# TABLE OF CONTENTS

## CHAPTER 1 - DEFINITIONS; REFERENCES

1.1 Definitions ......................................................................................................................... 5  
1.2 References ......................................................................................................................... 11  
1.3 Design-Builder’s Representations ....................................................................................... 13  
1.4 Meaning of Terms ............................................................................................................... 14

## CHAPTER 2 - GENERAL PROVISIONS

2.1 Contract not binding unless funds available ..................................................................... 15  
2.2 Fiscal responsibility ............................................................................................................. 15  
2.3 Confidential or proprietary information of UH ................................................................ 16  
2.4 Personal information protection .......................................................................................... 16  
2.5 Copyright or patent ............................................................................................................. 18  
2.6 Work Made for Hire ........................................................................................................... 18  
2.7 Ownership of results .......................................................................................................... 19  
2.8 Assignment of antitrust claims for overcharges for goods and materials purchased .......... 19  
2.9 Assignment of contract; change of name; assignment of money ......................................... 19  
2.10 Independent Contractor .................................................................................................... 20  
2.11 Liability ............................................................................................................................ 20  
2.12 Indemnification .................................................................................................................. 20  
2.13 Liquidated damages .......................................................................................................... 21  
2.14 Audit and inspection of records ......................................................................................... 21  
2.15 Severability ...................................................................................................................... 21  
2.16 Laws, regulations .............................................................................................................. 22  
2.17 Governing law and venue ................................................................................................. 22  
2.18 Campaign Contributions by State and County Contractors ............................................ 23

## CHAPTER 3 - INSURANCE; PERFORMANCE AND PAYMENT BONDS

3.1 Insurance ........................................................................................................................... 24  
3.2 Payment guarantee ............................................................................................................ 29  
3.3 Performance and payment bonds ....................................................................................... 29

## CHAPTER 4 - PERFORMANCE

4.1 Time is of the Essence ....................................................................................................... 31
CHAPTER 6 – PAYMENT; PRICE ADJUSTMENTS ................................................................. 61

6.1 Payment......................................................................................................................... 61
6.2 Provisional Sum/Allowance items ................................................................................ 62
6.3 Payments during performance of work ........................................................................... 62
6.4 Retention ........................................................................................................................ 62
6.6 Payment for delivered materials or Equipment ............................................................. 64
6.7 Final Payment ............................................................................................................... 64
6.8 Payment does not imply acceptance of work .................................................................. 65
6.9 Price adjustment .......................................................................................................... 65
6.10 Force account ................................................................................................................. 68
6.11 Prompt payment to Subcontractors ............................................................................. 71
6.12 Authority to withhold money due or payable ............................................................... 73
6.13 Interest ......................................................................................................................... 74

CHAPTER 7 - DISPUTES AND REMEDIES ......................................................................... 75

7.1 Suspension of Work ..................................................................................................... 75
7.2 Termination for default for nonperformance or delay; damages for delay ................. 76
7.3 Termination for convenience ......................................................................................... 78
7.4 Authority to resolve contract and breach of contract controversies ......................... 79

EXHIBITS

“A” Surety Bid Bond
“B” Performance Bond (Surety)
“C” Labor and Material Payment Bond (Surety)
“D” Performance Bond (Non-Surety)
“E” Payment Bond (Non-Surety)
“F” Estimate for Change Order Work
“G” Force Account Worksheet (UH FMPO-96)
“H” Certificate of Current Cost or Pricing Data
“I” Certification of Employment of Hawai‘i State Residents
“J” Certification of Safety Program
“K” Certification of Compliance for Final Payment
The General Conditions of Design-Build contracts of the University of Hawai‘i ("UH"), incorporated by reference in the Request for Proposals and referred to as the “GCDB” or “General Conditions,” represent the UH's policy and requirements relating to design-build projects as authorized by Hawai‘i Revised Statutes ("HRS"), Chapter 103D, and the Hawai‘i Administrative Rules ("HAR"), Title 3, Department of Accounting and General Services (collectively referred to as the “Procurement Code”). Should any contractual term herein be inconsistent with the Procurement Code, the Procurement Code shall govern. The Design-Builder is deemed to be familiar with the Procurement Code.

ORDER OF PRECEDENCE: The separate parts of the Contract, as defined below are intended to complement each other. Unless it is apparent that a different order of precedence is intended, the most recent RFP addenda shall govern over all other previously issued RFP addenda and other parts of the Contract; plans (including the Design Plans, the Working Plans, the Quality Plans, the Project Plans, and the As-Built Plans) (collectively the “Plans”) shall govern over the UH’s Performance Specifications; and the Special Provisions shall govern over the Plans, the UH's Performance Specifications, and/or the General Conditions.

Where the Design-Builder’s Proposal presents Work or products of a higher quality than that shown elsewhere in the Contract, and the UH has accepted the proposed change to the Work and products to that of a higher quality, the Design-Builder’s Proposal will take precedence for that specific higher quality Work and products, as applicable.

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.
CHAPTER 1 - DEFINITIONS; REFERENCES

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

“Acceptance” means a determination by the UH regarding satisfactory compliance with applicable Contract requirements and Government Rules.

“Approval” means the UH’s written statement indicating that the subject Work complies with Contract requirements. Approval shall not be construed as a warranty by the UH that the Design-Builder’s methods will succeed or will be the most efficient or economical method of accomplishing the Work, nor shall the terms be construed as a warranty that the actual materials used in construction will perform as represented in test results supplied to the UH by the Design-Builder. Approvals will only be given for those submittals, activities, or Work specifically identified for “Approval” or “approval” in the Contract.

“As-Built Plans” means final drawings and specifications furnished by the Design-Builder, documenting the details and dimensions of the completed Work.

“Authority Having Jurisdiction (“AHJ”)” means a governmental entity with a duty to approve certain actions, reports, permits, documents, etc., as described herein.

“Building Information Model (“BIM”)” means a digital representation of physical and functional characteristics of a facility. A BIM is a shared knowledge resource for information about a facility forming a reliable basis for decisions during its life-cycle; defined as existing from earliest conception to demolition.

“Calendar Day” means every day shown on the calendar, beginning at 12:00 a.m. Hawai‘i standard time.

“Change order” has the same meaning as set forth in HRS § 103D-104. A change order signed by all parties to the contract constitutes a supplemental agreement / modification to the contract.

"City" means the City and County of Honolulu, State of Hawai‘i.

"Construction" has the same meaning as set forth in HRS § 103D-104.

"Construction Manager" means the UH’s representative with responsibility for monitoring and/or auditing the Design-Builder’s construction and environmental field activities for compliance with the Contract’s requirements. UH may self-perform or contract with a Consultant to perform construction management services. The Design-Builder shall fully cooperate with the Construction Manager in the performance of their services.

"Contract" means the agreement between UH and the Design-Builder covering the design and construction of the Project and other services in connection therewith for which award is made to the Design-Builder, including the furnishing of labor, materials and equipment in connection therewith. It shall include all Contract documents.

"Contract modification" or "Modification" has the same meaning as set forth in HRS § 103D-104.

“Contract Price” means the total amount paid for the Work to be performed under the Contract, as it may be adjusted from time to time in accordance with the Contract. The initial Contract Price is specified in the Contract Agreement.
“Contract Time” means the number of days set forth in the Contract within which Design-Builder must achieve Substantial Completion of the Work, as adjusted by Change Order.

“Cost” means all expenditures, including design costs, wholly and necessarily incurred, whether on or off the Site, with respect to the Work and overhead, finance, and other charges properly allocable thereto. Cost does not include any allowance for profit.

“Critical Path” means each critical path on the Schedule of Work which ends on the contractual deadline for Substantial Completion (i.e., the term shall apply only following consumption of all available Float in the schedule for Substantial Completion). The lower case term "critical path" means the sequence of activities on the Schedule of Work that shows the shortest time path for completion of the Project.

"Days" means calendar days unless otherwise specified. [HAR § 3-120-2]

“DB Project” means Project.

“Design Acceptance” means written confirmation by the UH after submittal and review of the As-Built Plans and BIM Models that the Project design conforms to the Contract requirements and accurately reflects the As-Built conditions. Required as part of Final Acceptance.

“Design-Build” means the Project’s delivery methodology under which the UH contracts with a single entity that has responsibility for the design and construction of the Project under a single contract with the UH.

"Design-Builder" means the Person selected pursuant to the RFP undertaking the execution of the Work under the terms of the Contract with the UH, and acting directly or through its agents or employees. Also referred to as “Design-Build Entity (“DBE”).

“Design Documents” means maps, Design Plans, Project Specifications, reports, calculations, records, submittals, and other specified documents prepared by the Design-Builder and/or Designer in the course of performing project engineering and design Work.

“Design Plans” means the plans prepared by the Designer during the design development stage to represent the Project.

“Design Requirements” means those specifications and design criteria contained in the Contract that specify the minimum acceptable technical standards and define the limits within which the design of the Project shall be developed and conducted. Also referred to as Design Criteria.

“Design Review” means a comprehensive and systematic examination of the design as specified in the Contract to verify that the design is in conformance with the requirements of the Contract, as performed by the Design-Builder for all stages of the design except As-Built Plans, which is performed by the UH. During all stages of the design, except As-Built Plans, the UH will contribute to the review through oversight including participation, auditing and spot-checking.

“Design Specifications” means the dimensional and other physical requirements of the Project, including items being purchased for incorporation into the Project and how a product is to be fabricated or constructed for incorporation into the Project.

“Designee” means a person appointed by the UH President to act on its behalf with delegated authority.

“Designer” means a Principal Participant, specialized Subcontractor, or in-house designer that leads the team furnishing or performing the design of the Project.
“Designer of Record” means the member of the Design-Builder’s team responsible for stamping and sealing the Design Documents.

“Differing Site Condition” means subsurface or latent physical conditions that are encountered at the Site and differ materially from the conditions indicated in the Contract. It may also be unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the type of Work provided for in the Contract, provided in all cases that the Design-Builder had no actual or constructive knowledge of such conditions as of the Proposal Date.

“Employee” means any person working on the Project and who is under the direction or control of, or receives compensation from, the Design-Builder or any Subcontractor.

“Environmental Approvals” means the Governmental Approvals contained or referenced in the environmental provisions of the Contract.

“Equipment” means all apparatus, machinery, tools, and equipment, together with the necessary supplies for their upkeep and maintenance, necessary for the proper construction and acceptable completion of the Work.

“Final Acceptance” means the final acceptance of the Work by the UH upon the Design Builder’s completion of the Work as defined in the Contract (including submission and approval of the As-Built Plans) and which shall not occur until after: (a) UH’s oversight has been properly completed to the UH’s satisfaction and (b) UH’s Design Acceptance of the Work.

“Final Design” means any design activities following preliminary design and expressly includes, but is not limited to, the preparation of final construction plans and detailed specifications for the performance of construction work. Other activities constituting final design include, but are not limited to, final plans, project site plan, final quantities, and final engineer's estimate for construction.

“Float” means the difference between early completion times and late completion times for activities as shown on the Schedule of Work and including any float contained within an activity as well as any period containing an artificial activity.

“Force Account” means the basis of payment for the directed performance of design or construction Work, with payment based on the actual cost to the Design-Builder of labor, Equipment, and materials, and including various constant activities as described in Section 6.10 herein.

“General Conditions Design-Build” or “GCDB” means the General Conditions for Design-Build Contracts for the University of Hawai‘i, dated August 2016.

"Guarantee" or "Warranty" means a written agreement or assurance of the quality of or the length of use to be expected from Equipment, material, device, or system offered, or work performed.

"Hazardous materials" mean and include any and all radioactive materials, asbestos, organic compounds known as polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, hazardous wastes, toxic substances, and any and all other substances or materials defined as "hazardous materials," "extremely hazardous materials," "hazardous wastes" or "toxic substances" under or for the purposes of hazardous materials laws.

“Holidays” – In the State of Hawai‘i, these occur on:

a) January 1 (New Year's Day);
b) Third Monday in January (Martin Luther King Jr.'s Birthday);
c) Third Monday in February (Presidents Day);
d) March 26 (Prince Jonah Kuhio Kaianianole Day);
e) Friday before Easter (Good Friday);
f) Last Monday in May (Memorial Day);
g) June 11 (King Kamehameha Day);
h) July 4 (Independence Day);
i) Third Friday in August (Statehood Day);
j) First Monday in September (Labor day)
k) November 11 (Veterans’ Day);
l) Fourth Thursday in November (Thanksgiving Day); and
m) December 25 (Christmas Day);

or, on any day that may be appointed by the President of the United States or Governor for public
fast, thanksgiving or as a legal holiday.

If January 1, July 4, November 11, or December 25 falls upon a Sunday, the Monday following shall be
observed as a holiday.

If January 1, July 4, November 11, or December 25 falls upon a Saturday, the Friday preceding shall be
observed as a holiday.

"HRS" means the Hawai‘i Revised Statutes of the State of Hawai‘i, as amended.

“Indemnitee” has the meaning in Section 2.12.

“Inspector” means a Design-Builder representative detailed to inspect methods and materials, Equipment,
and Work both on and off the Site of the Project.

“Laboratory” means a testing laboratory retained by the Design-Builder for QC sampling and testing or
by the UH for verification sampling and testing.

“Milestone” means a defined step toward the completion of Work within a project schedule.

"Notice to Proceed" or “NTP” means the document issued to the Design-Builder designating the official
commencement date of the performance under the Contract.

“Partial Suspension” means suspension of Work on some, but not all, items.

“Payment Bond” means the approved form of security, executed by the Design-Builder and its Surety or
Sureties, guaranteeing the payment of all legal charges, costs, amounts, and debts pertaining to the design
and construction of the Work.

“Performance Bond” means the approved form of security, executed by the Design-Builder and its Surety
or Sureties, guaranteeing performance of all Work in compliance with the requirements of the Contract,
including all Change Orders pertaining thereto.

“Performance Specifications” means the functional or performance requirements of the item, what a
product does, and how well it performs.

“Person” means any individual, firm, corporation, company, limited liability company, limited liability
partnership, joint venture, voluntary association, partnership, trust, or public or private organization, other
legal entity, or combination thereof.
“Principal Participant” means any of the following entities:

a) The Design-Builder;

b) An individual firm, all general partners, or joint venture members of the Design-Builder;

and/or

c) All Persons and legal entities holding (directly or indirectly) a 15% or greater interest in the Design-Builder.

"Procurement" has the same meaning as set forth in HRS § 103D-104.

“Procurement Officer” has the same meaning as set forth in HRS § 103D-104.

"Professional services" has the same meaning as set forth in HRS § 103D-104.

"Project" means the Work to be designed and constructed by the Design-Builder and all other Work product to be provided by the Design-Builder in accordance with the Contract.

“Project Plans” means those portions of the Contract prepared by or for the Design-Builder that receive UH Review and Comment, consisting of drawings, diagrams, illustrations, schedules and other data which show the scope, extent, and character of the Work. Project Plans will go through all design phases including Final Design prior to being issued for construction.

“Project Specifications” means those specifications developed by the Design-Builder to define and control the specific requirements, conditions, means, and methods to be used on the Project. Project Specifications will be based on the Contract requirements, including the UH’s Performance Specifications (as modified in the Contract), and shall provide finished products that meet or exceed the quality requirements of the Contract. Project Specifications are subject to UH Review and Comment during Design Reviews.

"Proposal" means the final mutually-agreed terms of the proposal submitted by the Design-Builder in response to the UH’s RFP or the Best and Final Offer accepted by the UH in accordance with HAR §§ 3-122-53 and 3-122-54.

“Provisional Sum or Allowance Item” means an estimated amount set by the UH and so designated in the RFP pricing information or on the Contract serving to provide for payment for specified items of Work (including potential force account work) or an expenditure which has not been quantified or detailed at the time the Contract is executed, which sum may include provision for Work to be executed or for goods, materials, or services to be supplied.

“Quality Assurance” or “QA” means all planned and systematic actions by the Design-Builder necessary to provide assurances that the Design-Builder is effectively performing QC in accordance with the Quality Plan, that all Work complies with the Contract and that all materials incorporated in the Work, all Equipment, and all elements of the Work will perform satisfactorily for the purpose intended.

“Quality Control” or “QC” means the total of all activities performed by the Design-Builder, Designer, Subcontractor, producer or manufacturer to ensure that the Work meets the Contract requirements as set forth in the UH Performance Specifications, Section 01400, Quality Control. Quality Control also includes documentation of all QC design and construction efforts.
“Quality Plan” means the plan that sets out the Design-Builder’s means of complying with its obligations in relation to QA/QC as set forth in Performance Specifications, Section 01400, Quality Control.

“Safety Plan” means the plan that sets out the Design-Builder’s means of complying with its obligations in relation to Project safety, which plan shall be provided and maintained in accordance with the Contract requirements following UH Review and Comment.

“Samples” means: (1) representative quantities of materials taken in specified amounts and frequencies for subsequent testing in accordance with specified standard procedures or (2) physical examples of materials to be supplied or workmanship, which shall establish standards by which the Work shall be judged, provided such samples meet Contract requirements.

“Schedule of Values” means a table of schedule milestones that include a pay item description and value, planned or actual achievement date, a cross reference to a corresponding activity on the Design-Builder’s Schedule of Work, and serves as a basis for monthly payment. The Design-Builder’s Schedule of Values shall be subject to UH Review and Approval.

“Schedule of Work” has the same meaning as set forth in Performance Specifications Section 01300, Submittals

“Site” means those areas designated in writing by the UH for performance of the Work and such additional areas as may, from time to time, be designated in writing by the UH for the Design-Builder’s use in performance of the Work. For purposes of insurance, indemnification, safety, security requirements, and payment for use of Equipment, the term Site also includes any property being temporarily used by the Design-Builder for storage of Equipment and/or construction Work.

“Special Provisions” means additions and revisions to the General Conditions Design-Build covering conditions applicable to this individual Project.

"Specifications" has the same meaning as set forth in HRS § 103D-104.

"State" means State of Hawai‘i.

“Subcontract” means any agreement entered into by the Design-Builder or a Subcontractor (at any tier) for a portion of the design, construction, demolition or any other part of the Work in connection with, and under the terms of, the Contract.

"Subcontractor" means any Person that enters into an agreement with the Design-Builder to perform a portion of the Work for the Design-Builder, and any Person that enters into such an agreement with another Subcontractor. [HAR § 3-120-2]

“Substantial Completion” means the point at which the Design-Builder completes the Project, such that it can be safely and effectively used for its intended purpose as Approved by the UH.

“Substantial Completion Date” means the date upon which Substantial Completion is achieved.

“Substantial Completion Deadline” means the date on which the Design-Builder is required to achieve Substantial Completion, per the Contract.

"UH Project Manager" means the UH representative in charge of managing and administering the Contract and the Project.
“UH Review and Comment” means the UH’s reviews, observations, and/or inspections based solely on information submitted by the Design-Builder (not based on any independent investigation or inquiry by the UH) and the UH’s written responses resulting from such UH actions.

“UH Performance Specifications” means the Performance Specifications of the UH.

“Work” means all of the administrative, design, engineering, real property acquisition support services, utility support services, procurement, legal, professional, manufacturing, supply, installation, construction, supervision, management, testing, verification, labor, material, Equipment, maintenance, documentation, and other duties and services to be furnished and provided by the Design-Builder as required by the Contract, including all efforts necessary or appropriate to achieve Final Acceptance of the Project except for those efforts which the Contract specifies will be performed by the UH or other Persons. In certain cases, the term is also used to mean the products of the Work.

"Working day" means any day on the calendar, exclusive of State holidays, Saturdays, and Sundays. Unless another meaning is intended, "working days" shall mean consecutive working days.

“Working Plans” means those plans prepared by the Design-Builder to supplement Design Plans to specify additional details and procedures for construction of the Project, including the following:

a) Construction details;
b) Erection plans;
c) Fabrication plans;
d) Field design change plans;
e) Stress sheets;
f) Shop plans;
g) Lift plans;
h) Bending diagrams for reinforcing steel;
i) Falsework plans; and
j) Similar data required for the successful completion of the Work.

1.2 References. (a) Most recent edition used. When reference is made to known Standards and Specifications, the most recently adopted and published edition of such standards and specifications on the date of the notice to Design-Builders are to be used, unless otherwise specified.

(b) Abbreviations. The following abbreviations shall refer to the technical society, organization, body, code, rules, or standards, listed opposite each abbreviation:

AASHTO American Association of State Highway and Transportation Officials
ACI American Concrete Institute
ADAAG Americans with Disabilities Act Accessibility Guidelines
AISC American Institute of Steel Construction
AITC American Institute of Timber Construction
ANSI American National Standard Institute
ASA American Standards Association
ASCE American Society of Civil Engineers
ASLA American Society of Landscape Architects
ASME American Society of Mechanical Engineers
ASTM American Society for Testing and Materials
AWWA American Water Works Association
AWS American Welding Society
BIM Building Information Model or Building Information Modeling
1.3 Design-Builder’s Representations.

(a) License. Design-Builder represents that Design-Builder is a business entity which is experienced and skilled in the design and construction of projects of the type described in the Contract and that the Design-Builder, and all Subcontractors, are licensed by the State of Hawai‘i to engage in the type of design and construction required by the Contract and are in compliance with all laws and regulations.

(b) Design-Builder’s warranty. By the act of submitting its proposal in response to the RFP, the Design-Builder warrants that:

1. Reviewed Contract Documents. The Design-Builder and all Subcontractors intended to be used by the Design-Builder have carefully and thoroughly reviewed the Contract documents and have found them complete and free from ambiguities and sufficient for the purpose intended;

2. Examined the Site. The Design-Builder has investigated and examined carefully the Site and the Contract requirements and understands the nature, location and character of the Project and the Site;

3. Have required skill and experience. The Design-Builder and all workers, employees and Subcontractors used are skilled and experienced in the type of design and construction required by the Contract;

4. No reliance on UH representations. Neither the Design-Builder nor any of the Design-Builder’s employees, agents, suppliers, or Subcontractors have relied upon any verbal representations from the UH, its employees or agents, including architects, engineers or consultants, in assembling the Design-Builder’s proposal;

5. Proposal based solely on RFP. The Design-Builder’s proposal, including the proposed price, is based solely upon the RFP and properly issued written addenda and not upon any other written or verbal representation, and based upon the Design-Builder’s own examination and investigation of the surface and subsurface conditions at the Site and availability of materials and equipment; and

6. No limiting obligations. Design-Builder has no obligations, commitments or impediments of any kind that will limit or prevent performance of the Work as required by the Contract.

(c) Independent price determination; no collusion. Design-Builder certifies that the price submitted in its Proposal was independently arrived at without collusion. [HAR § 3-122-192]

(d) English language only. All materials submitted by Design-Builder under this Contract shall be provided in the English language. If material catalogs, instruction manuals, training materials and any other information is originally in another language, a full and complete translation shall be provided and the English version shall prevail over the other language version in the event of conflict.

(e) Delivery. Notices, deliverables and correspondence shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by fax after 4:00 p.m. Hawai‘i Standard Time and all other notices received after 5:00 p.m. shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.).
1.4 Meaning of Terms.

The words “shall” and “shall be” are also implied, and when implied or stated are to be considered mandatory and generally pertain to requirements or actions of the Design-Builder.

The word “will” generally pertains to decisions or actions of the UH.

END OF CHAPTER
CHAPTER 2 - GENERAL PROVISIONS

2.1 Contract not binding unless funds available.

(a) Certification required. No contract shall be binding or of any force and effect without endorsement by the UH Fiscal Officer, that there is an appropriation or balance of an appropriation over and above all outstanding contracts sufficient to cover the amount required by the Contract. Certification that there is an appropriation or balance of an appropriation sufficient to cover the amount required by the Contract, shall comply or be exempt under HRS § 103D-309. [HAR § 3-122-102]

(b) Multi-term contract. If a contract is a multi-term contract pursuant to HAR § 3-122-149, the UH Fiscal Officer shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts that is sufficient to cover the amount required to be paid under the contract during the current fiscal year or remaining portion of the current fiscal year of the first term of the multi-term contract. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds.

(c) Certification of a portion of funds. Notwithstanding the requirement for endorsement in subsection (a) above, 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 UH than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the UH Fiscal Officer states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues. All contracts partially funded shall be enforceable only to the extent to which funds have been certified as available. [HAR § 3-122-104(c)]

(d) Contracts involving federal funds. In any contract involving not only State or UH funds, but supplemental funds from the federal government, HRS § 103D-309 shall be applicable only to that portion of the Contract amount obligated and payable out of State or County funds. Unless otherwise specified, the Design-Builder, by submittal of a Proposal and acceptance of an award, agrees that payment of that portion of the Contract amount that is supplemented or funded entirely by federal funds shall be payable upon receipt of those federal funds.

(e) Certification that federal funds available. If the Contract will be funded, in whole or in part, with funds from the federal government, the Contract shall not be binding or of any force and effect without an endorsement by the UH Fiscal Officer that such federal funding has been made available to the UH.

2.2 Fiscal responsibility.

(a) Contract modification must be certified. Every contract modification, change order, or Contract Price adjustment shall be subject to prior written certification by the Fiscal Officer for funding the Project or the Contract, as to the effect of the contract modifications, change order or adjustment in Contract Price on the total Project budget or the total Contract budget. [HAR § 3-122-241]

(b) No certification without sufficient funds. In the event that any contract modification, change order, or adjustment results in an increase in the total Project budget or total Contract budget, the UH Procurement Officer shall not execute or make any contract modification, change order, or adjustment in Contract Price unless sufficient funds are made available therefor, or the scope of the Project or the
Contract is adjusted so as to permit the degree of completion that is feasible within the existing Project budget or the Contract budget; provided, that with respect to the validity, as to the Design-Builder, of any executed contract modification, change order or adjustment in the Contract Price, which the Design-Builder has reasonably relied upon, it shall be presumed that there has been compliance with the section. [HAR § 3-122-241]

2.3 **Confidential or proprietary information of UH.** Design-Builder understands and agrees that, in the performance of the Work or services under this Contract or in contemplation thereof, Design-Builder may have access to private or confidential information which may be owned or controlled by the UH and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the UH. Design-Builder agrees that all information disclosed by the UH to the Design-Builder shall be held in confidence and used only in performance of the Contract. Design-Builder shall exercise the same standard of care to protect such information as a reasonably prudent Design-Builder would use to protect its own confidential or proprietary data.

2.4 **Personal information protection.**

(a) Definitions.

“Personal information” means an individual’s first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

(1) Social security number;
(2) Driver’s license number or Hawai’i identification card number; or
(3) Account number, credit or debit card number, access code, or password that would permit access to an individual’s financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

“Technological safeguards” means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

(b) Confidentiality of material.

(1) **Design-Builder to safeguard personal information.** All material given to or made available to the Design-Builder by the UH by virtue of this Contract, which consists of personal information, shall be safeguarded by the Design-Builder and shall not be disclosed without the UH’s prior written approval.

(2) **No disclosure of personal information.** Design-Builder agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.

(3) **Implement technological safeguards.** Design-Builder agrees to implement appropriate “technological safeguards” that are acceptable to the UH to reduce the risk of unauthorized access to the personal information.

(4) **Report security breaches.** Design-Builder shall report to the UH in a prompt and complete manner any security breaches involving personal information.
(5) **Mitigate harmful effects.** Design-Builder agrees to mitigate any harmful effect that is known to Design-Builder because of a use or disclosure of personal information by Design-Builder in violation of the requirements of this paragraph.

(6) **Indemnify UH.** Design-Builder will indemnify, defend, and hold harmless the UH and its officers, employees, agents, representatives, and any person acting on UH’s behalf, from and against any claims, actions, liabilities, damages, losses, costs, and expenses (including attorneys’ fees, court costs, and other litigation expenses) arising from any unauthorized or improper disclosure of personal information furnished by the UH to Design-Builder and any related security breaches.

(7) **Cyberinsurance.** Design-Builder will purchase and maintain, at its cost and expense, cyberinsurance with the type and scope of coverage, minimum coverage limits, and deductibles acceptable to the UH, to help cover Design-Builder’s indemnity, defense, and hold harmless obligations under section 2.4(b)(6) herein, which obligations shall not be satisfied or limited by Design-Builder’s purchase of such cyberinsurance.

(8) **Maintain disclosure log.** Design-Builder shall complete and retain a log of all disclosures made of personal information received from the UH, or personal information created or received by the Design-Builder on behalf of the UH.

(c) **Security awareness training and confidentiality agreements.**

(1) **Certify training received.** Design-Builder certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.

(2) **Confidentiality agreements.** Design-Builder certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:

   (A) **Personal information kept confidential.** The personal information collected, used, or maintained by the Design-Builder will be treated as confidential;

   (B) **Only necessary access permitted.** Access to the personal information will be allowed only as necessary to perform the Contract; and

   (C) **Restricted use.** Use of the personal information will be restricted to uses consistent with the services to this Contract.

(d) **Termination for cause.** In addition to any other remedies provided for by this Contract, if the UH learns of a material breach by the Design-Builder of this paragraph by the Design-Builder, the UH may at its sole discretion:

   (1) **Cure opportunity.** Provide an opportunity for the Design-Builder to cure the breach or end the violation; or

   (2) **Termination.** Immediately terminate this Contract.
In either instance, the Design-Builder and the UH shall follow and comply with HRS Chapter 487N
with respect to notification of a security breach of personal information.

(e) Records retention.

(1) Destruction. Upon any termination of this Contract, the Design-Builder shall pursuant to
HRS Chapter 487R destroy all copies (paper or electronic form) of personal information
received from the UH.

(2) Maintain records. The Design-Builder and any Subcontractors shall maintain the files,
books, and records that relate to the Contract, including any personal information created or
received by the Design-Builder on behalf of the UH, and any cost or pricing data, for three
(3) years after the date of final payment under the Contract. The personal information shall
continue to be confidential and shall not be disclosed without the prior written approval of
the UH. After the three (3) year retention period has ended, the files, books, and records that
contain personal information shall be destroyed pursuant to HRS Chapter 487R.

2.5 Copyright or patent. If the Design-Builder 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 Design-Builder from the patentee or owner. The Design-Builder shall indemnify, defend,
and hold harmless the UH and all of its officers, employees and agents from and against all loss,
cost, expense, royalties, claims for damages or liability, in law or in equity, including, without
limitation, attorney’s fees, court costs, and other litigation expenses that may at any time arise or be
set up for 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, during the prosecution or after the completion of the Work.

2.6 Work Made for Hire. All work products developed or prepared by the Design-Builder under the
Contract, including, but not limited to deliverables, materials, documents, design plans, or
blueprints, are the property of the UH, and all right, title, and interest therein shall vest exclusively
in the UH and shall be deemed to be a “Work Made for Hire” under United States Copyright Laws
(17 U.S.C. § 101 et seq.). To the extent that title to any such works may not, by operation of law,
vest in the UH or such works may not be considered to be work made for hire, Design-Builder
hereby agrees that all right, title, and interest therein are irrevocably assigned to the UH. All such
work products shall belong exclusively to the UH with the UH having the right to obtain and to
hold in its own name, copyrights, registrations or such other protection as may be appropriate to the
subject matter, and extensions and renewals thereof. Design-Builder may make copies or reproduce
the work products developed under this Contract for its file and reference. Design-Builder further
agrees to execute and deliver to the UH all lawful documents, including without limitation,
petitions, oaths, declarations, assignments, disclaimers, and affidavits, in form and substance as
may be requested by the UH in connection with this provision; execute and record all documents
necessary to evidence the chain of title in or to, and UH’s ownership of, the Works Made for Hire
described herein; and furnish to the UH any and all documents in Design-Builder’s possession or
control, or in the possession or control of Design-Builder’s agents, legal representatives, successors
and assigns, which the UH may deem useful for establishing the facts surrounding the creation, use
or registration of the Work Product.
2.7 **Ownership of results.** Any interests of Design-Builder or the Subcontractors, in drawings, plans, specifications, blueprints, studies, memoranda, computation sheets, computer files, and media or other documents prepared by the Design-Builder or the Subcontractors in connection with services to be performed under this Contract, shall become the property of and will be transmitted to the UH. However, Design-Builder may retain and use copies for references and as documentation of its experience and capabilities. The Design-Builder agrees that any reports, materials, studies, photographs, negatives, drawings or other documents prepared by the Design-Builder in the performance of its obligations under this Contract shall be the exclusive property of the UH. Upon completion, termination or cancellation of the services under this Contract, all such documents, together with all Work inclusive of research, investigation and analysis data, reports (including files on disks), computations, tabulations, original drawings (including CADD and BIM information on disks), correspondence input from external sources (including Subcontractors), etc., shall be delivered to and become the property of the UH without limitation. Reuse of said materials, information or data, during performance or following termination of this Contract, on any other project or for any other purpose except as provided for herein, shall be at the UH’s discretion and the UH’s sole responsibility. The Design-Builder shall not utilize any materials, information or data obtained as a result of performing the services called for in this Contract in any commercial or academic publication or presentation without the express written permission of the UH. The Design-Builder shall not reference an opinion of an employee or agent of the UH obtained as a result of performing the services called for in this Contract in any publication or presentation without the written permission of the employee or agent to whom the opinion is attributed, in addition to the permission of the UH.

2.8 **Assignment of antitrust claims for overcharges for goods and materials purchased.** Design-Builder UH recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the project owner. Therefore, Design-Builder hereby assigns to UH any and all claims for such overcharges as to goods and materials purchased in connection with the order or contract, except as to overcharges which result from antitrust violations commencing after the price is established under this contract or any change order and which are not passed on to the UH under an escalation clause. In addition, Design-Builder warrants and represents that each of its first tier suppliers and Subcontractors shall assign any and all such claims to the UH, subject to the same exception.

2.9 **Assignment of contract; change of name; assignment of money.**

(a) **Assignment of Contract.** When in the best interest of the UH and upon written consent by the UH Procurement Officer, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the UH agree that:

1. **Transferee assumption.** The transferee assumes all of the transferor's obligations under the Contract;

2. **Transferor remains liable.** The transferor remains liable for all obligations under the Contract but waives all rights under the Contract as against the UH; and

3. **Transferor furnish bonds.** The transferor shall furnish all required bonds. [HAR § 3-125-14]
(b) **Change of name.** When a Design-Builder requests to change the name in which it holds the Contract with the UH, the UH Procurement Officer 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 Design-Builder to effect such a change of name. The agreement changing the name shall be in the form attached hereto as Exhibit “I” and shall specifically indicate that no other terms and conditions of the Contract are thereby changed. [HAR § 3-125-14]. Design-Builder shall submit such information as may be requested by UH and/or sufficient to prove or establish that the requested change is in fact only a change in name and not in the nature of an assignment.

(c) **Assignment of money.** No money receivable under the Contract is transferable, or otherwise assignable, without the written consent of the UH Fiscal Officer, Office of Capital Improvements [HAR § 3-125-14]. The rights of the assignee to monies due or to become due to the Design-Builder shall be subject to Section 6.12, "Authority to withhold money due or payable."

### 2.10 Independent Contractor

It is expressly understood and agreed that the Design-Builder is an independent contractor and shall not be deemed to be an agent, servant, representative or employee of the UH. The Contract shall not be construed to create a partnership or joint venture between the UH and the Design-Builder. However, the UH retains the general right of inspection by a designated representative in order to judge, whether in the UH's opinion, the Work is being performed by the Design-Builder in accordance with the terms of this Contract.

### 2.11 Liability

UH’S PAYMENT OBLIGATIONS UNDER THIS CONTRACT SHALL BE LIMITED ONLY TO THE PAYMENT FOR SERVICES UNDER THIS CONTRACT. SUBJECT ONLY TO CLAIMS SPECIFICALLY ALLOWED UNDER SECTION 5.6, IN NO EVENT SHALL UH BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS CONTRACT.

### 2.12 Indemnification

(a) **Scope of Design-Builder’s indemnification.** Design-Builder shall defend, indemnify and hold harmless UH and its officers, employees, agents, representatives, volunteers, and Construction Managers, and any other person or entity acting on UH’s behalf (collectively referred to as “Indemnitees” and individually referred to as “Indemnitee”), of and from any and all claims, demands, causes of action in law or equity, damages, penalties, costs, expenses, actual attorneys’ fees, experts’ fees, consultants’ fees, judgments, losses or liabilities, of every kind and nature whatsoever, including, without limitation, damages from personal injury, bodily injury, emotional injury, sickness or disease, or death to persons (including, but not limited, to any employees or agents of the Design-Builder, UH or any other contractor or any person) arising out of or in any way connected or incidental to, the performance of the Work or any of the obligations contained in this Contract. It is expressly acknowledged and agreed that each of the obligations set forth herein is independent of any obligations to procure insurance for the benefit of the UH and that each shall be given effect. It is expressly acknowledged and agreed that the Design-Builder and any other responsible party shall be jointly and severally liable to the UH with respect to claims and/or losses. At its sole discretion, the UH may determine which indemnitor or indemnitors UH will look to for indemnification hereunder.
(b) **Worker's compensation law.** The Design-Builder shall hold harmless the Indemnitees from all suits, actions or claims of any character brought on account of any claims or amounts arising or recovered under the Workers' Compensation Law or any other law, by-law, ordinance, order or decree.

2.13 **Liquidated damages.**

(a) **Design-Builder to pay liquidated damages for completion delay.** It is mutually understood and agreed by and between the parties to the Contract that time shall be of the essence in the completion of the work and all of the provisions of this Contract and that in case of failure on the part of the Design-Builder to complete the work under the Contract within the Contract Time, the UH will be damaged thereby, and the amount of said damages, inclusive of expenses for inspection, superintendence, and necessary traveling expenses, being difficult, if not impossible, of definite ascertainment and proof, it is hereby agreed that the amount of such damages shall be the amount set forth in the Contract as liquidated damages for each and every calendar day, including weekends and holidays, that the Design-Builder delays in finishing the Work beyond the completion deadline established in the Contract; and the Design-Builder hereby agrees to pay the said sum as liquidated damages, and not by way of penalty, to the UH and further authorizes the UH to deduct the amount of the damages from monies due the Design-Builder under the Contract, computed as aforesaid. If the monies due the Design-Builder are insufficient or no monies are due the Design-Builder, the Design-Builder shall pay the UH the difference or the entire amount, whichever may be the case, upon demand by the UH Procurement Officer.

(b) **Applicable liquidated damages.** If the Design-Builder fails to perform any of the items of Work described in the Contract, the Design-Builder agrees to pay the applicable Liquidated Damages charge specified in the Special Provisions attached hereto.

(c) **Substantial Completion Deadline.** Except as otherwise specifically provided in the Contract, the UH shall have no obligation to extend the Substantial Completion Deadline and the Design-Builder shall not be relieved of its obligation to achieve Substantial Completion by the Substantial Completion Deadline for any reason. The Substantial Completion Deadline for this Contract is specified in the Special Provisions attached hereto.

2.14 **Audit and inspection of records.** Design-Builder agrees to maintain and make available to the UH and entities and agencies designated by the UH, during regular business hours, accurate books and accounting records relating to the Work under this Contract. Design-Builder will permit UH and entities and agencies designated by the UH to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Contract. Design-Builder shall maintain such data and records in an accessible location and condition for a period of not less than three years after final payment under this Contract or until after final audit has been resolved, whichever is later. [HAR § 3-122-181]

2.15 **Severability.** If any term, condition, provision, covenant or agreement 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 Hawai‘i or the United States of America in any respect, such part of the terms under the Contract as shall have been rendered or held to be invalid, illegal or unenforceable shall not affect the validity of the terms under the Contract as a whole or the remainder of the terms 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.

2.16 **Laws, regulations.**

(a) **Specific laws.** The Design-Builder shall keep itself fully informed of all present and new laws, regulations, and ordinances which affect the Contract and the performance thereof, including but not limited to:

1. HRS Chapter 103, relating to expenditure of public money;
2. HRS Chapter 103D, relating to Hawai‘i procurement code;
3. HRS Chapter 104, relating to wages and hours of employees on public works;
4. HRS Chapter 378, relating to fair employment practices;
5. HRS Chapter 386, relating to worker's compensation;
6. HRS Chapter 396, relating to occupational safety and health;
7. HRS Chapter 444, relating to licensing of contractors; and
8. HRS Chapter 464, relating to licensing of professional engineers, architects, surveyors, and landscape architects.

The Design-Builder shall comply with all such present and new laws, regulations and ordinances, including the giving of all notices necessary and incident to the performance of the Contract. If any discrepancy or inconsistency is discovered between the Contract and any such law, regulation, or ordinance, the Design-Builder shall forthwith report the same in writing to the UH Procurement Officer or the UH Project Manager.

(b) **Certification of Employment of Hawai‘i State Residents HRS Chapter 103B.** HRS Chapter 103B, shall apply to this Design-Build Contract including any subcontract of $50,000 or more in connection with this Contract. The Design-Builder shall ensure that Hawai‘i residents compose not less than eighty per cent (80%) of the workforce employed to perform the Contract and comply with the reporting requirements set forth in HRS Chapter 103B and Exhibit I.

(c) **Public Records Law.** Information or documents received from the Design-Builder may be open to public inspection and copying. The UH will have the duty to disclose this information or these documents unless a particular record is made or deemed confidential by law or a common law balancing of interests. The Design-Builder may label specific parts of an individual document as a “trade secret” or “confidential” or “proprietary information” in accordance with the Uniform Information Practices Act (Modified), HRS chapter 92F, provided that the Design-Builder thereby agrees to indemnify, defend, and hold harmless the UH for honoring such a designation. The failure to so label any document that is submitted to the UH and is subsequently released by the UH shall constitute a complete waiver by the Design-Builder of any and all claims for damages caused by the UH’s release of such records.

2.17 **Governing law and venue.** The provisions of the Contract shall be interpreted in accordance with the laws of the State of Hawai‘i as those laws are construed and amended from time to time. All disputes arising out of or relating to this Contract shall be subject to the jurisdiction and venue of the State courts in Honolulu, Hawai‘i. All discovery between the parties undertaken pursuant to State or local rules shall be conducted in Honolulu, Hawai‘i, including, but not limited to, the production of documents and the appearance of expert and lay witnesses for deposition, if such depositions are permitted by court rules. In the event of a dispute, the Design-Builder and the UH
agree to bear the costs of producing their own employees for deposition in Honolulu, Hawai‘i, including but not limited to travel costs, per diem expenses, and cost of employee time. The parties further agree that if court rules or the court itself permits the deposition of expert witnesses, the party seeking the testimony of the expert witness will bear that witness’ reasonable costs of travel, preparation costs and cost for time while in transit.

2.18 Campaign Contributions by State and County Contractors. Design-Builder is hereby notified of the applicability of HRS § 11-355, which states that campaign contributions are prohibited from specified State or County government contractors during the term of the contract if the contractors are paid with funds appropriated by a legislative body.

END OF CHAPTER
CHAPTER 3 - INSURANCE; PERFORMANCE AND PAYMENT BONDS

3.1 Insurance

(a) Required coverages. The Design-Builder shall procure or cause to be procured and maintain (as provided herein), in a company lawfully authorized to do business in Hawai‘i, at Design-Builder’s sole cost, during the life of this Contract and any extensions thereof, or until such time as action against the Design-Builder or any Subcontractors for death, injuries, losses and damages is barred by the provisions of HRS Chapter 657, the following types of insurance to cover the operations under the Contract, and all other insurance that may be required under the laws, ordinances or regulations of any governmental authority with the following minimum coverage provided below, except as otherwise set forth in the Special Provisions:

(1) Workers Compensation and Employers Liability Insurance. The Design-Builder shall maintain, and require all Subcontractors to maintain, workers compensation and employers liability insurance. Workers compensation coverage shall be in accordance with applicable State law. Employers liability and/or commercial excess limits shall be not less than $1,000,000 each accident. Such policies shall include a waiver of subrogation in favor of the UH.

(2) Commercial General and Excess Liability Insurance.

(A) CGL. Design-Builder shall maintain commercial general liability (CGL) insurance with limits of not less than $2,000,000 per occurrence, $5,000,000 general aggregate, and not less than $5,000,000 products-completed operations aggregate limit. 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, explosion, collapse and underground property damage (XCU) and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). Such insurance shall include Design-Builder’s protective professional liability, using ISO forms CG 22 79 or CG 22 80 or equivalent. The UH shall be included as an additional insured under the CGL, using ISO additional insured endorsement CG 20 10 (or equivalent), and under the commercial excess, if any. The State of Hawai‘i, University of Hawai‘i, including all its departments and attached agencies, their officers, employees, agents, design engineers, architects and/or surveyors, and construction managers shall be included as additional insureds, using ISO additional insured endorsement CG 20 32 (or equivalent).

(B) Continuing Completed Operations Liability Insurance. Design-Builder shall maintain products and completed operations insurance with limits of not less than $2,000,000 each occurrence for at least TEN (10) years following Final Acceptance, or for such other period as specified in the Special Provisions. Such continuing insurance shall be written on ISO occurrence form CG 00 01 10 93 (or equivalent form) and shall, at minimum, cover liability arising from products-completed operations and liability assumed under an insured contract. Continuing CGL insurance shall have a products-completed operations aggregate of at least two times its each occurrence limit. The UH shall be included as an additional insured.
(3) **Auto Liability Insurance.** Design-Builder shall maintain auto liability (including no-fault coverage) insurance, either comprehensive or business automobile form, with limits of not less than $1,000,000 per accident. Such insurance shall cover liability arising out of any auto (including owned, hired, and non-owned autos) used in the performance of this Contract. Such auto coverage shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, or CA 00 20, with appropriate Hawai‘i endorsements, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01.

(4) **Umbrella Liability Insurance.** Design-Builder shall provide Umbrella liability insurance, including coverages in paragraphs (1), (2) and (3) above, with limits of not less than TEN MILLION ($10,000,000) per occurrence. The UH shall be included as an additional insured under such policy or policies.

(5) **Professional Liability Insurance.** Design-Builder shall provide professional liability insurance covering liability for any negligent act, error or omission arising out of design or engineering activities with respect to the Project, and shall ensure that professional liability insurance is provided for design professionals employed by Subcontractors if not covered by insurance supplied by Design-Builder. Limits shall be not less than $1,000,000 per claim. Such insurance shall remain in full force and effect continuously for the period of design and construction of the Work, and for an additional one (1) year period following Substantial Completion of Work set forth in the Contract. Vicarious liability endorsement shall be included and maintained for a period of TEN (10) years.

(6) **Design-Builder’s Pollution Liability.** Design-Builder will purchase a policy, with limits of not less than $2,000,000, covering third party injury and property damage claims including remediation and clean-up of mold or other hazardous materials conditions that are attributable to Design-Builder’s operations or completed operations with respect to the Work and the Project, performed by or on behalf of Design-Builder. Completed operations coverage will remain in effect for not less than 1 year after Substantial Completion of the Work set forth in this Contract. Coverage will be provided by a carrier acceptable to the UH, name UH as an additional insured, and be written on an occurrence and/or claims made form, including Gradual and Sudden/Accidental Pollution. If applicable, coverage will apply to liability arising out of transportation and non-owned disposal sites.

(7) **Property/Builder’s Risk Insurance.** Design-Builder shall purchase and maintain in force Builder’s Risk insurance in an amount equal to the full replacement cost of the Work, at an agreed amount, no coinsurance, or the Contract Price including any subsequent modifications thereto, whichever is greater, with deductible amounts as the UH may approve. Such property insurance shall be maintained in effect as required in the Contract. This insurance shall name as insured the UH, the Design-Builder, and all construction Subcontractors. The UH shall be included as Loss Payee on all required policies except coverage specified in subparagraph (D) below.

(A) **Perils to be covered.** Builder’s Risk Insurance shall be on a “Special Form” policy form, covering all risks of physical loss or damage, including the perils of fire and extended coverage, including theft, vandalism, malicious mischief, collapse, explosion and underground (“XCU”) perils, debris removal, and demolition occasioned by enforcement of any applicable legal requirements, and shall include coverage for reasonable
compensation for architects' services and other expenses made necessary due to an
insured loss. Coverage shall also be provided, as needed, for earthquake, flood and
named storms. Builder’s Risk insurance shall cover loss or damage to covered property,
which shall include structures or buildings, and all fixtures, materials, supplies,
machinery and equipment to be used in or incidental to the Work, scaffolding, falsework,
fences and temporary buildings located on the Site, portions of the Work located away
from the Site but intended to be used in the Site, and portions of the Work in transit, and
Valuable Papers and Records and all documentation produced or used in connection with
the Project (with sublimits, or endorsement, of not less than $1,000,000, providing
coverage against “Special Form” perils).

(B) **Site work:** Property insurance is not required for loss or damage to Site work, defined as
new underground works, sidewalks, paving, excavation or Site preparation and
landscaping. Design-Builder is responsible for loss or damage to such Site work, as
defined, until Final Acceptance, and it is the Design-Builder’s sole option to insure or
self-insure this risk.

(C) **Boiler and Machinery Insurance:** The Design-Builder shall purchase and maintain Boiler
and Machinery insurance if required by the Contract or by law, covering insured objects
during installation and testing and until Final Acceptance.

(D) **Design-Builder’s Equipment:** All Risk Equipment Insurance covering all risk of
physical damage to equipment provided for use at the Site by the Design-Builder,
whether owned, leased, rented, borrowed or used at the Site. Design-Builder agrees to
waive and does hereby waive its rights of recovery against the UH and its officers,
employees, agents, representatives, volunteers, Construction Manager, Project Manager,
and any person or entity acting on the UH’s behalf as to any damage or loss which may
occur to its equipment to the extent covered by insurance. Design-Builder will have the
insurance company specifically agree to this waiver. If uninsured, Design-Builder will
indemnify, defend, and hold harmless the UH and its officers, employees, agents,
representatives, volunteers, Construction Manager, Project Manager, and any person or
entity acting on the UH’s behalf for loss or damage to any tools, equipment, and other
personal property used in connection with the Work or the Project or present at the Site.
Design-Builder shall be responsible for any and all loss or damage to Design-Builder's
equipment, tools and other personal property.

(b) **Obtain consent for partial occupancy.** Partial occupancy of the Project or use of the Work shall
not commence until the insurance company or companies providing insurance as required have
consented to such partial occupancy or use. Design-Builder shall take reasonable steps to obtain
consent of the insurer(s) and Design-Builder and UH agree to take no action, other than upon
mutual written consent, with respect to such partial occupancy and use that could lead to
cancellation, lapse, or reduction of insurance.

(c) **General insurance conditions.** General insurance conditions applicable to all insurance herein
required, unless otherwise specified above:

1. **UH facilities covered.** As used herein, UH shall mean the University of Hawai‘i and all of its
campuses, facilities, etc., and its officers, employees, agents, representatives, volunteers,
Construction Manager, Project Manager, and any person or entity acting on UH’s behalf.
(2) **Design-Builder damage waiver.** Except for Professional Liability insurance required in Section 3.1(a)(5) above, Design-Builder waives all rights against the UH for recovery of damages to the extent such damages are covered by the insurance required herein.

(3) **Design-Builder insurance primary.** All insurance required herein shall apply as primary insurance and any insurance obtained or purchased by the UH or any UH self-insurance program shall not be expected to contribute to or cover any risks or claims covered by Design-Builder’s insurance.

(4) **Subcontractor’s Insurance.** Design-Builder shall cause each subcontractor employed by Design-Builder to purchase and maintain insurance of the types specified above on the same terms set forth above. Design-Builder shall obtain and maintain evidence of Subcontractor’s insurance, and if requested by UH, Design-Builder shall furnish copies of certificates of insurance evidencing coverage for each Subcontractor.

(5) **Cross-Liability coverage.** If Design-Builder’s liability policies do not contain the standard ISO separation of insureds provision, or a substantially similar clause, they shall be endorsed to provide cross-liability coverage.

(6) **Design-Builder responsible for loss.** The Design-Builder is responsible for paying any portion of any loss not covered because of the operation of any deductible applicable to the insurance required herein. If the UH is damaged by the failure of the Design-Builder to maintain insurance as required in this paragraph, then the Design-Builder shall bear all reasonable costs properly attributable to that failure.

(7) **UH not obligated to pay premiums.** UH shall not be required to pay any premiums for any insurance coverage required to be obtained by Design-Builder under the Contract.

(8) **Evidence of Insurance.**

   (A) **Certificate of insurance required at start.** Upon execution of the Contract by Design-Builder, Design-Builder shall furnish UH with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with insurance requirements set forth in paragraphs 3.1(a) above.

   (B) **Certificates for continuing coverage.** With respect to continuing insurance as required under section 3.1(a)(2)(B) and 3.1(a)(5) above, Design-Builder shall provide certificate(s) of insurance evidencing such coverage at the time of final payment, and thereafter whenever requested by the UH.

   (C) **Self-insured retention.** If the Design-Builder has any self-insured retentions (SIR’s) or deductibles under any of the required coverages, the Design-Builder must identify on the certificate of insurance the nature and amount of such self-insured retentions and deductibles and provide satisfactory evidence of financial responsibility for such obligations. All self-insured retentions will be the Design-Builder’s sole responsibility.

   (D) **Prior notice of cancellation.** All certificates shall provide for 30 days written notice to
UH prior to the cancellation or material change of any insurance referred to therein.

(E) **Furnish policies upon demand.** Design-Builder shall provide certified copies of all insurance policies required above within 10 days of the UH's written request for said copies.

(F) **No UH waiver.** Failure of the UH to demand such certificate or other evidence of full compliance with these insurance requirements or failure of UH to identify a deficiency from evidence that is provided shall not be construed as a waiver of Design-Builder's obligations to maintain such insurance.

(9) **Failure to Maintain Required Insurance**

(A) **UH may terminate Contract.** Failure to maintain the required insurance may result in termination of this Contract at UH's option.

(C) **Entry may be denied.** The UH shall have the right, but not the obligation, to prohibit Design-Builder or any Subcontractor from entering the Project Site until Design-Builder has provided certificates or other evidence that insurance has been placed in complete compliance with these requirements and such insurance has been approved by the UH.

(C) **UH may purchase insurance.** If the Design-Builder fails to maintain the insurance as set forth herein, the UH shall have the right, but not the obligation, to purchase said insurance at Design-Builder’s expense.

(10) **No representation of coverage adequacy.** By requiring insurance herein, the UH does not represent that coverage and limits will necessarily be adequate to protect all of Design-Builder’s interests under the Contract.

(11) **No limit on Design-Builder’s obligations.** The procuring of such required policies of insurance shall not be construed to limit Design-Builder’s liability hereunder nor to fulfill or fully satisfy Design-Builder’s indemnification, defense, and hold harmless obligations under the Contract. Notwithstanding said policies of insurance, Design-Builder shall be obligated for the full and total amount of any damage, injury, loss, liability, penalty, or assessment caused by Design-Builder under or in connection with the Contract.

(12) **UH may modify.** The UH reserves the right, upon reasonable notice and reasonable grounds, to require additional insurance policies, additional or increased limits of coverage in existing policies and additional endorsements, including without limitation, Project-specific liability insurance. The UH’s requirements shall be reasonable and shall be designed to provide protection from and against the kind and extent of risks that exist at the time a change in insurance is required. Such additional insurance shall be in such amounts, on such policy forms and with such carriers as UH may reasonably require.

(13) **Additional Insured’s:** Each policy required (except Worker's Compensation and Professional Liability) will name as additional insured the State of Hawai‘i, University of Hawai‘i including all its departments and attached agencies, their officers, employees and agents. General Liability coverage maintained by contractors and Subcontractors shall contain Additional Insured endorsement CG 2010 and CG 2037 or equivalent.
(14) **Waiver of Subrogation**: The Design-Builder and their respective insurers providing the required coverage as indicated in Workers’ Compensation and Commercial General Liability, Umbrella/Excess Liability or any required coverages, will waive all rights of recovery against UH and UH’s agents, officials, and employees.

### 3.2 Payment guarantee

The Design-Builder guarantees the payment of all just claims for materials, supplies, tools, labor and other just claims against the Design-Builder or any Subcontractor in connection with this Contract, and shall deliver the Project free and clear of any liens or potential lien applications, whether filed or unfiled. Design-Builder's bond, if required, will not be released by Final Acceptance and payment by the UH unless all such claims are paid or released, or so much of the monies due or to become due the Design-Builder under the Contract are retained by the UH as shall be considered necessary by the UH Procurement Officer upon recommendation by the UH Project Manager. Should any suit or claim be filed against the Design-Builder, the UH upon consultation with its General Counsel may retain, from any monies due to the Design-Builder, such amount or amounts as may be deemed necessary by the UH until such suits or claims have been finally settled and determined and upon satisfactory evidence of such settlement of such suits or claims the money retained shall be paid to the Design-Builder.

### 3.3 Performance and payment bonds

(a) **Contract performance and payment bonds**. Performance and payment bonds shall be required when the price of the Contract is $25,000 or more and each shall be in an amount equal to one hundred per cent (100%) of the amount of the Contract Price. The performance and payment bonds shall be delivered by the Design-Builder to the UH at the same time the Contract is executed. If the Contractor fails to deliver the required performance and payment bonds, the Contractor’s award shall be canceled, the Contractor shall be subject to a claim for all resulting damages, its bid security enforced, and the Contracting Officer may award the contract to the next ranked offeror in accordance with subchapter 11 of Chapter 122 of HAR. [HAR 3-122-224]

(b) **Acceptable contract performance and payment bonds**. The Design-Builder shall be required to provide, at no cost to the UH, performance and payment bonds sufficient to cover Design-Builder’s obligations under the Contract. Acceptable performance and payment bonds shall be limited to the following:

1. **Surety bonds**. Surety bond in the form attached to the RFP underwritten by a company licensed to issue bonds in this State;

2. **Legal tender**. Legal tender;

3. **CD or other**. A certificate of deposit, credit union share certificate, or cashier’s, treasurer’s, teller’s, or official check drawn by, or a certified check accepted by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, and payable at sight or unconditionally assigned to the UH Financial Officer.
   
   (A) **Maximum amount**. These instruments may be utilized only to a maximum of $100,000.
   
   (B) **Additional security**. If the required security amount totals over $100,000, more than one instrument not exceeding $100,000 each and issued by different financial institutions shall be accepted. [HAR § 3-122-222]
(d) **Bond forms.** The Design-Builder shall execute the surety performance and payment bond forms included in the RFP or as otherwise approved by the UH. [HAR § 3-122-228]

(e) **Contracts with federal funds.** In addition to the requirements of this section, whenever the Contract is partially or fully funded with federal funds, the amount of the bonds shall be the amount required by the federal agency, and the surety companies shall be those listed in the latest issue of the U.S. Treasury Circular 570.

(f) **Payment claims against the bond.**

(1) **Claimant under the payment bond.** Every person who has furnished labor or material to the Design-Builder for the Work provided in the Contract for which a payment bond or a performance and payment bond is furnished under this section, and who has not been paid amounts due before the expiration of a period of ninety days after the day on which the last of the labor was performed or material was furnished or supplied, for which a claim is made, may institute an action for the amount, or balance thereof, unpaid at the time of the institution of the action against the Design-Builder or Design-Builder and its sureties, on the payment bond and have their rights and claims adjudicated in the action, and judgment rendered thereon, subject to the UH's priority on the bond.

As a condition precedent to any such suit, written notice shall be given by registered or certified mail to Design-Builder and surety, within ninety days from the date on which the person did or performed the last labor or furnished or supplied the last of the material for which claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

(2) **Time limit on suit.** Every suit instituted upon a payment bond shall be brought in the circuit court of the circuit in which the Project is located, but no suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied for the work provided in the Contract. The obligee named in the bond need not be joined as a party in any suit.

(3) **Liability greater than security.** If the full amount of the liability of the Design-Builder or the Design-Builder and its sureties on the security is insufficient to pay the full amount of the claims, then, after paying the full amount due the UH, the remainder shall be distributed pro rata among the claimants. [HAR § 3-122-227]

(4) **Copies of bonds.** Certified copies of bonds may be requested and obtained by any person upon payment of the costs of reproduction and certification of the bonds, and postage. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original. [HAR § 3-122-228]

END OF CHAPTER
CHAPTER 4 - PERFORMANCE

4.1 Time is of the Essence.

(a) **Timely Project completion.** The parties hereto acknowledge that time is of the essence in the completion of the work and in all of the provisions of this Contract. Performance of the Contract shall commence on the commencement date designated in the Notice to Proceed and shall be completed within the number of days specified in the Contract, except as modified by mutual agreement.

(b) **Schedule of Work.** The Design-Builder’s Schedule of Work shall incorporate the dates specified in the Special Provisions attached hereto and said schedule shall become a requirement under the Contract. The Design-Builder’s Schedule of Work shall be in accordance with the Performance Specifications Section 01300, Submittals.

4.2 Commencement requirements.

(a) **Notice to proceed.** Upon execution of the Contract by the UH Procurement Officer, the UH Project Manager may schedule a pre-work conference. Only the UH Procurement Officer will issue a Notice to Proceed to the Design-Builder designating the official commencement date for performance of the Work and the Contract.

(b) **Commencement of Work.** Unless otherwise specified by the UH Project Manager, the Design-Builder shall begin the **Work within ten working days** from the official commencement date as stated in the Notice to Proceed and shall diligently prosecute the same to completion within the Contract Time. The Design-Builder shall notify the UH Project Manager at least **three working days** before beginning the Work. At any subsequent suspension and resumption of the Work, the Design-Builder shall notify the UH Project Manager at least **twenty-four hours** before beginning actual operations.

Unless otherwise specified in the Contract or in any written order, the Design-Builder shall not proceed with any part of the Contract, such as ordering of any equipment or materials, or performing any Work prior to the official commencement date as stated in the Notice to Proceed.

Unless otherwise provided for in the Contract, the requirements in this section shall be considered incidental to the Design-Builder's performance of the Contract and included in the Contract Price.

(c) **Submittals.** The Design-Builder’s Submittals shall be in accordance with the Performance Specifications Section 01300, Submittals and the Special Provisions, as applicable.

(d) **Payment and performance schedules.** **Within seven days** of the official commencement date or within such further time as the UH Project Manager may allow, the Design-Builder shall submit a Schedule of Work and a Schedule of Values to the UH Project Manager for review and approval in accordance with the Performance Specifications Section 01300, Submittals.

(e) **Personal supervision.** The Design-Builder, at all times, shall be present in person, or be represented by the Design-Builder's superintendent with authority to act for the Design-Builder in connection with the Contract during the performance of the Contract. Design-Builder’s superintendent shall represent Design-Builder and communications given to, and received from, Design-Builder's superintendent shall be binding on Design-Builder. The Design-Builder shall submit to the UH
Project Manager prior to start of Work, the name of the person charged with the responsibility of all Work. Pursuant to section 7.1, “Suspension of work,” failure of the Design-Builder or its superintendent to be present at the job site may result in suspension of the Work by the UH Project Manager.

The Design-Builder shall be available upon reasonable demand to discuss the progress of the services being performed under the Contract. The Design-Builder 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 Design-Builder. All questions arising during the performance of the Contract which must be resolved by the UH Project Manager shall be brought to the UH Project Manager's immediate attention.

(f) Design-Builder's place of business. The Design-Builder shall maintain, for the duration of the Contract, a permanent place of business within the State where the Design-Builder may be served notice and legal process. Written notice may also be served on the Design-Builder or its Project superintendent personally, or via email or facsimile machine if the Design-Builder has one, or via mail to the local post office address or post office box. [HRS §HRS 444-14]

(g) Construction Facilities. The Design-Builder’s construction facilities shall be in accordance with the Performance Specifications Section 01500, Construction Facilities.

(h) Permits, licenses.

(1) Design-Builder to obtain all government permits and approvals. The Design-Builder shall obtain all permits and licenses, pay all charges, fees, and taxes, give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the Work as drawn and specified to include any UH required permits and/or approvals. These may include, but not be limited to, demolition permit, building permit, dumping charges, grading permit, excavation permit, traffic permit, community noise permit, right-of-entry permit(s), National Pollutant Discharge Elimination System (NPDES) permit and compliance with Rodent Control Requirements on Demolition of Structures and Clearing of Sites and Vacant Lots. All cost and Work under this subsection shall not be paid for directly but shall be considered incidental and included in the Contract Price.

(2) Compliance. The Design-Builder shall comply with all permit requirements and conditions of local authorities as though they were specified herein, at no additional cost to the UH or said authorities. In the event of a conflict between the Contract and any permit requirements, the more stringent shall prevail. Local codes and permit conditions are incorporated by reference herein.

(3) UH Provided Permits. Design-Builder shall not start construction until Design-Builder obtains all governmental permits and approvals, including any UH Provided Permits, if any, that are identified in the Special Provisions attached hereto.

(4) Design-Builder Provided Permits. The Design-Builder shall obtain all other permits required for the performance of the Work, which shall include, but are not limited to the permits (if any) listed as Design-Builder Provided Permits in the Special Provisions attached hereto. The Design-Builder shall be responsible for all permits which may be required for removal of water from the Site, including but not limited to, the National Pollutant Discharge Elimination
System (NPDES) permit. All costs under this subsection shall be considered incidental and included in the Contract Price.

(i) **Surveys and construction stakes, lines and grades.** Design-Builder shall verify all grades, lines, levels, and dimensions shown on the drawings and shall report any errors or inconsistencies to the UH Project Manager before commencing the Work. Failure to do so shall make the Design-Builder responsible for any changes which may be required thereafter in connection therewith. The Design-Builder shall at its own expense furnish all stakes, templates, platforms, equipment, and labor that may be required in setting and cutting or laying out any part of the Work. The Design-Builder will be held responsible for the proper execution of the Work to such lines and grades as may be indicated by the UH Project Manager, and all stakes or other marks thus established shall be preserved by Design-Builder until their removal is authorized by the UH Project Manager. The Design-Builder shall be responsible for laying out the Project.

The construction portion of the Work shall be laid out and provided with grade stakes through the service of a registered land surveyor licensed in the State of Hawai‘i.

(j) **Electrical and water services.** Unless otherwise specified in the RFP, the Design-Builder shall pay for all utility service or connection charges that are incurred in connection with the Work, including any that may be assessed against the UH by the various public entities, including the Board of Water Supply and the Department of Environmental Services. All such utility service and/or connection charges shall be considered included in the Contract Price, and no extra compensation shall be paid to the Design-Builder thereof. The Design-Builder shall comply with Section 01500, Construction Facilities, set forth in the Performance Specifications. All assessed charges for temporary utility services shall be included as part of the Contract Price.

(k) **Work limitations, protective barriers, and warning signs.** It may be necessary to confine the Work to one area at any one time. The Design-Builder shall provide and maintain protective barriers, fencing, and whatever signs necessary to caution the UH faculty, staff, students, and visitors. The cost of providing and maintaining the protective barriers and warning signs shall be considered incidental to the cost of the Project and no extra compensation shall be made to the Design-Builder.

(l) **Traffic control.**

   1. **Design-Builder to obtain traffic permits.** The Design-Builder shall obtain the necessary permits from the appropriate Authority Having Jurisdiction (“AHJ”), which could include the UH, prior to commencing the Work. The Design-Builder shall comply with Section 01500, Construction Facilities, set forth in the Performance Specifications.

   2. **Traffic Management Plan.** The Design-Builder shall prepare a traffic management plan that mitigates any adverse traffic impacts caused by the Work and promotes the efficient and free flow of traffic in and out of the Site and submit such plan to AHJ for review and approval, and obtain any required permit to the extent necessary.

4.3 **Joint Contractor; subcontractor.**

(a) **Joint contractors.** For Solicitations issued pursuant to HRS § 103D-302 or, only if specified in the RFP Part 2 (HRS § 103D-303), the Design-Builder shall comply with HRS 103D-302, relating to any changes in joint contractors or subcontractors. [HAR § 3-122-21]
(b) **Specialty work.** Joint contractors or Subcontractors may perform only the specialty work for which they are listed and licensed.

(c) **Changes.** The UH Procurement Officer, upon recommendation by the UH Project Manager, or for informal bids, the UH Project Manager alone, may allow changes to the original listing of joint contractors or subcontractors only if justified by the Design-Builder for reasons such as the joint contractors or subcontractors:

1. **Bankruptcy.** Files a petition in bankruptcy or is the subject of an involuntary petition in bankruptcy which is not dismissed within ten (10) days of filing;

2. **Non-performance.** Is not performing in accordance with the Contract;

3. **Not previously required.** Is to perform additional work for which a joint contractors or subcontractors was not required to be listed in the Proposal; or

4. **Otherwise justified.** For any other reason that the UH Procurement Officer or the UH Project Manager may consider justified.

(d) **Subcontractual relations.** The Design-Builder shall be responsible under the Contract for the acts and omissions of the Subcontractors, suppliers, and persons either directly or indirectly employed by them, as fully as the Design-Builder is for acts and omissions of its own employees. Nothing in the Contract shall create any contractual relation between any Subcontractor or supplier and the UH, or any obligation on the part of the UH to pay any money to, or cause to be paid any money from any Subcontractor or supplier.

4.4 **Contract, Project Plans to be kept on Site.** The Design-Builder shall keep on or within the Site for readily accessible reference a copy of the most current Project Plans, including the Design Plans, the Working Plans, the Quality Control Plans, and the Contract and shop drawings.

4.5 **Construction methods and equipment.** The Design-Builder shall use proper and efficient methods and equipment for the performance of the Work and the Contract. All Equipment furnished by the Design-Builder and used on the Work shall be of such size and of such mechanical condition that the Work can be prosecuted in an acceptable manner at a satisfactory rate of progress and the quality of the Work produced will be satisfactory.

4.6 **Access and inspection.**

(a) Circumstances under which the UH may perform inspections include but are not limited to, inspections of the Design-Builder's, the Subcontractors, or any supplier's plant, or Site in order to determine [HAR § 3-122-166]:

1. **Applicable standards satisfied.** Whether the standards set forth in section 1.2(c) of the General Conditions and the UH Performance Specifications, have been met or are capable of being met;

2. **Performance per Contract terms.** If the Contract is being performed in accordance within its terms;

3. **Goods/services.** Whether the goods or services are acceptable by inspection of the goods or services;

4. **Cost/pricing data accuracy.** The accuracy of cost or pricing data by audit of Design-Builder’s books and records pursuant to HAR § 3-122-175; or
(5) **Initiate debarment/suspension.** Whether or not to debar or suspend a Person from consideration for award of contracts pursuant to HAR §§ 3-126-11 through 3-126-18.

(b) **UH Project Manager assistance.** During the performance of the Contract, the Design-Builder shall provide the UH Project Manager with proper and safe facilities for access to the Site and the shops of the Design-Builder and its Subcontractors or suppliers. The Design-Builder and the Subcontractors, or suppliers shall provide without charge, all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing. Such assistance may include but not be limited to installation of hoists and ladders necessary to inspect the plant or the Site.

c) **No waiver.** The presence or absence of an inspector shall not result in the waiver of any requirements of the Contract, nor shall any act, statement or omission by an inspector constitute or be deemed a change unless the procedure for changes, set forth in these General Conditions is followed.

d) **Other contractors.** UH may have other contractors who may be granted access to the Site for other projects and if so, the UH shall so inform Design-Builder and Design-Builder will coordinate the Work with the work to be done by these other contractors for other UH projects within the Site.

e) **Covered work**

   (1) **Uncovering may be required.** If a portion of the Work is covered contrary to the request of the UH Project Manager or to requirements specifically expressed in the Contract, it must, if required in writing by the UH Project Manager, be uncovered for the inspection and be replaced at the Design-Builder's expense without change in the Contract Time.

   (2) **Responsibility for uncovered costs.** If a portion of the Work has been covered which the Project Manager has not specifically requested to inspect prior to its being covered or is not expressly required by the Contract to remain uncovered for inspection, the Project Manager may request to see such Work and it shall be uncovered by the Design-Builder. If such Work is in accordance with the Contract, costs of uncovering and replacement shall, by appropriate Change Order, be charged to the UH. If such Work is not in accordance with the Contract, the Design-Builder shall pay such costs unless the condition was caused by the UH or a separate contractor in which event the UH shall be responsible for payment of such costs.

   (3) **Correction of rejected Work.** The Design-Builder shall promptly correct Work rejected by the UH Project Manager or failing to conform to the requirements of the Contract, whether or not fabricated, installed or completed. The Design-Builder shall bear all costs of correcting such rejected Work, including additional testing and inspections and compensation to the UH for any consultant services and expenses incurred by the UH in connection with correcting Design-Builder’s Work.

   (4) **Removal if necessary.** The Design-Builder shall remove from the Site portions of the Work which are not in accordance with the requirements of the Contract and are neither corrected by the Design-Builder nor accepted by the UH.

   (5) **Correct Work and dispose Equipment.** If the Design-Builder fails to correct nonconforming Work within seven days, or within the time specified in the written notice, the UH Project Manager may correct it in accordance with section 7.2, “Termination for default for nonperformance or delay; damages for delay.” If the Design-Builder does not proceed with
correction of such nonconforming Work within the time fixed by written notice from the UH Project Manager, the UH may remove it and store the salvageable, saleable materials or Equipment at the Design-Builder's expense. If the Design-Builder does not pay the costs of such removal and storage within ten days after written notice, the UH may upon ten additional days' written notice sell such materials and Equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Design-Builder, including, without limitation, compensation for any consultant services and expenses incurred by the UH. If such proceeds of sale do not cover costs which the Design-Builder should have borne, the Contract shall be reduced by the deficiency. If payments then or thereafter due the Design-Builder are not sufficient to cover such amount, the Design-Builder shall pay the difference to the UH.

(6) Correct damaged construction Work. The Design-Builder shall bear the cost of correcting destroyed or damaged construction Work, whether completed or partially completed, and whether caused by Design-Builder, the Subcontractors, or any other contractors. Construction Work shall be considered damaged if such Work was not done in accordance with the requirements of the Contract.

(7) Nothing contained in this subsection shall be construed to establish a period of limitation with respect to other obligations which the Design-Builder might have under the Contract. Establishment of the time period of one year as described in section 4.26, "Guarantee," relates only to the specific obligation of the Design-Builder to correct Work, and has no relationship to the time within which the obligation to comply with the Contract may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Design-Builder's liability with respect to the Design-Builder's obligations other than specifically to correct Work.

4.7 Quality of materials and Equipment.

(a) New high quality materials required. Materials and Equipment installed as part of any permanent construction shall be new, unless otherwise specified, and free of liens, claims, and security interests of third parties. The Contract contemplates the use of the highest quality materials and Equipment throughout the performance of the Contract, and it is agreed that any material for which no particular specification is given shall be of the highest quality of its class or kind. For the purpose of this subsection, "new" shall mean unused, purchased specifically for the Project for which award was made, and free of damage.

(b) Samples. Whenever requested by the UH Project Manager, the Design-Builder shall furnish samples of materials to be used in the performance of the Contract. Said samples, if accepted, will be retained by the UH Project Manager and shall be used as the standard with which all like materials furnished under the Contract must conform. The acceptance of any sample tested by the UH Project Manager or the failure of the UH Project Manager to require the furnishing of samples shall not relieve the Design-Builder from performing the Work in accordance with the Contract.

(c) Samples and test specimens. When required by the UH Project Manager, test specimens or samples of materials, appliances and fittings to be used or offered for use in the performance of the Contract shall be prepared and furnished by the Design-Builder in such quantities and sizes as may be required for proper examination and tests, with information as to their sources. The Design-Builder shall furnish additional test specimens and samples as directed. Unless otherwise specified in the Contract,
samples, test specimens, and tests, shall be considered incidental to the Design-Builder's performance of the Contract.

(1) **Timely submittal.** Test specimens and samples shall be submitted in ample time to enable the UH Project Manager to make such tests or examinations as may be necessary. Laboratory tests and examinations made in a laboratory other than that of the UH shall be at the expense of the Design-Builder.

(2) **Tests.** Tests specified by the Contract, statute, regulation or ordinance shall be made and the costs thereof shall be borne by the Design-Builder unless otherwise provided for in such Contract, statute, regulation or ordinance. Such tests shall be conducted under the direction of the UH Project Manager and the Design-Builder shall repair any damage resulting therefrom.

(3) **UH Project Manager tests.** In addition, the UH Project Manager may require such tests as deemed necessary to carry out the UH Project Manager's duties during the performance of the Work under the Contract. When a test is required by the UH Project Manager, the Design-Builder under the direction of the UH Project Manager shall conduct such tests and shall bear all of the costs, including the cost of tools, labor and materials necessary therefor.

### 4.8 Design Quality Management

(a) **Design-Builder solely responsible.** Design-Builder shall be solely responsible for Design Quality Management and in fulfilling such responsibility shall provide to UH a complete set of the Project Plans, the Working Plans, and the Project Specifications that will be used to deliver the finished construction Work in accordance with all Contract requirements. UH Review and Comments pertaining to design documents shall not relieve Design-Builder of any of Design-Builder’s responsibility for such Design Quality Management and to provide a complete set of Project Plans, the Working Plans, and the Project Specifications.

(b) **No construction Work start.** Unless otherwise authorized by the UH, the Design-Builder shall not begin construction Work until all UH comments on the Final Design are resolved to the UH’s satisfaction. Design-Builder shall provide a Design Management Plan that describes Design-Builder’s plan to ensure each of the following:

1) **Manage design quality.** Manage the design and design quality of the Work;

2) **Coordinate obtaining permits and approvals.** Coordinate with and obtain necessary approvals from Authorities Having Jurisdiction regarding permits, temporary road diversions and detours, shutdowns, temporary traffic diversions, utility relocations, and all other matters for which authorization may be required;

3) **Document permits obtained.** Document how permit requirements are met in accordance with the Environmental Compliance Plan and that appropriate permits are obtained (which may include the Environmental Compliance Plan);

4) **Ensure reviews completed.** Ensure that the responsible Design Professionals complete the necessary reviews, evaluations and quality checks in accordance with the procedures set out in the Design Management Plan and Quality Plan and file appropriate documentation and certifications; and

5) **Ensure quality procedures followed.** Ensure that the Quality Manager certifies that quality procedures have been followed in accordance with all Contract documents and the Quality Plan.
(c) **Responsible for design quality.** Design Manager shall be responsible for the supervision and quality of all design Work and design processes, including but not limited to each of the following:

1) Accuracy;
2) Adequacy;
3) Conformance to professional standards of practice;
4) Compliance with all legal requirements and contractually-mandated Standards and other Contract requirements;
5) Cost effectiveness;
6) Quality; and
7) Fitness for purpose and function as specified or implied in the Contract.

(d) **Design Management Plan.** The Design-Builder's Design Management Plan shall be part of the Quality Plan to be submitted for UH Review and Approval prior to the start of design. The Design Management Plan shall include the quality responsibilities of the Design Manager and Quality Manager. The Design Management Plan shall clearly describe the design review process and the involvement of all relevant parties. The Design Management Plan shall be specific to each stage of design development. Design-Builder shall make a single comprehensive design check and design review for developed Project Plans, including the Working Plans, the Project Specifications and for each stage of design development.

(e) **Design Exceptions.** All design exceptions from specified Standards and/or Industry practices shall be provided by Design-Builder to UH, stating why exceptions are being proposed with supporting documentation; and shall be submitted prior to UH Review and Comment of the schematic design.

If design is amended subsequent to the schematic design review by the UH, Design-Builder shall re-check and re-certify the design as an additional Schematic Design review. Substantive changes to Project Plans initiated by Design-Builder and already checked by the Design Professional and certified by the Quality Manager shall be subjected to the Design Review process as an entirely new design. Design-Builder shall not be entitled to any increase in Contract Price or additional Contract Time for the re-check and re-certification except when the amended design results from a Change Order initiated by the UH for reasons other than design non-compliance.

(f) **Design Reviews.** The Design Management Plan shall set forth the process for conducting design review meetings to include attendees, frequency, and other requirements to ensure the UH participation as envisioned by the partnering provisions of the Contract and/or Special Provisions.

1) **As-Built Plans.** As-Built Design Review shall be performed initially by Design-Builder to assure “red-lines” and authorized changes to the Final Design and Working Plans are properly notated on the record Project Plans and that quality documents and project records indicating variances or changes have been reflected on the plans and specifications. Once Design-Builder has completed its review, the As-Built Plans will be submitted to the UH for Review and Acceptance.

2) **Design Quality Records.** Design Quality Records shall be maintained by Design-Builder in an auditable format according to the Quality Plan procedures. The UH has the right to audit the Quality Records, including the Design Quality Records, for compliance with the Quality Plan and the Contract requirements. Upon completion of the Project, the Quality Records shall be turned over to the UH.
(g) **Professional Seal Requirements.** Submittals of the Design Documents and/or the Working Plans, when specified or required by governing codes and regulations, shall be sealed and signed by a professional engineer or architect currently licensed in the State of Hawai‘i as appropriate for the specific discipline involved. The Design Documents that shall be signed and sealed include, but are not limited to, construction drawings, construction specifications, engineering reports, engineering calculations, Project Plans and other documents as required by regulatory agencies and the Contract.

4.9 **Character of workers, methods and Equipment.**

(a) **Employees to properly perform Work.** The Design-Builder shall employ persons who possess the skill required to properly perform the work under the Contract. When required by the UH Project Manager, whose decision shall be final, the Design-Builder shall replace any employee who lacks the skill to perform the Work assigned to the employee or is discourteous or disorderly while performing such Work. If acceptable to the UH Project Manager, a person who has been so replaced may be assigned other Work on the Project. Any such acceptance by the UH Project Manager shall not relieve the Design-Builder from performing the Work in accordance with the Contract.

(b) **Workers must have sufficient skill.** All workers must have sufficient skill and experience to perform properly the Work assigned to them. All workers engaged in special work or skilled work such as bituminous courses of mixtures, concrete pavement or structures, electrical installation, plumbing installation, or in any trade shall have sufficient experience in such work and in the operation of the Equipment required to properly and satisfactorily perform all Work. All workers shall make due and proper effort to execute the Work in the manner prescribed in the Contract.

(c) **Insufficient workers.** Should the UH Project Manager find that the Work is being performed with an insufficient number of workers, the Design-Builder shall be required to increase the number of workers on the Project.

4.10 **Other contracts, cooperation, coordination.**

(a) **Coordinate with other UH projects.** The Design-Builder shall coordinate its operations with those of other contractors who may be employed on adjacent or related projects of the UH, 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 Design-Builder and the other UH contractor(s) in regard to their projects shall be resolved by the UH Project Manager, whose decision shall be final and binding.

(b) **Coordination with Others.** In its performance of services authorized and required under the Contract, the Design-Builder shall assist the UH in coordination activities with governmental, public and private agencies as required by the UH. Such coordination assistance shall include attending meetings in connection with the Work pursuant to the Contract with UH, governmental, public, or private agencies as may be authorized and required by the UH. The Design-Builder shall prepare and submit to the UH meeting minutes of all such meetings attended within 10 working days after the meeting. The Design-Builder shall promptly bring to the attention of the UH by written notice any significant requests or decision arrived at during coordination with such agencies.

(c) **Within Site coordination required.** The Design-Builder is advised that other contractors may be performing Work on the same Site as this Contract. These other contracts may affect the Work and may require frequent coordination meetings to minimize the overall impacts. The Design-Builder shall coordinate with other contractors performing work on or within the Site. All costs for
coordination and working adjacent to other contractors shall be included as incidental costs to the Work under the Contract.

4.11 Wages and hours.

(a) **HRS Chapter 104 compliance.** The Design-Builder shall observe and comply with all the provisions of HRS Chapter 104, relating to wages and hours of employees on public works contracts. The Design-Builder shall pay all employees on the Contract and any contract with the UH, the minimum basic wage rate in conformance with applicable State laws, and Federal laws if the Project is subject to federal funding.

(b) **Minimum wages.** The minimum wage shall be periodically increased during the performance of the Contract in an amount equal to the increase in the prevailing wages for those kinds of work as periodically determined by the State of Hawai‘i Director of Labor and Industrial Relations ("DLIR Director"). Notwithstanding the provisions of the original Contract entered into, if the DLIR Director determines that the prevailing wage has increased, the rate of pay of laborers and mechanics on the Contract shall be raised accordingly. No additional compensation shall be made to the Design-Builder for failing to consider such increases of the minimum wage during the duration of the Contract.

(c) **Overtime work.** No laborer or mechanic employed on the job site shall be permitted or required to work on a Saturday, Sunday, or a legal holiday of the State or in excess of eight hours on any other day unless the laborer or mechanic receives overtime compensation for all hours worked on a Saturday, Sunday, and a legal holiday of the State or in excess of eight hours on any other day. For purposes of determining overtime compensation under this subsection, the basic hourly rate of any laborer or mechanic shall not be less than the basic hourly rate determined by the DLIR Director to be the prevailing basic hourly rate for corresponding classes of laborer and mechanics on projects of similar character in the State.

(d) **Certified payrolls.** One (1) certified copy of all payrolls shall be submitted weekly to the UH Project Manager. The Design-Builder shall be responsible for the submission of certified copies of the payrolls of all Subcontractors and lower tiered subcontractors. The certification shall affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates contained in the wage determination decision of the DLIR Director, and that the classifications set forth for each laborer or mechanic conform with the work the laborer or mechanic performed. The payrolls shall contain the name of each employee, the employee’s classification, rate of pay (basic rate and fringe benefits), daily and weekly number of hours worked on the Project as well as hours performed on other projects, the deductions made, and the actual wages paid.

(e) **Maintain payroll records.** Payroll records for all laborers and mechanics working at the Site of the Work shall be maintained by the Design-Builder and its Subcontractors, during the course of the Work and preserved for a period of three years thereafter. The records shall contain the name of each employee, the employee’s correct classification, rate of pay, daily and weekly numbers of hours worked, deductions made, and actual wages paid.

(f) **Availability of Payrolls.** The Design-Builder shall make payroll records available for examination within ten (10) days from the date of a written request by a governmental agency or any authorized representative thereof. Any Design-Builder who: (1) fails to make payroll records accessible within ten days; (2) fails to provide information requested for the proper enforcement of said HRS Chapter
104 within ten (10) days; or fails to keep or falsifies any record required under said HRS Chapter 104; shall be assessed a penalty as provided in HRS § 104-22(b).

(g) Violations. If the UH Project Manager finds that any laborer or mechanic employed on the job site or the Site by the Design-Builder or any subcontractor has been or is being paid wages at a rate less than the required rate, or has not received the laborer's or mechanic's full overtime compensation, the UH Project Manager may take appropriate action in accordance with HRS § 104-21, or the Procurement Officer may, upon recommendation of the UH Project Manager, by written notice to the Design-Builder, terminate the Design-Builder's right, or the right of any Subcontractor, to proceed with the Work or with the part of the Work in which the required wages or overtime compensation have not been paid and the UH may complete such Work or any part thereof by contract or otherwise or require the Design-Builder’s sureties to take over completion of said portion of the Work, and in any event, the Design-Builder and its sureties shall be liable to the UH for any excess costs occasioned thereby.

(h) Post wage schedule. The Design-Builder is required to post the applicable wage schedule in a prominent and easily accessible place at the job site or the Site. The Design-Builder shall give to each laborer and mechanic employed by any entity performing Work either under the Contract or a subcontract a copy of the rates of wages required to be posted.

(i) Federally funded or federally assisted projects. On federally funded or federally assisted projects, the current federal wage rate determination in effect at the time of advertising the RFP is incorporated as part of the Contract, and both Federal and State wage rates shall apply. Where rates for any class of laborers and mechanics differ, the higher rates shall prevail. The minimum federal wage rates shall be those in the U. S. Department of Labor Wage Determination Decision and Modifications in effect ten days prior to the bid opening date.

A copy of the wage rate determination, (including any additional classification and wage rate conformed under 29 CFR 5.5a(1)(ii)) and Davis-Bacon poster (WH-1321) shall be posted at all times at the job site or the Site in a prominent and accessible place where it can be easily seen by the workers.

(j) Employee Interviews. The UH Project Manager and the State of Hawai‘i Department of Labor and Industrial Relations (“DLIR”) may interview employees during working hours on the job. Failure to allow employees to be interviewed may result in the assessment of the penalties described under HRS § 104-22(b).

(k) Failure to comply. Failure to comply with the requirements of this section may result in disqualification from bidding or submitting proposals on future projects.

(l) Inclusion in subcontract. The Design-Builder shall include this section in every subcontract for work under this Contract.

4.12 Safety and health.

(a) Comply with laws and orders. The Design-Builder shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss. The Design-Builder shall prepare a Site-specific health and safety plan and shall submit Exhibit “J” certifying their Health and Safety Program.
(b) **Safety program.** The Design-Builder shall comply with HRS Chapter 396, relating to the standards of occupational safety and health and all applicable federal, State, and City/County laws and regulations, including but not limited to HRS § 396-18, relating to safety and health programs for contractors for UH construction projects where the proposal amount is in excess of $100,000.

(c) **Responsibility.** The Design-Builder shall designate a responsible member of its organization at the Site whose duty shall be the prevention of accidents. This person shall be the Design-Builder's superintendent unless otherwise designated by the Design-Builder in writing to the UH Project Manager.

(d) **Safeguards, signs.** The Design-Builder shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities.

(e) **No loading.** The Design-Builder shall not load or permit any part of the construction or the Site to be loaded so as to endanger its safety.

(f) **Emergency.** In an emergency affecting safety of persons or property, the Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. The Design-Builder shall notify the UH Project Manager in writing of such emergency and remedial steps taken as soon as reasonably feasible. Additional compensation or extension of time claimed by the Design-Builder on account of an emergency shall be determined as provided in Section 6.9(c), “Price adjustment,” and Section 5.6, “Delay; time extensions.”

**4.13 Protection of pedestrians and vehicular traffic; access to property.**

(a) **Measures considered incidental.** Unless otherwise specified in the Contract, the requirements in this section shall be considered incidental to the Design-Builder's performance of the Contract and included in the Contract Price. The Design-Builder shall comply with the requirements of Performance Specifications Section 01500, Construction Facilities.

**4.14 Discovery of hazardous materials.**

(a) **Responsibility.** The Design-Builder shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Work under the Contract.

(b) **Stop work.** In the event the Design-Builder encounters on the Site material or substances reasonably believed to be hazardous materials which have not been rendered harmless, the Design-Builder shall immediately stop Work in the area affected and report the condition to the UH Project Manager in writing. The Work in the affected area shall not thereafter be resumed except by written agreement of the UH and the Design-Builder if in fact the material is a hazardous material and has not been rendered harmless. The Work in the affected area shall be resumed in the absence of any hazardous materials, or when it has been rendered harmless.

(c) **Notice.** The Design-Builder shall give any notices bearing on safety of persons or property or their protection from damage, injury or loss and any other required notices or reports and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities.
(d) **Safeguards, signs.** The Design-Builder shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent site and utilities.

4.15 **Environmental pollution and hazardous materials control.**

(a) **Pollution control.** It is the responsibility of the Design-Builder to investigate and comply with all applicable hazardous materials laws, including but not limited to, those relating to control and abatement. Unless otherwise specified in the Contract, the requirements in this section shall be considered incidental to and part of the Design-Builder's performance of the Contract and included in the Contract Price. The Design-Builder shall comply with the requirements set forth in the Performance Specifications, Section 01715, Existing Conditions – Hazardous Materials Survey, and Section 01567, Pollution Control, as applicable.

4.16 **Noise control.**

(a) **Noise permit.** The Design-Builder shall comply with the provisions of Chapter 46, Community Noise Control, of the State Department of Health, Administrative Rules. When required, the Design-Builder shall obtain a community noise permit.

(b) **Costs included.** The costs and Work covered by this section shall not be paid for directly, but shall be considered incidental and included in the proposal prices for the various items of Work under the Contract.

4.17 **Restoration and precautions.**

(a) **Protect from damage.** The Design-Builder shall protect property adjacent to the Site of the Project from damage and shall immediately restore property damaged by the Design-Builder to the condition it was in prior to the damage. Unless otherwise specified in the Contract, the requirements in this section shall be considered incidental to the Design-Builder's performance of the Contract and shall be included in the Contract price. The Design-Builder shall comply with the requirements of Performance Specifications Section 01700, Contract Closeout regarding Site restoration and precautions.

4.18 **Historical and archaeological finds.**

(a) **Preservation of finds.** All items having any apparent historical or archaeological interest discovered in the course of construction activities shall be preserved. The Design-Builder shall leave the archaeological find undisturbed and immediately report the find to the UH Project Manager so that the proper authorities may be notified.

(b) **Implement archaeological monitoring plan.** The Design-Builder shall provide and execute an archaeological monitoring plan for inspecting excavations as stipulated by the State of Hawai‘i Department of Land and Natural Resources, Historic Preservation Division (“SHPD”), which includes providing an archaeological monitor to be onsite to monitor all subsurface disturbances during construction. The cost of archaeological monitoring shall be considered incidental and included in the Contract prices for the various items of Work under the Contract.
(c) **Training.** All Design-Builder equipment operators and laborers involved in excavation activities shall receive training in identification and response to inadvertent archaeological discovery.

(d) **Burials discovery.** In the event of discovery of burials, the Design-Builder shall immediately stop work and contact the UH Project Manager and SHPD.

(e) **Stop work.** All work in the immediate vicinity of the Site shall cease, until the Site is cleared by the SHPD.

### 4.19 Surface and subsurface conditions

(a) **UH representations.** Where investigation of subsurface conditions has previously been made by the UH, the Design-Builder may inspect UH records as to such investigation and examine any sample that may be available. Where such information is shown in the plans, said information represents only the statement by the UH as to the character of material which has been actually encountered by the UH in its investigation and is included only for the convenience of Design-Builder.

Any subsurface information or hydrographic survey data furnished in the RFP is for the Design-Builder convenience only. The information and data furnished are the product of the UH's interpretation of the facts gathered in investigations made at the specific locations indicated, and the UH assumes no responsibility whatever in respect to the sufficiency or accuracy of borings or of the log of test borings or other preliminary investigations, or of the interpretation thereof, and there is no guaranty, either expressed or implied, that the conditions indicated are representative of those existing throughout the Site. In addition, no assurance is given that conditions found at the time of the subsurface explorations, such as the presence or absence of water, will be the conditions that prevail at the time of construction of this Project. The Design-Builder shall be solely responsible for all assumptions, deductions, or conclusions the Design-Builder may make or derive from the subsurface information or data furnished.

Making information concerning subsurface conditions available to the Design-Builder is not to be construed in any way as a waiver of the Design-Builder's responsibility to examine the RFP and the Site. The Design-Builder must satisfy itself through its own investigation as to conditions to be encountered.

(b) **Differing site conditions.** Unless the parties agree to include HAR § 3-125-11(1) in the Special Provisions in lieu of this section, the Design-Builder accepts the conditions at the Site as they eventually may be found to exist and warrants and represents that the Contract can and will be performed under such conditions, and that all materials, Equipment, labor, and other facilities required because of any unforeseen surface or subsurface conditions (physical or otherwise) shall be wholly at the Design-Builder's own cost and expense, anything in this Contract to the contrary notwithstanding. [HAR § 3-125-11(2)]

### 4.20 Utilities, underground

(a) **Duty to protect utilities.** The Design-Builder shall be responsible for the protection of existing surface and subsurface utilities and facilities within and abutting the Site that the Design-Builder encounters during the progress of the Work, such as telephone system, electric system, water system, sewer system, drainage system, and irrigation system, etc., whether or not shown on any UH-provided documents provided with the RFP. The Design-Builder shall notify the UH Project Manager of the affected utility and/or facility immediately of any damage or disturbance to the utility and/or facility.
(b) **Design-Builder responsible for damages.** The Design-Builder shall be fully responsible for any and all damages, injuries, death and expenses to property and persons from accidents to and from existing utilities and facilities.

(c) **Failure to exercise reasonable care.** The Design-Builder shall immediately notify the UH Project Manager of any disturbance or damage to any utilities and/or facilities. The Design-Builder shall repair, restore, and/or reconstruct at its cost any damage to the disturbed utilities and facilities to the pre-existing condition. Any damage claims due to the disruption of service caused by the utilities being damaged shall be paid by the Design-Builder, who shall indemnify, defend, and hold harmless the UH from all suits, actions or claims of any character brought on account of such action.

(d) **Damage to sewer facility.** The Design-Builder shall notify the UH Project Manager and the City and County of Honolulu (“City”) Department of Environmental Services, Collection and Maintenance Division (“ES Department”) immediately whenever a sewer facility is damaged. All Design-Builder-related damages which are not reported immediately to the ES Department, and results in sewer backups, spills, and overflow, shall be billed to the Design-Builder by UH for the actual cost of the clean-up. Any subsequent fines, imposed upon the UH by the Environmental Protection Agency (“EPA”) and/or State of Hawai’i Department of Health (“State DOH”) will be backcharged to the Design-Builder or withheld from payments due the Design-Builder, at the UH’s discretion.

4.21 **Materials and Equipment; UH provided materials and Equipment.**

(a) **Availability of materials/Equipment.** The UH does not assume any responsibility for the availability of any materials or Equipment required under this Contract. Unless otherwise specified in the Contract Special Provisions, the Design-Builder shall be considered as having taken into account when submitting its Proposal the availability of materials or Equipment required under the Contract.

(b) **UH supplied materials.** If applicable, the materials specified in the Special Provisions attached hereto will be made available to the Design-Builder and supplied by the UH for this Contract.

4.22 **Maintenance of site and final cleanup.**

(a) **Clean-up costs considered incidental.** The requirements in this section shall be considered incidental to the Design-Builder's performance of the Contract and included in the Contract Price.

(b) **Maintenance of Site.** The Design-Builder shall, during performance of the Work, keep the Site and surrounding area free from the accumulation of excess dirt, waste materials, and rubbish caused by the Design-Builder. The Design-Builder shall, at suitable intervals and upon completion of each phase of the Project, remove all accumulations of rubbish or refuse materials, surplus concrete, and mortar and excavated materials not required or suitable for backfill. Washings from concrete mixers or mixing boxes shall not be deposited in the drainage or sewer system of the UH or on paved streets. The Design-Builder shall keep the Project and surrounding area neat and free of dirt and dust by periodic blading, power brooming, watering or other approved means.

(c) **Surplus excavated material.** All surplus excavated materials from the Project shall become the property of the Design-Builder unless otherwise specified. Excess material, debris, adobe and unacceptable material shall be hauled away. The cost of the Work under this section shall be considered incidental and included in the Contract prices for the various items of Work under this Contract.
(d) **Removal.** Upon completion and before Final Acceptance by the UH Project Manager of the Work performed under the Contract, the Design-Builder shall remove rubbish, surplus or discarded materials, falsework, forms, temporary structures, field offices, project signs, signs not a part of the Project, and the Design-Builder's Equipment and machinery, and shall leave the Site and ground occupied by the Design-Builder in connection with the performance of the Contract in an orderly and clean condition. Buildings constructed, altered, or worked in by the Design-Builder in the performance of the Contract shall be left "broom clean," and stains and other blemishes resulting from the Design-Builder's operations, such as dropped or splattered concrete or mortar and paint, shall be removed from floors, walls, ceilings, windows, and all other exposed surfaces.

**4.23 Partial acceptance of Project.** The UH Project Manager may accept and place parts of the Project in service as completed and the Design-Builder shall give proper access to such portions for this purpose.

**4.24 Responsibility of the Design-Builder prior to acceptance.**

(a) **Repair and restore.** The Design-Builder shall repair, reconstruct, restore, and replace the Work or any part thereof which is injured, damaged or vandalized prior to acceptance of the Work by the UH Project Manager.

(b) **Occupancy prior to acceptance.** The UH may occupy or use any completed or partially completed portion of the Work at any stage prior to acceptance when such portion is designated by separate agreement with the Design-Builder, provided such occupancy or use is consented to by the Design-Builder's insurer. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the UH and Design-Builder have accepted in writing the responsibilities assigned to each of them for payments, retainage if any, security, maintenance, air conditioning, utilities, damage to the Project and insurance, and have agreed in writing concerning the period for correction of Work and commencement of the guarantee required by the Contract. Consent of the Design-Builder to partial occupancy or use shall not be unreasonably withheld.

(c) **Inspection.** Immediately prior to such partial occupancy or use, the UH Project Manager and the Design-Builder shall jointly inspect the area to be occupied or used in order to determine and record the condition of the area.

(d) **No acceptance of non-complying work.** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Project shall not constitute acceptance of Work not complying with the requirements of the Contract.

**4.25 Final inspection.**

(a) **Design-Builder inspection.** Before notifying the UH Project Manager that the Project is substantially complete including compliance with section 4.22, "Maintenance of site and final cleanup,” the Design-Builder shall inspect the Project and test all equipment with all of its Subcontractors. The Design-Builder shall also proceed to obtain the documents required under the Contract such as but not limited to:

1. All written guarantees;
2. All As-Built Plans and Building Information Models;
3. All certified payroll affidavits if not submitted earlier;
(4) Certificate of plumbing and electrical inspection;
(5) Certificate of building occupancy;
(6) Certificate of soil and wood treatments;
(7) Certificate of water system chlorination;
(8) Maintenance service contract;
(9) Two (2) copies of a list of all Equipment installed; and
(10) All operating, maintenance, and training manuals for Equipment installed.

(b) Prior to final inspection. Prior to requesting a final inspection to determine Substantial Completion, the Design-Builder shall also complete the following items:

1. Arrange delivery. Arrange to deliver tools, spare parts, extra materials, and similar items to a location designated by the UH. Label with manufacturer’s name and model number, where applicable.
2. Complete startup. Complete startup testing of systems.
4. Remove temporary facilities. Terminate and remove temporary facilities from the Site, along with mockups, construction tools, and similar elements.
5. Utility changeover. Advise the UH of changeover in other utilities.
6. Final cleaning. Complete final cleaning requirements.

(c) "Substantially complete" means:

1. Utilities working. All utilities are connected and in working condition;
2. Major Equipment working. All air conditioning and other major Equipment are in acceptable working condition;
3. Use for intended purpose. The building, structure, improvement, or the Site can be used for its intended purpose; and
4. Work conforms to specifications. The completed work conforms to the specifications of the Contract, except for “minor discrepancies” as provided for in paragraph 4.25(f) of this Contract.

(d) Notify UH Project Manager. After finding everything in order, the Design-Builder shall notify the UH Project Manager in writing that the Project is substantially complete and ready for inspection.

(d) UH Project Manager determination. The UH Project Manager shall then make a determination as to whether or not the Project is ready for inspection. If the UH Project Manager is not satisfied, the Design-Builder will be notified in writing of the items that require completion prior to such final inspection. After the Design-Builder complies with the UH Project Manager's instructions, the Design-Builder will again submit, in writing, a request for inspection.

(e) Pre-final inspection. When the Project Manager determines that the Project is substantially complete, a pre-final inspection will be conducted by the UH Project Manager along with representatives of
other UH agencies interested in the Project, within seven days of receipt of the request from the Design-Builder.

(f) Pre-final inspection results. If the pre-final inspection discloses only minor discrepancies, the UH Project Manager shall accept the Project as substantially complete and issue in writing, a list of the discrepancies that need to be corrected including all documents required by the Contract (the "punch list") and the time in which the Design-Builder must complete the punch list. The date of acceptance of the Project as substantially complete shall signify the end of the Contract completion time.

(g) Complete punch list. The Design-Builder shall, within seven days after receipt of the punch list, proceed to complete the items on the punch list. Upon completion, the Design-Builder shall submit a written request for a final inspection, after which, if the UH Project Manager finds that all discrepancies are satisfactorily corrected, the UH Project Manager will accept the Project as completed ("final acceptance").

(h) Noncompliance. If the Design-Builder fails to proceed or complete the punch list within the specified times, the UH Project Manager may proceed to have such work performed at the Design-Builder's expense, and the Design-Builder's sureties will be liable therefor. The UH shall be entitled to reasonable attorneys' fees and consultants' fees and costs necessarily incurred by the Design-Builder's refusal to complete the Project and the Contract and to pay such costs of corrective work.

(i) After final acceptance. Upon final acceptance, the Design-Builder shall be relieved of its responsibility in maintaining and protecting the Work and the Site and for injury to persons or property. Release of final payment shall be as specified in Section 6.7, "Final Payment."

(j) Submission of remaining documents. Prior to release of final payment, the Design-Builder shall submit, within thirty days after final acceptance, or within such time as the UH Project Manager may allow, all remaining documents required by the Contract.

4.26 Guarantee

(a) Additional guarantee. This guarantee shall be deemed supplemental to guarantee provisions provided in other sections of the specifications for the individual units and systems of units so specified.

(b) Performance. The Design-Builder guarantees its performance and the performance of its Subcontractors under the Contract.

(c) Materials and Equipment. The Design-Builder also guarantees all materials and Equipment furnished or installed under the Contract against defects and poor workmanship and to be in operable condition upon final acceptance of the Work or portions of the Work, and that all such materials and equipment conform to the requirements of this Contract and be fit for the use intended.

(d) Design. The Design-Builder guarantees the design to meet the criteria and operating requirements specified and against failure to perform in accordance with such criteria and operating requirements.

(e) Guarantee period. Unless otherwise specifically stated in the Contract that a longer period is intended, the guarantee shall extend for a period of two (2) years upon final acceptance of the Work by the UH Project Manager and shall include all labor, materials, Equipment and parts. The UH Project Manager may also determine the guarantee period to commence upon acceptance of the material or Equipment installed, or the Work performed. Furthermore, this period shall be extended from the time of correction of any defect or failure, corrected under the terms of this guarantee, for a
like period of two (2) years. The Design-Builder shall provide a new certificate of guarantee for the extended one-year period.

(f) Correction. The Design-Builder shall correct all defects or failures discovered within the guarantee period. The UH will give the Design-Builder prompt written notice of such defects or failures following their discovery. The Design-Builder shall commence corrective work within seven days following notification and shall diligently prosecute such work to completion. The Design-Builder shall bear all costs of corrective work, which shall include necessary disassembly, transportation, reassembly and retesting, as well as repair or replacement of the defective materials or Equipment and any necessary disassembly and reassembly of adjacent work.

(g) Noncompliance. If the Design-Builder fails to perform corrective work in the manner and within the time stated, the UH may proceed to have such work performed at the Design-Builder's expense, and the Design-Builder's sureties will be liable therefor. The UH shall be entitled to reasonable attorneys' fees, consultants' fees, and costs necessarily incurred by the Design-Builder's refusal to complete the Contract and the Project and to pay such costs of corrective work.

(h) Performance bond. Unless otherwise specifically stated in the Contract that a longer period is intended, the performance bond shall be in full force and effect for the duration of the Contract and for a period of one year after final acceptance of the Project and the Contract by the UH Project Manager.

(i) Rights and remedies. The rights and remedies of the UH under this provision do not preclude the exercise of any other rights or remedies provided by this Contract or by law with respect to unsatisfactory work performed by the Design-Builder.

4.27 As-Built Plans. The Design-Builder shall maintain at the Site two (2) sets of full size Project Plans and redlined .pdf files, marking them in red to show all variations between the construction actually provided and that indicated or specified in the Project Plans, including buried or concealed portions of the Work, or where variations in scope or character of Work from that of the original Contract are authorized, the drawings shall be marked to define the construction actually provided. Where equipment installation is involved, the size, manufacturer’s name, model number and power input or output characteristics, as applicable, shall be shown on the As-Built Plans. The representations of such changes shall conform to standards and details as necessary to clearly portray the as-built construction.

The drawings shall be maintained and updated on a daily basis, both hardcopy and .pdf. Monthly and final payments to the Design-Builder shall be subject to prior approval of the updated drawings, including approved Change Order changes to design.

On completion of the Work, both sets of marked-up drawings and .pdf files shall be delivered to the UH Project Manager and shall be subject to the UH Project Manager’s approval before acceptance.

4.28 Project management and construction management.

(a) Project/construction management services. Design-Builder shall provide project and construction management services for the scope of Work defined in the Contract. This shall include, but not be limited to, the following activities:

(1) Project Management Plan. Design-Builder shall develop and implement a Project Management Plan that reflects the scope of Work and the processes to be implemented to
manage the delivery of the Project. The plan shall include such items as a project organization chart, description of the project management tools and processes, communication protocols and processes, progress reporting requirements, and a project personnel contact listing. As a “living document” this plan may require updates periodically to reflect changes and improvements.

(2) **Weekly Coordination Meetings.** Design-Builder will conduct and document weekly coordination meetings that will be held at the jobsite with the UH and other stakeholders participating in the Project. The meetings will cover items of Work completed the previous week and planned for the next two weeks (3-Week Look Ahead Schedule) and any current issues of concern, resolution of conflicts, and other meetings requiring UH participation. Design-Builder will maintain an action items log that reflects assigned responsibilities and due dates for actions raised in the meeting. Special meetings may be necessary to maintain schedule delivery on all aspects of the Design-Builder’s Work. Typically, these special meetings include, but are not limited to, design workshops, design reviews, environmental clearances, construction easements, and traffic management and control.

(3) **Monthly Progress Reports.** Design-Builder shall prepare and submit monthly progress reports covering the current period performance and the next period’s plan. The report shall include progress photos, schedule updates, and areas of concern. Progress photos shall include, but not be limited to, the photographic condition of active construction, utility protection, environmental protection, and traffic management. Photo documentation shall also be used for pre-construction surveys.

(4) **Coordination with Other Work.** Design-Builder shall coordinate the Work with all other adjacent work and follow-on work to be performed by others.

(5) **Management of Labor, Material, and Equipment.** Design-Builder is responsible for managing the labor, material, and Equipment required to efficiently and effectively perform the Work.

(6) **Submittal Management.** Design-Builder is responsible for managing all Contract submittals, maintaining submittal logs, and follow-up responses/actions to UH comments until satisfactorily resolved. Design-Builder shall use UH’s online e-Builder® project management system for managing submittals required by the Contract and Special Provisions, as applicable.

(b) **Schedule Control and Reporting.** **Within ten (10) days** after execution and delivery of the Notice to Proceed (unless otherwise specified in the Contract Documents), Design-Builder shall submit the following to UH for its timely review:

(1) **Schedule of Work.** A Schedule of Work in accordance with Technical Specifications Section 01300, Submittals and Section 01010, Summary of Work for UH review and approval. Work shall not commence until the Critical Path Method Schedule of Work has been accepted by UH.

(2) **Schedule of Values.** A Schedule of Values that depicts the pay item number, description, pay item value, planned achievement date, and cross-reference to the Design-Builder’s Schedule of Work. This document shall be used for the monthly pay request and shall be included in UH’s online e-Builder® project management system, as applicable.
(3) **Must adhere to Schedule of Work.** Design-Builder shall adhere to the Schedule of Work established, as it may be adjusted from time to time as provided below:

(A) **Schedule of Work adjustments – No change to Contract Time.** Design-Builder shall submit to UH for acceptance proposed adjustments in the Schedule of Work that will not change the Contract Time. Such adjustments will conform generally to the Schedule of Work then in effect.

(B) **Schedule of Work adjustments – Contract Time changes.** Proposed adjustments to the Schedule of Work that will change the Contract Time (or Milestones) shall be submitted in accordance with the requirements of the Changes in Contract Time clause. Such adjustments may only be made by a Change Order.

(4) **Progress Meetings.** Progress meetings will be conducted at least on a twice monthly basis during design and weekly during construction with the UH, UH’s Representative, Design-Builder, active Subcontractors, and all other such representatives concerned with current progress or involvement in planning, design, coordination, or future critical activities.

(5) **Construction schedule.** Design-Builder shall review progress since the last meeting and determine the status of each activity in relation to the Project schedule. Design-Builder shall determine how to expedite construction activities that are behind schedule and secure commitments from parties involved to so expedite such construction activities. Design-Builder shall discuss revisions required to ensure subsequent activities will be completed within the construction schedule requirements.

(6) **Schedule updating.** After each meeting the Project schedule will be revised and updated as appropriate, and distributed to the meeting attendees and such other persons as the UH may determine and/or request, together with the prior meeting’s minutes and an explanation/justification for the revised Project schedule.

(7) **Electronic and hard copy submittal.** Both electronic and hard copies of the initial Schedule of Work and each subsequent update shall be provided to the UH.

**END OF CHAPTER**
CHAPTER 5 – MODIFICATIONS; CHANGE ORDERS

5.1 Not used.

5.2 Omission, errors or discrepancies in Contract.

(a) Omissions. Work incidental to the Contract, although not specifically referred to in the Contract, shall be furnished and performed by the Design-Builder without change in the Contract Price. Labor, materials and Equipment directly or indirectly necessary to complete the construction of the Project, whether or not the same may have been expressly provided for in the Contract, shall be furnished and performed by the Design-Builder without change in the Contract Price.

(b) Errors or discrepancies. The Design-Builder shall notify the UH Project Manager in writing immediately upon discovery of any error, omission or discrepancy:

(1) In points or instructions furnished by the UH Project Manager; or

(2) Within the Contract or any part thereof.

(c) Notify UH Project Manager. After discovery of an error, omission, or discrepancy as described in subsections 5.2(a) and (b), the Design-Builder shall provide written notice of same in the manner and time prescribed above to the UH Project Manager. The Design-Builder shall proceed with the performance of the Contract only after receiving written approval or instructions from the UH Project Manager. The UH Project Manager may direct the Design-Builder to continue performance of the Work while instructions and/or approval are being processed.

(d) Design-Builder responsibility for errors. The Design-Builder bears full responsibility for any errors and/or omissions related to documents provided as part of the RFP that were not brought to the attention of the UH prior to the Proposal Date.

5.3 Change Orders.

(a) UH issuance of Change Order. The UH Procurement Officer may at any time, without notice to any surety, issue a change order to make changes in the Work within the scope of the Contract as may be found to be necessary or desirable. Such changes shall not invalidate the Contract or release the sureties, and the Design-Builder will perform the Work as changed, as though it had been part of the original Contract. Minor changes in the Work may be directed by the UH Project Manager at no change in the Contract Price or Contract Time. In the absence of a change order or written order, the Design-Builder will not be entitled to payment for any such extra work. [HAR § 3-125-4(1)] The Design-Builder’s cost of responding to any requests for price or time adjustments is included in the Contract Price. No additional compensation will be allowed unless authorized by the Procurement Officer. A change order signed by all parties to the Contract constitutes a supplemental agreement/modification to the Contract.

(b) Adjustments of price or time for performance. If any change order increases or decreases the Design-Builder's cost of, or the time required for performance of any part of the Work under this Contract, an adjustment may be made and the Contract modified in writing accordingly. Any adjustment in the Contract Price made pursuant to this section shall be determined in accordance with HAR § 3-125-13(a), which is included in Section 6.9 of this GCDB, “Price adjustment.” Failure of the parties to agree to an adjustment in the Contract Price shall be resolved in accordance with the price adjustment
clause included in Section 6.9 pursuant to HAR § 3-125-13(a)(1)(E). Failure of the parties to agree to an adjustment in Contract Time shall not excuse a Design-Builder from proceeding with the Contract as changed, provided that the Procurement Officer, within 14 days after the changed work commences, makes such provisional adjustments in time as the Procurement Officer deems reasonable. The right of the Design-Builder to dispute the cost or time required for performance or both shall not be waived by its performing the Work, provided however, that it follows the notice requirements for disputes and claims established in Section 7 of the Contract. [HAR § 3-125-4(2)]

On any price adjustment, the Design-Builder shall submit detailed cost breakdowns in a format acceptable to the UH, for material, Equipment and labor, including additional or reduction in time, for the UH Project Manager’s approval, **within three working days** or within such further time as the UH Project Manager may allow, from the time the Design-Builder is informed of the Work to be performed or of any changes. The substantiation shall include the Design-Builder’s and Subcontractor’s cost breakdown to a level of detail acceptable to the UH Project Manager.

Should the Design-Builder delay or refuse to submit detailed cost breakdowns for the changed Work, the UH Project Manager may pay the Design-Builder in accordance with Section 6.9, “Price adjustment.”

(c) **Time period for claim.** Within thirty days after receipt of a written Change Order under subsection (a) above, unless such period is extended by the Procurement Officer in writing, the Design-Builder shall file a notice of intent to assert a claim for an adjustment. The requirement for filing a timely written notice cannot be waived and shall be a condition precedent to the assertion of a claim. [HAR § 3-125-4(3)]

(d) **Claim barred after final payment.** No claim by the Design-Builder for an adjustment hereunder shall be allowed if written notice is not given prior to final payment under this Contract. [HAR § 3-125-4(4)]

(e) **Other claims not barred.** In the absence of such a change order, nothing in this clause shall restrict the Design-Builder’s right to pursue a claim arising under the Contract or for breach of contract. [HAR § 3-122-4(5)]

5.4 **Claims based on oral directives.**

(a) **Oral directives.** Any oral order, direction, instruction, interpretation or determination from the UH Project Manager which, in the opinion of the Design-Builder, causes any change, can be considered as a change only if the Design-Builder gives the UH Project Manager written notice of its intent to treat the oral order, direction, instruction, interpretation or determination as a change directive. The written notice must be delivered to the UH Project Manager before the Design-Builder acts in conformity with the oral order, direction, instruction, interpretation or determination, but not more than five days after delivery of the oral order to the Design-Builder. The written notice shall state the date, circumstances, whether a time extension will be requested, and source of the order that the Design-Builder regards as a change. The written notice may not be waived and shall be a condition precedent to the filing of a claim by the Design-Builder. Unless the Design-Builder acts in accordance with this procedure, any oral order shall not be treated as a change and the Design-Builder waives any claim for an increase in the Contract Time or Contract Price related to the work. [HAR § 3-125-16]
(b) **Acknowledgment of oral directive.** Not more than ten (10) days after receipt of the written notice from the Design-Builder, the UH Procurement Officer shall issue a Change Order for the subject Work if the UH Project Manager recommends it constitutes a change. If no change order is issued in the time established, it shall be deemed a rejection of the Design-Builder's claim for a change. If the Design-Builder objects to the UH refusal to issue a Change Order, it shall file a written claim with the UH Project Manager within thirty days after delivery to the UH Project Manager of the Design-Builder's written notice of its intention to treat the oral order as a change. In all cases the Design-Builder shall proceed with the Work. The protest shall be determined in accordance with the disputes provisions under section 8.7, "Authority to resolve contract and breach of contract controversies." [HAR § 3-125-16]

(c) **Notice to Sureties.** If notice to a surety of any change affecting the general scope of the Work or the provisions of the Contract (including, but not limited to, Contract Price or Contract Time) is required by the provisions of any Bond, the giving of any such notice will be Design-Builder's responsibility. The amount of each applicable Bond will be adjusted to reflect the effect of any such change and a copy of the Bond shall be submitted to the UH Procurement Officer.

5.5 **Overtime inspections.**

(a) **Written request.** If the Design-Builder wishes to work at such time of the day which is during the period other than the regular business hours of the UH, or on a Saturday, Sunday, or legal State holiday, the Design-Builder shall make a written request for inspection services during such period.

(b) **Notice.** If such a request is made and granted, the Design-Builder shall notify the UH Project Manager not less than twenty-four hours in advance of the time when such inspection services are required.

(c) **Invoice.** The Design-Builder will be required to pay for approved overtime inspection services in the following manner:

1. **UH inspector.** The UH shall invoice the Design-Builder for overtime inspection services rendered by UH inspectors.

2. **Private construction manager.** In the event the UH has retained a private construction manager, the Design-Builder will be responsible to pay the private construction manager for overtime inspections services. The private construction manager will invoice the Design-Builder at the construction manager's established rate for overtime inspection as set forth in the Contract between UH and the private construction manager.

5.6 **Delay; time extensions; unforeseeable delays; suspension.**

(a) **Permits.** The Design-Builder shall be solely responsible for obtaining all permits and approvals required for performance of the Work in a timely manner. For delays in obtaining the necessary building and/or grading permits which are extraordinary and beyond the control of the Design-Builder and will result in a delay of the commencement of the Work, the Design-Builder may be granted an extension of time for the performance of the Contract corresponding to the delay, in the sole discretion of UH, provided the Design-Builder notifies the UH Project Manager immediately upon first encountering the delay. The Design-Builder shall keep the UH Project Manager informed as to the estimated length of the requested delay.
(b) **Increases in scope of Work.** For increases in the scope of Work caused by alterations and additional work under this Contract, the Design-Builder will be granted an extension of time only if the changes are on the Critical Path and affect the Design-Builder’s ability to achieve Substantial Completion by the deadline specified in the Contract. If the Design-Builder feels that an extension of time is justified, the Design-Builder must request it in writing when submitting the detailed cost breakdown for the Change Order. The Design-Builder must show how the Substantial Completion date will be affected based on the progress of the Project and must also support the claim with schedules, time impact analyses, and statements from its Subcontractors, suppliers, and/or manufacturers as to the extent of the delay.

(c) **Delivery of materials and equipment.**

(1) **Delays not attributable to Design-Builder.** For delays in delivery of materials and Equipment which occur as a result of unforeseeable causes beyond the control and without fault or negligence of the Design-Builder, the Subcontractors or suppliers, the Design-Builder may be granted an extension of time, in the sole discretion of UH, provided that the Design-Builder complies with the procedures herein. No extension of time will be considered unless the material and Equipment were ordered at the earliest possible date and will not be considered if ordered after the date set forth in the Design-Builder’s project schedule.

(2) **Delay caused by shortage of materials.** No extension of time shall be granted for a delay caused by a shortage of materials unless the Design-Builder, within ten days from the beginning of the delay (unless the UH Project Manager grants a further period of time before the date of final payment under the Contract), notifies the UH Project Manager in writing of the delay and submits proof that the Design-Builder has diligently made every effort to obtain the materials from all known sources, and further proof that the inability to obtain the materials when originally planned did in fact cause a delay in Substantial Completion of the entire Work which could not be compensated for by revising the sequence of the Design-Builder's operations. [HAR § 3-125-18] Approval of any extension shall be in the sole discretion of UH.

(3) **Delays must be substantiated.** The extent of delay must be substantiated by submission of evidence and supported by specific reasons for the delay to the satisfaction of the UH Project Manager, which may include.

(A) **State reasons.** State specifically the reason or reasons for the delay. Also, explain as necessary, the effect of this delay to the other trades and to the specified completion date of the Project.

(B) **Time impact analysis.** Provide a time impact analysis identifying the pertinent chronological events and their dates for the Project, such as, but not limited to, the following:

(i) Notice to proceed  
(ii) Sample or shop drawing submittal  
(iii) Sample or shop drawing return  
(iv) Purchase order  
(v) Factory shipment  
(vi) Arrival of ship  
(vii) Delivery to Site  
(viii) Material installation
(ix) Specified completion of Project
(x) Actual completion of Project
(xi) Pertinent correspondence, telegrams, meetings and telephone conversations.

(C) **Submit delay evidence.** Submit copies of purchase order, factory invoice, bill of lading, shipping manifest, delivery tag and any other pertinent correspondence as evidence to support the delay.

(D) **Identify delay duration.** Cite the period of delay and the number of days requested therefor. The period of delay shall not exceed the difference between the originally scheduled delivery date at the Site versus the actual delivery date.

(d) **Other unforeseeable delays.** If any delay in the completion of the Work arises from delay in the Critical Path directly attributable to causes such as acts of God, acts of the public enemy, acts of the UH and any other governmental entity in either a sovereign or contractual capacity, acts of another contractor (but not the Design-Builder's Subcontractor(s)) in the performance of a contract with the UH), fires, floods, epidemics, quarantine restrictions, strikes or other labor disputes, freight embargoes, unusually severe weather, or delays of Subcontractors due to causes similar to those set forth above, then the Design-Builder shall be granted an extension of time provided that:

1. **Delay is beyond Design-Builder’s control.** The event and the effects of the event were beyond the control of the Design-Builder, not due to an act or omission of the Design-Builder, any Subcontractors, their employees, agents and officers or any other Person for whom the Design-Builder may be legally or contractually responsible, and could not have been avoided or prevented by due diligence and use of reasonable efforts by the Design-Builder.

2. **Notice of delay within 10 days.** The Design-Builder shall notify the UH Project Manager in writing, within ten days from the commencement of the delay (unless the UH Project Manager grants a further period of time before the date of final payment under the Contract), of the causes of the delay and, if possible, the possible effects such circumstances may have on the completion date of the Contract. Upon becoming aware of the extent of any such delay, the Design-Builder shall immediately inform the UH Project Manager in writing, stating specifically the reason or reasons for the delay and submit evidence to support its reasons.  [HAR § 3-125-18]

3. **Extent of delay substantiated.** The extent of any delay must be substantiated as follows:

   (A) **State reasons.** State specifically the reason or reasons for the delay. Also, explain as necessary, the effect of this delay to other trades and to the specified completion date of the Project.

   (B) **Time impact analyses.** Provide a time impact analysis identifying the pertinent chronological events for the Project and their dates, such as, but not limited to, the following:

   (i) Notice to proceed
   (ii) Sample or shop drawing submittal
   (iii) Sample or shop drawing return
   (iv) Purchase order
   (v) Delivery to job site
   (vi) Material installation
(vii) Specified completion of Project
(viii) Actual completion of Project
(ix) Pertinent correspondence, telegrams, meetings and telephone conversations.

(C) Submit delay evidence. Submit copies of purchase orders, delivery tags, and any other pertinent correspondence as evidence to support claim.

(D) Identify delay duration. Cite the period of delay and the number of days requested therefor.

(E) Confirm whether delay stopped or ongoing. A statement either that the above circumstances have been cleared and normal working conditions restored as of a certain day or that the above circumstances will continue to prevent completion of the Project.

[4] Exclusions. For purposes of determining entitlement to additional compensation under this subparagraph (d), the term “unforeseeable delays” specifically excludes from its definition the following matters which might otherwise be considered unforeseeable:

(A) Climatic conditions. Any climatic conditions, storms, floods (less than 50-year), droughts, fires, windstorms (less than Cat-3), earthquakes 3.5 or lower on the Richter scale as measured within proximity to the Project, landslides, or other catastrophes;

(B) Strikes. Strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout, or other similar occurrence;

(C) Failure to obtain approval. The suspension, termination, interruption, denial or failure to obtain, or nonrenewal of any permit, license, consent, authorization, or approval (excluding Environmental Approvals but including all other Governmental Approvals) which is necessary for the performance of the Work or the maintenance of the Project;

(D) Foreseeable change in Governmental Rule. Any change in a Governmental Rule (excluding material changes in Environmental Laws) which was proposed or was otherwise foreseeable at the Proposal Date;

(E) 3rd party presence. The Work or the presence on the Project Site of any third party, including, but not limited to, that of other contractors or personnel employed by the State of Hawai‘i; by other public bodies; by railroad, transportation, or utilities; or by private enterprises or any delay in progressing such Work by any third party as indicated or disclosed in the Contract or ordinarily encountered or generally recognized as inherent in the Work;

(F) 3rd party facility. The existence of any facility or appurtenance owned, operated, or maintained by any third party, as indicated or disclosed in the Contract or ordinarily encountered or generally recognized as inherent in the Work;

(G) Failure to act. The act, or failure to act, of any other public or governmental body, transportation company or corporation, or utility, including, but not limited to, approvals,
permits, restrictions, regulations, or ordinances attributable to the Design-Builder’s design, submission, action or inaction, or means and methods of construction;

(H) **Court orders.** Restraining orders, injunctions, or judgments issued by a court which were caused by the Design-Builder’s submissions, action or inaction, or means and methods of design and construction;

(I) **Shortage of materials.** Any shortages of supplies or material required by the Contract Work;

(J) **Soil moisture variations.** Variations in soil moisture content from that represented in reports, borings, or tests conducted by the UH and/or the Design-Builder;

(K) **Contemplated situations.** Any situation which was within the contemplation of the parties at the time of entering into the Contract; and

(L) **Matters not caused by UH.** All other matters not caused by the UH or beyond the control of the UH.

(5) **Ability to recover insurance proceeds not affected.** The foregoing limitations shall not affect the Design-Builder’s ability to obtain proceeds of insurance required under the Contract to be used for repair and replacement work associated with insured events.

(e) **Other work.** For subsections (b), (c), and (d), the UH Project Manager shall have the option of extending the Contract Time for only that portion of the Work affected by the delay. If the UH Project Manager exercises this option, the Design-Builder shall defer work in the areas approved by the UH Project Manager and complete the remaining work within the time specified in the Contract.

(f) **Suspension.**

(1) **Total suspension extensions.** When the performance of Work is totally suspended by the UH Project Manager for one or more days in accordance with paragraphs (1), (2), (3), or (5), of section 7.1, “Suspension of work,” the Contract completion date shall be revised accordingly.

(2) **Partial suspension extensions.** During periods of partial suspensions of the Work, the Design-Builder will be granted an extension only if the partial suspension affects the Substantial Completion Date. If the Design-Builder feels that an extension of time is justified, the Design-Builder must request it in writing **at least five working days** before the partial suspension will affect the critical operations in progress. The Design-Builder must show how the Substantial Completion Date will be affected based on the progress of the Project and must also support its claim with statements from its Subcontractors.

(3) **Evaluation.** The UH Project Manager shall evaluate all time extension requests and shall ascertain the facts and extent of the time involved and the UH Project Manager's findings of the facts thereof shall be final and conclusive.

(4) **No time extensions.** No time extension will be considered for the following:

(A) **Design-Builder’s fault.** Delays or suspension of work due to the fault of the Design-Builder, including the causes listed in paragraph (2) of section 7.1(a);
(B) **Material/Equipment arrival delay.** Delays in arrival of materials and equipment due to the fault of the Design-Builder, its Subcontractors or supplier in ordering, fabricating, delivery, etc.;

(C) **Unjustified changes.** Delays caused by changes which the UH Project Manager determines unjustifiable due to the lack of supporting evidence or because the change is of such nature that the Design-Builder’s ability to achieve Substantial Completion by the Substantial Completion Date will not be affected;

(D) **Failure to timely submit delays.** Delays caused by the failure of the Design-Builder to submit, on a timely basis, for approval by the UH Project Manager, shop drawings, descriptive sheets, material samples, color samples, etc. except as covered in subsections 5.6(c) and 5.6(d);

(E) **Failure to timely request clarification.** Failure to submit requests for clarification on a timely basis to avoid impacting the project schedule;

(F) **Weather delays.** Delays of weather unless unusually severe weather, or unless determined by the UH Project Manager to be justified;

(G) **Subcontractor delays.** Delays by Subcontractors or suppliers at any tier unless it can be shown that the delay was unforeseeable and not caused by any failure or neglect on the part of the Subcontractor or supplier;

(H) **Early completion delays.** Delays that affect the Design-Builder’s planned early completion, but do not affect the specified or adjusted Contract Time;

(I) **Materials available from other sources.** Shortages of materials or equipment if the supplies, services, or equipment were obtainable from other sources in sufficient time to permit the Design-Builder to meet the required schedule;

(J) **Financial difficulties.** Delays that are attributable to any financial or related difficulties encountered or experienced by the Design-Builder and/or the Subcontractors or suppliers of any tier at any time during or subsequent to the Contract Time;

(K) **Inability to perform.** Delays that are attributable to a lack of know-how or other inability to perform on the part of the Design-Builder and/or the Subcontractors or suppliers of any tier at any time in connection with the performance of the Work;

(L) **Labor problems.** Delays that are attributable to any labor or related problems or difficulties encountered or experienced by the Design-Builder and/or the Subcontractors or suppliers of any tier at any time in connection with the Work; and

(M) **Sole source Equipment.** Delays attributable to any requirement that the Design-Builder use Equipment designated by the UH for the Project (“sole source” equipment).
(h) **Additional rights and remedies.** The UH rights and remedies provided in the Contract are in addition to any other rights and remedies provided by law. [HAR § 3-125-18]

1. **Excusable delays.** The parties agree that the occurrence of an excusable delay that delays overall Project completion may not result in additional compensation paid to the Design-Builder. No additional compensation will be paid to the Design-Builder for excusable delays that are not the UH’s fault, and in such event the Design-Builder is only entitled to an adjustment of Contract Time.

2. **Concurrent delays.** No additional compensation will be paid to the Design-Builder for any time period when the overall Project completion date is delayed as a result of concurrent delay. Delays are considered to be concurrent when the Design-Builder encounters an excusable delay but also has caused its own delay to the Project for the same period of time. In that situation, the Design-Builder is only entitled to an adjustment of Contract Time for the length of the concurrent delay.

3. **Unreasonable delays.** Additional compensation shall be paid to Design-Builder if unreasonable delays caused by the UH are the sole reason that the overall Project completion date is delayed. No additional compensation is warranted for delay if that delay does not affect the overall Project completion date.

4. **Contract Time adjustments.** All adjustments of Contract Time shall be solely for the period of time during which the overall Project completion date was actually delayed.

### 5.7 Variations in estimated quantities

(a) **Variations above 115% or below 85%.** Where the quantity of a pay item in the Contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen per cent above or below the estimated quantity stated in the Contract, an adjustment in the Contract Price shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred fifteen per cent or below eighty-five per cent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Procurement Officer shall, upon receipt of a timely written request for an extension of time, prior to final payment of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the Procurement Officer the findings justify. Any adjustment in the Contract Price shall be in accordance with section 6.9, “Price adjustment.” [HAR 3-125-10]

(b) **Quantities are approximate and no UH warranties.** If applicable, all quantities appearing in the RFP are approximate, and those indicated in the RFP are prepared for the comparison of proposals only. The UH does not, expressly or by implication, warrant that the actual quantities will correspond therewith. Design-Builder understands and has included in its proposed prices, the entire cost of the performance of the Contract, and it is understood and agreed that there is included in each lump sum or unit priced item, the entire cost of any and all items incidental to the performance of the Contract covered by such lump sum or unit priced item. By submittal of its Proposal, Design-Builder certifies that it has verified these quantities in a manner deemed necessary or expedient.

**END OF CHAPTER**
CHAPTER 6 – PAYMENT; PRICE ADJUSTMENTS

6.1 Payment.

(a) Contract Price is full compensation. The Design-Builder shall be paid the Contract Price as full compensation for the performance of the Contract. If an error, omission or misstatement shall be discovered in the quantities or measurements stated in the Contract, the same shall not vitiate the Contract, or release the Design-Builder or his surety or sureties from performing the Contract, or affect the price agreed to under the Contract, or excuse the Design-Builder from any of the obligations or liabilities under the Contract, or entitle the Design-Builder to damages or compensation, except as provided herein.

(b) Payment based on milestones achieved. Each application or request for payment shall be based upon the most recent Schedule of values submitted by the Design-Builder and accepted by the UH in accordance with the terms of the Contract, the sum of which shall not exceed the total Contract amount. Each request shall be supported by data to substantiate its accuracy. The Schedule of Values must be approved by the Project Manager, prior to any progress payments.

Requests for payment must include the following documents before the UH is obligated to make any payment under this Contract:

(1) Schedule of Values. A copy of the UH-approved Schedule of Values;

(2) Percentage of completion certificate. A certificate by the Design-Builder of the percentage of completion of each element of the Work as well as the materials that have been obtained by the Design-Builder and accepted by the UH Project Manager as of the end of the period covered by the request for payment; and

(3) Updated Schedule of Work. An updated monthly critical path method (CPM) Schedule of Work for the Project that shows:
   
   (A) Any Design-Builder claimed event of delay;
   
   (B) The impact of the event of delay on the Critical Path; and
   
   (C) The current revised Critical Path based upon the event of delay.

(c) Lump sum contracts.

(1) Determining Contract Price. For lump sum contracts, the Contract Price shall be the result obtained by first reducing the amount designated as the total sum proposed in the award by the amount included therein for allowances and contingencies, and adding thereto or deducting therefrom any extra cost or any reduction in cost, respectively, to the UH as a result of supplemental agreements in writing and written orders.

(2) Contract Price covers Work completed per Project Plans. Lump sum Contract Prices include all materials, equipment, labor and all other incidental work required for the complete construction and installation of the lump sum product, all in accordance with the Project Plans. Payment will be made only for the item in place complete, regardless of the amount of material, equipment and labor necessary to complete the same in a proper and workmanlike manner and in accordance with the Project Plans.
(d) **Unit priced items.** Payment shall be made for the actual quantities of units incorporated into the Contract multiplied by the unit prices of the Contract items, when the unit work or items are in place complete, provided that where the quantity of any item varies more than fifteen per cent above or below the estimated quantity stated in the Contract, payment shall be made at the adjusted unit price in accordance with section 5.7, “Variations in estimated quantities.”

6.2 **Provisional Sum/Allowance items.** Payment for allowance items, if incorporated into the Work, shall be included in the monthly estimate for progress payment upon submittal of invoices. Unless otherwise specified in the RFP, the Design-Builder shall be reimbursed from the allowance items as follows:

1. **Force account work.** For force account, in accordance with UH approved daily force account worksheets.

2. **Special Provisions and/or Contract Documents.** As set forth in the Special Provisions or other Contract documents.

6.3 **Payments during performance of work.** The UH Project Manager shall, not later than the fifteenth day of each month during the performance of the Contract, make an estimate of the amount of Work completed in accordance with the Contract during the immediately preceding month for the construction items listed in the performance schedule described in section 4.2(d), “Payment and performance schedules.” In arriving at an estimate of work completed during the month, the UH Project Manager shall deduct sufficient allowance for any incomplete or unprotected work or to provide for any contingencies for remedy of defects or damage to said Work or for the necessity of performing any part of the Work over again to cure defects or damage.

6.4 **Retention.**

(a) **Retention for satisfactory progress.** Pursuant and subject to HRS § 103-32.1, if the UH Project Manager finds that satisfactory progress is being made:

1. **Monthly progress payments.** Progress payments to the Design-Builder for the Work completed for the month shall be for a sum equal to ninety-five per cent of the above estimate (after accounting for any deductions and contingencies), less previous payments and sums withheld by the UH pursuant to subsection (a).

2. **Adjustment upon 50% completion.** After the first fifty per cent of the Work to be performed under the Contract has been completed and progress is satisfactory, progress payments will be for one hundred per cent of the above estimate less:

   (A) Five per cent withheld from the previous payments to the Design-Builder during the performance of the first fifty per cent of Work required under the Contract;

   (B) Other sums withheld by the UH pursuant to the Contract; and

   (C) Previous payments.

(b) **Unsatisfactory progress.** The UH Project Manager may continue to make progress payments to the Design-Builder for a sum equal to ninety-five per cent of the above estimates, less previous payments and sums withheld by the UH pursuant to the Contract until such time that satisfactory progress is achieved by the Design-Builder.
(c) **Subcontractor retention withheld.** The retention amount withheld by the Design-Builder from its Subcontractors of any tier shall not be more than the same percentage of retainage as that of the Design-Builder, where a Subcontractor has provided evidence to the Design-Builder of:

1. A valid performance and payment bond for the Project that is acceptable to the Design-Builder and executed by a surety company authorized to do business in this State;
2. Any other bond acceptable to the Design-Builder; or
3. Any other form of collateral acceptable to the Design-Builder. [HRS § 103-32.1]

Where the Subcontractor does not provide the above-listed performance and payment bonds, retainage by the Design-Builder (of the Subcontractor’s billings) shall be in accordance with HRS § 103-32.1(e).

(d) **Subcontractor withholding notice.** A written notice of any withholding shall be issued to a Subcontractor, with a copy to the Procurement Officer, specifying the following:

1. **Withheld amount.** The amount to be withheld;
2. **Specify withholding causes.** The specific causes for the withholding under the terms of the Subcontract; and
3. **Subcontractor remedial actions.** The remedial actions to be taken by the Subcontractor to receive payment of the amounts withheld.

(e) **Retainage held by Procurement Officer.** Any retainage provided for in this Section or requested to be withheld by the Design-Builder shall be held by the Procurement Officer.

(f) **Payment of Subcontractor withholdings.** A payment request made by the Design-Builder to the UH Project Manager that includes a request for sums that were withheld or retained from a Subcontractor and are due to the Subcontractor may not be approved under HRS § 103-10.5(e), unless the payment request includes:

1. **Substantiation required.** Substantiation of the amounts requested; and
2. **Design-Builder certification.** Certification by the Design-Builder, to the best of the Design-Builder’s knowledge and belief, that:
   
   (A) **Performance in accordance with Contract.** The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the Contract;
   
   (B) **Subcontractor payments made.** Each 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) **No Subcontractor withholding amounts included.** The payment request does not include any amounts that the Design-Builder intends to withhold or retain from a Subcontractor or supplier in accordance with the terms and conditions of their Subcontract.
(g) **Comply with retainage requirements.** The Design-Builder shall comply with all provisions of HRS § 103-32.1 relating to retainage requirements.

(h) **Delay in completion of Work.** Upon written request from the Design-Builder, if the completion of the Work under the Contract is being delayed through no fault of the Design-Builder, the Design-Builder may request for the release of all or part of the amount withheld. The Procurement Officer, upon recommendation of the UH Project Manager, may make additional payments from the amount withheld to the extent that such amount withheld is not required for the protection of the UH. The Procurement Officer may require the Design-Builder to submit tax clearances from the State and Internal Revenue Service and surety clearance as a condition to the release of any retention.

(i) **Substitution with general obligation bonds.** Pursuant to HRS § 103 32.2, the Design-Builder may request, and the Procurement Officer, upon recommendation of the UH Project Manager, may enter into an agreement to allow the Design-Builder to withdraw from time to time the whole or any portion of the sums retained as set forth above upon depositing with the Procurement Officer any general obligation bond of the State or its political subdivisions with a market value not less than one hundred ten per cent of the sum to be withdrawn.

### 6.6 Payment for delivered materials or Equipment

(a) **Incorporation required for payment.** No payment for any material or equipment that is affixed, movable or removable, delivered to the Site of the Work under the Contract will be made until said material or equipment is incorporated into the parts of the Project required to be constructed under the Contract. Payment for the material or equipment so incorporated shall be included in the monthly progress payment under the appropriate cost item.

(b) **Partial payment permitted.** The Design-Builder may be allowed partial payments to the extent of NINETY PERCENT (90%) of the manufacturer’s, supplier’s, distributor’s or fabricator’s invoice cost of accepted materials to be incorporated into the Work upon a showing of the following:

1. **Delivery confirmed.** The materials are delivered and properly stored at the site of Work; or
2. **Special materials.** For special materials, the materials are delivered to the Design-Builder or Subcontractor(s) and are properly stored in a location acceptable to the UH within a reasonable distance to the Site of Work; and
3. **Furnish proof of insurance.** Design-Builder provides proof of insurance covering the full risk or loss for the materials.

### 6.7 Final Payment

(a) **Making the Final Payment.** After final acceptance by the UH Project Manager, the Design-Builder will be paid the balance due, provided that final payment will be made only with the approval of the Procurement Officer and upon submittal of the following to the Procurement Officer:

1. **Equipment installed.** Whenever the payment includes payment for movable or removable equipment, two copies of the list of equipment installed or provided under the Contract, listing the description, make, model, serial number, quantity, cost, an indication of whether or not the equipment is movable or removable, and the specific location of the equipment such as the room number, in accordance with Section 6.6;
2. **Surety consent.** Written consent of the surety or sureties on the Design-Builder's bonds;
(3) **Claims affidavit.** Completed affidavit, either certifying that there are no outstanding claims or acknowledging the existence and/or extent of any outstanding claims arising out of the performance of the Design-Builder's Work;

(5) **Insurance evidence.** Evidence of continuing insurance as required in section 3.1; and

(6) **Tax clearance certificate.** The Design-Builder’s submission of a tax clearance certificate from the director of taxation from the State and the Internal Revenue Service. A tax clearance certificate, not over two months old, with an original green certified copy stamp, must accompany the invoice for final payment on the Contract. In lieu of the green certified copies the Design-Builder may submit the tax clearance, labor compliance, and good standing certificates obtained through using the Hawai‘i Compliance Express to evidence compliance with laws governing entities performing public works construction projects in the State of Hawai‘i.

In addition to a tax clearance certificate, an original “Certification of Compliance for Final Payment”, Exhibit “K,” will be required for final payment.

(b) **Failure to comply.** If the Design-Builder delays or fails to comply with the requirements of this Section, the Procurement Officer, upon recommendation of the UH Project Manager and without further obligation to the Design-Builder, may take any or all of the following actions:

(1) **Assign payment to tax agency.** Upon notice from the State Department of Taxation or Internal Revenue Service, assign payment to the appropriate tax agency.

(2) **Use UH Project Manager final payment determination.** Unilaterally, use the final payment determination of the UH Project Manager as the final payment to the Design-Builder.

(3) **Make non-responsibility determination.** Determine the Design-Builder to be non-responsible which may jeopardize the Design-Builder's future status as a qualified offeror.

(c) **Subcontractors must be paid.** Upon final payment to the Design-Builder, full payment to all Subcontractors shall be made in accordance with Section 6.11, “Prompt payment by Contractors to Subcontractors.” [HRS § 103-10.5; HAR § 3-125-23]

6.8 **Payment does not imply acceptance of work.** The granting of any payment by the UH, or the receipt thereof by the Design-Builder, shall in no way imply acceptance of the Work. The unsatisfactory character of such Work, equipment, components or workmanship that do not conform to the requirements of this Contract and/or the Project Plans may be rejected by the UH and in such case must be replaced by the Design-Builder without delay.

6.9 **Price adjustment.**

(a) **Method and manner of reaching price adjustment.** Any adjustment in Contract Price made pursuant to the Contract shall be determined in one or more of the following ways [HRS § 103D-501(b); HAR § 3-125-13]:

(1) **Fixed price adjustment.** By agreement on a fixed price adjustment before commencement of the pertinent performance;

(2) **Unit price basis.** By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
(3) **Cost basis.** By the costs attributable to the events or situations under such clauses with
adjustment of profit or fee, all as specified in the Contract or subsequently agreed upon before
commencement of the pertinent performance;

(4) **Other basis.** In any other manner as the parties may mutually agree upon before commencement
of the pertinent performance;

(5) **Inability to reach agreement.** In the absence of agreement between the parties, the provisions of
HRS § 103D-501(b)(5) shall apply.

(b) **Combined overhead and profit.** For mutually-agreed changes, the allowances for all overhead,
extended overhead resulting from adjustments to Contract Time (including home office and field
overhead) and profit combined, shall not exceed the percentages set forth below:

(1) **Design-Builder forces.** For the Design-Builder, for any work performed by its own labor forces,
twenty percent (20%) of the cost;

(2) **Subcontractor forces.** For each Subcontractor involved, for any work performed by its own
forces, twenty percent (20%) of the cost;

(3) **Design-Builder/Subcontractor forces.** For the Design-Builder or any Subcontractor, for work
performed by their subcontractor(s), ten percent (10%) of the amount due the performing
subcontractor.

Not more than three line-item percentages for fee and overhead, not to exceed the maximum
percentages shown above, will be allowed regardless of the number of tier Subcontractors. This
provision also applies to price adjustments for changes associated with Design.

(c) **Unable to agree on price adjustment.** In the absence of agreement between the parties, where the
Design-Builder and the UH Project Manager cannot agree to the price adjustment of any change in
Work:

(1) **Change orders not exceeding $50,000.** For change orders with value not exceeding $50,000 by
documented actual costs of the Work, allowing for twenty per cent (20%) of the actual costs for
overhead and profit on Work done directly by the Design-Builder and ten per cent (10%) on any
Subcontractor’s billing to the Design-Builder for the Design-Builder’s overhead and profit
(“Force Account”). A change order shall be issued within fifteen days of submission by the
Design-Builder of proper documentation of completed force account work, whether periodic
(conforming to the applicable billing cycle) or final. The Procurement Officer shall return any
documentation that is defective to the Design-Builder within fifteen days after receipt, with a
statement identifying the defect; or

(2) **Change orders exceeding $50,000.** For change orders exceeding $50,000 by a unilateral
determination by the UH Project Manager of the costs attributable to the events or situations
under clauses with adjustment of profit or fee, all as computed by the UH Project Manager in
accordance with applicable sections of HAR Chapters 3-123 and 3-126 (“Unilateral
Determination”). [HRS § 103D-501(b)(5)(A)]

Costs included in the unilateral change order shall allow for twenty per cent (20%) of the actual
costs for overhead and profit on Work done directly by the Design-Builder and ten per cent (10%)
on any Subcontractor's billing to the Design-Builder for the Design-Builder’s overhead and profit.
Upon receipt of the unilateral change order, if the Design-Builder does not agree with any of the
terms or conditions, or the adjustment or non-adjustment of the Contract Time or the Contract
Price, the Design-Builder shall, within thirty days after the receipt of the written unilateral change
order, file a notice of intent to claim. Failure to file a protest within the time specified shall
constitute agreement on the part of the Design-Builder with the terms, conditions, amounts, and
adjustment or non-adjustment of the Contract Time or the Contract Price set forth in the unilateral
change order.

(d) Cost or pricing data.

(1) Application. Application for cost or price adjustment shall be made pursuant to HAR § 3-122-
121 et seq. For any adjustment exceeding $100,000, the Design-Builder shall submit cost or
pricing data and certification of that data except as provided for in paragraph (3). Certification
shall be in the form attached herein as Exhibit “H.” For adjustments less than $100,000, the UH
Project Manager may, upon written determination that the circumstances warrant submission of
cost or pricing data, require cost or pricing data.

(2) Cost or pricing data defined. Cost or pricing data mean all facts as of the date of price agreement
that prudent buyers and sellers would reasonably expect to significantly affect price negotiation.
Such data are factual, not judgmental, and are therefore verifiable. They are 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 including such facts as:

(A) Vendor quotations;
(B) Nonrecurring costs;
(C) Information on changes in production methods and in production or purchasing volume;
(D) Data supporting projections of business prospects and objectives and related operation costs;
(E) Unit cost trends such as those associated with labor efficiency;
(F) Make or buy decisions;
(G) Labor union contract negotiations; and
(H) Information on management decisions that could have a significant bearing on costs.

(3) Exceptions. Cost or pricing data are not required if the price is based on Contract unit prices,
adequate competition (as in receiving bids or quotations from various Subcontractors or suppliers
for changed work), established catalogue prices or market prices, or prices set by law or
regulation. However, the UH Project Manager may request cost or pricing data if the UH Project
Manager considers that such price is not reasonable.

(4) Submission of cost or pricing data and certification. The Design-Builder shall be required to
submit cost or pricing data if any adjustment in the Contract Price is subject to the provisions of
HRS § 103D-312. The submission of any cost or pricing data shall be made subject to the
provisions of subchapter 15, Chapter 3-122. A fully executed Change Order or other documents
permitting billing for the adjustment in price under any method listed in Section 6.9(a)(1)-(4)
shall be issued within 10 days after agreement on the method of adjustment. Cost or pricing
data shall be submitted to the UH Project Manager prior to beginning price negotiations. The
Design-Builder shall submit certification of that data in the form attached herein as Exhibit “H,”
as soon as practicable after agreement is reached on price, certifying that the cost or pricing data
submitted are accurate, complete, and current as of the date of reaching agreement on price.
Certification constitutes a representation as to the accuracy of the data upon which the Design-
Builder’s judgment is based. A certificate of current cost or pricing data shall not substitute for examination and analysis of the Design-Builder’s proposal.

(e) Defective cost or pricing data. 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 UH 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.

If the Design-Builder and the UH Project Manager cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the UH Project Manager shall set an amount in accordance with the provisions of HAR 3-122-121 et seq., and the Design-Builder may appeal this decision as a contract controversy under HAR Chapter 3-126.

6.10 Force account. When the Design-Builder and the UH Project Manager cannot agree to the price adjustment of any change in Work, the UH Project Manager may, in accordance with section 6.9, “Price adjustment,” require that the Work be performed under force account until such time that an equitable adjustment can be agreed to by both parties, provided that the UH Project Manager promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. Payment for work under force account shall be as follows: [HAR §§ 3-125-4, 3-125-13]

(a) Allowable costs. In force account, cost shall be the sum of the costs of the following:

(1) Labor. The Design-Builder shall receive the current wage rate including fringe benefits for actual work engaged by the hourly worker and foreman in charge of the specific force account work. Fringe benefits are required amounts established by the State Department of Labor and Industrial Relations (“State DLIR”), any collective bargaining agreement and other employment contract generally applicable to the classes of labor employed. The Design-Builder shall submit the fringe benefits for each class in writing to the UH Project Manager for acceptance before the force account work begins. The wages for labor shall not exceed the rate of wages paid for similar labor performed under the Contract, as evidenced by the record of the Design-Builder's payroll on file with the UH Project Manager.

For salaried workers, the UH Project Manager will determine the hourly wage rate by dividing the monthly salary plus benefits by one hundred seventy-six hours. The UH Project Manager shall authorize salaried workers to perform the Work.

For overtime work, payment will be for one and a half times the hourly wage rate plus the actual hours of overtime for fringe benefits, and/or as required by any collective bargaining agreement. For authorized salaried workers, payment will be for the hourly wage rate times the actual hours of overtime.

(2) Materials. The Design-Builder will receive the actual cost of materials accepted by the UH Project Manager and entering permanently into the Work under the Contract including transportation charges as shown by the invoices submitted to the UH Project Manager.

For stock materials, used and incorporated into the Work, the Design-Builder shall receive the actual cost paid by the Design-Builder, as certified by the Design-Builder. The UH Project Manager will include transportation charges and taxes paid by the Design-Builder.

(3) Machinery and equipment. The UH Project Manager may reject any machinery or equipment, other than small tools and minor equipment, which the UH Project Manager deems unnecessary,
inefficient or inadequate for the Work to be performed. The term "small tools and minor equipment" shall include individual equipment or tools having a replacement value of two hundred fifty dollars or less, whether or not they are consumed in the use thereof.

(A) **Per hour/monthly rental rate.** The rate shall be the per-hour rental rate based on the monthly rate established for said machinery or equipment in the then-current edition of the Rental Blue Book for Construction Equipment including the estimated operating cost per hour, and regional correction provided therein.

The hourly rate will be determined by dividing the monthly rate by one hundred and seventy-six. The rate includes the estimated operating cost per hour and the regional correction factor.

If no rate is listed for a particular kind, type or size of machinery or equipment, then the monthly, hourly rate shall be as agreed upon in writing by the Design-Builder and the UH Project Manager prior to the use of said machinery or equipment. The Design-Builder shall provide proof of the rental rates charged.

(B) **Non-owned trucks.** For trucks not owned by the Design-Builder, rental rates as those established under the Hawai‘i State Public Utilities Commission will be used to determine the cost and will be paid for as a material item under paragraph (3).

(C) **Owned trucks.** For the Design-Builder-owned trucks not listed in the Rental Rate Blue Book, the rates shall be as agreed upon in writing by the Design-Builder and the UH Project Manager prior to the use of said trucks.

(D) **Higher than Blue Book rate must be justified.** Rental rates which are higher than those specified in the Rental Rate Blue Book may be allowed where such higher rate can be justified by job conditions such as Work in water, on lava, etc. Request for higher rate shall be submitted in writing to the UH Project Manager for approval prior to the use of the machinery or equipment in question.

(E) **Rental rate is inclusive.** All rental rates for machinery and equipment shall include the cost of fuel, oil, lubricants, supplies, small tools, necessary attachments, repairs, maintenance, tire wear, depreciation, storage, and all other incidentals.

(F) **Transportation and/or mobilization**

   (i) **Location to be approved.** The location from which the equipment is to be moved or transported shall be approved by the UH Project Manager.

   (ii) **Equipment transportation.** Payment will be made for mobilizing and transporting the equipment or machinery to the force account work site, including loading and unloading, and back to its original location or other site, whichever cost is less. The cost of transportation shall not exceed the rates established by the Hawai‘i State Public Utilities Commission. If rates are nonexistent, then the rates will be determined by the
UH Project Manager based upon the prevailing rates charged by established haulers within the locale.

(iii) **Self-propelled equipment.** Payment for self-propelled equipment or machinery will be for the cost of moving the equipment by its own power to the force account work site and back to the original location or other site, whichever cost is less.

(iv) **Transporter equipment.** When transporting equipment or machinery by other than its own power, payment shall be made for the transporter, if owned by the Design-Builder, at the hourly rate including the estimated operational rate and the applicable regional correction factor. Payment for the transporter, if not owned by the Design-Builder, shall be by invoice cost and paid for as a material item. Payment for the equipment or machinery shall be at the rate of "idle time" under (G).

(v) **Transportation not payable if not force account.** Payment for mobilization and transportation will not be made if the equipment or machinery is used on the Work or at the Site in any other way than upon extra work paid for under force account.

(G) **Rental period**

(i) **Idle time.** Idle time herein means the period in which the machinery or equipment designated for the specific force account work is not in use for the Work. The time period shall be for a working day (8 hours). Payment shall be fifty per cent of the hourly rate excluding the estimated operational cost per hour per working day.

(ii) **Standby time.** Standby time herein means the period in which the machinery or equipment are standing by for the specific force account work day. A work day shall not exceed eight hours (standby time plus the operating time) unless the UH Project Manager authorizes the overtime. Payment shall be at the hourly rate including the estimated operational cost per hour per working day.

(iii) **Rental period.** The rental period shall begin at the time equipment reaches the Site, shall include each day that the machinery or equipment is at the Site and shall terminate at the end of the day on which the UH Project Manager directs the discontinuance of the use of the machinery or equipment.

(iv) **Round to 30 minutes of use.** Less than thirty minutes of operation will be considered a half hour of operation.

(v) **No rental time while inoperative.** Rental time will not be allowed or credited for any day on which machinery or equipment is inoperative due to its breakdown. On such days, the Design-Builder will be paid only for the actual hours that the machinery or equipment was in operation.

(vi) **Completion in less than 8 hours.** When force account work is completed within less than 8 hours, payment shall be for 8 hours.
Continuous and consecutive days. For the purpose of determining the rental period, the continuous and consecutive days shall be the normal 8-hour shift work day, Monday through Friday excluding Saturday, Sunday, and legal holidays. Any work day to be paid less than 8 hours shall not be considered as continuous, except for equipment removed from rental for fuel and lubrication.

Overtime. Overtime shall be paid for each hour in excess of the normal 8-hour shift work day at the corresponding hourly rate for daily, weekly, and monthly rates.

State excise and use tax. State excise tax not to exceed the current rate and will be added to the total sum of paragraphs (1) through (3).

Subcontractor work. When work is performed by a Subcontractor who has been approved pursuant to Section 4.3, “Joint contractor; subcontractors,” the Design-Builder will receive an additional amount equal to ten per cent of the total cost of paragraphs (1) and (3), to which shall be added the State excise tax.

Percentages for fee and overhead. Not more than three-line item percentages for fee and overhead, not to exceed the maximum percentages shown in subsection 6.9(c), will be allowed regardless of the number of tier Subcontractors. [HAR § 3-125-13]

No payment without proper documentation. Payment for the above shall be deemed payment in full for work done under force account including superintendence, overhead, use of tools, machinery and equipment for which no rental is allowed, profit, taxes, subcontracting and other costs in connection therewith which are not provided for herein. No payment will be made until itemized records along with receipted invoices and appropriate documents have been submitted and approved, including Daily Force Account Report sheets, Exhibit “G.”

Records. The Design-Builder shall submit records of the above to the UH Project Manager at the end of each day on Daily Force Account Report sheets, Exhibit “G,” issued by the UH Project Manager. Such records submitted shall be subject to the approval of the UH Project Manager as evidenced by the UH Project Manager's signature thereon. The Design-Builder shall submit a statement covering the cost of all of the above items not later than the tenth day of the month following the month in which the costs were incurred.

6.11 Prompt payment to Subcontractors.

Payment to Subcontractor within 10 days. Any money paid to the Design-Builder for Work performed by a Subcontractor shall be disbursed to the Subcontractor 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 between UH and the Design-Builder on which the Procurement Officer has withheld payment.

Final payment to Subcontractor. Upon final payment to the Design-Builder, full payment to the Subcontractor, including retainage, shall be made within ten (10) days after the Design-Builder’s receipt of the money; provided there are no bona fide disputes over the Subcontractor’s performance under the Subcontract.

Penalties. The Design-Builder will be subject to a penalty of one and one-half per cent (1-1/2%) per month upon outstanding amounts due that were not timely paid by the Design-Builder to a
Subcontractor where a Subcontractor has provided evidence to the Design-Builder of satisfactorily completing all work under their Subcontract and has provided a properly documented final payment request as described in subsection (d) below, and:

(1) **Acceptable bond provided.** Has provided to the Design-Builder an acceptable performance and payment bond for the Project executed by a surety company authorized to do business in the State, as provided in HRS § 103-32.1; or

(2) **Other conditions.** The following has occurred:

(A) **Subsequent 90-day period expires without claim.** A period of ninety days after the day on which the last of the labor was done or performed and the last of the material was furnished or supplied has elapsed without written notice of a claim given to the Design-Builder and the surety, as provided for in HRS § 103D-324; and

(B) **Provided release of retainage bond.** The Subcontractor has provided to the Design-Builder an acceptable release of retainage bond, executed by a surety company authorized to do business in the State, in an amount of not more than two times the amount being retained or withheld by the Design-Builder, any other bond acceptable to the Design-Builder, or any other form of mutually-acceptable collateral.

Then, all sums retained or withheld from a Subcontractor and otherwise due to the Subcontractor for satisfactory performance under the Subcontract shall be paid by the Procurement Officer to the Design-Builder and subsequently, upon receipt from the Procurement Officer, by the Design-Builder to the Subcontractor within the applicable time periods specified in subsection (b) and HRS § 103-10. The penalty may be withheld from future payment due to the Design-Builder. If the Design-Builder has violated subsection (b) three or more times within two years of the first violation, the Design-Builder shall be referred by the Procurement Officer to the State licensing board who has jurisdiction over the Design-Builder’s general contracting and other professional licenses for action under HRS § 444-17(14). [HRS § 103-10.5(c); HAR § 3-125-23.]

(d) **Documented final payment request.** A properly documented final payment request from a Subcontractor, as required by subsection (c), shall include:

(1) **Substantiation.** Substantiation of the amounts requested;

(2) **Subcontractor certification.** A certification by the Subcontractor, to the best of the Subcontractor’s knowledge and belief, that:

   (A) **Amounts for performance completed.** The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the Subcontract;

   (B) **Subcontractor has met its subcontract obligations.** The Subcontractor has made payments due to its subcontractor and suppliers from previous payments received under the Subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
(C) No withholding amounts included. The payment request does not include any amounts that the Subcontractor intends to withhold or retain from its subcontractor or supplier in accordance with the terms and conditions of their Subcontract; and

(3) Documentation submitted. The submission of documentation confirming that all other terms and conditions required under the Subcontract agreement have been fully satisfied.

The Procurement Officer shall return any fiscal payment request that is defective to the Design-Builder within seven days after receipt, with a statement identifying the defect.

(e) Payment request for Subcontract retainage. Under the Contract, a payment request made by a Design-Builder to the Procurement Officer that includes a request for sums that were withheld or retained from a Subcontractor and are due to a Subcontractor may not be approved under subsection (c) unless the payment request includes:

(1) Substantiation. Substantiation of the amounts requested; and

(2) Certification. A certification by the Design-Builder, to the best of the Design-Builder’s knowledge and belief, that:

(A) Only for performance completed. The amounts requested are only for performance in accordance with the specifications, terms and conditions of the Contract;

(B) Subcontractor payment obligations met. The Subcontractor has made payments due to its subcontractor 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) No withholding amounts included. The payment request does not include any amounts that the Design-Builder intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

The Procurement Officer shall return any final payment request that is defective to the Design-Builder within seven days after receipt, with a statement identifying the defect.

(f) Additional Subcontract terms. This section shall not be construed to impair the right of a Design-Builder or a Subcontractor at any tier to negotiate and to include in their respective Subcontracts provisions that provide for additional terms and conditions that are requested to be met before the Subcontractor shall be entitled to receive final payment under subsection (c) of this section; provided that any such payments withheld shall be withheld by the Procurement Officer.

6.12 Authority to withhold money due or payable.

(a) Withholding money due or payable. The UH may withhold such amounts from the money due or to become payable under the Contract to the Design-Builder, or any assignee under section 2.11, “Assignment of money,” as may be necessary to:

(1) Protect UH from liability. Protect the UH from any liability resulting from the Work performed under this Contract;
(2) **Satisfy any Design-Builder obligation.** Satisfy any obligation of the Design-Builder to the UH, State Department of Taxation or Internal Revenue Service, including obligations not relating to the Contract as required by law, and the obligation of the Design-Builder to the workers, Subcontractors, and suppliers who have performed labor or furnished material and equipment under the Contract as the Procurement Officer deems necessary, but only with the concurrence of or instructions from the Design-Builder's surety; or

(3) **Repair damage.** Repair, restore, or compensate for, any real or personal property located within the Site or in the vicinity thereof which was damaged as a result of the fault or negligence of the Design-Builder while performing the Work under this Contract.

(b) **Making payment from money withheld.** The UH may make such payments from such amounts withheld for reasons specified in subsection (a); provided, that before making any payment for damages to property prescribed in subsection (a)(3), the UH Project Manager shall request the Design-Builder in writing to undertake the repair or restoration of the damaged property or make compensation therefor. If the Design-Builder fails or refuses to make such repair, restoration, or compensation to the satisfaction of the UH Project Manager within seven days after notification by the UH Project Manager, the Procurement Officer, upon recommendation of the UH Project Manager and upon the Procurement Officer's own findings that such recommendation is justified, use any such withheld amounts to make the necessary repairs or restoration and/or take such other corrective action as may be necessary.

6.13 **Interest.** Interest on amounts ultimately determined to be due to the Design-Builder shall be payable at the statutory rate applicable to judgments against the State under HRS Chapter 622 from the date the governmental body receives the written notice through the date of decision or judgment, whichever is later; except that if an action is initiated in circuit court pursuant to HRS Section 103D-711, interest under this section shall only be calculated until the time such action is initiated.

END OF CHAPTER
CHAPTER 7 - DISPUTES AND REMEDIES

7.1 Suspension of Work.

(a) UH Project Manager may suspend Work. The UH Project Manager may, by written order, suspend the Work, either in whole or in part for periods as the UH Project Manager may deem necessary for any cause, including but not limited to:

(1) Design-Builder’s failures. Failure on the part of the Design-Builder to:
   (A) Correct conditions unsafe for the general public or for the workers;
   (B) Carry out orders given by the UH Project Manager;
   (C) Perform the Work in strict compliance with the provisions of the Contract;
   (D) Provide adequate supervision on the jobsite; or
   (E) Maintain current liability insurance coverages.

(2) Redesign deemed necessary. Whenever a redesign that may affect the Work is deemed necessary by the UH Project Manager;

(3) Mitigate noise/dust. Unacceptable noise or dust arising from the Work even if it does not violate any law or regulation; or

(4) UH convenience. The convenience of the UH. [HAR § 3-125-7]

(b) Partial and total suspension. Suspension of the Work on some but not all items of Work shall be considered a "partial suspension." Suspension of the Work on all items shall be considered "total suspension." The period of suspension shall be computed from the date set out in the written order for the Work to cease until the date of the order for the Work to resume. [HAR § 3-125-7]

(c) Reimbursement to Design-Builder. In the event that the Design-Builder is ordered by the UH Project Manager in writing as provided herein to suspend all or part of the Work under the Contract in accordance with subsections (a)(3), (a)(4), or (a)(5), the Design-Builder may be reimbursed for actual money expended toward the Project during the period of suspension. No allowance will be made for anticipated profits. [HAR § 3-125-7]

(d) Cost adjustment. If the performance of all or part of the Work is suspended for reasons beyond the control of the Design-Builder, an adjustment shall be made for any increase in the cost of performance of the Contract (excluding profit) necessarily caused by such suspension, and the Contract modified in writing accordingly. However, no adjustment under this section shall be made for any suspension:

(1) Attributable to any other cause. To the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Design-Builder; or

(2) Already subject to adjustment. For which an adjustment is provided for or excluded under any other provision of the Contract. [HAR § 3-125-7]

(e) Claims for adjustment. Any adjustment in the Contract Price made pursuant to this section shall be determined in accordance with the provisions on changes and claims for adjustment. Claims for compensation shall be filed in writing with the UH Project Manager within thirty days after the date
of the order to resume Work or the claims will not be considered. Together with the claim, the Design-Builder shall submit substantiating documents covering the entire amount shown on the claim. The UH Project Manager shall take the claim under consideration and may make such investigations as are deemed necessary and shall be the sole judge as to the equitability of the claim and the UH Project Manager's decision shall be final. [HAR § 3-125-7]

(f) No adjustment. No provision of this section shall entitle the Design-Builder to any adjustments for delays due to failure of surety, for suspensions made at the request of the Design-Builder, for any delay required under the Contract, for suspensions, either partial or whole, made by the UH Project Manager under the provisions in subsection (a)(2). [HAR § 3-125-7]

(g) Design-Builder's responsibilities. In case of suspension in the performance of the Work under the Contract from any cause whatsoever, the Design-Builder in addition to being responsible for performing the Work under the Contract shall:

1. Indemnify UH. Indemnify and save the UH and its officers and employees harmless from liability for any injury or damage occurring during the period that the performance of the Contract is suspended;

2. Responsible for materials/equipment. Be responsible for all materials and equipment delivered to the Site, including materials and equipment for which Design-Builder has received partial payment;

3. Storage of materials/equipment. Properly store the materials and equipment which have been partially paid for by the UH or which have been furnished by the UH;

4. Remove surplus materials/equipment. Remove immediately as directed by the UH Project Manager all surplus materials, equipment, and rubbish;

5. No traffic interference. Neatly and compactly store all materials and equipment on or within the Site and/or in areas within public highways or streets so as not to impede traffic or interfere with the use of public utilities or facilities;

6. Provide suitable drainage. Provide suitable drainage and erect such temporary structures as are necessary to protect the Project or parts of the Project from damage;

7. Maintain plantings. Properly and continuously maintain in an acceptable growing condition all living material in newly established plantings, seedlings, and sodding furnished under this Contract; and

8. Maintain liability insurance. Continue to maintain liability insurance coverages.

7.2 Termination for default for nonperformance or delay; damages for delay.

(a) Default. If the Design-Builder refuses or fails to perform the Work, or any separable part thereof, with such diligence as will assure its completion within the time specified in the Contract, or any agreed upon extension thereof, fails to complete said Work within such time, or commits any other substantial breach of the Contract, and further fails within seven days after receipt of written notice from the UH Project Manager to commence and continue correction of the refusal or failure with diligence and promptness, the Procurement Officer may, upon recommendation by the UH Project Manager, by written notice to the Design-Builder, declare the Design-Builder in breach and terminate the Design-Builder's right to proceed with the Work or the part of the Work as to which there has
been delay or other breach of contract. In this event the UH may take over the Work and perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the Work, the materials, appliances, and plant as may be on the Site and necessary therefor. Whether or not the Design-Builder's right to proceed with the Work is terminated, the Design-Builder and the Design-Builder's sureties shall be liable for any damage to the UH resulting from the Design-Builder's refusal or failure to complete the Work within the Contract Time specified. [HAR § 3-125-18]

Any of the following causes may be deemed by the UH to be a default and result in Design-Builder's termination under the Contract:

1. **Failure to timely start.** Failure to commence Work within the time specified in the notice to proceed;
2. **Failure to use sufficient forces.** Failure to perform the Work with sufficient workers and equipment or with sufficient materials to assure the prompt completion of said Work;
3. **Failure to comply with orders.** Failure to comply with orders of the UH Project Manager;
4. **Stop Work.** Discontinuation of the prosecution of the Work;
5. **Failure to timely resume Work.** Failure to resume Work which has been discontinued within a reasonable time after notice to resume;
6. **Design-Builder insolvency.** Insolvency or is declared bankrupt, or commits any act of insolvency or bankruptcy;
7. **Final judgment against Design-Builder.** Allows any final judgment to stand against the Design-Builder unsatisfied for a period of ten days;
8. **Assignment for creditors.** Assignment for the benefit of creditors;
9. **Unauthorized changes.** Unauthorized changes in the subcontractor listing submitted with the Design-Builder's Proposal; or
10. **Failure to correct/complete.** Failure to correct deficiencies or to complete the Contract.

(b) **Liquidated damages.**

1. **Upon termination.** If fixed and agreed liquidated damages are provided in the Contract, and if the UH so terminates the Design-Builder's right to proceed, the resulting damage will consist of the liquidated damages for the time as may be required to achieve Substantial Completion of the Work.

2. **In absence of termination.** If fixed and liquidated damages are provided in the Contract, and if the UH does not terminate the Design-Builder's right to proceed, the resulting damage will consist of liquidated damages until the Work is completed or accepted. [HAR § 3-125-18]

(c) **Time extension.** The Design-Builder's right to proceed shall not be so terminated nor shall the Design-Builder be charged with resulting damage if the delay in the completion of the Work was not the fault of the Design-Builder as in section 5., “Delay; time extensions.” [HAR § 3-125-18]

(d) **Right to construction and goods.** The UH Project Manager may direct the Design-Builder to assign the Design-Builder's right, title, and interest under terminated orders or Subcontracts to the UH. The
UH Project Manager may require the Design-Builder to transfer title and deliver to the UH in the manner and to the extent directed by the UH Project Manager:

(1) **Completed Work.** Any completed Work; and

(2) **Partially completed Work.** The partially completed Work, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and Contract rights (hereinafter called "construction material") as the Design-Builder has specifically produced or specially acquired for the performance of the terminated part of the Contract.

(c) **Additional rights and remedies.** The rights and remedies of the UH provided in this section are in addition to any other rights and remedies provided by law or under this Contract. [HAR § 3-125-18]

### 7.3 Termination for convenience

(a) **Termination.** The Procurement Officer may, when the interests of the UH so require, terminate the Contract in whole or in part, for the convenience of the UH. The Procurement Officer, upon recommendation by the UH Project Manager, shall give written notice of the termination to the Design-Builder specifying the part of the Contract terminated and when termination becomes effective. [HAR § 3-125-22]

(b) **Design-Builder's obligations.** The Design-Builder shall incur no further obligations in connection with the terminated Work, and on the date set in the notice of termination the Design-Builder will stop Work to the extent specified. The Design-Builder shall also terminate outstanding orders and Subcontracts as they relate to the terminated Work. The Design-Builder shall settle the liabilities and claims arising out of the termination of Subcontracts and orders connected with the terminated Work subject to the UH's approval. The UH Project Manager may direct the Design-Builder to assign the Design-Builder's right, title, and interest under terminated orders or Subcontracts to the UH. The Design-Builder must still complete the Work not terminated by the notice of termination and may incur obligations as necessary to do so. [HAR § 3-125-22]

(c) **Right to Work and goods.** The UH Project Manager may require the Design-Builder to transfer title and deliver to the UH in the manner and to the extent directed by the UH Project Manager:

   (1) **Completed Work.** Any completed Work; and

   (2) **Partially completed Work.** The partially completed Work, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and Contract rights (hereinafter called "construction material") as the Design-Builder has specifically produced or specially acquired for the performance of the terminated part of the Contract.

   The Design-Builder shall protect and preserve property in the possession of the Design-Builder in which the UH has an interest. If the UH Project Manager does not exercise this right, the Design-Builder shall use its best efforts to sell the Work, goods, and construction materials in accordance with the standards of HRS § 490:2-706. This in no way implies that the UH has breached the Contract by exercise of the termination for convenience clause. [HAR § 3-125-22]

(d) **Compensation**

   (1) **Termination claim submission.** The Design-Builder shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by subchapter 15 of HAR Chapter 3-122, bearing on such claim.
If the Design-Builder fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may, upon recommendation of the UH Project Manager, pay the Design-Builder, if at all, an amount set in accordance paragraph (3)(B).

(2) Settlement. The Project Manager and the Design-Builder may agree to a settlement provided the Design-Builder has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total Contract Price plus settlement costs reduced by payments previously made by the UH, the proceeds of any sales of Work, goods, and construction materials under paragraph (3)(C), and the portion of the Contract Price allocable to the Work not terminated.

(3) Payments to Design-Builder. Absent complete agreement under paragraph (2), the Procurement Officer shall pay the Design-Builder the following amounts, provided payments under paragraph (2) shall not duplicate payments under this subsection for the total (without duplication of any items) of:

(A) Cost of Work performed. The cost of all Contract work performed prior to the effective date of the notice of termination plus a five per cent markup on actual direct costs on the portion of the Work (the markup shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of the Work; provided, however, that if it appears that the Design-Builder 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;

(B) Cost of terminating Work and Subcontracts. Subject to the prior approval of the Procurement Officer, the costs of settling and paying claims arising out of the termination of Subcontracts or orders pursuant to subsection (b). Subcontractors shall be entitled to a markup of no more than ten per cent on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with subparagraph (A);

(C) Total paid will not exceed total Contract Price. The total sum to be paid the Design-Builder under this subsection shall not exceed the total Contract Price reduced by the amount of any sales of the Work, goods, and construction materials under subsection (c), and the portion of the Contract Price allocable to work not terminated.

(D) Costs agreed to. Cost claimed, agreed to, or established under paragraphs (2) and (3) of this subsection shall be in accordance with HAR Chapter 3-123 (Cost Principles). [HAR § 3-125-22]

7.4 Authority to resolve contract and breach of contract controversies.

(a) Decisions of the UH Project Manager. Any question or dispute concerning any provisions of the Contract which may arise during its performance shall be decided by the UH Project Manager; provided, that decisions on questions or disputes relating to default or termination of the Contract, additional cost to the UH where the cost is more than ten per cent of the original Contract Price or $25,000 or more, and payment, shall be made only with the approval of the Procurement Officer.

(b) Resolving controversies. All controversies between the UH Project Manager and the Design-Builder which arise under, or are by virtue of, the Contract and which are not resolved by mutual agreement
between the UH Project Manager and the Design-Builder, shall be decided by the Procurement Officer in writing, within the time limitations below, after receipt of a written request from the Design-Builder for a final decision:

(1) Not exceed $50,000 – 90 days. For controversies or for claims not exceeding fifty thousand dollars: ninety (90) calendar days after receipt of the claim.

(2) Exceed $50,000 – 90 days. For claims exceeding fifty thousand dollars: ninety (90) calendar days after receipt of the claim; provided that if a decision is not issued within ninety calendar days, the Procurement Officer shall notify the Design-Builder of the time within which the Procurement Officer will make the decision. The reasonableness of this time period will depend on the size and complexity of the claim and the adequacy of the Design-Builder's supporting data and other relevant factors.

If a decision on a controversy or a claim not exceeding fifty thousand dollars is not made within ninety (90) calendar days after receipt, or if a decision is not made within the time promised for a claim in excess of fifty thousand dollars, the Design-Builder may proceed as if an adverse decision has been received.

The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting Design-Builder 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. [HAR § 3-126-28]

(c) Controversies involving UH claims against the Design-Builder. All controversies involving claims asserted by the UH against the Design-Builder which cannot be resolved by mutual agreement shall be the subject of a decision by the Procurement Officer or the UH Project Manager as applicable. [HAR § 3-126-29]

(d) Cost of dispute. The Design-Builder shall pay to the UH the amount of the UH's costs to enforce the Contract, including but not limited to amounts for attorneys' fees, consultants' fees, and expenses.

(e) Decision. The Procurement Officer shall immediately furnish a copy of the decision to the Design-Builder, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. Any such decision shall be final and conclusive, unless fraudulent, or unless the Design-Builder 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.

Any dispute arising under or out of this Contract not resolved by the decision of the Procurement Officer is subject to HAR Chapter 3-126 and/or requirements set forth in the Special Provisions. Pending final resolution, the Design-Builder shall comply with any decision of the Procurement Officer and proceed diligently with performance of the Contract, except where there has been a material breach of Contract by the UH; provided that in any event the Design-Builder shall proceed diligently with the performance of the Contract where the Procurement Officer has made a written determination that continuation of the Work under the Contract is essential to the public health and safety. [subchapter 3 of HAR Chapter 3-126]

END OF CHAPTER

EXHIBITS ATTACHED SEPARATELY