

CONTRACT NO.  
SC-DTS-1000182

**HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT  
MAINTENANCE & STORAGE FACILITY**

**LEED NC 2.2 FUNDAMENTAL AND ENHANCED  
COMMISSIONING SERVICES CONTRACT**

**HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT  
MAINTENANCE & STORAGE FACILITY  
LEED NC 2.2 FUNDAMENTAL AND ENHANCED COMMISSIONING  
SERVICES CONTRACT**

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THE CITY AND COUNTY OF HONOLULU

**AGREEMENT  
FOR PROFESSIONAL SERVICES**

THIS AGREEMENT FOR PROFESSIONAL SERVICES dated OCT 06 2010 (this "Agreement"), is made and entered into by and between the CITY AND COUNTY OF HONOLULU, a municipal corporation of the State of Hawaii, whose principal place of business and mailing address is Honolulu Hale, 530 South King Street, Honolulu, Hawaii 96813, hereinafter called the "CITY", and ENOVITY, INC., a California Corporation, whose principal place of business and mailing address is 100 Montgomery Street, Suite 600, San Francisco, California, 94104, hereinafter called the "CONSULTANT".

WITNESSETH THAT:

WHEREAS, the CITY desires to engage the CONSULTANT to provide LEED NC 2.2 Fundamental and Enhanced Commissioning Services for the Maintenance and Storage Facility for the Honolulu High-Capacity Transit Corridor Project, hereinafter called the "PROJECT";

WHEREAS, the services entered hereunder are technical and professional in nature and CITY personnel are not able to provide these services; and

WHEREAS, the CONSULTANT was selected pursuant to Section 103D-304 of the Hawaii Revised Statutes, as amended, and related Hawaii Administrative Rules ("HAR"), relating to procurement of professional services;

NOW, THEREFORE, the CITY and the CONSULTANT, in consideration of the foregoing and of the mutual promises hereinafter set forth, and intending to be legally bound, hereby mutually agree as follows:

1. The CONSULTANT shall perform and complete in a professional manner all of the services required for the PROJECT in accordance with and as set forth in the Contract Documents as hereinafter described, shall furnish all services, labor, goods, materials, supplies, equipment and other incidentals reasonably necessary for the successful completion of the PROJECT and work contemplated under the Contract Documents (the "Work"), and the CONSULTANT shall receive and accept as full compensation for all of the Work the price for the various items of the Work as hereinafter set forth.

2. The CONSULTANT shall complete the technical and professional services and perform the Work in accordance with:

- a. This Agreement;
- b. The Special Provisions and any attachments and exhibits thereto ("Special Provisions"); and
- c. The General Terms and Conditions for Contracts for Professional Services for the City and County of Honolulu, dated 8/00 ("General Terms and Conditions");

all of which are collectively referred to as the Contract Documents, are attached hereto and incorporated herein, and are listed in order of controlling preference should there be any conflict in the terms of the Contract Documents, and any modifications, changes or amendments in connection therewith being specifically referred to and incorporated herein by reference and made a part hereof as though fully set forth herein.

3. The CONSULTANT shall complete the Work required under the Contract Documents as provided for in the Special Provisions attached hereto.

4. This is a firm fixed-price contract, and subject to the provisions of this paragraph and in accordance with Section 8 of the General Terms and Conditions, the CITY agrees to pay the CONSULTANT, for the satisfactory performance and completion of the Work, the payments in accordance with the schedule of payments, all as set forth in the Special Provisions. The aggregate amount of these lump sum payments shall not exceed TWO HUNDRED SEVENTY-EIGHT THOUSAND SIX HUNDRED THIRTY AND NO/100 DOLLARS (\$278,630.00). The lump sum payments for services and the Work performed under this Agreement are all inclusive of direct labor, overhead, general and administrative expenses, other direct costs, subcontractor costs, fixed fees, and all applicable taxes, including State general excise and use tax.

In accordance with the paragraphs above, the total aggregate amount of TWO HUNDRED SEVENTY-EIGHT THOUSAND SIX HUNDRED THIRTY AND NO/100 DOLLARS (\$278,630.00) is established as the maximum payable under this Agreement and is subject to the Special Provisions and the General Terms and Conditions, including the provisions thereof relating to reducing or increasing the compensation of the CONSULTANT.

5. By signing below, the CONSULTANT hereby certifies that, to the best of its knowledge and belief, cost or pricing data, as defined in section 3-122-122, HAR, and submitted pursuant to section 3-122-125, HAR, either actually or by specific identification in writing to the Officer-in-Charge in support of this Agreement, is accurate, complete, and current as of the date of this Agreement. This certification includes the cost or pricing data supporting any advance agreement(s) between the CONSULTANT and the CITY which are part of the proposal.

6. As provided in the General Terms and Conditions, when notice is to be given to the CITY, it shall be mailed or delivered to:

City and County of Honolulu  
Department of Transportation Services  
650 South King Street, 3<sup>rd</sup> Floor  
Honolulu, Hawaii 96813  
Attention: Director

When notice is to be given to the CONSULTANT, it shall be mailed or delivered to:

Mr. Greg Cunningham  
Co-Principal  
Enovity, Inc.  
100 Montgomery Street, Suite 600  
San Francisco, California 94104

From BFS - 74  
(Mar. 1996)

## Certificate

The attached contract for consultant services for LEED NC 2.2 Fundamental and Enhanced Commissioning Services for the Maintenance and Storage Facility for the Honolulu High-Capacity Transit Corridor Project

(\$278,630.00)

is hereby approved as to availability and designation of funds, and certification is hereby made that there is a valid appropriation from which expenditures to be made under said contract may be made and that sufficient unencumbered funds are available in the Treasury of the City and County of Honolulu to the credit of such appropriation to pay the amounts of such expenditures when the same become due and payable.

CONTRACT NO. SC - DTS- 1000182

FUND Transit Fund (690)

ACCOUNT NO.

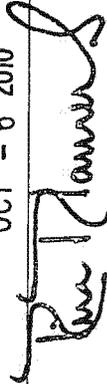
690/7801-09-D (4064) \$ 180,000.00

690/7801-10-D (4064) 98,630.00

\$ 278,630.00

HONOLULU, HAWAII

OCT - 6 2010



Director of Budget & Fiscal Services

IN WITNESS WHEREOF, the CITY and the CONSULTANT have executed this Agreement by their duly authorized officers or agents on the day and year first above written.

APPROVED AS TO CONTENT

Wayne Yoshioka  
By: Wayne Yoshioka, Director  
Department of Transportation Services

CITY AND COUNTY OF HONOLULU

Rix Maurer III  
By: Rix Maurer III, Director  
Department of Budget and Fiscal Services

OCT 06 2010

*W*

APPROVED AS TO FORM AND LEGALITY

GARY Y. TAKEUCHI  
Deputy Corporation Counsel

ENOVITY, INC

By: Aregy McJames  
Its: Principal

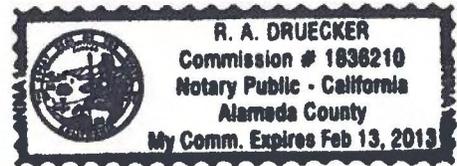
Address:

100 Montgomery Street,  
Suite 600  
San Francisco, CA 94104

Federal ID No.

04-3657838

State of California, County of SAN FRANCISCO  
On 8-6-10 before me, R. A. DRUECKER,  
Notary Public, personally appeared Gregory Cunningham  
who proved to me on the basis of satisfactory evidence to be the person(s)  
whose name(s) is/are subscribed to the within instrument and acknowledged  
to me that he/she/they executed the same in his/her/their authorized capacity(ies),  
and that by his/her/their signature(s) on the instrument the person(s), or the entity  
upon behalf of which the person(s) acted, executed the instrument.  
I certify under PENALTY OF PERJURY under the laws of the State of California  
that the foregoing paragraph is true and correct.  
WITNESS my hand and official seal. R. A. Druecker



**SPECIAL PROVISIONS TO THE AGREEMENT BETWEEN  
THE CITY AND COUNTY OF HONOLULU AND ENOVITY, INC.  
LEED NC 2.2 FUNDAMENTAL AND ENHANCED COMMISSIONING SERVICES  
HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT**

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**SPECIAL PROVISIONS TO THE AGREEMENT BETWEEN  
THE CITY AND COUNTY OF HONOLULU AND ENOVITY, INC.**

This Special Provisions to the Agreement for Professional Services (this "Special Provisions"), shall be incorporated into and be a part of that certain Agreement for Professional Services, by and between the CITY AND COUNTY OF HONOLULU (the "CITY") and ENOVITY, INC (the "CONSULTANT"), dated \_\_\_\_\_ (the "Agreement"). This Special Provisions and the General Terms and Conditions for Contracts for Professional Services for the City and County of Honolulu dated 8/00 ("General Terms and Conditions") shall apply to, and are incorporated by reference into the Agreement, except as modified by reference herein. All defined terms in the Agreement shall have the same meaning in this Special Provisions.

**I. PROJECT**

Conduct the LEED NC 2.2 Fundamental and Enhanced Commissioning Services for the Maintenance and Storage Facility for the Honolulu High-Capacity Transit Corridor Project.

**II. SERVICES**

The services that the CONSULTANT shall provide under the Agreement are set forth in the Scope of Work attached hereto as Exhibit 1.

**III. TIME**

Performance of services under this PROJECT shall be completed within ONE THOUSAND NINE HUNDRED TWENTY-FIVE (1,925) calendar days from the first Notice to Proceed (NTP) date, exclusive of CITY review time.

There will be several separate and distinct written Notices to Proceed under the Agreement. Work shall not begin until the CITY has issued the respective NTP. Any work undertaken by the CONSULTANT prior to issuance of a NTP will be the sole responsibility of and will be undertaken at the sole risk of the CONSULTANT, without any obligation on the part of the CITY.

The first NTP ("NTP #1") will be strictly limited to gathering of information for the development of the CITY's Owner's Project Requirements (OPR). An initial on-site meeting with Key Project Stakeholders and the CITY's Project Management Staff will be held to gather OPR information; the OPR shall be completed prior to the start of the Basis of Design (BOD) development.

The second NTP ("NTP #2") will be for the development of the BOD and completion of the Detailed Design Phase activities.

NTP #2 and all subsequent NTPs will be issued after the Federal Transit Administration (FTA) issues a Record of Decision for the Honolulu High-Capacity Transit Corridor Project and/or a Letter of No Prejudice.

The third NTP ("NTP #3") will be for the Construction Phase to include the acceptance activities.

The fourth NTP ("NTP #4") will be for the Warranty Phase and all remaining Work of the Agreement.

IV. LIQUIDATED DAMAGES

Liquidated damages are not applicable to this Agreement.

V. INSURANCE REQUIREMENTS

See Paragraph 4.3., Insurance, of the General Terms and Conditions.

VI. COMPENSATION AND PAYMENT SCHEDULE

A. Subject to the General Terms and Conditions, the compensation of the CONSULTANT shall be the amount stated in the Agreement and upon completion and acceptance of each Milestone, payment shall be made in accordance with the Project Payment Schedule in Exhibit 2, paragraph 4, inclusive of all taxes. Upon completion of any portion of each stage, a proportionate share of the fee may be paid when requested by the CONSULTANT and as determined by the Officer-in-Charge.

B. Final acceptance of the Work contracted for herein and payment therefor shall not excuse the CONSULTANT from any liability for defects in performance which may subsequently appear.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

VII. MODIFICATIONS TO THE GENERAL TERMS AND CONDITIONS FOR  
CONTRACTS FOR PROFESSIONAL SERVICES FOR THE CITY AND  
COUNTY OF HONOLULU (8/2000)

The General Terms and Conditions for Contracts for Professional Services for the City and County of Honolulu (8/2000) shall apply to, and are incorporated by reference into, this Agreement, except as may be modified by reference herein.

A. DEFINITIONS

The following definitions are added:

C.F.R.

The Code of Federal Regulations.

DIRECTOR

The CITY's Director of the Department of Transportation Services or the Director's duly authorized representative.

FEDERAL GOVERNMENT

The United States of America and any executive department or agency thereof.

FTA

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.

PMOC

The Federal Transit Administration's Project Management Oversight Contractor.

PROJECT

Conduct the LEED NC 2.2 Fundamental and Enhanced Commissioning Services for the Maintenance and Storage Facility for the Honolulu High-Capacity Transit Corridor Project.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

**STANDARD OR REQUIREMENT**

Any provision of any federal, state or local, including CITY, law, ordinance, code, rule, regulation guideline, directive, order, circular, agreement, practice, policy, notice, plan, statement, or other standard or requirement, and any amendment or revision thereto made in the future, including any mandatory provision, term, condition, clause, representation, certification, assurance or other statement required thereunder.

**U.S.C.**

The United States Code.

**U.S. DOT**

The United States Department of Transportation, including its operating administrations.

**WORK**

The furnishing of all services, labor, goods, materials, supplies, equipment and other incidentals reasonably necessary to the successful completion of this Agreement.

The following definitions are modified:

**CONSULTANT OR CONTRACTOR**

Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or other private legal entity engaged by the CITY to perform the services under this Agreement.

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.

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.

**B. DESIGNATION OF PROJECT MANAGERS**

The Officer-in-Charge shall designate, in writing, a representative to coordinate the Work under this Agreement, to coordinate work under other CITY contracts with the Work under this Agreement, and to act as the liaison between the CONSULTANT and the CITY in order to assist in expediting the resolution of questions or controversies, the making of CITY decisions, and the review and approval by the CITY of documents, progress reports, requests, and other matters as required.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

The CONSULTANT shall, with the approval of the CITY, designate in writing a representative, who shall maintain close and frequent communications with the CITY's representative and be authorized to act on behalf of the CONSULTANT. Any change in the CONSULTANT's representative will be made with the approval of the CITY. The CONSULTANT's representative shall be experienced and qualified in the type of work involved and shall be directly responsible for the prosecution of the Work under this Agreement.

Every effort will be made by all parties to this Agreement to retain the same representatives during the term of this Agreement in order to maintain continuity of effort and control.

C. PROMPT PAYMENT TO SUBCONTRACTORS

Paragraph 8.6 of the General Terms and Conditions, entitled "PROMPT PAYMENT TO SUBCONTRACTORS," is hereby deleted in its entirety and replaced with the following:

"8.6 PROMPT PAYMENT TO SUBCONTRACTORS.

(a) Any money, other than retainage, paid to a contractor shall be dispersed 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.

(b) 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. [3-125-33, HAR]

(c) A payment request made by a contractor to the officer-in-charge that includes a request for sums that were withheld or retained from a subcontractor and are due to the subcontractor may not be approved, unless the payment request includes:

- (1) Substantiation of the amounts requested; and
- (2) Certification by the contractor, to the best of the contractor's knowledge and belief; that:
  - (A) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

SPECIAL PROVISIONS TO  
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- (B) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the contract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
- (C) The payment request does not include any amounts that the contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

(d) Prompt Payment of Retainage to Subcontractors upon Satisfactory Completion of Subcontractor Work. Upon satisfactory completion of accepted work by a subcontractor, the contractor shall request sums that were withheld or retained from a subcontractor and are due to the subcontractor pursuant to subsection (c). The contractor shall pay all retainage owed to the subcontractor within ten (10) days after payment to the contractor."

**D. NO THIRD PARTY BENEFICIARY**

The parties are entering into this Agreement for the sole benefit of the parties in exclusion of any third party, and no third party beneficiary is intended or created by execution of this Agreement.

**E. CHANGE ORDERS**

It is agreed that the notification period contained in Clause 5.1.1 (c) of the General Terms and Conditions shall be thirty (30) days.

**F. DELAY**

It is agreed that the notification period contained in Clause 6.2 of the General Terms and Conditions shall be thirty (30) days.

**G. AUTHORITY OF THE OFFICER-IN-CHARGE AND DIRECTOR OF BUDGET AND FISCAL SERVICES**

It is agreed that the words "and binding upon parties" and "binding upon all parties" contained in Clause 6.5 of the General Terms and Conditions shall be deleted.

**H. RETAINAGE**

Retainage is not applicable to this Agreement.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

**VIII. FEDERALLY REQUIRED CLAUSES**

**1.0 General**

The CONSULTANT understands that Federal laws, regulations, policies, and related administrative practices applicable to this Contract on the date signed may be modified from time to time. The CONSULTANT agrees that the most recent of such Federal requirements will govern the administration of the Agreement at any particular point in time, except if the CITY issues a written determination otherwise. To achieve compliance with changing Federal requirements, the CONSULTANT agrees to include notice in each subcontract that Federal requirements may change and that the changed requirements will apply to the subcontract as required.

**1.1 No Government Obligation to Third Parties**

(a) The CITY and the CONSULTANT acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying Contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this Contract and shall not be subject to any obligations or liabilities to the CITY, the CONSULTANT, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying Contract.

(b) The CONSULTANT agrees to include the above clause in each subcontract. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

**1.2 Program Fraud and False or Fraudulent Statements and Related Acts**

(a) The CONSULTANT acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 *et seq.* and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions pertaining to this PROJECT. Upon execution of the underlying Contract, the CONSULTANT certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying Contract or the FTA assisted PROJECT for which this contract work is being performed. In addition to other penalties that may be applicable, the CONSULTANT further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the CONSULTANT to the extent the Federal Government deems appropriate.

(b) The CONSULTANT also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a PROJECT that is financed in whole or in part with Federal assistance awarded by FTA under the authority of 49 U.S.C. §5307 the Federal Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on the CONSULTANT, to the extent the Federal Government deems appropriate.

(c) The CONSULTANT shall include the above two clauses in each subcontract. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

**1.3 Access to Records and Reports**

(a) The CONSULTANT shall provide the CITY, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives' access to any books, documents, papers and records of the CONSULTANT which are directly pertinent to this Contract for the purposes of making audits, examinations, excerpts and transcriptions. The CONSULTANT shall, pursuant to 49 C.F.R. 633.17, provide the FTA Administrator or his authorized representatives, including any PROJECT Management Oversight Contractor, access to the CONSULTANT's records and construction sites pertaining to a major capital PROJECT, defined at 49 U.S.C. § 5302(a)(1), which is receiving federal financial assistance through the programs described at 49 U.S.C. §5307, 5309, or 5311.

(b) The CONSULTANT shall permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

(c) The CONSULTANT shall maintain all books, records, accounts and reports required under this Contract for a period of not less than three years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case the CONSULTANT shall maintain the same until the CITY, the FTA Administrator, the Comptroller General of the United States, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto.

**1.4 Federal Changes**

The CONSULTANT shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between the CITY and the FTA, as they may be amended or promulgated from time to time during the term of this Contract. The CONSULTANT's failure to so comply shall constitute a material breach of this Contract.

**1.5 Civil Rights Requirements**

The CONSULTANT shall comply with the following requirements and include the following requirements in each subcontract, modified only if necessary to identify the affected parties:

(a) Nondiscrimination. In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Federal transit law at 49 U.S.C. § 5332, the CONSULTANT shall not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the CONSULTANT shall comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

(b) Equal Employment Opportunity. The following equal employment opportunity requirements apply to the underlying Contract:

(1) Race, Color, Creed, National Origin, Sex. In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and Federal transit laws at 49 U.S.C. § 5332, the CONSULTANT shall comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. Parts 60 et seq., (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the PROJECT. The CONSULTANT shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the CONSULTANT shall comply with any implementing requirements FTA may issue.

(2) Age. In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623 and Federal transit law at 49 U.S.C. § 5332, the CONSULTANT shall refrain from discrimination against present and prospective employees for reason of age. In addition, the CONSULTANT shall comply with any implementing requirements FTA may issue.

(3) Disabilities. In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, the CONSULTANT shall comply with the requirements of the U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, the CONSULTANT shall comply with any implementing requirements FTA may issue.

(4) Access for Individuals with Disabilities. The CONSULTANT shall comply with 49 U.S.C. § 5301(d), which states the Federal policy that elderly individuals and individuals with disabilities have the same right as other individuals to use public transportation services and facilities, and that special efforts shall be made in planning and designing those services and facilities to implement transportation accessibility rights for elderly individuals and individuals with disabilities.

**1.6 Disadvantaged Business Enterprises (DBE)**

(a) DBE Assurances. The CONSULTANT and its subcontractors shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The CONSULTANT shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of U.S. DOT-assisted contracts. Failure by the CONSULTANT to carry out these requirements is a material breach of this Contract, which may result in termination of this Contract or such other remedy, as the CITY deems appropriate. The above paragraph shall be included in each subcontract the CONSULTANT signs with a subcontractor.

(b) Prompt Payment. The CONSULTANT shall pay all subcontractors (DBEs and non-DBEs) for satisfactory performance of their subcontracts no later than ten (10) days from receipt of payment by the CITY. Full and prompt payment by the CONSULTANT to all subcontractors shall include retainage, if applicable.

(c) DBE Goal. The CITY has established a race neutral annual overall DBE goal of 3.83 % for 2010. Although the CITY has not established a DBE contract goal for this contract, DBE firms and small businesses shall have an equal opportunity to participate in the Contract. The CONSULTANT shall adhere to the following requirements:

(1) Take affirmative steps to use as many of the race-neutral means of achieving DBE participation identified at 49 CFR 26.51(b) as practicable to afford opportunities to DBEs to participate in the Contract. A race-neutral measure is one that is, or can be, used to assist all small businesses.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

(2) A DBE firm must perform a commercially useful function, i.e., must be responsible for the execution of a distinct element of the work and must carry out its responsibility by actually performing, managing and supervising the work; and

(3) A DBE firm must be certified by the Hawai'i State Department of Transportation before its participation is reportable under paragraph (d) below;

(d) Reports to the CITY. The CONSULTANT shall report its DBE participation obtained through race-neutral means throughout the period of performance. The CONSULTANT shall submit the "DBE Participation Report" reflecting payments made by the CONSULTANT to DBE subcontractors. Payments to the CONSULTANT will not be processed if the DBE Participation Report is not properly completed and attached. The DBE Participation Report shall be prepared in the format set forth in Attachment 1.6 herein.

The CONSULTANT shall keep records deemed necessary by the CITY. The CONSULTANT shall make records available at reasonable times and places for inspection by authorized representatives of the CITY and appropriate Federal agencies. The records kept by the CONSULTANT shall include:

- (1) The names of all DBE subcontractors and vendors, and identified by DBE category;
- (2) The nature of work of each DBE subcontractor and vendor; and
- (3) The dollar amount contracted with and paid to each DBE subcontractor and vendor.

The CONSULTANT shall submit the "DBE Participation Report" with each invoice. Payment will not be processed if the DBE Participation Report is not properly completed and attached.

The CONSULTANT shall submit the "Final Report of DBE Participation" (see Attachment 1.6) with its final invoice. Payment will not be processed if the Final Report of DBE Participation is not properly completed and attached.

(e) Records. On request, the CONSULTANT shall make available for inspection, and assure that its subcontractors make available for inspection:

- (1) Records of prompt payments made in accordance with Section 1.6(b), above;
- (2) The names and addresses of DBE subcontractors, vendors, and suppliers under this Contract;
- (3) The dollar amount and nature of work of each DBE subcontractor;
- (4) The social/economic disadvantaged category of the DBE firms, i.e. Black American, Hispanic American, Native American, Subcontinent Asian American, Asian Pacific American, Non-Minority Women, or Other; and
- (5) Other related materials and information.

(f) The CONSULTANT shall promptly notify the CITY, whenever a DBE subcontractor performing work related to this Contract is terminated or fails to complete its work. The CONSULTANT shall also promptly notify the CITY of a DBE subcontractor's inability or unwillingness to perform and provide reasonable documentation.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

**1.7 Government-Wide Debarment and Suspension (Non-procurement)**

(a) This Contract is a covered transaction for purposes of 2 CFR 180.220(b) and 2 CFR 1200.220. As such, the CONSULTANT is required to verify that none of the CONSULTANT Team, its principals, as defined at 2 CFR 180.995, or affiliates, as defined at 2 CFR 180.905, are excluded or disqualified as defined at 2 CFR 180.940 and 2 CFR 180.935.

(b) The CONSULTANT is required to comply with 2 CFR 180, Subpart C, as supplemented by 2 CFR 1200, Subpart C, and must include the requirement to comply with 2 CFR 180, Subpart C, as supplemented by 2 CFR 1200, Subpart C, in any lower tier covered transaction equal to or exceeding \$25,000 it enters into. By signing the Contract, the CONSULTANT certifies as follows:

The certification in this clause is a material representation of fact relied upon by the CITY and County of Honolulu (the CITY). If it is later determined that the CONSULTANT knowingly rendered an erroneous certification, in addition to remedies available to the CITY, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The CONSULTANT agrees to comply with the requirements of 2 CFR 180, Subpart C, as supplemented by 2 CFR 1200, Subpart C, throughout the Contract period. The CONSULTANT further agrees to include a provision requiring such compliance in its lower tier covered transactions equal to or exceeding \$25,000.

**1.8 Lobbying**

The "CERTIFICATION REGARDING LOBBYING," as executed by the CONSULTANT in Exhibit 3 of the Special Provisions is incorporated herein by reference. The CONSULTANT and its subcontractors at every tier shall comply with U.S. DOT regulations, "New Restrictions on Lobbying," 49 C.F.R. Part 20, modified as necessary by 31 U.S.C. § 1352, which requires that no Federal appropriated funds shall be used to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant, or award covered by 31 U.S.C. § 1352. Such disclosures are forwarded from tier to tier up to the CITY.

**1.9 Clean Air Requirements**

(a) The CONSULTANT shall comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.* The CONSULTANT shall report each violation to the CITY and understands and agrees that the CITY will, in turn, report each violation as required to FTA and the appropriate EPA Regional Office.

(b) The CONSULTANT shall include the above clause in each subcontract exceeding \$100,000.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

**1.10 Clean Water Requirements**

(a) The CONSULTANT shall comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.* The CONSULTANT shall report each violation to the CITY and understands and agrees that the CITY will, in turn, report each violation as required to FTA and the appropriate EPA Regional Office.

(b) The CONSULTANT shall include the above clause in each subcontract exceeding \$100,000.

**1.11 Fly America Requirements**

(a) The CONSULTANT shall comply with 49 U.S.C. § 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 C.F.R. Parts 301-10, which provide that the CITY and sub-recipients of Federal funds and their consultants are required to use U.S. Flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The CONSULTANT shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements.

(b) The CONSULTANT shall include the requirements of this section in all subcontracts that may involve international air transportation.

**1.12 Energy Conservation Requirements**

(a) The CONSULTANT shall comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

(b) The CONSULTANT shall include the above clause in each subcontract at every tier. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to the provisions.

**1.13 Recycled Products**

The CONSULTANT agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act as amended (42 U.S.C. § 6962), including but not limited to the regulatory provisions of 40 C.F.R. Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 C.F.R. Part 247.

**1.14 ADA Access**

The CONSULTANT shall comply with the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, which requires that accessible facilities and services be made available to individuals with disabilities; and with the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §§ 4151 *et seq.*, which requires that buildings and public accommodations be accessible to individuals with disabilities, and any subsequent amendments to these laws. In addition, the CONSULTANT agrees to comply with all applicable implementing Federal regulations and directives and any subsequent amendments thereto.

SPECIAL PROVISIONS TO  
AGREEMENT FOR PROFESSIONAL SERVICES

**1.15 Seismic Safety**

The CONSULTANT shall require that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in the U.S. Department of Transportation's Seismic Safety Regulations (49 C.F.R. Part 41) and shall certify to compliance to the extent required by the regulation. The CONSULTANT also agrees to ensure that all work performed under this Contract including work performed by a subcontractor is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the PROJECT.

**1.16 Incorporation of FTA Terms.**

(a) The preceding provisions include, in part, certain Standard Terms and Conditions required by the U.S. DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by the U.S. DOT, as set forth in FTA Circular 4220.1 F are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Contract. The CONSULTANT shall not perform any act, fail to perform any act, or refuse to comply with any CITY requests which would cause the CITY to be in violation of the FTA terms and conditions.

(b) The CONSULTANT shall include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

# ATTACHMENT 1.6 - DBE PARTICIPATION REPORT

DBE PARTICIPATION REPORT			
Project Name:		Consultant Name:	
Contract No:	Contract Amount (including amendments):		\$
Federal ID No.:	Contract Amount (including amendments):		\$
(OWP WE #, FTA Grant #, FHWA Project #)			
Period Covered By This Report:		Current (Invoice #)	Total to Date
Total Invoice Amount		(A) \$	(B) \$
Payment Requested:	DBE? (Yes/No) DBE Code (if "Yes")	Prior Amount	Current Amount
Prime Consultant		\$	\$
Subcontractors (attach additional sheets as needed):			
Name:		\$	\$
Type of Work:		\$	\$
Name:		\$	\$
Type of Work:		\$	\$
Name:		\$	\$
Type of Work:		\$	\$
Name:		\$	\$
Type of Work:		\$	\$
<b>TOTALS</b>		\$	(C) \$
DBE Participation to Date (C/B)			%

## ATTACHMENT 1.6 - FINAL REPORT OF DBE PARTICIPATION

This report must be submitted by the Consultant with the final invoice or request for payment under this contract.

Project Title: \_\_\_\_\_

Consultant Name: \_\_\_\_\_

Project No.: \_\_\_\_\_ Contract No.: \_\_\_\_\_

Period Covered by this Report: \_\_\_\_\_

Contract Amount (including amendments): \$ \_\_\_\_\_

Final Payment Amount: \$ \_\_\_\_\_ Invoice No.: \_\_\_\_\_

Total Payment to DBE: \$ \_\_\_\_\_

All Subcontractors (DBE and non-DBE) & DBE Suppliers or Manufacturers	Type of Service or Materials Provided	Subcontract Amount
Name Address Telephone No.		

Add additional sheets as necessary.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name & Title

**ATTACHMENT 1.6 - INSTRUCTIONS FOR COMPLETING THE  
FINAL REPORT OF DBE PARTICIPATION**

All subcontractors, suppliers and manufacturers should be listed on the FINAL REPORT OF DBE PARTICIPATION in the same order as listed in the proposal.

Project Title:	Self Explanatory
Project No.:	Self Explanatory
Period Covered by this Report:	Same period as invoice period
Consultant Name:	Self-Explanatory
Contractor No:	Self-Explanatory
Contract Amount (including amendments):	Less Mobilization, Force Account Items and Allowance Items Amendments should be listed separately with an explanation of how it was allocated to DBEs and non-DBEs
Invoice No.:	Self-Explanatory
Final Payment Amount:	Self-Explanatory
Total Payment to DBE	Total \$ amount paid to DBE

**EXHIBIT 1  
SPECIAL PROVISIONS TO THE  
AGREEMENT FOR PROFESSIONAL SERVICES**

**HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT  
MAINTENANCE & STORAGE FACILITY  
LEED NC 2.2 FUNDAMENTAL AND ENHANCED COMMISSIONING SERVICES**

**SCOPE OF WORK**

**EXHIBIT 1  
SPECIAL PROVISIONS TO THE  
AGREEMENT FOR PROFESSIONAL SERVICES**

This Exhibit 1 to the Special Provisions to the Agreement for Professional Services (“Exhibit 1”) shall be incorporated into and be a part of that certain Agreement for Professional Services, by and between the CITY AND COUNTY OF HONOLULU (the “CITY”) and ENOVITY, INC. (the “CONSULTANT”), dated \_\_\_\_\_ (the “Agreement”). All defined terms in the Agreement and the Special Provisions shall have the same meaning in this Exhibit 1.

**PROJECT PURPOSE AND DESCRIPTION:** The purpose of the services for a Leadership in Energy and Environmental Design (LEED) Commissioning for the Maintenance & Storage Facility (MSF) is to have a fully integrated base yard for the operations, maintenance and storage facilities for the Honolulu High-Capacity Transit Corridor Project situated on approximately 43 acres of land which will include four main structures totaling 184,000 square feet (sq. ft.): (1) the Operations and Service Building (134,000 sq. ft.); (2) the Maintenance of Way Building (36,400 sq. ft.); (3) the Train Wash Facility (14,000 sq. ft.); and (4) the Wheel Truing Building (1,500 sq. ft.).

The CONSULTANT shall perform commissioning services in accordance with all applicable provisions of the LEED Fundamental and Enhanced Commissioning of Building Energy Systems for NC 2.2 reference guide for New Construction.

**SCOPE OF WORK**

1. The CONSULTANT will provide LEED Commissioning Services in accordance with the general requirements for LEED NC 2.2 for Fundamental (Energy and Atmosphere Prerequisite 1) and Enhanced Commissioning (Energy and Atmosphere Credit 3) for the Design, Construction and Warranty Phases of the PROJECT which will include, but not be limited to, the following:
  - a. The CONSULTANT will assume the role of LEED Commissioning Authority (CxA) for the entire MSF project.
  - b. CxA to review the Owner’s Project Requirements (OPR) and Basis of Design (BOD) documentation for clarity and completeness.
  - c. CxA to perform a formal commissioning review of the Design documents prior to the mid-construction documents phase and back-check the review comments in the subsequent Design submission.
  - d. CxA to ensure that LEED commissioning specifications are included in the Construction documents.
  - e. CxA to develop and implement a LEED Commissioning Plan.
  - f. CxA to perform a review of MSF Design/Build (D/B) Contractor submittals applicable to MSF systems being commissioned for compliance with the OPR and BOD.
    - i. Heating, Ventilating, and Air Conditioning (“HVAC”) systems and HVAC controls in their entirety

- ii. Building lighting and controls
- iii. Domestic hot water generators and distribution systems
- iv. Renewable energy systems
- g. CxA to verify the installation and functional performance of the MSF systems to be commissioned.
- h. CxA to assist the MSF D/B Contractor in developing a LEED Systems Manual for the MSF project.
- i. CxA to verify that the training requirements for each facility operating staff are completed.
- j. CxA to complete a Summary Construction Phase Commissioning Report.
- k. CxA to review each building operation within ten (10) months after substantial Construction completion with the MSF Operations and Maintenance (O&M) staff and occupants, and assist in preparing a plan for resolution of outstanding commissioning-related issues.

2. Deliverables:

- a. Draft and Final Commissioning Plan and Specifications.
  - i. Prepare Initial Commissioning Plan; incorporate comments and revise.
  - ii. Prepare Commissioning Specifications; incorporate comments and revise.
- b. Design Phase:
  - i. Provide OPR and BOD template; review and comment on draft OPR and BOD documents.
  - ii. Prepare Design Review Report based on 30% detailed Design submission.
  - iii. Prepare LEED Enhanced Commissioning Design Review Report based on 50% detailed Design submission and back-check the comments in the 90% Design submission.
- c. Construction Phase:
  - i. Lead one (1) Construction Phase Commissioning Kickoff Meeting; prepare meeting minutes.
  - ii. Lead three (3) Construction Commissioning Coordination Meetings prior to MSF systems startups; prepare meeting minutes.
  - iii. Publish, update and maintain the Commissioning Issues List.
  - iv. Written comments on submittals where appropriate for conformance to the OPR and BOD.
  - v. Conduct three (3) site visits (Installation Verification/Pre-Start Inspections) prior to MSF systems startup; prepare reports.
  - vi. Provide Installation Verification Checklists (IV Forms) to be completed by the CONSULANT and the MSF D/B installing contractors.
  - vii. Collect the completed IV Forms and incorporate into the Commissioning Report.
  - viii. Provide an updated Commissioning Issues List after the MSF D/B installing contractors' completion.
  - ix. Witness five (5) days of systems startup, test and balance and back-checks requiring three (3) separate trips; prepare reports.
  - x. Collect startups forms from the MSF D/B installing contractors, review and approve.
  - xi. Review Test and Balance (TAB) Plan and TAB Preliminary Report, review and approve/comment where appropriate.

- xii. Provide MSF System Readiness Checklists (SRCs) to the MSF D/B Contractor. Review and approve completed SRC Forms.
  - xiii. Witness six (6) days of Component and Systems Integration Functional tests and back-checks requiring three (3) separate trips; prepare reports.
  - xiv. Provide Functional Performance Test Forms (FPTs) to the MSF D/B Contractor. Review and approve the completed FPT Forms.
  - xv. Provide an updated Commissioning Issues List to the CITY and the MSF D/B Contractor.
  - xvi. Lead one (1) on-site commissioning coordination meeting to review the MSF D/B contractor deliverables completion of project acceptance; prepare meeting minutes.
  - xvii. Review MSF D/B Contractor deliverables for inclusion in the LEED Systems Manual.
  - xviii. Assemble the Final LEED Systems Manual for the CITY.
  - xix. Review MSF D/B Contractor Training Plan and elements. Provide comments where appropriate.
  - xx. Review documentation of completed training elements and approve for conformance to LEED Enhanced Commissioning requirements.
  - xxi. Complete the Construction Phase Commissioning Report
    - 1. Updated Commissioning Issues List.
    - 2. Final IV Forms, Startup Forms, SRC Forms, and FPT Forms (signed by the MSF D/B Contractor).
    - 3. Final Commissioning Plan, OPR, BOD and Specifications.
    - 4. Final compiled commissioning documents [one (1) hard copy and soft copy on flash drive] within sixty (60) days following substantial completion.
    - 5. Complete LEED Online Commissioning Documentation Upload.
- d. Warranty Phase:
- i. Schedule and perform one (1) site visit, conduct interviews and perform inspections to update the Commissioning Issues List; prepare report.
  - ii. Provide limited review and analysis of Building Automation System (BAS) trend logs; assist MSF O&M staff in interpreting trend log results; prepare report.
  - iii. Provide limited assistance to MSF O&M staff for strategies to resolve warranty items; prepare report.
  - iv. Provide a written update to the Final Commissioning Report.
3. Schedule: The Work shall be completed within ONE THOUSAND NINE HUNDRED TWENTY-FIVE (1,925) calendar days from the first Notice to Proceed date, exclusive of CITY review time.

**EXHIBIT 2  
SPECIAL PROVISIONS**

**COMPENSATION AND INVOICING**

**HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT  
MAINTENANCE & STORAGE FACILITY  
LEED NC 2.2 FUNDAMENTAL AND ENHANCED COMMISSIONING SERVICES**

## **Exhibit 2 – COMPENSATION AND INVOICING**

1. Subject to the provisions set forth in this Agreement, the CONSULTANT will be paid periodically by the CITY for authorized and satisfactorily completed work and services rendered under this Agreement. Such payment shall be full compensation for work performed and services rendered, for all supervision, labor, supplies, materials, equipment or use thereof, taxes, and for all other necessary incidentals. The amount to be paid to the CONSULTANT shall be computed as hereinafter set forth; provided that such payment shall not exceed the amount of TWO HUNDRED SEVENTY-EIGHT THOUSAND SIX HUNDRED THIRTY AND NO/100 DOLLARS (\$278,630.00), (hereinafter called the "Total Price"), subject only to authorized adjustments as specifically provided in this Agreement. In the event the CONSULTANT incurs costs or fees in excess of the Total Price, adjusted as provided herein, the CONSULTANT shall pay such excess from its own funds and CITY shall not be required to pay any part of such excess and the CONSULTANT shall have no claim against CITY on account thereof.
2. **Payment Schedule.** The City will pay approved invoices within thirty (30) days of receipt. At no time shall the total cumulative amount paid for the Project work exceed the Total Price.

Compensation for work and services shall be on a lump sum basis by Milestone. The Project Payment Schedule is detailed herein following paragraph 3.

**PROJECT PAYMENT SCHEDULE (Lump Sum Payments)**

Progress Payment No. 1 Milestone 1 (Upon Completion of Owner's Project Requirements Development)	\$ 5,520
Progress Payment No. 2 Milestone 2 (Upon Completion of Detailed Design Phase)	\$ 78,020
Progress Payment No. 3 Milestone 3 (Upon Completion of Construction Phase include the Acceptance Phase)	\$ 163,600
Progress Payment No. 4 (Final) Milestone 4 (Upon Completion of Warranty Phase include submittal of Final Commissioning Report)	\$ 31,490
<b>SUBTOTAL LUMP SUM</b>	<b>\$ 278,630</b>
<b>TOTAL</b>	<b>\$ 278,630</b>

**EXHIBIT 3  
SPECIAL PROVISIONS TO THE  
AGREEMENT FOR PROFESSIONAL SERVICES**

**HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT  
MAINTENANCE & STORAGE FACILITY  
LEED NC 2.2 FUNDAMENTAL AND ENHANCED COMMISSIONING SERVICES**

**CERTIFICATION REGARDING LOBBYING**

**EXHIBIT 3**

**CERTIFICATION REGARDING LOBBYING**

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) **No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned,** to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of **ANY** Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan or cooperative agreement.

(2) **If any funds other than Federal appropriated funds have been paid or will be paid** to any person for making lobbying contacts to an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with **THIS** Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions [as amended by "Government-wide Guidance for New Restrictions on Lobbying," 61 Federal Regulations 1413 (1/19/96). Note: Language in paragraph (2) herein has been modified in accordance with Section 10 of the Lobbying Disclosure Act of 1995 (P.L. 104-65, to be codified at 2 U.S.C. 1601, et seq.)].

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[Note: Pursuant to 31 U.S.C. §1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each expenditure or failure.]

The CONSULTANT, Enovity, Inc., certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the CONSULTANT understands and agrees that the provisions of 31 U.S.C. §3801, et seq., apply to this certification and disclosure, if any.

Company Name: Enovity, Inc.  
Signature: [Handwritten Signature]  
Print Name: Greg Cunningham  
Title: Principal  
Date: 7/13/10

**NOTE: THE CONSULTANT IS REQUIRED PURSUANT TO FEDERAL LAW, TO INCLUDE THE ABOVE LANGUAGE IN SUBCONTRACTS OVER \$100,000 AND TO OBTAIN THIS LOBBYING CERTIFICATE FROM EACH SUBCONTRACTOR BEING PAID \$100,000 OR MORE UNDER THIS CONTRACT.**

**General Terms and Conditions for Contracts for  
Professional Services for the City and County of  
Honolulu (8/2000)**

(8/00)

**GENERAL TERMS AND CONDITIONS  
FOR CONTRACTS FOR PROFESSIONAL SERVICES  
FOR THE  
CITY AND COUNTY OF HONOLULU**

**SECTION 1 - DEFINITIONS; GENERAL PROVISIONS**

**1.1 DEFINITIONS.** Terms as used in these General Terms and Conditions and the contract, unless the context requires otherwise, shall have the following meaning:

"Amendment" means modification.

"Change order" means a written order signed by the officer-in-charge and approved by the Director of Budget and Fiscal Services, directing the contractor to make changes which the changes clause of the contract authorizes the officer-in-charge to order without the consent of the contractor.

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

"Contract" means the written agreement between the City and the successful contractor.

"Contractor" or "consultant" means the person having a contract with the City.

"Day" means calendar day unless otherwise specified.

"Design and plans" means any and all designs, plans, construction drawings, specifications, cost estimates, work schedules, proposals, studies, reports and other items.

"Designee" means a person appointed by the Director of Budget and Fiscal Services or the officer-in-charge to act on his/her behalf with delegated authority.

"Director of Budget and Fiscal Services" means the chief procurement officer of the executive branch of the City and County of Honolulu, or the director's designee.

"General terms and conditions" means these General Terms and Conditions for Contracts for Professional Services for the City and County of Honolulu.

"HRS" means the Hawaii Revised Statutes of the State of Hawaii.

"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" means the written document indicating the official commencement date of services.

"Officer-in-charge" means the head of the department or a designee of the officer-in-charge for which services are being rendered.

GENERAL TERMS AND CONDITIONS  
(8/2000)

AR00054221

"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 section 415A-2, HRS, or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook.

"Qualified list method" means the method of source selection for professional services under HRS 103D-304.

## 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. The City shall not provide any reimbursement for the cost of developing or presenting proposals in response to the request for proposal. Failure to include the requested information may have a negative impact on the evaluation of the offeror's 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 Director of Budget and Fiscal Services 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** Managed Competition Review. All contracts executed on or after July 20, 1998 which will extend beyond June 30, 2001 (including contracts which have initial terms ending before June 30, 2001, with options to extend beyond June 30, 2001) will be subject to the Managed Competition Review, as defined below.

During its term, the contract shall be subject to a single review by the City pursuant to the managed process for public-private competition to be developed under Part III, Section 6 of Act 230, Session Laws of Hawaii 1998. It is the understanding of the parties that, as a result of the managed process review, the Agreement may be terminated by the City, renegotiated by mutual agreement of the parties, or continued in its current form. Any termination pursuant to this Section shall be deemed a termination for convenience.

**1.2.12** Cooperation. The contractor shall cooperate and coordinate with other contractors who may be employed by the City on the same or related projects of the City, 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 the City shall be resolved by the officer-in-charge, whose decision shall be final and binding.

**1.2.13** 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.

## **SECTION 2 - HAWAII ADMINISTRATIVE RULES (HAR)**

The Public Procurement Code (HRS Chapter 103D) and the Hawaii Administrative Rules, Title 3, Department of Accounting and General Services, State of Hawaii (HAR), govern the procurement of goods and services and are by reference incorporated herein and made a part of the request for proposals and contract documents.

Wherever "chief procurement officer" appears in the HAR, for the Board of Water Supply (BWS), it shall mean the Manager and Chief Engineer of the BWS, for all others it shall mean the Director of Budget and Fiscal Services.

Wherever "head of the purchasing agency" and "procurement officer" appear in the HAR, both shall mean the officer-in-charge, or their authorized designees. For all agencies except the Board of Water Supply, the officer-in-charge shall have authority to act as specified herein.

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. Should any provision of these general terms and conditions be found to be inconsistent with the HAR, the provision in the HAR shall take precedent.

### **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 Director of Budget and Fiscal Services 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 Director of Budget and Fiscal Services 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; and

- (3) If there is no direct expenditure of public funds from the City to the contractor.
- (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 the City than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the Director of Budget and Fiscal Services 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 the City 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 Director of Budget and Fiscal Services, 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**

**4.1.1** The contractor shall perform the work as an independent contractor and shall indemnify and hold harmless the City, its departments, and 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 contract..

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

**4.1.2** 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 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 the City and its departments, 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** The City 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 contract documents, the contractor shall procure or cause to be procured and maintain (as provided herein), at no cost to the City, during the life of this contract and any extensions thereof, all insurance to cover the 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. 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 . 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). The City shall be included as an additional insured under the CGL, using ISO additional insured endorsement CG 20 10 (or equivalent), and under the commercial umbrella, if any. The policy(ies) shall contain a waiver of subrogation in favor of the City.
3. Business Automobile and Umbrella Liability Insurance . 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 contractor in the performance of this contract. Business auto coverage 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.

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, the contractor's employees or agents for liability arising out of errors, omissions, or negligence 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 1 year 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 such insurance is primary coverage with respect to all insureds for claims arising from contractor's negligent acts and/or omissions or misconduct; and that any insurance (or self-insurance) carried by the City shall be excess and non-contributing;
2. Contain a standard Cross Liability endorsement 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 the City, except for non-payment 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 the City.
5. Be provided by insurers authorized to do business in the State of Hawaii, and with a current Best's rating of not less than A-, or otherwise as approved by the City;

**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, or if requested, copies of the policies, evidencing the insurance in effect at all times during the term of this contract as required herein to the City.
2. Certificates shall clearly identify the project by name and/or contract number.
3. Certificates shall show the Certificate Holder as the City and County of Honolulu, and be delivered to the Director of Budget and Fiscal Services, 530 South King Street, Honolulu, Hawaii 96813.

## **SECTION 5 - MODIFICATIONS**

**5.1 MODIFICATIONS OF CONTRACTS.** The City 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 Director of Budget and Fiscal Services; 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 of Budget and Fiscal Services, 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 the City 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 ten days* after receipt of a written change order, unless the 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 Director of Budget and Fiscal Services, 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 Director of Budget and Fiscal Services, 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 Director of Budget and Fiscal Services, shall either:

- (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.** 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 or as soon thereafter as practicable;
- (2) By unit prices specified in the contract or subsequently agreed upon;
- (3) By the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;
- (4) In such other manner as the parties may mutually agree; or
- (5) In the absence of agreement between the parties, by a unilateral determination by the Director of Budget and Fiscal Services upon the recommendation of the officer-in-charge of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the officer-in-charge in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
- (6) The contractor shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, subchapter 15, HAR. [3-125-12, HAR]

### **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 Director of Budget and Fiscal Services.

**5.3.2** Recognition of a successor in interest; assignment. When in the best interest of the City, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the City shall agree that:

- (1) The transferee assumes all of the transferor's obligations;
- (2) The transferor remains liable for all obligations under the contract but waives all rights under the contract as against the City; 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 the City, the Director of Budget and Fiscal Services 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 Director of Budget and Fiscal Services 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 Director of Budget and Fiscal Services, 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 the City.

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 DIRECTOR OF BUDGET AND FISCAL SERVICES.** 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 Director of Budget and Fiscal Services, and provided further that nothing herein shall be construed as making final and binding any decision of the officer-in-charge and/or Director of Budget and Fiscal Services 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 Director of Budget and Fiscal Services.

**6.6 LIQUIDATED DAMAGES.** The amount of damage to the City as a result of failure to complete performance of specified services under the contract within the time fixed or any extension thereof, exclusive of overhead expenses, being certain but difficult, if not impossible to ascertain, the contractor agrees to pay the sum stated in the contract as liquidated damages, and not by way of penalty, for every calendar day of delay until the services are completed and accepted, or a reasonable time has expired for completion and acceptance of the services remaining to be performed.

When the contractor is given notice of delay or nonperformance as specified in subsection 9.2, Termination for default, and fails to cure in the time it is agreed specified, the contractor shall pay to the City the amount specified in the contract per calendar day from the date set for cure until either the officer-in-charge reasonably obtains similar goods or services if the contractor is terminated for default, or until the contractor provides the goods or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under 9.2.3, Excuse for nonperformance or delayed performance of the termination for default clause, liquidated damages shall not be due the City. The contractor remains liable for damages caused other than by delay. [3-125-19, HAR]

**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.

## **SECTION 7 - SERVICES TO BE PERFORMED BY THE CITY**

**7.1 COOPERATION BY THE CITY.** The City 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 the City 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.

**7.2 REVIEW BY THE OFFICER-IN-CHARGE.** The officer-in-charge shall review all submittals and other work and data required to be made by the contractor and reject or approve such submittals in their entirety or approve the same subject to such deletions, additions and revisions as the officer-in-charge may deem necessary and proper. In submittals specified in the special provisions, all items not required by the contractor to be deleted, added, or revised after review by the contractor and not defective by reason or error, omissions or negligence on the part of the contractor, his subcontractor, agents or employees shall be deemed to have been approved.

## **SECTION 8 - COMPENSATION**

**8.1 COMPENSATION.** The contractor shall be paid the amount stated in the contract or the amount determined in accordance with the special provisions, whichever is lower, as full compensation for the performance of the services under the contract.

**8.2 PROGRESS PAYMENT.** The contractor's compensation shall be paid as set forth in the contract.

**8.3 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 Director of Budget and Fiscal Services. 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 of Budget and Fiscal Services, 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 the City against liability or to satisfy the obligations of the contractor to the City, 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 the City.

**8.5 RETAINAGE.** In accordance with HRS 103-32.1, the officer-in-charge may determine the need for retainage of a portion of the monthly payments to the contractor or payments made upon completion of phases of the contract to insure the proper performance of the contract; provided that the sum withheld shall not exceed five per cent of the amount due the contractor and that after fifty per cent of the contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the officer-in-charge may continue to withhold as retainage, sums not exceeding five per cent of the amount due the contractor.

For federally funded contracts, the amount of retainage shall be the amount allowed by federal regulations.

**8.6 PROMPT PAYMENT TO SUBCONTRACTORS.**

- (1) Any money, other than retainage, paid to a contractor shall be dispersed to subcontractors within ten 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; and
- (2) Upon final payment to the contractor, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract. [3-125-23, HAR]

**8.7 PAYMENT FOR REIMBURSABLE EXPENSES.**

Payment requests for all reimbursable expenses shall be accompanied and supported by receipted invoices for all charges. The City 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 the City.

**SECTION 9 - TERMINATION OF CONTRACTS**

**9.1 RIGHT OF THE CITY TO TERMINATE.** The City 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 Director of Budget and Fiscal Services, 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 Director of Budget and Fiscal Services may procure similar goods or services in a manner and upon terms deemed appropriate by the Director of Budget and Fiscal Services. 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 the City as the result of a default by the contractor, the City may secure, on any terms and in any manner that the City deems appropriate, supplies, materials, equipment and/or services similar to those required under the work terminated. The contractor shall be liable to the City for any excess costs for such similar supplies, materials, equipment and/or services, and the City 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 the City, 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 the City, then the contractor shall deposit, within ten (10) days from the receipt of each notice of any such reletting, to the credit of the City, solely for the prosecution and completion of the work, a sum of money equal to such excess; and in case the City 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 the City, the amount of any excess cost occasioned by such completion over the amount available under the contract in the hands of the City, free from all claims or deductions as aforesaid, all without prejudice to any other or additional rights or remedies the City 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 Director of Budget and Fiscal Services 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 the City has an interest.

**9.2.2 Compensation.** Payment for completed goods delivered and accepted by the City 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 of Budget and Fiscal Services, upon recommendation of the officer-in-charge, shall set an amount subject

to the contractor's rights under chapter 3-126, HAR. The City may withhold from amounts due the contractor as the Director of Budget and Fiscal Services deems to be necessary to protect the City against loss because of outstanding liens or claims of former lien holders and to reimburse the City 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 the City 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 the City 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 Director of Budget and Fiscal Services may, upon recommendation of the officer-in-charge, when the interests of the City so require, terminate the contract in whole or in part, for the convenience of the City. The Director of Budget and Fiscal Services 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 the City's approval. The contractor may be directed to assign the contractor's right, title, and interest under terminated orders or subcontracts to the City. 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.

- (1) The contractor may be required to transfer title and deliver to the City in the manner and to the extent directed by the officer-in-charge or the Director of Budget and Fiscal Services: 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.

- (2) The contractor shall, upon direction of the officer-in-charge, protect and preserve property in the possession of the contractor in which the City 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 the City has breached the contract by exercise of the termination for convenience clause.

### 9.3.3 Compensation

- (1) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data 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.
- (2) 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 the City, 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.
- (3) 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:
  - (A) Contract prices for goods or services accepted under the contract;
  - (B) 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;
  - (C) Subject to the prior approval of the Director of Budget and Fiscal Services 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).
  - (D) 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.

- (4) 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 Director of Budget and Fiscal Services shall, upon recommendation by the officer-in-charge, after written request by the contractor for a final decision, promptly 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 Director of Budget and Fiscal Services 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 Director of Budget and Fiscal Services shall notify the contractor of the time within which a decision will be made.

If the Director of Budget and Fiscal Services 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 the City against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Director of Budget and Fiscal Services, 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 Director of Budget and Fiscal Services 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 the City; provided that in any event the contractor shall proceed diligently with the performance of the contract where the Director of Budget and Fiscal Services 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 Director of Budget and Fiscal Services, 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, the City 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 the City'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. Section 1-18, ROH is on file and available for viewing in the Purchasing Division. Contractors needing a copy must pick up the copy from the Office of the City Clerk, Room 203, City Hall, 530 South King Street, Honolulu, Hawaii.

**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 the City.

**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.