paragraph shall not exceed the total contract price reduced by the amount of any sales of construction, goods, and construction materials under Paragraph C, Right to construction and goods, and the contract price of work not terminated.
- 4) Cost claimed, agreed to, or established under subparagraphs (2) and (3) of this clause shall be in accordance generally accepted cost principles.

## 50. PERFORMANCE EVALUATION REPORT

### A. Overall Evaluation of Contractor

A Contractor's overall evaluation includes the performance of its subcontractors and shall be based on the following performance elements using either "outstanding" or "satisfactory" or "unsatisfactory" as an evaluation finding:

- 1) Performance Elements
  - a) Compliance with the submittals requirement(s) (i.e., schedules, shop drawings, daily reports, payroll affidavits, closing documents, etc.) and the associated deadline(s) specified in the IFB/RFP.
  - b) Effectiveness of management (i.e., during the course of construction, the Contractor provided on the job site a foreman familiar with the project's requirements; Contractor exhibited control of his subcontractors.)
  - c) Adherence to the approved work schedule by Contractor and its subcontractors.
  - d) Cooperation and timely response in resolving any project issue(s) raised by

the RCUH (i.e., questions, problems, change orders, etc.) within the time specified by the RCUH for such matter(s).

- e) Quality of work (i.e., adherence to performance specifications and quality control standards specified for the project; extent of punch-list reasonable for size/type of project).
- f) Understanding of project requirements to minimize the submission of RFIs and/or change order requests.
- g) Timely Performance (i.e., Contractor achieved project completion by the contract completion date; Contractor completed all punch-list items by the deadline specified by the RCUH).
- h) Compliance with Labor Standards
- i) Compliance with Safety Standards

2) Overall Evaluation

If a performance rating of "unsatisfactory" is given to a Contractor for any THREE (3) elements noted above, the Contractor shall be assigned an overall evaluation rating of "unsatisfactory."

An overall "unsatisfactory" rating shall also apply to any other company which the Contractor's Officers or Directors or Responsible Managing Employee(s) or Managing Partner(s) or Partner(s) are listed by the DCCA as holding similar titles/positions.

B. Revision(s) to Performance Evaluation Report During Warranty Period(s)

Following the date of project acceptance, if a Contractor fails to satisfactorily respond to and complete any warranty work requested by the RCUH during the period such warranty(ies) is/are in effect, the RCUH reserves the right to downgrade the Contractor's overall rating. Such action shall be without prejudice to any other remedy or right of action available to the University.

51. COMPLAINTS AND PROTESTS

- A. Complainants should seek resolution of their complaints initially with the Procurement Officer. Such complaints should be made in writing.
- B. Protests shall be made in writing to the Procurement Officer within FIVE (5) working days after the protester knows or should have known of the facts giving rise thereto. A protest of an award or proposed award shall in any event be submitted in writing within FIVE (5) working days after the posting of the award of the contract. No protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers. Protests filed after the applicable filing periods shall not be considered.
- C. Protestors may file a protest on any phase of solicitation or award including but not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.
- D. To expedite handling of protests, the envelope should be labeled "Protest" and either

served personally or sent by registered or certified mail, return receipt requested to the Procurement Officer. The written protest shall include as a minimum the following:

- 1) The name and address of the protestor;
- 2) Appropriate identification of the procurement, and, if a contract has been awarded, its number;
- 3) A statement of reasons for the protest; and
- 4) Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

- E. Protests concerning a procurement action shall be decided by the Executive Director or designee in accordance with applicable law.

## 52. VARIATIONS IN ESTIMATED QUANTITIES

Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than FIFTEEN PERCENT (15%) above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of either party. If the quantity variation is such as to cause an increase in the time necessary for completion, the RCUH shall, upon receipt of a timely written request for an extension of time, prior to final payment of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the RCUH the findings justify. Any adjustment in contract price shall be determined in accordance with the price adjustment provisions of this contract.

## 53. RETAINAGE

The RCUH shall retain a portion of the amount due under the contract to the Contractor, to ensure the proper performance of the contract.

- A. The sum withheld by the RCUH from the Contractor shall not exceed FIVE PERCENT (5%) of the total amount due the 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 RCUH may continue to withhold as retainage, sums not exceeding FIVE PERCENT (5%) of the amount due the Contractor.
- B. The retainage shall not include sums deducted as liquidated damages from monies due or that may become due the Contractor under the contract.
- C. General Obligation Bonds – The Contractor may withdraw retainage monies in whole or in part by providing a general obligation bond of the State or its political subdivisions suitable to the RCUH. The Contractor shall endorse over to the RCUH and deposit with the RCUH any general obligation bond suitable to the RCUH, but in no case with a face value less than the value established by law, of the amount to be withdrawn. The RCUH may sell the bond and use the proceeds in the same way as it may use monies directly retained from progress payments or the final payment.
- D. Any retainage provided for in this section or requested to be withheld by the Contractor shall be held by the RCUH.

- E. A dispute between a Contractor and subcontractor of any tier shall not constitute a dispute to which the RCUH is a party and there is no right of action against the RCUH. The RCUH may not be interpleaded in any judicial or administrative proceeding involving such a dispute.
  
- F. The retention amount withheld by the Contractor from its subcontractor shall be not more than the same percentage of retainage as that of the Contractor (also applies to subcontractors who subcontract work to other subcontractors) where a subcontractor has provided evidence to the Contractor of:
  - 1) A valid performance and a payment bond for the project that is acceptable to the Contractor and executed by a surety company authorized to do business in this State.
  - 2) Any other bond acceptable to the Contractor; or
  - 3) Any other form of collateral acceptable to the Contractor.
  
- G. A written notice of any withholding shall be issued to a subcontractor, with a copy to the RCUH, specifying the following:
  - 1) The amount to be withheld;
  - 2) The specific causes for the withholding under the terms of the subcontract; and
  - 3) The remedial actions to be taken by the subcontractor to receive payment of the amounts withheld.
  
- H. The provisions of this section shall not be construed to require payment to subcontractors of retainage released to a Contractor pursuant to an agreement entered into with the RCUH meeting the requirements of subparagraph C.