

## 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 RCUH agreement (e.g., Agreement for Services, Construction Contract, etc.). Certain vendors require the use of their own contracts/T&C (i.e., non-standard T&C) to either solely govern the transaction or in conjunction with RCUH's standard T&C; this is acceptable, provided the non-standard T&C are reviewed and acceptable pursuant to this policy. Before entering into a transaction with a vendor, carefully review the non-standard T&C and seek to amend unfavorable clauses. If Principal Investigators (PIs) have any concerns or questions, they should consult with their Fiscal Administrator (FA), who may reach out to RCUH Procurement for assistance.

An Employee-Independent Contractor (EIC) classification is required before the T&Cs is executed, if services are being procured from an individual, sole proprietor, or single member LLC; refer to Policy 3.225 RCUH Employee-Independent Contractor Review.

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

### II. Responsibilities

#### **A. Principal Investigator**

Examine non-standard T&C applicable to a procurement transaction and work with the FA on amending unfavorable terms.

#### **B. Fiscal Administrator**

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

## C. RCUH

Provide support and assistance to the Project and FA in reviewing and negotiating the non-standard T&C governing a transaction. Review and approve all non-standard T&C \$25,000 and above, and transactions under \$25,000 if required by this policy.

### 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.

#### A. Terms and Conditions (\$25,000 and above)

1. Due to the fact that T&C give rise to contractual legal obligations of the parties, before entering into a transaction with a vendor, Pls must carefully review any non-standard T&C and consult with their FA or RCUH Procurement if they have concerns. Regardless of the dollar amount, Projects are always required to review non-standard T&C, and comply with any related procurement and/or UH requirements that may arise from the T&C (for both standard and non-standard T&C). RCUH will also review the T&C if the purchase is \$25,000 and above. The following is a list of some of the common differences between RCUH's standard T&C and a vendor's non-standard T&C, which may be addressed:

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 “buyer’s destination” (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 assumes responsibility and risk for the goods once it leaves the seller's premises; that is, the Project is responsible for any loss that may occur.

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. As an agency of the State of Hawai'i, RCUH is not authorized to indemnify any third party, including vendors.

- c. **Dispute Resolution** – Binding arbitration is a method to resolve a dispute arising out of a transaction. As an agency of the State of Hawai'i, RCUH is not authorized to 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, and it is approved by the PI, the Project shall bear the risk and responsibility of any associated legal/dispute costs.
- e. **Jurisdiction/Venue** – Any contract dispute should be mediated or litigated in the State of Hawai'i. 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, and it is approved by the PI, the Project shall bear the risk and responsibility of any costs associated with dispute resolution occurring outside the State of Hawai'i.
- f. **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 Project shall bear the interest cost or other charges (e.g., service charge, collection costs, court costs, attorneys' fees) for any past-due amounts.
- g. **Limitation of Liability** – Limitations on a vendor's liability for damages or other losses should not be limited such that RCUH would be liable for damages or losses exceeding the stated limited amount, or such that a vendor's indemnification obligations are unacceptably limited. If this provision is retained, RCUH recommends that any limitation on a vendor's liability not apply to damages resulting from the vendor's negligence or willful misconduct.
- h. **Term** – The term/duration should have a specific start and end date, and automatic renewals (i.e., evergreen clauses) should be avoided as much as possible. The term must be within the project account period.
- i. **Confidentiality** – State agencies such as RCUH and UH are subject to applicable public disclosure laws, primarily HRS Chapter 92F, and cannot guarantee that any information designated by the vendor as confidential, will

be kept confidential in all situations. RCUH/UH may be required under such laws to publicly disclose such information. RCUH/UH can notify vendors prior to releasing information, but cannot be required to obtain consent.

- j. **Attorneys' Fees and Costs of Third-Parties** – Provisions that require the non-prevailing party in a dispute or legal action to pay the other party's attorneys' fees and costs should not be accepted, as it is in the nature of an indemnity obligation. The provision may be revised to require that each party bear its own attorneys' fees and costs, or that the payment be limited to what is allowable under Hawaii law.
  - k. **Non-Compete** – RCUH cannot guarantee that it will abide by any non-compete requirements, as many T&C are executed by different projects. Such clauses should either be removed or, as an alternative, limited to the specific project/school executing the T&C. The project/school shall then be responsible for ensuring the requirements are followed.
  - l. **Warranties and Guaranties** – RCUH should not grant or provide warranties or guaranties to others as they are in the nature of an indemnity and hold harmless obligation. RCUH does not recommend using the terms "warrant" or "guarantee" in reference to any affirmative obligations.
2. The appropriate UH office (or RCUH Project Administration (for Direct Projects)) may also need to be consulted for the following **issues/terms**:
- a. **Intellectual Property (IP)** – The UH Office of Innovation and Commercialization (OIC) should be consulted on all IP provisions that deviate from the pre-approved language in any RCUH standard template, or if the provision grants the vendor any rights (e.g., license, copyright, etc.). Direct Projects should contact RCUH Project Administration.
  - b. **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. UH and RCUH are subject to U.S. export control laws and regulations. The UH Office of Export Controls (for UH projects) or RCUH Project Administration (for Direct Projects) should be consulted prior to the transaction or contract execution if: (i) any information, technologies, and commodities will be transferred outside of the U.S. or to a foreign national inside the U.S., or (ii) there is an export control provision in a vendor's contract with RCUH, or (iii) the items being purchased fall on the [Commerce Control List](#), or [United States Munitions List](#), and/or are categorized as potentially highly controlled products or (iv) the vendor is a foreign entity or individual, in which case OEC will perform a Restricted Party Screening. Refer to [University of Hawaii Research Compliance](#) for more information.

### **Potentially Highly Controlled Products**

Below is a list of items, materials, and software (collectively, “products”) that may be subject to the International Traffic in Arms Regulations (“ITAR”) and thus highly export controlled. If purchasing or receiving any product that falls within one of the product groups listed below, Projects must ascertain export control classification information from the vendor prior to purchasing and receiving the product.

- Military aircraft (including surveillance, aerial mapping);
  - Inertial navigation systems, inertial measurement units (IMUs), Altitude and Heading Reference Systems (AHRS);
  - Unmanned aerial vehicles (UAVs /drones);
  - Ground effect machines
  - Electronic intelligence, surveillance, or monitoring systems (and systems to counteract these)
  - Infrared [IR] sensors, focal plane arrays
  - Image intensification / image intensifiers
  - Thermal Imaging cameras, night sighting
  - Expensive Global Positioning Systems (GPS)
  - Protective personnel equipment (including body armor, radar/infrared [IR]-resistant clothing)
  - Weapons: side-arms, shotguns, silencers, guns, flame throwers, ammunition
  - Missiles, rockets, launch vehicles
  - Advanced composite ablative materials
  - Bombs, mines: equipment for detecting/detonating
  - Explosives, propellants, incendiary agents, energetic materials
  - Amphibious vehicles
  - Military electronics (including underwater sound equipment, radar, military computers)
  - Carbon/carbon billets and preforms with 3+D reinforcement
  - Carbon/carbon and metal matrix composites
  - Chemical agents (nerve agents, vesicant agents, incapacitating agents) and their precursors; biological agents; tear gases, defoliants; equipment to handle or protect against any of these
  - Spacecraft, including CubeSats and other satellites
  - Nuclear weapons
  - Military radiation detection/measurement
  - Directed energy weapons (laser, particle beam, radio)
  - Submersible vessels (manned or unmanned, tethered or untethered)
- c. **Data** – For all purchases involving software or services, where there is any collection, management, sharing, exchange, use, and/or release of protected data (i.e., non-public data), review by the UH Data Governance Office is required. Additional information and the Data Governance Process (DGP) forms are available at: [Data Governance Process \(DGP\) | UH Institutional Data Governance \(hawaii.edu\)](#). Direct Projects should contact RCUH Project Administration.

- d. **Hardware/Software Purchases (UH projects only)** – Approval by the UH Office of the Vice President for Information Technology and/or Chief Information Officer (OVPIT/CIO), is required if electronic equipment, hardware, software, or related services are being purchased, and the total cost is \$25,000 and above or it will be connected/integrated into the UH IT infrastructure (any amount). Additional information and the OVPIT/CIO approval request forms are available at: [Support Tools | Information Technology Services \(hawaii.edu\)](#) (select “Request OVPIT approval for IT procurement”).
- e. **Publicity** – If a vendor will be using the UH name or logo, and the clause cannot be removed, the UH Office of External Affairs and University Relations should be consulted. Direct Projects should contact RCUH Project Administration regarding the RCUH name or logo.

## B. Terms and Conditions (below \$25,000)

1. Due to the fact that T&C give rise to contractual legal obligations of the parties, before entering into a transaction with a vendor, PIs must carefully review any non-standard T&C and consult with their FA if they have concerns. Prior to making any revisions, PIs and FAs may search for a vendor on the Financial Portal (under Miscellaneous, Search Vendors). If a vendor record is found, you may contact RCUH Procurement to check if RCUH has previously revised T&C or has executed a master agreement with the vendor. If there is anything on file, RCUH Procurement can assist with the T&C.

For both standard and non-standard T&C related to purchases below \$25,000, the Fiscal Administrator is authorized to execute the T&C, subject to the following limitations:

- a. All T&C related to construction, professional services (e.g., architectural design, legal), leases, credit applications, foreign purchases, and high-risk/dangerous activities (e.g., marine/aircraft/ground transportation services, potentially hazardous materials, etc.), must be reviewed and executed by RCUH Procurement. When emailing RCUH regarding these T&C, please include the vendor’s name, and school/department name in the subject line of your email.
- b. The FA is authorized to review and sign T&C *provided* there are no provisions that would require RCUH to (i) indemnify vendors or third-parties, (ii) submit to binding arbitration, or (iii) pay attorneys’ fees and costs of third-parties. FAs are encouraged to review for the other terms listed in Section III.A.1., above, but revisions are not required, as long as the PI authorizes acceptance of the other terms.

If the above indemnification, binding arbitration, and/or attorneys’ fees clauses are in the T&C, the FA may “line out” the clauses and have the vendor, PI, and FA initial the changes and sign the T&C. If this is not acceptable to the vendor, the FA should contact RCUH Procurement for assistance.

- c. The party/customer/buyer name on the T&C should be “Research Corporation of the University of Hawaii (for the benefit of the [insert UH/project name])”. The FA should sign for RCUH as the contracting party, and the PI should sign as “Recommended by: \_\_\_\_\_”. The FA’s and PI’s signatures indicate that the Project is accepting responsibility for all clauses in the T&C.
- d. If Federal funds are being used, and the T&C specifically prohibit or exclude the inclusion of any other terms for the purchase, a reference to the applicable Attachment 32a/b/c/d should be included in the T&C.
- e. Projects are responsible for complying with all applicable requirements noted in Section III.A.2., above (intellectual property, export controls, data, hardware/software, and publicity).

#### **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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