
 <p>HAWAII HEALTH SYSTEMS CORPORATION <i>Quality Healthcare for All</i></p> <p>PROCEDURE</p>	<p>Department:</p> <p>Corporate Finance</p>	<p>Policy No.</p> <p>PUR 0014B</p>
		<p>Supersedes Policy No.</p>
<p>Subject:</p> <p>Legal Review of RFP/IFB and Contracts</p>	<p>Approved By:</p>  <p>By: Edward Chu Its: HHSC President & CEO</p>	<p>Approved Date:</p> <p>September 13, 2024</p> <p>Last Reviewed:</p> <p>September 12, 2024</p>

- I. **PURPOSE:** To streamline the procedures for legal review and processing of Agreements, requests for proposals (“RFP”), invitations for bid (“IFB”), and to ensure that all financial arrangements with physicians and physician organizations and referral sources are subject to appropriate legal review.

This procedure supersedes all former HHSC PUR procedures on this subject.

II. **DEFINITION**

As used herein:

- A. **“Agreement”** for avoidance of doubt, has the same meaning as “Contract” for purposes of HHSC procurement. Procurement documents created by the State Procurement Officer (“SPO”), the Department of General and Accounting Services (“DAGS”), and HHSC may use the term “Contract” or “Agreement” or both, depending on the method of procurement, the type of procurement, and department or agencies procuring goods or services.
- B. **“Contract”** means a legally binding written agreement entered between or among parties, for the disposal or procurement of goods or services or both, creating mutual obligations among the parties and for which the parties have a legal or contractual remedy in the event of nonperformance by one or more of the parties.
- C. **“Contract Manager”** shall mean an HHSC employee who is authorized to manage the procurement process, with responsibility to obtain appropriate reviews of all Agreements and populate and maintain the centralized contract document repository.
- D. **“HHSC”** means Hawaii Health Systems Corporation, including any one or more of its regional systems or facilities and its corporate office.
- E. **“Management”** means the corporate or regional executive team member(s) or hospital administrator(s) who are authorized to execute the Contract.

- F. **“Physician”** means a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor, as defined in Section 1861(r) of the Social Security Act. For purposes of this Procedure, “Physician” shall include members of a Physician’s immediate family as defined under 42 C.F.R. § 411.351, as amended from time to time.
- G. **“Physician Organization”** means a physician, a physician practice, or a group practice consistent with 42 C.F.R. § 411.351.
- H. **“Technical Representative”** is the primary point person responsible for ensuring compliance with a contract by both the contractor and HHSC once it is executed, as more fully defined in PUR 0015 – Contract technical representative duties.
- I. **“Healthcare Service Agreements”** means any proposed or executed agreement with a physician, physician organization, advanced practice registered nurse, physician assistant, and/or health care entity owned, in whole or in part, by one or more physicians and/or physician organizations, or their immediate family member(s). The definition of Healthcare Service Agreements shall include the provision of any designated health service, as defined under 42 C.F.R § 411.351, or any potential or actual patient referrals to or from HHSC, consistent with 42 U.S.C. § 1320a-7b (b) and 42 U.S.C. § 1395nn.
- J. **“Business Associate”** means a person or entity that creates, receives maintains or transmits protected healthcare information (“PHI”) on behalf of HHSC for a function or activity regulated by 45 C.F.R Parts 160, 162, and 164. Business Associate is further defined in HHSC policy PUR0014A and CMP 0031A - HIPAA Business Associate Disclosure.
- K. **“RFP”** means Request for Proposal, which is the preferred solicitation method for HHSC for the disposal or procurement of goods, services, or both, or for complex solicitations.
- L. **“IFB”** means Invitation for Bid, which is the preferred solicitation method for HHSC for capital improvement projects.
- M. **“Electronic Agreement,”** which may be referred to as **“Clickthrough”**, **“Clickwrap”**, or **“Shrinkwrap”**, means electronically displayed terms and conditions that require click acceptance of binding terms and conditions. Such Electronic Agreements are typically encountered while using vendor electronic media to upload data, download data or generally using web-based applications and cloud-based applications granting access to a vendor license agreement that attempts to bind HHSC to terms and conditions by clicking “I Accept”.

III. PROCEDURE:

A. Agreements Requiring Legal Review

Types of Agreements listed below must be submitted to the HHSC legal department or outside counsel for legal review in accordance with policy ADM 0026A – Retention of Outside Counsel. Agreements for goods and services **not** included under section III.A. may be submitted to outside counsel, selected by the General Counsel and/or Management, for review.

1. New Agreements with a total not to exceed amount over \$100,000.
2. All Healthcare Service Agreements and Supplemental Agreements (regardless of amount and/or cost, including no-cost Agreements, with **Physician(s)**, **Physician Organization(s)**, advanced practice registered nurses, physician’s assistants and/or other health care entities owned, in whole or in part, by one or more Physicians and/or Physician Organizations, or their family members (collectively “Healthcare Service Agreements”), including:
 - a. Space Leases or Rental Agreements
 - b. Equipment Leases or Rental Agreements
 - c. Reimbursement Agreements
 - d. Employment Agreements
 - e. Recruitment Agreements
 - f. Reimbursement Agreements
 - g. Employment Agreements
 - h. Medical Director Agreements
 - i. Emergency Department call coverage Agreements
 - j. Joint venture, any type of partnership, and Limited Liability Company Agreements
 - k. Agreements for payment from a Physician, Physician Organization, Physician- or Physician Organization-owned entity, advanced practice nurse, physician assistant, or any combination thereof for items or services
 - l. Agreements for payment from the hospital to a Physician, Physician Organization or Physician- or Physician Organization-owned entity, or any combination thereof for items or services
 - m. Any other Contract or Agreement, whether or not related to the provision of health care services
 - n. Agreements for the sale or purchase of a physician practice
 - o. Supplemental agreements to any of the above Healthcare Service Agreements.
3. Agreements using vendor documentation regardless of dollar value; provided however, if the abbreviated HHSC General Conditions form is incorporated into the vendor Contract, attached, and given priority over conflicting terms in the vendor Agreement and/or vendor quotes, and any terms prohibited by this Procedure PUR 0014B are not present, the vendor Contract may be used.

4. Supplemental Agreements to Healthcare Services Agreements.
5. Supplemental Agreements, where the Primary or initial Contract or previous supplement requiring legal review did not require or receive review by the legal department or outside counsel, but the Agreement as amended by the Supplemental Agreement now requires legal review (e.g., a primary Contract with a not-to-exceed Contract amount of less than \$100,000 that is now being amended by a Supplemental Agreement that increases the not-to-exceed amount of the Contract to over \$100,000).
6. Special requirements determined by the Contract Manager or Management on a case-by-case basis, regardless of amount.
7. Software, internet or cloud based click-wrap and/or click-through acceptance terms for software, goods and services with a total not-to-exceed amount in excess of \$100,000 shall be reviewed by legal counsel prior to acceptance of vendor software or web based approval/click-through.
8. Equipment and Space leases of any kind. All financing leases shall be reviewed for form and substance by both legal counsel and the HHSC Corporate CFO.
9. Agreements and Supplemental Agreements for purchase or sale of goods or services or both where payment is made by federal or state health care programs, including, but not limited to, the following:
 - a. Clinical laboratory services
 - b. Physical therapy services
 - c. Occupational therapy services
 - d. Radiology or other diagnostic services
 - e. Durable medical equipment ("DME")
 - f. Parenteral and enteral nutrients, equipment and supplies
 - g. Prosthetics, orthotics and prosthetic devices
 - h. Home health services
 - i. Outpatient prescription drugs
 - j. Inpatient and outpatient hospital services
10. Joint venture or other investment Agreements.
11. Agreements that require disclosure of protected health information ("PHI"), electronic protected health information ("ePHI") or use of PHI by the contractor.
12. Agreements that require PHI or ePHI or both to be electronically transferred to any person or entity for any reason.

13. HHSC Business Associate Agreement terms modified by vendors shall be negotiated between HHSC legal department and/or approved outside counsel and vendor's legal counsel, without exceptions. HHSC legal department shall keep Contract Manager informed of final negotiated Business Associate provisions.
14. Agreements with persons who are, or are related to, corporate or regional HHSC employees, directors or officers, or board members.
15. Agreements that are being submitted to the corporate Board of Directors for approval.
16. Agreements in which the vendor and/or any portion of its workforce or data storage is located, temporarily or permanently, outside of the United States, and for which Agreement HHSC data, including but not limited to ePHI or personally identifiable information (PII), is reasonably anticipated to be generated, processed, hosted, downloaded, printed, stored, transferred, or maintained outside of the United States by contractor or its subcontractors.

B. Agreements Not Requiring Legal Review

Agreements not listed in Section A above do not need to be submitted to the legal department for legal review, PROVIDED all of the following conditions are satisfied. If any of the following conditions are not satisfied, the Agreement shall require legal review.

1. **Indemnification** - There shall be no indemnification or hold harmless provision from HHSC for the benefit of the contractor or other persons. This type of provision comes in a variety of forms; any provision that requires HHSC to promise to pay money to the other party to the Agreement for damages or liability shall not be permitted unless the General Counsel has approved of the form and content of the provision.

NOTE: ANY EMPLOYEE WHO SIGNS OR CLICKS ANY AGREEMENT CONTAINING EITHER AN INDEMNIFICATION OR HOLD HARMLESS PROVISION WILL RISK BEING HELD PERSONALLY LIABLE FOR PERFORMANCE UNDER EITHER OR BOTH PROVISIONS.

HHSC requires that its standard indemnification and cost of litigation provisions (for the contractor to indemnify HHSC) be included in all Agreements. However, the CEO, CFO and/or authorized Management may have the discretion to waive the indemnification clause requirements after obtaining legal advice, prior to Agreement execution.

2. **Attorneys' Fees** – There shall be no provision in which HHSC agrees to pay for the other party's attorneys' fees or costs, unless the CEO or CFO and/or authorized Management expressly agrees to such a provision after review by the General Counsel or her designee.

3. **Evergreen Clause** – There shall be no automatic renewal provision (the “Evergreen Clause”). A written Supplemental Agreement must be mutually executed for every extension or renewal, in advance of the expiration of the then current Agreement.
4. **Term** – The term of an Agreement shall be stated clearly; preferably, the term should not exceed two (2) years to coincide with the biennial budgeting period and/or be subject to appropriation of funds available,. Terms beyond the existing current biennium budget shall include the statement “subject to appropriation.”
5. **Written Modification** – There shall be no provision that allows the other party to modify the terms of the Agreement without HHSC’s prior written consent. The Agreement shall require that all amendments to the document be in writing and signed by both parties prior to the commencement of any work under the amendment.
6. **Governing Law and Jurisdiction/Venue** -- There shall be no provision requiring application of laws from another state or requiring HHSC to submit to a court or jurisdiction outside of the State of Hawaii. If the Agreement includes requirements inconsistent with this Section B.7., the Agreement shall be sent to HHSC legal department for review.

If the contractor or other party is legally unable to agree to the application of Hawaii law and jurisdiction/venue in Hawaii (for example, if contractor is a government agency from another state), HHSC management may agree to delete the governing law and jurisdiction/venue provisions and remain silent on both governing law and jurisdiction/venue. If the contractor or other party is not legally prohibited from agreeing to Hawaii law and jurisdiction/venue, but for other reasons requests modification of HHSC’s governing law and jurisdiction/venue provisions, HHSC authorized management may consider this request following legal review and evaluation.

7. **Confidentiality** – Any confidentiality provision requiring HHSC to keep confidential any document, material, or agreement shall be made subject to HRS Chapter 92F as modified by Chapter 323F and Chapter 103D.
8. **Assignment** - There shall be no provision that allows the contractor to assign the agreement or any of its rights or obligations under the agreement to another entity or party without HHSC’s prior written approval, which approval may be withheld in HHSC’s sole discretion.
9. **Contract Amount** - The Agreement amount shall be clearly set forth in the Contract. There shall be a “not-to-exceed” amount and “subject to appropriation” qualification in every provision identifying the compensation to be paid by HHSC to the contractor.

Notwithstanding the foregoing, Master Service Agreements and/or Master Purchase Agreements are not required to contain a compensation schedule and “not to exceed” amount. Rather, Master Service/Purchase Agreements must include a provision to enter into task order(s) for services or goods deliverable, which task order(s) shall be governed by the master agreement provisions. Each task order or equivalent shall contain a not to exceed amount, subject to appropriation qualification included within the task order.

10. **Termination** – There should be a provision allowing HHSC to terminate the Agreement without cause, even if HHSC will be required to pay a penalty. There should also be a termination for cause provision setting forth the conditions under which HHSC may terminate the Agreement for cause. Either termination provision may be deleted but must be made by Management.
11. **Corporate Compliance** – The corporate compliance requirements (HHSC’s standard provision) shall be expressly set forth in the Agreement. If the other party insists that it be allowed to comply with its own corporate compliance program, the Contract Manager shall obtain a copy of the vendor’s compliance program, and have the adequacy of the program reviewed by the regional and/or HHSC Corporate Compliance and Privacy Officer.
12. **Computer Security** – If the contractor is permitted by agreement to access HHSC’s computer system, the agreement shall expressly set forth the requirement that the contractor comply with HHSC’s information technology security policies and procedures, including but not limited to corporate policy ITD 0005A - Information Systems Access. Any such access shall be limited to the term of the agreement and the contractor’s access shall be automatically terminated on the expiration date or earlier termination of the contract unless a Supplemental Agreement is executed in advance of the expiration. The language below must be added to the section that allows such access to our system by the contractor:

Any remote access to HHSC system by contractor for any purpose shall be in compliance with HHSC’s information technology security policies and procedures including but not limited to corporate Policy ITD 0005A related to Information Systems Access and the following HHSC

Network and Systems Policies:

- ITD 0051A – Information Security
- ITD 0091A – Secure Areas
- ITD 0131A – Reporting Information Security Events and Weaknesses
- ITD 0151A – Compliance with Legal Requirements
- PAT 0004 – Corporate Policy on Confidential Patient Information

The Contract Manager will work with the Technical Representative of the Contract to ensure the timely termination of the vendor’s remote or local access into HHSC secured network/servers.

13. **Privacy** – The Business Associate Agreement shall be included with each Contract, unless Technical Representative confirms with the Contract Manager and determines that there will be no disclosure of any PHI or ePHI protected health information to the contractor. In any event, the Business Associate Agreement provision in the HHSC General Conditions shall not be deleted unless expressly approved by Management. Any determination to delete or revise the provision shall be made by the General Counsel or her designee in consultation with the Corporate Compliance and Privacy Officer.
14. **Insurance** – There shall be no provision requiring HHSC to obtain insurance outside of HHSC’s current standard insurance program coverage and limits; if contractor insists that such a provision be included, the responsible Contract Manager shall ensure that the provision has been reviewed and approved by General Counsel or her designee and the Corporate CFO.
15. **Exclusion from Federal Program** – The Agreement shall require the standard HHSC’s General Conditions provision:

“CONTRACTOR EXCLUSION FROM FEDERAL PROGRAMS. CONTRACTOR affirmatively states that it and none of its employees, agents or subcontractors performing services or providing goods pursuant to this Agreement are excluded from participation in federal health care programs, as defined in the Social Security Act (Section 1128 and 1128A), and other federal laws and regulations relating to health care. CONTRACTOR has an affirmative duty to verify the accuracy of this statement at least monthly and to inform HHSC in the event it is discovered that it is no longer true. HHSC reserves the right to verify that the above statements are true and to immediately cancel this Agreement in the event they are not true. It is violated.”

Any revision to this HHSC General Conditions provision shall be reviewed and approved by General Counsel or her designee.

16. **Nondiscrimination** – the Contract shall include the following provision:

“No person performing work under this Agreement, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.”

17. **Access to Books and Records** – the Agreement must require the following provision or its equivalent provision if the Contract amount over the course of one year exceeds \$10,000:

“If the value or cost of Services rendered to HHSC pursuant to this Agreement is Ten Thousand Dollars (\$10,000.00) or more over a twelve-month period, CONTRACTOR agrees as follows:

- a. *Until the expiration of six (6) years after the furnishing of such services, CONTRACTOR shall, upon written requests, make available to the Secretary of the Department of Health and Human Services (the "Secretary"), the Secretary's duly-authorized representative, the Comptroller General, or the Comptroller General's duty-authorized representative, such books, documents and records as may be necessary to certify the nature and extent of the cost of such Services; and*
- b. *If any such Services are performed by way of subcontract with another organization and the value or cost of such subcontracted Services is Ten Thousand Dollars (\$10,000.00) or more over a twelve-month period, such subcontract shall contain and CONTRACTOR shall enforce a clause to the same effect as subparagraph a. immediately above. The availability of CONTRACTOR's books, documents, and records shall be subject at all times to all applicable legal requirements, including without limitation, such criteria and procedures for seeking and obtaining access that may be promulgated by the Secretary by regulation. The provisions of subparagraph a. and this subparagraph b., shall survive the expiration of other termination of this Agreement regardless of the cause of such termination."*

18. Compliance with Laws – the Agreement shall include the following provision or its equivalent; provided that any provision different than the following, shall be reviewed by HHSC legal department:

"The CONTRACTOR shall comply with all applicable federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time."

C. Other Terms - Other terms may require legal review dependent on the type of solicitation utilized, the type of Agreement, or the type of goods or services purchased. The Contract Manager shall confer with the HHSC legal department and utilize the standard HHSC General Conditions and Abbreviated General Conditions provided by the HHSC legal department.

D. Legal Review at the Discretion of Contract Managers - Contract Managers shall have discretion to refer any Contract, for any reason, for legal review.

E. RFP/IFB – RFP and IFB shall be reviewed by the HHSC legal department for all projected solicitations estimated to be \$5,000,000 or more and for all services of the type described in Procedure Section III.A.2 or III.A.9, above. Contract Managers shall have the full discretion to refer any RFP/IFB for counsel review on a case-by-case basis. Prior to award of a Contract, if the vendor proposes to change the HHSC General Conditions during the RFP/IFB process, the Contract Manager shall obtain legal review on all changes made.

IV. APPLICABILITY: All HHSC facilities and corporate office.

V. REFERENCES:

- HRS Ch. 92F;
- HRS Ch. 323F;
- HRS Ch. 103D and implementing Hawaii Administrative Rules (HAR) (Reference to Chapter 103D does not imply it is applicable in all cases.);
- 45 C.F.R. Parts 160, 162, 164;
- 42 U.S.C. § 1395x(r);
- 42 U.S.C. §§ 1320a-7b(b) and 1395nn;
- 42 C.F.R § 411.351;
- HHSC Policies PUR0014A, CMP 0031A, FIN 0002 and FIN 0004.