

**HONOLULU AUTHORITY FOR RAPID TRANSPORTATION
GENERAL TERMS AND CONDITIONS
FOR PROFESSIONAL SERVICES**

SECTION 1 - DEFINITIONS; GENERAL PROVISIONS

1.1 DEFINITIONS. Terms as used in this solicitation document and the Contract, unless the context requires otherwise, shall have the following meaning:

“Agreement” means the Contract.

“Airport Alignment” means the approximately twenty (20) mile minimum operable segment of the Locally Preferred Alternative identified by Honolulu City Council Resolution No. 08-261.

“Amendment” means modification.

“C.F.R.” means the Code of Federal Regulations

"Change Order" means an amendment or modification of the Contract signed by the Contracting Officer or his/her authorized designee, directing the Contractor to make changes with or without the consent of the Contractor. [HRS 103D-104] [HAR 3-125-2]

"Chief Procurement Officer" means and refers to the HART Executive Director and CEO or designee.

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

"Contract" means the written agreement between HART and successful Contractor.

“Contractor” or “consultant” means the person having a contract with HART.

"Day" means calendar day unless otherwise specified.

“Design and Plans” means any and all design, plans, construction drawings, specifications, cost estimates, work schedules, proposals, studies, reports and other items.

“Designee” means a person appointed by the Director, the Contracting Officer, the Chief Procurement Officer, or the Officer-in-Charge or any other authorized person to act on its behalf with delegated authority.

“Director” means the Honolulu Authority Rapid Transportation Executive Director and CEO or his delegated designee.

“FTA” means the Federal Transit Administration, United States Department of Transportation. The Federal Transit Administration is the current designation for the former Urban Mass Transportation Administration. Any reference in any law, map, regulation, document, paper or other record of the United States to the Urban Mass Transportation Administration or its acronym UMTA is deemed a reference to the Federal Transit Administration.

“Federal Government” means the United States of America any executive department or agency thereof.

“Full Funding and Grant Agreement” (“FFGA”) means the designated means for the FTA to provide New Starts funds to projects with a Federal share of \$25 million or more. An FFGA establishes the terms and conditions for Federal financial participation in a New Starts project; defines the project; sets the maximum amount of Federal New Starts funding for a project; covers the

period of time for completion of the project; and facilitates efficient management of the project in accordance with applicable Federal statutes, regulations, and policy.

“General Terms and Conditions” means these General Terms and Condition for Professional Services for the Honolulu Authority for Rapid Transportation.

“HAR” means the Hawaii Administrative Rules of the State of Hawaii, as amended.

“HART” means the Honolulu Authority for Rapid Transportation.

"HRS" means the Hawaii Revised Statutes of the State of Hawaii, as amended.

“Milestone” means a defined step toward the completion of Work in the Schedule of Milestones.

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

"Notice to proceed" or “NTP” means the written document indicating the official commencement date of the performance under the Contract.

"Officer-in-Charge" means the Executive Director or CEO of HART or his delegated designee.

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

“PMOC” means the FTA’s Project Management Oversight Contractor.

“PMSC” means HART’s Program Management Services consultant or any successor entity.

"Project" means the Work to be performed as set forth in the Contract, including furnishing all services, labor, goods, materials, supplies, equipment and other incidentals reasonably necessary for the successful completion of Work contemplated under the Agreement.

“Subcontractor” means any subcontractor who enters into an agreement with the Contractor or the Contractor’s subcontractors at any tier to perform a portion of the Work for the Contractor.

"State" means the State of Hawaii.

“U.S.C.” means the United States Code.

“U.S.DOT” means the United States Department of Transportation, including its operating administrations.

"Warranty" shall have the same meaning as Guarantee.

“Work” means all of the duties and services to be furnished and provided by the Contractor to fulfill the requirements of the Contract, including the services described in Exhibit 1 of the Special Provisions. In certain cases, the term is also used to mean the products of the Work.

“Work Breakdown Structure” (WBS) means the breakdown of Project elements into definable units in a logical manner to be able to review cost, schedule, and other Project information.

1.2 GENERAL PROVISIONS

1.2.1 Nondisclosure of designated trade secrets or proprietary information. A person shall request in writing nondisclosure of designated trade secrets or other proprietary data to be confidential. *Such data shall accompany the proposal, be clearly labeled as confidential, and shall be readily separable from other data in order to facilitate eventual public inspection of the nonconfidential portion of the data.* [3-122-46, HAR]

1.2.2 Independent price determination. By submitting an offer or price, the person certifies that the price submitted for the contract was independently arrived at without collusion. [3-122-192, HAR].

1.2.3 No reimbursement. HART shall not provide any reimbursement for the cost of developing or presenting proposals in response to the request for proposal.

1.2.4 Cancellation of solicitation. Solicitations may be canceled in whole or in part when in the best interest of the agency. [3-122-95, HAR]

1.2.5 Determination of contractual terms and conditions. The Chief Procurement Officer is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts, provided such provisions, terms, and conditions are not contrary to statutory or Chapter 91, HRS, administrative rule requirements governing the procurement. [3-122-7, HAR]

1.2.6 Any notice required or permitted by the provisions hereunder or under the contract to be given by a party to any other party, shall be written and either shall be delivered personally or mailed postage prepaid by certified mail, return receipt requested, to each other party at the address and to the person designated by each party in the contract. No other method of notice shall be effective. If notice is given by mail, it shall be effective one business day following the date it is mailed. If notice is hand delivered, it shall be effective upon receipt. Any change of address of either of the parties shall be effective upon receipt of written notice of such change by the other party.

1.2.7 If any term, condition, provision, covenant or agreement of the terms hereunder or under the contract or the application thereof to any person or circumstance is rendered or held invalid, illegal or unenforceable under the laws of the State of Hawaii or the United States of America, such part of the terms hereunder or under the contract as shall have been rendered or held to be invalid, illegal or unenforceable shall not affect the validity of the terms hereunder or under the contract as a whole or the remainder of the terms hereunder or under the contract and the application of such part to other persons and circumstances, but shall be given effect and enforced without such part to the greatest extent permitted by applicable law.

1.2.8 The provisions of this document and the contract shall be interpreted in accordance with the laws of the State of Hawaii as those laws are construed and amended from time to time.

1.2.9 The titles of headings of sections, subsections and paragraphs are intended for convenience of reference and shall not be considered as having any bearing on their interpretation.

1.2.10 All words used in the singular shall extend to and include the plural. All words used in the plural shall extend to and include the singular. All words used in any gender shall extend to and include all genders.

1.2.11 Cooperation. The Contractor shall cooperate and coordinate with other contractors who may be employed by HART on the same or related projects of HART, and to the extent possible, shall avoid interference therewith, and shall cooperate with the other contractors so as to avoid unnecessary delay or hindrance in the performance of their respective contracts. Any difference or conflict which may arise between the Contractor and the other contractors of HART shall be resolved by the Officer-in-Charge, whose decision shall be final and binding.

1.2.12 Confidentiality. When dealing with the news media, the Contractor is expected to be circumspect and to treat all matters falling within the scope of the contract with the utmost confidentiality. The Contractor shall consult with and/or obtain the consent of the Officer-in-Charge prior to having conversations with or giving public interviews to the news media or any other members of the public.

1.2.13 Designation of Project Managers. The Officer-in-Charge will designate a HART Project Manager for this contract. The Contractor shall, subject to written approval from HART, designate a Project Manager, who shall maintain close and frequent communication with HART's Project Manager and be authorized to act on behalf of the Contractor. Communication regarding the Project should be between the parties' designated Project Managers, except as otherwise required in the contract.

SECTION 2 - HAWAII ADMINISTRATIVE RULES (HAR)

2.1 PROCUREMENT CODE. The Public Procurement Code (HRS 103D) and the Hawaii Administrative Rules, Title 3, Department of Accounting and General Services, State of Hawaii (HAR), govern the procurement of any goods, services, or construction and are by reference incorporated herein and made a part of the request for proposals or qualifications and resulting contracts.

Sections of the HAR are provided in whole or in part in these general terms and conditions for convenience only and the applicable section numbers are indicated in brackets. These provisions are not intended to relieve the Contractor from the responsibility of familiarizing themselves with the HAR relating to this contract.

SECTION 3 - AWARD AND EXECUTION OF CONTRACT

3.1 AWARD OF CONTRACT. The Contractor, upon being selected to render the services for the Project, will be notified of its commission by the Officer-in-Charge. Said notice shall not be construed to be authorization to proceed with the performance of services under the contract.

3.2 EXECUTION OF CONTRACT

3.2.1 If the Contractor is an individual, or partnership, the Contractor shall cause the contract to be signed before a notary public duly acknowledged. If the Contractor is a corporation, or if the joint venture is made up of two or more corporations, the Contractor shall cause the contract to be signed and sealed before a notary public who shall acknowledge the person(s) signing, their titles, and shall affix thereto their corporate resolution, or other instrument vesting such officer with authority to sign the contract on their behalf.

3.2.2 If performance and payment bonds are required in the solicitation or contract, such documents shall be executed in the same manner above.

3.2.3 The signed contract, bonds, if any bonds are required, shall be returned together with evidence of insurance coverages as may be required, to the Officer-in-Charge for further processing, within ten days after notification of award.

3.3 CONTRACT NOT BINDING UNLESS PROPERLY EXECUTED AND APPROPRIATION AVAILABLE. The contract shall not be binding or of any force and effect without an endorsement by the Chief Financial Officer that there is an appropriation or balance of an appropriation over and above all outstanding contracts sufficient to cover the amount required by the contract.

3.3.1 Exceptions to the certification of funds required above are:

1. If a contract is a multi-term contract pursuant to section 3-122-149, HAR, the Chief Financial Officer shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts that is sufficient to cover the amount required to be paid under the contract during the current fiscal year or remaining portion of the current fiscal year of the first term of the multi-term contract. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore from sources which are identified in writing;
2. If the contract is one under which the total amount to be paid to the Contractor cannot be accurately estimated at the time the contract is to be awarded;
3. If there is no direct expenditure of public funds from HART to the Contractor; and
4. Certification of a portion of the total funds required for a contract may be permitted when an immediate solicitation will result in significantly more favorable contract terms and conditions to HART than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the Chief Financial Officer states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues. All contracts partially funded shall be enforceable only to the extent to which funds have been certified as available.

3.3.2 Contracts involving federal funds. Unless otherwise specified in the solicitation, for any contract supplemented by federal funds or receiving one hundred per cent federal funds, payment shall be made upon receipt of federal funds. The obligation of HART shall extend only to that portion of funds certified to and payable out of City funds. [3-122-102; 3-122-103, HAR]

3.4 COMMENCEMENT OF WORK. Work shall not commence until a contract has been executed and availability of funds certified by the Chief Procurement Officer, and the Officer-in-Charge has issued a written notice to proceed or the executed contract specifies the official commencement for services to begin.

SECTION 4 - LEGAL RELATIONS AND RESPONSIBILITY

4.1 INDEPENDENT Contractor. The Contractor shall perform the work as an independent Contractor and shall indemnify and hold harmless the City, HART, all of their officers, employees or agents, from any and all deaths, injuries, losses and damages to persons or property, and any and all claims, demands, suits, action and liability therefor including reasonable attorney fees and cost of defense, caused by error, omissions or negligence in the performance of the contract by the Contractor or the Contractor's subcontractors, agents and employees and this requirement shall survive the termination of the contract.

The contractor is an independent Contractor and shall not be deemed to be an agent, servant, or employee of HART. The Contract shall not be construed to create a partnership or joint venture between HART and the contractor.

4.1.1 Laws, regulations. The Contractor shall keep itself fully informed of all laws, ordinances, codes, rules and regulations, governmental general and development plans, setback limitations, rights-of-way, and all changes thereto, which in any manner affect the contract and the performance thereof. The Contractor shall comply with all such laws, ordinances, codes, rules and regulations, governmental general and development plans, setback limitations, rights-of-way, including the giving of all notices necessary and incident to the proper and lawful prosecution of the work, and all changes thereto. If any discrepancy or inconsistency is discovered between the contract and any such law, ordinance, code, rule, regulation, design standard, design criterion, governmental general and development plans, setback limitation, rights-of-way, the Contractor shall forthwith report the same in writing to the Officer-in-Charge.

4.2 COPYRIGHT OR PATENT.

4.2.1 If the Contractor is required or desires to use any design, device, material or process covered by letters of patent or copyright, the right for such use shall be procured by the Contractor from the patentee or owner. The Contractor shall indemnify and hold harmless HART, the City, and its departments, from any and all claims for infringement by reason of the use of any such patented design, device, material or process, or any trademark or copyright in connection with the work to be performed under the contract, and shall indemnify HART, the City, and all of their officers, employees or agents, for any costs, expenses and damages which it may be obliged to pay by reason of any such infringement at any time during the prosecution or after the completion of the work.

4.2.2 HART shall have an unrestricted, royalty-free, nonexclusive and irrevocable license to reproduce, publish, translate or otherwise use and to authorize others to publish and use all materials obtained or produced in connection with the work hereunder which may be copyrighted by the Contractor prior to the completion of the contract.

4.3 INSURANCE.

4.3.1 Unless otherwise specified in the contract documents, the Contractor shall procure or cause to be procured and maintain (as provided herein), at no cost to HART, during the life of this contract and any extensions thereof, all insurance to cover the Contractor's Contractor operations under this contract, that may be required under the laws, ordinances or regulations of any governmental authority, including but not limited to the coverages below. The Contractor shall either include all tiers of subcontractors, if any, under the policies required under paragraphs 2 through 4, to the extent permitted by law, or shall require all subcontractors to maintain coverages described in paragraphs 1 through 4.

1. Workers Compensation and Employers Liability Insurance. The Contractor shall maintain workers compensation and employers liability insurance. Workers compensation coverage shall be in accordance with State statutes. Employers liability coverage shall provide limits of not less than \$100,000 each accident for bodily injury by accident or \$100,000 each employee, \$100,000 aggregate, for bodily injury by disease.
2. Commercial General and Umbrella Liability Insurance. The Contractor shall maintain commercial general liability (CGL) and if necessary, commercial umbrella insurance with a limit of not less than \$1,000,000 each occurrence, and general aggregate. CGL insurance shall be written on ISO occurrence form, CG 00 01 (or a substitute form providing equivalent coverage), and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). HART and the City shall be included as additional insureds under the CGL, using ISO additional insured endorsement CG 20 10 (or equivalent); such additional insured provisions shall also apply under the commercial umbrella, if any. The policy(ies) shall contain a waiver of subrogation in favor of HART and the City.
3. Business Automobile and Umbrella Liability Insurance. The Contractor shall maintain business auto liability (including no-fault coverage) and if necessary, commercial umbrella liability insurance with a limit of not less than \$1,000,000 each accident. Such insurance shall cover liability arising out of any auto (including owned, hired, and non-owned autos) used by the Contractor in the performance of this contract. Business auto coverages shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage, subject to policy terms and conditions.
4. Professional Liability Insurance. The Contractor shall maintain professional liability insurance with limits of not less than \$1,000,000 per claim/annual aggregate, covering the Contractor and the Contractor's employees or agents for liability arising out negligent acts, errors or omissions in the performance of professional services under the contract. Such insurance shall remain in full force and effect continuously for the period of design and construction of the Work, and for a period of three years following substantial completion of construction, provided that such coverage is reasonably available at commercially affordable premiums, as mutually determined and agreed.

4.3.2 The insurance specified above shall:

1. Provide that insurance specified in Sections 4.3.1(2) and 4.3.1(3)3 above is primary for claims arising from the Contractor's performance of services or operation of automobiles under this Agreement and that insurance (or self-insurance) carried by HART and/or the City shall be excess and non-contributing to Contractor's insurance;
2. Contain a standard Cross Liability coverage providing that the insurance applies separately to each insured, applicable to policies specified in 4.3.1.2 and 4.3.1.3 above;
3. Not be terminated, canceled, not renewed, or substantially changed without thirty (30) days prior written notice to HART, except for cancellation due to nonpayment of premium;
4. Except for Professional Liability insurance required in 4.3.1.4 above, be written on an "Occurrence" form of policy, unless otherwise specifically approved by HART;
5. Be provided by insurers authorized to provide insurance in the State of Hawai'i and with a current Best's rating of not less than A-7 or otherwise approved by HART.

4.3.3 Certificate of Insurance:

1. The Contractor will provide and thereafter maintain current and renewal certificates of insurance, prepared by a duly authorized agent, evidencing the insurance in effect at all times during the term of this contract as required herein to HART. In the event of a claim HART may request, and Contractor shall then provide, a copy of the insurance policies.
2. Certificates shall clearly identify the project by name and/or contract number.
3. Certificates shall show the Certificate Holder as the Honolulu Authority for Rapid Transportation, and be delivered to the Executive Director and CEO, 1099 Alakea Street, Suite 1700, Honolulu, Hawai'i 96813. Certificates shall name the Honolulu Authority for Rapid Transportation and the City and County of Honolulu as additional insureds as to General Liability.

SECTION 5 – MODIFICATIONS

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

5.1.1 Change order.

(a) The Officer-in-Charge, with the approval of the Director, may at any time, and without notice to any surety, unilaterally, order of the Contractor:

1. Changes in the work within the scope of the Contract; and
2. Changes in the time of performance of the Contract that do not alter the scope of the Contract work.

(b) If any change order increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under the Contract, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in Contract price made pursuant to this clause shall be determined, where applicable, in accordance with subsection 5.2, Price adjustment, or as negotiated. Failure of the parties to agree to an adjustment shall not excuse the Contractor from proceeding with the Contract as changed, provided that the Officer-in-Charge promptly and duly makes the provisional adjustments in payment or time for the direct costs of the work as HART 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 written notice requirements for disputes and claims established by the Contract or these provisions.

(c) ***Within thirty (30) days*** after receipt of a written change order or directive, unless the response period is extended by the Officer-in-Charge in writing, the Contractor shall respond with a claim for an adjustment. The requirement for a timely written response cannot be waived and shall be a condition precedent to the assertion of a claim.

(d) Claim barred after final payment. No claim by the Contractor for an adjustment hereunder shall be allowed if written response is not given prior to final payment under the Contract.

(e) Claims not barred. In the absence of a change order, nothing in this subsection shall be deemed to restrict the Contractor's right to pursue a claim under the Contract or for breach of contract. [3-125-2, HAR]

5.1.2 Modifications.

(a) By written order, the Officer-in-Charge, with the approval of the Chief Procurement Officer, may at any time, and without notice to any surety, subject to mutual agreement of the parties to the Contract and all appropriate adjustments, make modifications within the general scope of the Contract to include any one or more of the following:

1. Drawings, designs, or specifications, for the goods to be furnished;
2. Method of shipment or packing;
3. Place of delivery;

4. Description of services to be performed;
5. Time of performance (i.e., hours of the day, days of the week, etc.);
6. Place of performance of the services; or
7. Other provisions of the Contract accomplished by mutual action of the parties to the Contract.

(b) If any modification increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under the Contract, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in Contract price made pursuant to this clause shall be determined, where applicable, in accordance with subsection 5.2, Price adjustment or as negotiated.

(c) Claim barred after final payment. No claim by the Contractor for an adjustment hereunder shall be allowed if written agreement of modification is not made prior to final payment under the Contract.

(d) Claims not barred. In the absence of a Contract modification, nothing in this subsection shall restrict the Contractor's right to pursue a claim arising under the Contract or for breach of contract. [3-125-3, HAR]

5.1.3 Variations in definite quantities. Upon the agreement of the parties, the quantity of goods or services or both specified in the Contract may be increased by a maximum of ten percent provided the unit prices will remain the same except for any price adjustments otherwise applicable and the Officer-in-Charge makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract. [3-125-8, HAR]

5.1.4 Order to stop work.

(a) The Officer-in-Charge may, with the approval of the Chief Procurement Officer, by written order to the Contractor, at any time, and without notice to any surety, require the Contractor to stop all or any part of the work called for by the Contract. ***This order shall be for a specified period not exceeding sixty days*** after the order is delivered to the Contractor, unless the parties agree to any further period. Any order shall be identified specifically as a stop work order issued pursuant to this subsection. Upon receipt of an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Officer-in-Charge, with the approval of the Chief Procurement Officer

1. Cancel the stop work order, or:

2. Terminate the work covered by the order as provided in subsection 9.2, Termination for default, or subsection 9.3, Termination for convenience.

(b) Cancellation or expiration of the order. If a stop work order issued under this subsection is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or Contract price, or both, and the Contract shall be modified in writing accordingly, if:

1. The stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of the Contract; and
2. The Contractor asserts a claim for such an adjustment within thirty days after the end of the period of work stoppage; provided that, if the Officer-in-Charge decides that the facts justify such action, any claim asserted may be received and acted upon at any time prior to final payment under the Contract.

(c) Termination of stopped work. If a stop work order is not canceled and the work covered by the order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowable by adjustment or otherwise.

(d) Adjustment of price. Any adjustment in Contract price made pursuant to this clause shall be determined in accordance with subsection 5.2, Price adjustment. [3-125-6, HAR]

5.2 PRICE ADJUSTMENT.

(a) Any adjustment in Contract price pursuant to a clause in the Contract shall be made in one or more of the following ways:

1. By agreement on a fixed price adjustment before commencement of the pertinent performance;
2. By unit prices specified in the Contract or subsequently agreed upon before commencement of the pertinent performance;
3. By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the Contract or subsequently agreed upon before commencement of the pertinent performance;
4. In any other manner as the parties may mutually agree before commencement of the pertinent performance; or
5. In the absence of agreement between the parties, the provisions of section 103D-501(b)(5), HRS, shall apply.

(b) Submission of cost or pricing data. The Contractor shall be required to submit cost or pricing data if any adjustment in Contract price is subject to the provisions of section 103D-312, HRS. The submission of any cost or pricing data shall be made subject to the provisions of subchapter 15, chapter 3-122, Hawai'i Administrative Rules. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraph (a)(1) through (a)(4) above shall be issued within ten (10) days after agreement on the method of adjustment.

5.3 NOVATION OR CHANGE OF NAME

5.3.1 No assignment. No contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer

5.3.2 Recognition of a successor in interest; assignment. When in the best interest of HART, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and HART 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 HART; and
3. The transferor shall continue to furnish, and the transferee shall also furnish, all required bonds.

5.3.3 Change of name. When a Contractor requests to change the name in which it holds a contract with HART, the Director 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. [3-125-14, HAR]

5.4 CLAIMS BASED ON THE OFFICER-IN-CHARGE'S ACTIONS OR OMISSIONS.

(a) If any action or omission on the part of an Officer-in-Charge or designee of such officer, requiring performance changes within the scope of the Contract constitutes the basis for a claim by the Contractor for additional compensation, damages, or an extension of time for completion, the Contractor shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, the Contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

1. The Contractor shall have given written notice to the Officer-in-Charge;

- (A) **Prior to the commencement** of the work involved, if at that time the Contractor knows of the occurrence of the action or omission;
 - (B) **Within thirty days after** the Contractor knows of the occurrence of the action or omission, if the Contractor did not have knowledge prior to the commencement of the work; or
 - (C) Within further time as may be allowed by the Officer-in-Charge in writing.
2. This notice shall state that the Contractor regards the act or omission as a reason which may entitle the Contractor to additional compensation, damages, or an extension of time. The Officer-in-Charge or designee of such officer, upon receipt of the notice may rescind the action, remedy the omission, or take other steps as may be deemed advisable in the discretion of the Officer-in-Charge or designee of such officer;
 3. The notice required by paragraph (1) describes as clearly as practicable, at the time, the reasons why the Contractor believes that additional compensation, damages, or an extension of time may be remedies to which the Contractor is entitled; and
 4. The Contractor maintains and, upon request, makes available to the Officer-in-Charge within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with the changes.

(b) Nothing herein contained, however, shall excuse the Contractor from compliance with any rules of law precluding any City officers and any contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.

(c) Any adjustment in the Contract price made pursuant to this clause shall be determined in accordance with subsection 5.2, Price adjustment. [3-125-15, HAR]

SECTION 6 - PERFORMANCE OF CONTRACT

6.1 TIME. Time is of the essence of the Contract. Performance of the services under the Contract shall be commenced on the date designated in the notice to proceed or in the Contract and the services as required in the Contract shall be completed within the number of days or on the date specified.

6.2 DELAY. If any excusable delay occurs, it shall be dealt with in accordance with subsection 9.2.3, Excuse for nonperformance or delayed performance. No extension of time however, shall be granted unless the written application therefor stating in detail the cause or causes of delay is filed by the Contractor with the Officer-in-Charge **within fifteen days** after the commencement of the delay. No such extension shall be deemed a waiver of the right of the Officer-in-Charge to require the completion of services under the Contract within the time required herein as so extended by the specific terms of such extension or extensions, nor a waiver of right to terminate the Contract for any other or additional delay not covered by the specific terms of such extension or extensions. The number of days of each extension of time shall be determined by the Chief Procurement Officer upon the recommendation of the Officer-in-Charge.

6.3 EXTENSION OF TIME ON CONTRACTS. If a contract has exhausted its provision for extension(s) of time of performance, or if the contract does not include a provision for extension(s) of time of performance, the contract may be extended upon approval of the Chief Procurement Officer, provided:

1. The period of each extension is for one hundred eighty calendar days or less;
2. The Officer-in-Charge makes a written determination that it is not practical to award another contract at the time of the expiration of the contract for reasons to include but be limited to the following:
 - (A) A new contract cannot be executed by the time the contract expires; or
 - (B) The need for the good or service is short term;
3. All parties agree to the extension of time of performance; and
4. The price or conditions of the contract remain the same as the original contract, or as amended per the contract; or if not the same or as amended, they are fair and reasonable.
[3-122-3, HAR]

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

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

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

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

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

The Officer-in-Charge shall have access, at all reasonable times, to all notes, designs, drawings, tracings or other technical data pertaining to the services being performed under the Contract for

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

6.5 AUTHORITY OF THE OFFICER-IN-CHARGE AND CHIEF PROCUREMENT OFFICER. The decisions of the Officer-in-Charge shall be final and binding upon parties unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence, provided that decisions on questions or disputes relating to the acceptance of the services performed under the Contract, suspension or termination of the Contract, extension of time, reduction or increase in the compensation of the Contractor and payment shall become final and binding upon all parties only upon approval of the Chief Procurement Officer, and provided further that nothing herein shall be construed as making final and binding any decision of the Officer-in-Charge and/or Chief Procurement Officer on a question of law. Pending final decision of any dispute or question, the Contractor shall proceed diligently with the performance of services under the Contract in accordance with the decision of the Officer-in-Charge and/or Chief Procurement Officer.

6.6 LIQUIDATED DAMAGES. Liquidated damages shall not apply to this Agreement.

6.7 SUBCONTRACTING. The Contractor shall not subcontract all or any part of the services under the Contract without the prior written consent of the Officer-in-Charge. Any consent by the Officer-in-Charge to subcontract or otherwise dispose of any portion of the Contract shall not be construed to relieve the Contractor of any responsibility for the performance of the Contract.

6.8 SAFETY AND SECURITY CERTIFICATION.

(a) The purpose of HART's overall safety and security certification process is to ensure that:

1. The design, construction, fabrication, installation, testing, and commissioning of all safety- and security-certifiable elements (civil, structural, and systems) have been evaluated for conformance with the safety and security design criteria and specifications requirements and to verify their readiness for operational use; and
2. The rail system is operationally safe and secure for customers, employees, emergency responders and the general public.

(b) The objective is to achieve an acceptable level of risk through a systematic approach to safety hazard and security vulnerability management, design criteria adherence, specification and construction compliance, and testing and commissioning verification.

(c) The Contractor shall support HART in implementing HART's safety and security certification process. The Contractor's activities include, but are not limited to, the following:

1. Participate in safety and security committees and working groups established by HART to perform safety and security certification activities as requested;
2. Provide oversight of the Design-Bid-Build or Design-Build Contractor's Safety and Security verification process to review its conformance in accordance with the Construction Contract Documents; and
3. As required, submit supporting documents using HART's document management system for safety and security certification related activities.

6.9 FIELD SAFETY AND SECURITY

(a) The Contractor is responsible for initiating and maintaining a safety and health program on the oversight activities performed by the Contractor that complies with applicable local, state and federal occupational safety and health regulations, including but not limited to the Hawai'i Administrative Rules, Title 12, Department of Labor and Industrial Relations Subtitle 8, Division of Occupational Safety and Health Part 3, Construction Standards.

(b) The Contractor shall be familiar with the Honolulu Rail Transit Project Construction Safety and Security Plan (CSSP) current revision and comply with applicable sections, such as, but not limited to, visitor control, public access, first aid/emergency response, safe work practices, personal protective equipment and safety and security reporting requirements. All personnel who will be accessing field locations must attend the HART Safety and Environmental Orientation.

(c) The Contractor shall designate at least one person as the Safety and Security Representative (this may be a collateral duty position and/or prime sub-consultant designee). The Safety and Security Representative shall have completed the OSHA 10 Hour Construction Safety Outreach Program or equivalent.

(d) The Contractor shall ensure employees and subcontractors comply with applicable regulations and the Safety and Security Site Plan (SSSP) submitted by the Contractor for this Project.

(e) The Contractor shall submit a Safety and Security Plan (SSP), which shall address the work of the Contractor. This SSP must interface with the Contractor's overall safety and health program and be submitted to the HART Safety and Security Manager for review and acceptance within thirty (30) days of NTP. The SSP shall include, but not be limited to, the following elements:

1. Title, signature and phone number of the Plan Preparer (this person must be a qualified person), Company Officer and Safety and Security Representative (SSR);
2. Background information: Provide Contractor name, Contract name and number, description of work to be performed (with attention to field related work);
3. Responsibilities and Lines of Authority. Include a statement of the Contractor's ultimate

responsibility for the implementation of the SSP. Identification and accountability of subcontractors and personnel responsible for safety at all levels is required;

4. Safety Policy Statement detailing the Contractor's commitment to providing a safe and healthy workplace for all employees;
5. Training. Provide a statement requiring completion of the HART Safety and Environmental Orientation for all personnel prior to accessing field work locations;
6. List procedures for complying with applicable portions of the CSSP;
7. Emergency Notifications. Develop an emergency notification plan in conjunction with HART; and
8. Personal Protective Equipment (PPE). At a minimum, all personnel, including visitors, on work site locations associated with the Project shall wear the following PPE:
 - (A) Head protection complying with ANSI Z89.1-2009 and ANSI Z89.2-2009 shall be worn at all times when on the work site;
 - (B) High visibility, retro-reflective clothing (class 2 or 3) complying with ANSI/ISEA 107, 23 CFR Part 634, MUTCD 6E-3, and 29 CFR 1926.201(a) shall be worn at all times within the traffic work zone;
 - (C) Eye protection complying with ANSI Z87.1- 2003 shall be worn at all times when on the work site;
 - (D) Foot protection complying with ASTM F2413-05 or ANZI 241-1999 shall be worn at all times when on the work site. Work boots are the preferred type of protective footwear. No tennis-type shoes are permitted; and
 - (E) Hearing protection with a Noise Reduction Rating (NRR) appropriate for the exposure shall be worn by personnel exposed to noise levels in excess of the 29 CFR 1926.101 Table D-2 Permissible Exposure Limit (PEL). When in the field, personnel must have hearing protection readily available for use.

(f) The Contractor shall enforce the compliance of applicable regulations and the (SSP) amongst its employees and subcontractors.

(g) Notwithstanding the forgoing provisions of this Article 6.9, however, it is understood and agreed that the Contractor is responsible only for construction safety and security in relation to the Contractor's staff and property.

6.10 KEY PERSONNEL

(a) The key personnel are considered essential to the work being performed under this Agreement. The key personnel may not be changed without the consent of the Officer-in-Charge.

(b) Prior to removing, replacing, or diverting any of the specified key personnel, the Contractor shall seek HART's approval by notifying the Project Manager in writing. The Contractor shall submit information to support the proposed action to enable the Officer-in-Charge to evaluate the potential impact of the change on the Agreement. The Contractor shall not remove or replace key personnel under this Agreement until the Officer-in-Charge approves the change. The Officer-in-Charge shall not unreasonably withhold his/her consent to remove any key personnel, but subject to Section 6.10(d) below.

(c) The key personnel under this Agreement are those indicated in the Request For Qualifications.

(d) Should the Contractor's Construction Manager or Resident Engineers be replaced for any reason prior to the completion of the Agreement, upon department HART shall receive a credit to be applied against the Contractor's subsequent invoice(s) in the amount of \$250,000. In addition, each time any of the other key personnel are replaced for any reason prior to the completion of this Agreement, upon departure HART shall receive a credit to be applied against the Contractor's subsequent invoice(s) in the amount of \$100,000. The Contractor may request, in writing, that the Officer-in-Charge waive all or part of a reduction if extenuating circumstances exist. The Officer-in-Charge shall have unilateral discretion to waive all or part of a reduction.

SECTION 7 - SERVICES TO BE PERFORMED BY HART

7.1 COOPERATION BY HART. HART shall, without cost to the Contractor, through the Officer-in-Charge, cooperate fully with the Contractor and will promptly place at the disposal of the Contractor all available pertinent information which HART may have in its possession. The Officer-in-Charge will certify to the accuracy of certain information in writing whenever it is possible to do so. The Officer-in-Charge does not represent that other information not certified as accurate is so and takes no responsibility therefor, and the Contractor shall rely on such information at the Contractor's own risk.

SECTION 8 – COMPENSATION

8.1 COMPENSATION AND INVOICING

(a) The compensation of the Contractor shall be up to the amount stated in the Agreement and shall be made in accordance with the Contract Cost Estimate and invoicing/payment Schedule in Exhibit 2A and accompanying Schedule A (Cost Estimate Detail), Schedule B (Other Direct Cost Detail), and Schedule C (Approved Subcontractor List).

(b) HART reserves the right to direct removal from the Project of any Contractor or subcontractor employee for any reason and at any time.

(c) Reimbursement of Contractor Work should be invoiced to HART on a monthly basis and shall be accompanied by a schedule with the details identified in Exhibit 2B. The Contractor shall certify that the schedule includes only employees authorized by HART to charge the Project at the authorized rate(s) and that the information ties to the Contractor's general ledger. The invoice shall also be accompanied by a report of the work accomplished during the previous month and a list of major Work in progress.

(d) Reimbursement to the Contractor for subcontractor and Other Direct Costs (ODC) shall be made upon submission of Subcontractor and Expense Reimbursement Invoices, which shall include copies of pertinent vendor bills or invoices, except for items negotiated on a fixed price or lump sum basis in which case the Contractor shall certify that these items were used in the performance of the work during the invoice period.

(e) Final acceptance of the Work contracted for herein and payment therefore shall not excuse the Contractor from any liability for defects in performance of the Work which may subsequently appear.”

8.2 ACCEPTANCE AND FINAL PAYMENT. The Officer-in-Charge shall approve and accept completion of the Contract upon the satisfactory fulfillment of the terms of the Contract and receipt of a certificate from the State Director of Taxation and the Internal Revenue Service, as provided in section 103-53, HRS, relating to prerequisite for final settlement of contracts, provided that final payment will be made upon approval of the Chief Procurement Officer. The tax clearances required at final settlement of a contract shall be on an original certificate or certified copy and valid for a period of 6 months from the later date stamped on the form, provided that the Contractor does not delay in obtaining clearance from both agencies.

8.3.1 In the event equipment is provided under the Contract, which received prior approval from the Director, the Contractor shall also provide a written list of equipment installed or provided, listing the description, make, model, serial number, cost, and location of the equipment or room number in which the equipment is located. For purposes of this subsection, "equipment" means any item such as a water heater that can be removed with a hand tool, or like an air conditioner, is capable of being moved or transferred to another location and is accessible to tagging with an identification number.

8.3.2 Acceptance by the Contractor of the final payment shall constitute payment in full for all services performed under the Contract.

8.4 AUTHORITY TO WITHHOLD MONEY DUE OR PAYABLE. The Officer-in-Charge may withhold such amounts from the money due or to become payable under the Contract to the Contractor, or any assignee under subsection 5.3, Novation or change of name, as may be necessary to protect HART against liability or to satisfy the obligations of the Contractor to HART, State Department of Taxation, Internal Revenue Service, and to employees, subcontractors and material suppliers who have performed labor or furnished material and equipment under the Contract and may make such payments from such amounts as may be necessary to discharge such obligations and protect HART.

8.5 RETAINAGE. Retainage shall not apply to this Agreement.

8.6 PROMPT PAYMENT TO SUBCONTRACTORS.

- (a) Generally. Any money paid to a Contractor shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes on which the procurement agency has withheld payment.
- (b) Final Payment. Upon final payment to the Contractor, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract. The final payment request shall be properly documented as required under HAR § 3-125-23(4).
- (c) Penalties. The Contractor may be subject to a penalty of one and one-half percent (1-1/2%) per month on the outstanding amounts due that were not timely paid to the subcontractor under the following conditions. Where a subcontractor has provided evidence to the Contractor of satisfactorily completing all work under their subcontract and has provided a properly documented final payment request as described in paragraph (d), and:
1. 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; or
 2. The following has occurred:
 - (A) 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, and
 - (B) 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,then, all sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by HART to the Contractor and subsequently, upon receipt from HART, by the Contractor to the subcontractor within the applicable time periods specified in paragraph (b). The penalty may be withheld from future payment due to the Contractor, if the Contractor was the responsible party. If a Contractor has violated paragraph (b) three or more times within two years of the first violation, the Contractor shall be referred by HART to the Contractor's license board for action.
- (d) Properly documented final payment request from a subcontractor, as required by paragraph (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; and
 - (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
 3. The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied. HART shall return any final payment request that is defective to the Contractor within seven (7) days after receipt, with a statement identifying the defect.
- (e) 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 paragraph (c); provided that any such payments withheld shall be withheld by HART.

8.7 PAYMENT FOR REIMBURSABLE EXPENSES. Payment requests for all reimbursable expenses shall be accompanied and supported by receipted invoices for all charges. HART must approve of all reimbursable expenses in writing. Payment for reimbursable items shall be made for allowable costs in accordance with the Hawaii Administrative Rules, Title 3, Department of Accounting and General Services, Chapter 3-122, Subchapter 15, cost or pricing data, and Chapter 3-123, cost principles. Reimbursable amounts stated in the Contract shall not be exceeded without a Contract amendment. Any balance remaining from the reimbursable expense funds at the completion of the Agreement shall revert to HART.

SECTION 9 - TERMINATION OF CONTRACTS

9.1 RIGHT OF HART TO TERMINATE. HART shall have the right to suspend performance of the services under the Contract or terminate the Contract in whole or in part at any time by written notice to the Contractor. If the termination is for reasons other than default of the Contractor as provided in subsection 9.2, the Contractor shall be compensated in accordance with subsection 9.3, Termination for convenience.

9.2 TERMINATION FOR DEFAULT. If the Contractor refuses or fails to perform any of the provisions of the Contract with such diligence as will ensure its completion within the time specified in the Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of the Contract, the Officer-in-Charge may notify the Contractor in writing of the delay or nonperformance, and *if not cured in ten days* or any longer time specified in writing by the Officer-in-Charge, the Officer-in-Charge may, with the approval of the Chief Procurement Officer, terminate the Contractor's right to proceed with the Contract or a part of the Contract as to which there has been delay or other breach of contract. In the event of termination in whole or in part, the Chief Procurement Officer may procure similar goods or services in a manner and upon terms deemed appropriate by the Chief Procurement Officer. The Contractor shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

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

9.2.1 Contractor's duties. Notwithstanding termination of the Contract and subject to any directions from the Chief Procurement Officer or the Officer-in-Charge, the Contractor shall take timely and necessary action to protect and preserve property in the possession of the Contractor in which HART has an interest.

9.2.2 Compensation. Payment for completed goods delivered and accepted by HART shall be at the Contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the Contractor and the Officer-in-Charge; if the parties fail to agree, the

Director, upon recommendation of the Officer-in-Charge, shall set an amount subject to the Contractor's rights under chapter 3-126, HAR. HART may withhold from amounts due the Contractor as the Chief Procurement Officer deems to be necessary to protect HART against loss because of outstanding liens or claims of former lien holders and to reimburse HART for the excess costs incurred in procuring similar goods and services.

9.2.3 Excuse for nonperformance or delayed performance. Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of the Contract in accordance with its terms, if the Contractor has notified the Officer-in-Charge *within fifteen days* after the cause of the delay and the failure arises out of causes including but not limited to: acts of God; acts of the public enemy; acts of HART and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if the failure arises out of causes similar to those set forth above, the Contractor shall not be deemed to be in default, unless the goods or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the Contract requirements. Upon request of the Contractor, the Officer-in-Charge shall ascertain the facts and extent of the failure, and, if the Officer-in-Charge determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the Contractor's progress and performance would have met the terms of the Contract, the completion date or delivery schedule shall be revised accordingly, subject to the rights of HART under subsection 9.3, Termination for convenience. As used in this paragraph, the term "subcontractor" means subcontractor or subconsultant at any tier.

9.2.4 Additional rights and remedies. The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law. [3-125-17, HAR]

9.3 **TERMINATION FOR CONVENIENCE.** The Chief Procurement Officer may, upon recommendation of the Officer-in-Charge, when the interests of HART so require, terminate the Contract in whole or in part, for the convenience of HART. The Chief Procurement Officer shall give written notice of the termination to the Contractor specifying the part of the Contract terminated and when termination becomes effective.

9.3.1 Contractor's obligations. The Contractor shall incur no further obligations in connection with the terminated work and on the dates set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated 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 HART's approval. The Contractor may be directed to assign the Contractor's right, title, and interest under terminated orders or subcontracts to HART. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

9.3.2 Right to goods.

- (a) The Contractor may be required to transfer title and deliver to HART in the manner and to the extent directed by the Officer-in-Charge or the Chief Procurement Officer: any completed goods; and the partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights, hereinafter called "manufacturing material," as the Contractor has specifically produced or specially acquired for the performance of the terminated part of the Contract.
- (b) The Contractor shall, upon direction of the Officer-in-Charge, protect and preserve property in the possession of the Contractor in which HART has an interest. If the Officer-in-Charge does not exercise this right, the Contractor shall use the Contractor's best efforts to sell such goods and manufacturing materials. Use of this section in no way implies that HART has breached the Contract by exercise of the termination for convenience clause.

9.3.3 Compensation

- (a) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by subchapter 15, chapter 3-122, HAR, bearing on such claim. If the Contractor fails to file a termination claim *within one year* from the effective date of termination, payment may be made to the Contractor, if at all, in accordance with paragraph (3) below.
- (b) A settlement may be agreed to by both parties provided the Contractor has filed a termination claim supported by cost or pricing data to the extent required by subchapter 15, chapter 3-122, HAR, and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by HART, the proceeds of any sales of goods and manufacturing materials under paragraph 9.3.2, Right to goods, and the Contract price of the work not terminated.
- (c) Absent complete agreement under paragraph (2), the Contractor shall be paid the following amounts, provided payments agreed to under paragraph (2) shall not duplicate payments under this paragraph for the following:
 - 1. Contract prices for goods or services accepted under the Contract;
 - 2. Costs incurred in preparing to perform and performing the terminated portion of the work plus a five percent markup on actual direct costs on such portion of the work, the markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided that if it appears that the Contractor would have sustained a loss if the entire Contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 - 3. Subject to the prior approval of the Chief Procurement Officer the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to paragraph 9.3.1, Contractor's obligations. Subcontractors shall be entitled to a markup of no more than ten percent on direct costs incurred to the date of termination. These costs

must not include costs paid in accordance with subparagraph (3)(B).

4. The total sum to be paid the Contractor under this paragraph shall not exceed the total Contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subsection 9.3.2, Right to goods, and the Contract price of work not terminated.

- (d) Cost claimed, agreed to, or established under paragraphs (2) and (3) shall be in accordance with Chapter 3-123, HAR. [3-125-21, HAR]

SECTION 10 - DISPUTES ON CONTRACT AND BREACH OF CONTRACT CONTROVERSIES.

10.1 FINAL DECISION.

- (a) When a controversy cannot be resolved by mutual agreement between the Officer-in-Charge and the Contractor, the Chief Procurement Officer shall, upon recommendation by the Officer-in-Charge, after written request by the Contractor for a final decision, issue a written decision.
- (b) Any such decision shall be final and conclusive, unless fraudulent, or unless the Contractor brings an action seeking judicial review of the decision in a circuit court of this State *within the six months* from the date of receipt of the decision.

10.1.1 The Chief Procurement Officer shall issue a written decision within the following time limitations:

- (1) For claims not exceeding fifty thousand dollars: *ninety calendar days* after receipt of the claim.
- (2) For claims exceeding fifty thousand dollars: *ninety calendar days* after receipt of the claim; provided that if a decision is not issued within ninety calendar days, the Chief Procurement Officer shall notify the Contractor of the time within which a decision will be made.

If the Chief Procurement Officer fails to issue a decision on a claim not exceeding fifty thousand dollars within ninety calendar days after receipt, or does not issue a decision within the time promised for a claim in excess of fifty thousand dollars, the Contractor may proceed as if an adverse decision had been received.

10.2 PAYMENT. The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting Contractor action concerning appeal. Such payments shall be without prejudice to the rights of either party and where such payments are required to be returned by a subsequent decision, interest on such payments shall be paid at the statutory rate from the date of payment.

10.3 CLAIMS AGAINST THE Contractor. All controversies involving claims asserted by HART against a Contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Chief Procurement Officer, upon recommendation by the Officer-in-Charge. [3-126-29, HAR]

10.4 CONTINUED PERFORMANCE OF THE CONTRACT. The Contractor shall comply with any decision of the Chief Procurement Officer and proceed diligently with performance of the Contract pending final resolution by a circuit court of this State of any controversy arising under, or by virtue of, the Contract, except where there has been a material breach of contract by HART; provided that in any event the Contractor shall proceed diligently with the performance of the Contract where the Chief Procurement Officer has made a written determination that continuation of work under the Contract is essential to the public health and safety. [3-126-28, 3-126-29, 3-126-31, HAR]

10.5 REMEDIES. Any dispute arising under or out of the Contract is subject to chapter 3-126, HAR. The procedures and remedies provided for shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension or debarment proceeding, or in connection with a contract controversy, to resolve their claims or differences. The contested case proceedings set out in chapter 91, HRS, shall not apply to protested solicitations and awards, debarments or suspensions, or the resolution of contract controversies. [HRS 103D-704]

SECTION 11 - COST OR PRICING DATA

11.1 COST OR PRICING DATA. Pursuant to chapter 3-122, subchapter 15, HAR, cost or pricing data may be required as determined by the Officer-in-Charge or by chapter 3-122, subchapter 15, HAR, along with the certification of current cost or pricing data, substantially in the form attached hereto as Exhibit "A".

11.1.1 Cost and pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of a prospective Contractor's judgment about future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all facts that can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include such factors as:

- (1) Vendor quotations;
- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit cost trends such as those associated with labor efficiency;
- (6) Make or buy decisions;
- (7) Labor union contract negotiations; and

(8) Information on management decisions that could have a significant bearing on costs.

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

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

11.1.3 If a prospective contractor refuses to supply the required data, the Chief Procurement Officer, upon recommendation of the Officer-in-Charge, shall determine in writing whether to disqualify the noncomplying contractor, to defer award pending further investigation, or to enter into the contract. If, after award, a contractor refuses to supply the required data, the Officer-in-Charge shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under chapter 3-126, HAR. The certificate of cost or pricing data is not to be construed as a representation as to the accuracy of the Contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the Contractor's judgment is based. The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

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

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

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

SECTION 12 - SEXUAL HARASSMENT POLICY

12.1 GENERAL. The Contractor must comply with Revised Ordinances of Honolulu (ROH) section 1-18, on sexual harassment. The Contractor shall have and enforce a policy prohibiting sexual harassment. The Contractor's sexual harassment policy must set forth the same or greater protection than those contained or required by the ordinance.

12.1.1 The ordinance is applicable to the employer's business and includes:

- (1) Prohibitions against an officer's or employee's sexual harassment of the following:
 - (A) Another officer or employee of the employer;
 - (B) An individual under consideration for employment with the employer; or
 - (C) An individual doing business with the employer;
- (2) A provision prohibiting a management or supervisory officer or employee from knowingly permitting a subordinate officer or employee to engage in the sexual harassment prohibited under paragraph (1) above;
- (3) A prohibition against retaliation towards an officer, employee, or individual who has complained of sexual harassment, conducted an investigation of a complaint, or acted as a witness during an investigation of a complaint;
- (4) A prohibition against a malicious false complaint of sexual harassment by an officer, employee, or individual;
- (5) Provisions allowing an officer, employee, or individual to make a sexual harassment complaint to an appropriate management, supervisory, or personnel officer or employee;
- (6) Procedures for investigating a sexual harassment complaint in an unbiased, fair, and discreet manner with appropriate safeguards to maintain confidentiality and protection from embarrassment;
- (7) A provision requiring the use of the "reasonable person of the same gender standard," to determine if sexual harassment has occurred. Under the standard, sexual harassment shall be deemed to have occurred if the alleged offender's conduct would be considered sexual harassment from the perspective of a reasonable person of the same gender as the alleged victim. If the alleged victim is a woman, the "reasonable person of the same gender standard" shall be equivalent to and may be called the "reasonable woman standard;"
- (8) Disciplinary actions which may be imposed on an officer or employee who committed a prohibited act; and
- (9) For an employer with at least five employees, a provision requiring the annual viewing of a video on the sexual harassment policy by each management or supervisory officer or employee.

12.2 POLICY TERM. The policy required under this section shall be in effect for at least the duration of the Contractor's Contract with HART.

12.3 PLEDGE AND ACCEPTANCE. The action of the Contractor signing the Contract shall constitute the Contractor's pledge and acceptance of the provisions for the sexual harassment policy as required by section 1-18, HRS.