

Section A8.230 Contracting for Services

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A8.230 Contracting for Services

1. General

Programs requiring specialized skills, knowledge, resources and/or experience which cannot be provided by existing staff may obtain such services on a contractual basis from providers outside the University. Under no circumstances should a services contract be used to circumvent University employment procedures or to perform a job that could be accomplished by available personnel within the University.

Moreover, while acquisition of services by contract may be perceived as a cost-effective means for satisfying departmental service requirements, the misclassification of a service provider can potentially subject the University to costly penalties due to non-compliance with federal tax laws or assessments resulting from workers' compensation, unemployment insurance, malpractice or other employment-related claims. Therefore, programs are cautioned that careful consideration should be given to the various ramifications of obtaining services on a contractual basis.

2. Applicability

This section shall apply to all University officials, programs, and organizations.

3. Definitions

- a. Consultant Contract means a contract engaging the services of a consultant where the only (or predominant) service to be rendered is advice or counsel in either verbal or written form. Included under this definition shall be contracts engaging individuals or firms to perform studies or evaluations of University programs, systems or procedures.
- b. Contract means any agreement for the procurement of goods, services or construction.

- c. Contractor means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the contract with the University, and acting directly or through its agents or employees.
- d. Employee means an individual who performs services that are subject to the will and control of an employer - both what must be done and how it must be done. The employer can allow the employee considerable discretion and freedom of action, as long as the employer has the legal right to control both the method and the result of the services. It is not necessary that the employer actually direct or control the manner in which services are performed; it is sufficient if the employer has the right to do so.
- e. Grant means the furnishing of assistance whether financial or otherwise, to any person to support a program authorized by law. The term does not include an award whose primary purpose is to procure an end product, whether in the form of goods, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.
- f. Honorarium means a payment which is primarily intended to confer distinction on or to demonstrate respect, esteem or admiration for the recipient.
- g. Independent Contractor means any service provider having a contract with the University who is subject to the control and direction of the University for which services are performed only as to the result of the work and not as to the means. In determining whether a service provider should be an independent contractor or an employee, "control" is the determining factor according to the Internal Revenue Service (IRS) (Refer to "employee" above). In addition, a service provider may be considered an independent contractor if he or she:
 - 1) has a significant investment in assets and/or training;
 - 2) incurs significant unreimbursed expenses;
 - 3) agrees to perform the services for a particular amount of time or to complete a specific result;
 - 4) is liable for damages for early termination without cause;

- 5) is paid primarily on a commissioned basis; and
- 6) purchases products for resale.

Additional benchmarks are if the service provider has a principal place of business, and does not primarily provide the service on University premises, or pays a fair market rent for use of the University's premises; or the service provider is not required to perform services exclusively for the University, and in the year in question and the preceding or subsequent year has performed other work for other clients, has advertised or otherwise solicited jobs, including listing with registries, agencies or brokers.

Among the most frequently used categories of independent contractors are:

- i. Consultant: an individual or firm possessing expertise in a particular field for which it is engaged to give expert or professional advice or counsel in return for an established fee.
 - ii. Speaker: an individual having specialized knowledge of a particular subject who is engaged to convey this knowledge by discourse to an audience in return for an established fee. Note: The Internal Revenue Service (IRS) has ruled that, in most cases, adjunct faculty are employees.
 - iii. Technical Service: an individual or firm rendering technical service for a fee. Note: In general, individuals (as opposed to corporations) rendering technical services are employees.
- h. 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, public finance bond underwriting, public finance bond investment banking or any other practice defined as professional by the laws of this State.
 - i. Services means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.
 - j. Sole Proprietorship means a form of business in which one

person owns all the assets. No one else has any interest in the business as owner. The interest or ownership of the business is not held in common or jointly with others, but is of such nature that the sole proprietor must alone sustain the entire loss if the business is ruined.

4. Procedure for the Acquisition of Services

Acquisition of services for all University programs shall be subject to the following procedures:

- a. Prior to initiating the acquisition of services via procurement procedures, programs should first determine whether their requirements may be met by available in-house resources or through other employment options authorized by University policy.

If the program's recruitment efforts prove unsuccessful or if employment procedures are deemed to be impracticable, the program may then consider acquisition of its service requirements by contract. See Exhibit A.

- b. To address the privatization issue, Act 230, SLH 1998, was enacted by the legislature to temporarily allow for privatization of governmental services. The act provides for the appointment of a committee to develop a "managed process" which will determine whether a particular service can be provided more efficiently, effectively, and economically by a public agency or a private enterprise.

Until this "managed process" is developed, the University may continue to contract for the required services, e.g., cashiers-clerks for the Bookstores, custodial maintenance services, security guard services, data entry operators, etc. When contracting for such services, Act 230 requires the requesting department to provide a one page public statement to the Office of Human Resources (OHR) containing a brief description of the contract and its rationale. University programs shall prepare this statement and submit it to Office of Procurement, Real Property and Risk Management (OPRPRM) which will forward it to OHR for their information. A second requirement of Act 230 applies to contracts for affected services which are entered into after July 20, 1998, the effective date of the act, and prior to July 1, 2001, AND which extend beyond June 30, 2001. If the contract meets this criteria, the following provision shall be included advising the bidder/contractor that the contract may be canceled, renegotiated, continued, or extended by the

University:

MANAGED PROCESS REVIEW

If this Agreement was entered into between July 20, 1998, and July 1, 2001, and extends beyond June 30, 2001, it is subject to a single review pursuant to the managed process developed pursuant to Part III, Section 6 of Act 230, 1998 Hawaii Session Laws, 785, 787. Pursuant to the managed process review, this Agreement may be canceled, continued, or extended by the University.

If a contract will not extend beyond June 30, 2001, the above provision need not be included in the contract.

- c. If the University program decides to acquire services by contract, the services shall be acquired by one of the following source selection methods: competitive sealed bidding, competitive sealed proposals, professional services procurement, small purchases, sole source procurement, or emergency procurements. Services may also be acquired as an exempt procurement (see APM Section A8.220.10). Programs should consult the relevant section of the Administrative Procedures Manual to determine the appropriate source selection method for a specific requirement.
- d. Subsequent to completion of the appropriate source selection process, the following procedure shall apply:

If the awardee is an individual (with or without a dba), he or she shall be hired through the University's employment procedures except for individuals in the following categories who are considered independent contractors with no employer/employee relationship with the University:

- 1) Entertainers or performers, e.g., dancers, singers, disk jockeys and other performance services, for any length of time;
- 2) Speakers for special engagements, e.g., commencement speaker, University sponsored speaker making a presentation in his/her area of expertise for any length of time;
- 3) Officials for athletic events;
- 4) Artist's models;
- 5) Special-duty police officers;
- 6) Sign language interpreters;
- 7) Hearings officers;
- 8) Non-credit instructional services;

- 9) Emergency services which are exempt from civil service, e.g., computer repair, locksmithing, on a one time basis where no long term service contract exists or is implied;
- 10) Repair and maintenance services which are exempt from civil service utilizing 58XX object code;
- 11) Freelance copy editors;
- 12) Freelance proofreaders;
- 13) Freelance publication designers;
- 14) Freelance sales representatives;
- 15) Physicians for School of Medicine residency program in Okinawa;
- 16) Royalty payments to individuals utilizing 7105 object code;
- 17) Freelance typesetters;
- 18) Sole proprietor doing business under a company name whose services are exempt from civil service;
- 19) Foreign language interpreters; and
- 20) Freelance writers.

Any other exception to this procedure must be approved by the Office of Human Resources (OHR) and will be granted only if it is clearly established that the individual is an independent contractor in accordance with Internal Revenue Service guidelines. Programs shall take into consideration the 20 common law factors provided by the IRS (Independent Contractors, **Attachment 230.1**), which indicate whether sufficient control is present to establish an employer-employee relationship, for determination of the correct relationship. Programs are advised that if the proper relationship cannot be ascertained after analyzing these factors, the employer-employee relationship should be established.

Programs wishing to secure an exception shall provide the OHR with written justification including the Independent Contractor Questionnaire, UH Form 78 (**Attachment 230.2**).

If the OHR determines that the individual may be considered an independent contractor, it shall notify the program in writing of its determination. The program may then proceed with the acquisition by contract as specified in Exhibits B and C. However, if the information provided on the Independent Contractor Questionnaire, UH Form 78 (**Attachment 230.2**) is inadequate for the OHR to make a determination, OHR will either request additional information or notify the program in writing that the individual should be hired as an

employee.

Any determination made by the OHR will apply to other individuals of the same class if the facts are not materially different from those of the individual whose status was ruled upon. The OHR shall decide whether a previous determination is applicable to other individuals.

- e. In addition to the independent contractor review discussed above, if services are to be provided by an individual, the University program shall request approval from the OHR for exemption from the Civil Service Law in accordance with section 76-16, HRS. If the OHR determines that the services are exempt from the Civil Service Law, the appropriate certification will be affixed to the procurement document by OHR:

CERTIFICATION OF EXEMPTION FROM CIVIL SERVICE

Pursuant to the delegation of the authority by the Director of Human Resources Development, I certify that the services provided under this Agreement, and the person(s) providing the services under this Agreement are exempt from the civil service, pursuant to Hawaii Revised Statutes §76-16.

- f. Sole proprietors shall be subject to the same requirements in paragraphs d and e above as those required for service providers who are individuals. Corporations and partnerships may be awarded a procurement contract without regard to paragraph d and e above.

5. Limitations

- a. Prior approval of the Board of Regents is required for all consultant contracts which exceed \$25,000 or which may result in changes in the Board of Regents' policies and/or will have significant impact on programs and operations, regardless of cost. For consultant contracts exceeding \$25,000, approval of the Office of the Senior Vice President for Legal Affairs and University General Counsel as to form is required prior to submittal to the Board of Regents for approval.
- b. Prior grantor approval is generally required for the acquisition of consultant services under extramural contracts and grants. (Refer to Section A8.290)
- d. Prior authorization of the Office of the Senior Vice President for Legal Affairs and University General Counsel is required in order to expend public funds for the employment or retention by contract or otherwise of any attorney.

6. Honoraria

An "honorarium" is a payment which is primarily intended to confer distinction on or to demonstrate respect, esteem or admiration for the recipient. It is paid to non-employees **at the discretion of the University** and is not a fee charged or negotiated by the person being paid. If the recipient is being paid to render services, e.g., to give a lecture or deliver an address, the payment, regardless of the amount, will be considered a payment for services and shall be subject to the procedures mentioned above. Written justification for honoraria exceeding a nominal amount, e.g., \$500, shall be maintained in the fiscal officer's file.

7. Responsibility

- a. Programs requiring professional or non-professional services are responsible for:

- 1) Planning the acquisition with adequate procurement lead time. There will be no "After the fact" ratification commitments made by programs or employees.
- 2) Determining limitations, if any, and obtaining all required approvals in advance of contract preparation, and insuring that the specifications and/or contract terms are clear, complete and justifiable before transmittal to Office of Procurement, Real Property and Risk Management (OPRPRM). If in doubt, request technical assistance from OPRPRM staff.
- 3) Providing a timely written request for services of \$25,000 or more to OPRPRM for procurement action which shall include appropriate supporting documentation (Contracting for Services, OPRPRM Form 74, **Attachment 230.3**). If services are to be acquired on a sole source basis, a Request for Sole Source, Form 65, **Attachment 255.1**, Notice of Sole Source, OPRPRM Form 110, **Attachment 255.2**, a quotation from the sole source vendor, Determination of Cost or Price Reasonableness, **Attachment 285.1**, grant award documents (if applicable), Contract Encumbrance and Payment Form, FMIS-41, **Attachment 275.1, 275.1a, and 275.1b**, and a draft of the proposed contract, University of Hawaii Agreement for Services, OPRPRM Form 107G, **Attachment 230.4**, made ready for execution by the parties, shall be submitted to OPRPRM with the request for procurement action. If services are to be acquired on an exempt basis, a quotation from the exempt vendor, Determination of Cost or Price Reasonableness, **Attachment 285.1**, grant award documents (if applicable), Contract Encumbrance and Payment Form, FMIS-41, **Attachment 275.1, 275.1a, and 275.1b**, and a draft of the proposed contract, University of Hawaii Agreement for Services, OPRPRM Form 107G, **Attachment 230.4**, made ready for execution by the parties, shall be submitted to OPRPRM with the request for procurement action. A one hundred (100)-day lead time should be provided to OPRPRM for formal solicitations (IFB's and RFP's) and a sixty (60)-day lead time for sole source and exempt contracts. See Exhibit B.
- 4) Insuring that all contracted services are performed satisfactorily and on time, in accordance with the contract terms.

- 5) Complying with Administrative Procedure A9.480 Casual Appointments.
 - 6) If services are to be acquired on a small purchase basis, a purchase order should be issued for services of less than \$4,000 and a University of Hawaii Services Contract, OPRPRM Form 63, **Attachment 230.5**, together with a purchase order for encumbrance and payment purposes, shall be used for services of \$4,000 to less than \$25,000. Fiscal officers are authorized to execute the University of Hawaii Services Contract, OPRPRM Form 63, **Attachment 230.5**, within their purchasing authority and together with the fully executed contract, fiscal officers shall issue a purchase order for purposes of encumbrance of funds and payment. See Exhibit C.
- b. OPRPRM responsibilities include:
- 1) Reviewing all documentation submitted by the program for: a) completeness of all required contractual and supporting documentation, b) determination of adequate justification for sole source award of the contract, if applicable, c) determination that adequate cost or price reasonableness has been established, d) determination that appropriate ethics clearances have been satisfied and/or obtained from the Ethics Commission, e) determination of appropriate contract form to be utilized, f) transmittal of the contract for execution by the contractor, g) confirming the tax status of the contractor, including contractor's tax identification number, h) assignment of a University contract number and i) final distribution.
 - 2) Notifying the contractor of the requirement of a tax clearance in accordance with Section 103-53, Hawaii Revised Statutes, for contracts of \$25,000 or more, prior to entering into the contract and before final payment can be made.
 - 3) Closing the contract file.
- c. The Disbursing Office shall be responsible for:
- 1) Making final contract payment and insuring that all actions outlined in Section A8.275.4.h, Contract Closing, have been completed.

- 2) Verifying receipt of the tax clearance certificate from the contractor.
- 3) Insuring that a departmental official has certified that, as contractually authorized, all services have been satisfactorily completed.
- 4) Notifying OPRPRM when final payment has been made.