

THE LITTLE CONTRACT THAT COULDN'T

For the first time since this UARC business began, I found myself agreeing with UH administration when newcomer, UH Manoa Vice Chancellor Gary Ostrander, said that “people will be disappointed in the contract.” For faculty, students and community members who have raised questions about the proposed UARC, this contract does nothing to address any of the multiple concerns about the UARC already on the table and unaddressed by the UH administration while actually raising even more questions about the value and purposes of the UARC.

As Ostrander said, the contract is “basically a document on how you do business.” But, as anyone familiar with contracts in other areas and contract law knows, the language in a contract may be used to conceal as well as reveal. This proposed contract on the UARC does far more of the former than the latter, to the extent that one might argue the language is purposely vague and possibly duplicitous.

While further examination by experts in the Manoa Faculty Senate and others certainly will help to expand or put to rest these concerns, or perhaps uncover other concerns, this paper serves as a set of preliminary observations of contradictions, problems and vagaries in the contract that make it a vehicle that may actually damn itself.

The administration’s long-standing argument that the UARC is simply a continuation of the way UH researchers have been doing research is completely destroyed by even a casual reading of the contract. The contract, if implemented, would actually institutionalize military research at the UH. Currently, UH researchers compete individually for government contracts. Further, the current pattern is for researchers to compete for contracts knowing what the final product will be. The proposed UARC, however, is a radical departure from that pattern, involving as it does, a contractual relationship with the University, called “the contractor,” in the proposed contract, rather than the individual researchers who previously were only sponsored by the UH. Moreover, UH researchers now will be at the beck and call of the Navy, conducting research on task orders that the Navy produces. These are not small or subtle differences. They mean the UH itself, not individual researchers or programs, will be bound contractually to the Navy, with all the baggage that implies for a University. They also mean that UH researchers will become small cogs in the Navy machinery, churning out “products” (as the contract calls them) rather than engaging in the independent pursuit of knowledge. This contract, then, by inference, asks the question, are these the directions in which the community, faculty and students wish the University to move?

The University administration has focused solely on the financial benefits that the UARC will bring. They have argued that the contract will bring a minimum of \$10 million and a maximum of \$50 million to University coffers over a period of five years. Administrators try to bolster their argument by figuring all potential benefits at the \$50 million level, virtually ignoring their own statements that the total may actually be \$10 million rather than \$50 million. Now, even that promise seems untenable given this proposed contract:

1. Nowhere in the contract does there appear to be ANY guaranteed amount of money promised!
2. The contract is for only three years, with a possible two-year option. If the contract is terminated after three years, what would happen to the “guaranteed” amount of money? Even \$10 million may not be realistic.
3. The contract has numerous provisions for subcontractors, other organizations that may be doing part of the requested work. This further reduces the amount of money that allegedly would pour into UH coffers.
4. The UH is required to put up millions of dollars in start-up costs, further reducing the amount of money the UH will receive.

In other words, this UARC may very well end up costing the UH money rather than being a financial windfall as UH administrators argue. The financial argument may be the weakest reason of all for bringing a UARC to UH!

The option to end the contract after three years (discussed above) appears to be only for the Navy, not the UH, to exercise. The contract states that “the government has the right to unilaterally exercise any... option.”

No products are specified in the contract. The Navy and the UH administration argue that this is because all products will be task orders that the Navy will direct UH researchers to produce. Is it really possible that two organizations like the Navy and the UH would willingly engage in a contractual relationship without a clue as to what the products will be? Such an assumption seems unbelievable since it would assume that both parties, and particularly the UH administration, are naïve at best and incompetent or duplicitous at worst. From the point of view of UH, an equally more plausible hypothesis would be that the parties do, in fact, have an idea about what products might be expected, and because of the nature of those products, are keeping them concealed. This hypothesis gains weight because of the 2004 memo from Ronald Sega, Director of Defense Research and Engineering at the Pentagon, stating that the Navy is looking forward, “to seeing this intriguing basic and applied ocean science and astronomical technology IMPROVE SYSTEM PERFORMANCE OF DoD WEAPON SYSTEMS” (emphasis added).

The contract calls for conducting research on underwater noise sources on marine life and mammals. Given the widespread deaths of dolphins and whales around the world that allegedly is due to Navy underwater noises, will the products of UH research now be used to continue the carnage? There are no safeguards in the contract that will prevent the UH from engaging in this most abhorrent of practices. Is that the type of research in which our communities want the UH expertise in oceanographic research to be engaged?

The contract is unclear, possibly misleading and possibly even intentionally deceptive about the major limitations and restrictions that will be imposed on UH researchers who participate in the UARC. The Manoa Faculty Senate has already opposed engaging in any contract where there are provisions limiting the researcher’s freedom to use the results of his or her own research and disseminate them in any way the researcher deems appropriate. This contract is rife with implicit and explicit restrictions. The explicit ones

are clear when the contract mentions (and only mentions; see below) classified (secret) research. But the contract also states that any unclassified research may be deemed to be “sensitive,” and therefore subject to the same restrictions: the information may not be used, disclosed, reproduced or disseminated in any forms—including publication—without specific approval from the government. Given the obsession for secrecy of the current Federal government, can anyone seriously doubt that these restrictions will be rigorously enforced?

There is, in fact, mention of 3-year limitations on use of any information derived from the UARC to the extent that UARC researchers may not share their results with the community or even participate in competitive bidding for government contracts that may involve use of knowledge gained from the UARC. There are no provisions whatsoever for the development of dual use technologies, those that can be beneficial for both the military and the community. The contract mentions these restrictions; it does not spell them out, perhaps for obvious reasons. Yet, there is strong corroborating evidence from the training manual from other UARCS, attached as “UARC Training.” While there is far too much about the prohibitions on use of results from working in a UARC to quote here, a brief quote may suffice:

1. “It is your responsibility to inform the Research project Director that work you are performing includes access to Government-sensitive or third-party proprietary data.
2. If in the course of your work, you receive Government Sensitive or Third Party data that has (sic) not been released or otherwise made available to the public, you may not use that data for any purpose other than performance of the contract unless prior written approval is received from the contracting officer.
3. This means that you cannot share it with your colleagues or other employees.
4. You cannot present it at a conference, and
5. You cannot use it in a publication, unless those actions are necessary for the performance of the contract” (p.23).

Note that these are the restrictions for UNCLASSIFIED data declared as “sensitive.” There are no limitations in the contract on what the Navy can declare as classified or sensitive. This puts the lie to the administration’s oft-repeated claim that only a small amount of the research (ranging from 1.5% to 15%) will be classified. Some have argued that the military is like the Mafia; once they have their hooks into you, there is absolutely nothing one can do to regain independence.

Another UH administration argument that is not addressed by the contract, and thereby possibly refuted unless clarified, is that UARC researchers unconditionally will have the right to refuse any projects. While that claim is naïve on the surface given the way graduate students and junior faculty can be used by unscrupulous administrators, the fact that the contract appears to make no mention of this “right” raises serious questions. Is there or is there not such a right? Are there any penalties to the researcher or the institution for refusal to participate?

Classified research –a huge bone of contention among the faculty- is only mentioned, but never described or detailed. In fact, the contract states that classified research is discussed in an Appendix, but no such Appendix was released by the administration. The implications of this omission are enormous and ominous. Are there details about the classified research that the administration and the Navy already want concealed from the faculty and the public even before there is a signed contract and a single product?

One section of the contract calls specifically for the UH to “indoctrinate its personnel” as to the many restrictions on UARC products. Faculty, students and the community alike have to decide whether “indoctrination” is the real purpose of a University as opposed to the search for new knowledge and its dissemination to students and the community and the conduct of research that will have clear benefits for the state and the world. Up to now, the UH focuses on the latter. Clearly, in its own words, the UARC contract will require the former, indoctrination!

One section of the contract provides guidelines for the disposal of “scrap” that is “dangerous to public health, safety or welfare.” Given the propensity of the UH to mismanage hazardous materials, as pointed out by the interim report of the Faculty Senate Committee on the UARC, as well as the fines the UH has incurred for such mismanagement, how secure can the people of Hawai’i feel about the possibility of more hazardous materials that are dangerous to the community being handled with appropriate safeguards, especially when that hazardous material may be deemed classified or sensitive and therefore not subject to public scrutiny or accountability about its disposal?

Signing of this contract will be illegal according to State law which prohibits employment discrimination against gays, lesbians and transgendered people. The Navy by law discriminates by refusing to employ people who acknowledge they belong to one of these sexually oppressed groups. The contract does state that the contractor cannot discriminate with regard to race, color and national origin, but is mute on the issue of sexual orientation. Thus, by default, other Navy requirements will be used, making this contract illegal as soon as it is signed.

The contract discusses the transportation by sea of materials needed by, and, possibly, products of, the UARC. There are no provisions discussing the protection of the sea and Pacific communities from the transportation of possibly hazardous materials.

The contract is full of details describing how business must be conducted by the UARC. That business will require the hiring of a large bureaucracy to manage the UARC, or as the Faculty Senate UARC Committee put it, another “bureaucracy within a bureaucracy” at Manoa. Since many faculty already consider the UH to be “over-bureaucratized,” it strains the imagination to think that the main product of the UARC just may be a new, but even more secretive, bureaucracy.

One provision of the contract calls for the UH to be furnished with “intelligence products.” What more evidence is needed that the university will become a branch of the

military rather than a University devoted to the search for knowledge that will positively transform our community and the world?

Because the community, faculty and students with questions about the UARC largely have been shut out of the process by the UH administration, access to information about concerns such as these has been severely limited. It is hoped that colleagues in the Faculty Senate will be more successful in prodding administrators to clearly and specifically address the many concerns described here, whether it is to verify or negate them.

But until they do, there is not a shred of evidence in this contract or the University's UARC "Business Plan" that preceded it that explains why the University of Hawai'i should make such a radical departure from its Mission Statement and Strategic Plan and embark on a course of action that for all intents and purposes will make the UH appear as though we now are an arm of the military.

Penalties for refusal?