

2.203 Vendor Terms and Conditions

I. Overview

Terms and conditions (T&C), also referred to as terms of sale, terms of service, or terms of use, are legal, contractual obligations dictating the responsibilities of each party involved in a transaction, and are often used to fulfill legal disclosure obligations, disclaim certain liabilities, and specify how to resolve subsequent contract disputes.

The RCUH standard T&C contained in Attachment 31 and Attachments 32a-d (if applicable) should be used for all transactions without a formal written agreement (e.g., Agreement for Services, Construction Contract, etc.). An exception may be granted to vendors that require the use of their own T&C to either solely govern the transaction or in conjunction with RCUH's standard T&C, provided the vendor's T&C are acceptable to RCUH. Before entering into a transaction with a vendor, carefully review the vendor's T&C and seek to amend unfavorable clauses. If you have any concerns or questions regarding the T&C, consult with your Fiscal Administrator (FA) or RCUH Procurement.

RCUH's Attachments 32a, b, c, or d, govern all transactions utilizing Federal funds irrespective of other T&Cs that may apply.

II. Responsibilities

A. Principal Investigator

Examine vendor T&C applicable to a procurement transaction and work with the FA on amending unfavorable T&C.

B. Fiscal Administrator

Work closely with the PI on reviewing and amending vendor T&C per RCUH policies. Work with RCUH Procurement on questions and concerns regarding vendor T&C.

C. RCUH

Provide support and assistance to the Project and FA in reviewing and negotiating the T&C governing a transaction. Review and approve all non-standard T&C, including transactions within the FA's discretion.

III. Details of Policy

A contract is a legally binding agreement involving two or more individuals or entities that sets forth the requirements and contractual obligations of the parties. A contract is formed when the parties mutually agree in writing to provide each other some benefit, such as a promise to make a payment in exchange for the delivery of certain goods or services. If no written agreement exists with a vendor, the contract governing the transaction consists of the Purchase Order (PO) and the T&C applied to the PO.

T&C may fulfill a number of different roles, but they are often used to fulfill legal disclosure obligations, impose acceptable requirements on the parties to the transaction, disclaim certain liabilities, and dictate how subsequent contract disputes must be resolved.

Due to the fact that T&C give rise to contractual legal obligations of the parties, before entering into a transaction with a vendor, carefully review the vendor's T&C and consult with your FA or RCUH Procurement if you have concerns with certain T&C. RCUH Procurement must review and approve all non-standard T&C regardless of dollar amount. A non-standard T&C is anything that deviates from RCUH's standard templates (e.g., Attachment 31, Agreement for Services, etc.). General guidance is given below to address the most common differences between an RCUH and a vendor's T&C.

- A. Free on Board (FOB) Destination** – In connection with the sale and shipment of goods, FOB is the acronym for “Free on Board,” and delineates which party (buyer or seller) pays for shipment, loading costs, and/or where responsibility for the goods is transferred. The preference for all RCUH transactions is FOB Destination, meaning the risk and reward of ownership transfers from the seller to the buyer at the “destination” port (i.e., when the buyer takes possession of the goods).

If FOB Shipping Point, FOB Origin, or FOB Port is delineated in the order, the buyer pays for the shipping cost, and assumes responsibility and risk for the goods once it leaves the seller's premises; that is, the Project is responsible for bearing this risk. The table below describes the various ways in which shipping/freight is handled by vendors.

Freight Terms	Customer Takes Title of Goods	Customer Responsibilities	Vendor Responsibilities
FOB Destination	At point of delivery		Pays freight Owns goods in transit Files claims (loss, damage, etc.)
FOB Destination, Freight Pre-Paid and Added	At point of delivery	Freight added to invoice	Pays freight Owns goods in transit Files claims (loss, damage, etc.)

FOB Destination, Freight Collect	At point of delivery	Pays freight	Owns goods in transit Files claims (loss, damage, etc.)
FOB Origin, Freight Prepaid and Allowed	At shipping point or factory	Owns goods in transit Files claims (loss, damage, etc.)	Pays freight
FOB Origin, Freight Prepaid and Added	At shipping point or factory	Freight added to invoice Owns goods in transit Files claims (loss, damage, etc.)	Pays freight
FOB Origin	At shipping point or factory	Pays freight Owns goods in transit Files claims (loss, damage, etc.)	

B. Indemnification – To indemnify another party is to compensate the party for loss, damage, or liability that has already occurred, or to guarantee through a contractual agreement to repay another party for loss, damage, or liability that may occur in the future. For example, a subcontractor may agree to indemnify a general contractor for any losses that may occur as a result of the subcontractor’s work—whether the loss is from a suit filed against the general contractor for (a) breach of contract, or (b) personal injury.

As an agency of the State of Hawai‘i, RCUH is not authorized to indemnify a third party. Based on this, any indemnification provision in a vendor’s T&C should be revised as follows:

INSERT VENDOR NAME and RCUH acknowledge and agree that RCUH, as an agency of the State of Hawai‘i, is not authorized to indemnify INSERT VENDOR NAME in any way, including, without limitation, against any claims for bodily injury, wrongful death, and/or property damages by any persons. Notwithstanding anything to the contrary contained in this Agreement or INSERT TITLE OF DOCUMENT, RCUH shall have no contractual duty to indemnify, defend, or hold harmless INSERT VENDOR NAME or any other persons under any circumstances arising out of or related to this Agreement or INSERT TITLE OF DOCUMENT. In each instance in this Agreement or INSERT TITLE OF DOCUMENT, where RCUH is obligated to indemnify, defend, or hold harmless INSERT VENDOR NAME or any other persons, such obligations shall

be deemed to be null and void and of no effect, and such contrary indemnity, defense, and/or hold harmless obligations and provisions shall be deemed to be superseded by this provision, and of no force or effect.

If the above language is unacceptable to the vendor, the alternative is to have the vendor's T&C remain silent on the matter. If the vendor insists on keeping its indemnification provision, RCUH Procurement should be consulted. If the vendor is a federal or county agency, approval by the Governor of the state of Hawai'i may allow RCUH to accept a vendor's indemnification clause. In this situation, please consult with RCUH Procurement.

- C. Dispute Resolution** – Binding arbitration is a method to resolve a dispute arising out of a transaction. RCUH cannot enter into binding arbitration, and the preference is to resolve disputes through mediation and/or through litigation in the state of Hawai'i judicial system.
- D. Governing Law** – The laws of the State of Hawai'i should govern all transactions and any resulting contractual disputes. If a vendor is unwilling to accept State of Hawai'i law to govern the transaction, the alternative is for both parties to remain silent on the matter. If the vendor insists on the law of another state to govern the transaction, the Principal Investigator (PI) shall bear the risk and responsibility of any associated costs.
- E. Jurisdiction/Venue** – Any contract dispute should be mediated or litigated in the State of Hawai'i judicial system. If a vendor is unwilling to accept mediation or litigation in the state of Hawai'i, the alternative is for both parties to remain silent on the matter. If the vendor insists on the jurisdiction or venue of another state, the PI shall bear the risk and responsibility of any costs associated with dispute resolution occurring outside the state of Hawai'i.
- F. Intellectual Property (IP)** – The University of Hawai'i, Office of Technology Transfer and Economic Development (OTTED) should be consulted on all IP provisions that deviate from the pre-approved language in any RCUH standard template.
- G. Export Controls** – The U.S. government controls the export of certain strategically important information, technologies, and commodities (e.g., goods, items, equipment, data, etc.) as a means to protect national security interests and foreign policy objectives. The University of Hawai'i and RCUH are subject to U.S. export control laws and regulations. If any information, technologies, and commodities will be transferred outside of the U.S. or to a foreign national inside the U.S., or if there is an export control provision in a vendor's contract with RCUH, the UH Office of Export Controls should be consulted prior to the transaction or contract execution.
- H. Late Fees/Interest Rates** – Late payment fees or interest rates charged on any past-due amounts for RCUH procurement transactions should not exceed the maximum allowable rate prescribed in Hawaii Revised Statutes (HRS) § 103-10. The maximum interest rate allowed by State law for past-due amounts remaining unpaid after 30 days is equal to the prime rate for each calendar quarter plus 2 percent. The interest rate is adjusted quarterly using the prime rate as posted in the *Wall Street Journal* on the first business day of the month preceding the calendar quarter. The PI shall bear

the interest cost or other charges (e.g., service charge, collection costs, court costs, attorneys' fees) for any past-due amounts.

- I. **Limitation of Liability** – A vendor's liability to a third party for damages or other losses arising out of an agreement or contract with a vendor should not be limited such that RCUH would be liable for damages or losses (resulting from the vendor's conduct or actions) exceeding the stated limited amount.

IV. Relevant Documents

[HRS § 103-10](#)

[Attachment 8a Agreement for Services \(UH\)](#)

[Attachment 8b Agreement for Services \(Direct Projects\)](#)

[Attachment 31 General Terms and Conditions Applicable to All Purchase Orders](#)

[Attachment 32a Terms and Conditions Applicable to Contracts and Purchase Orders \(Under Federal Grants\)](#)

[Attachment 32b Federal Provisions – Government Subcontract Provisions Incorporated In All Subcontracts/Purchase Orders \(Under Federal Prime Contracts\)](#)

[Attachment 32c Federal Provisions Applicable When Subcontractor \(Commercial Entity\) Is In Possession of Government Property – Government Subcontract Provisions Incorporated In All Subcontracts/Purchase Orders \(Under Cost-Type Prime Cost Reimbursable Contracts\)](#)

[Attachment 32d Federal Provisions Applicable When Subcontractor \(Educational or Nonprofit Organization\) Is In Possession of Government Property – Government Subcontract Provisions Incorporated In All Subcontracts/Purchase Orders \(Under Cost-Type Prime Cost Reimbursable Contracts\)](#)

[Policy 2.201 Purchase Orders](#)

[Policy 2.204 Services Agreements](#)

[Policy 2.209 Construction Contracts](#)

[Policy 2.210 Professional Services Contracts](#)

[Policy 2.211 Leases](#)

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