Article 6
Modification and Termination of Contracts for Supplies and Services

§16601. Contract Clauses and their Administration

§16601. Contract Clauses and their Administration. (a) **Introduction.** The following contract clauses are available for use in supply and service contracts at the discretion of the Hospital Administrator, or the designee of either officer, in accordance with 5 GCA §5350 (Contract Clauses and Their Administration) of the Guam Procurement Act. Alternative clauses are provided in some instances to permit accommodation of differing contract situations.

(b) **Variations in Contract Clauses.** If the clauses set forth in this Chapter are utilized, they may be varied for use in a particular contract when, pursuant to the provisions of 5 GCA §5350(d) (Contract Clauses and Their Administration, Modification of Clauses) of the Procurement Act, the Hospital Administrator makes a written determination describing the circumstances justifying the variation or variations.

Any material variation from these clauses shall be described in the solicitation documents in substantially the following form:

> Clause No. _____, entitled _____ is not a part of the general terms and conditions of this contract and has been replaced by Special Clause No. _____, entitled _____.

(c) **Changes Clause**

(1) **Changes Clause in Fixed-Price Contracts.** In fixed price contracts the following clause may be inserted:

CHANGES

1. **Change Order**. By a written order, at any time, and without notice to surety, the Hospital Administrator may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:
   (a) drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the hospital in accordance therewith;
   (b) method of shipment or packing; or
   (c) place of delivery.
2. **Adjustments of Price or Time for Performance**. If any such change order increases or decreases the contractor's cost, or the time required for performance of any part of the work under this contract whether or not changed by the order, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.
   Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the hospital promptly and duly makes such provisional adjustment in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.
3. **Time Period for Claim**. Within thirty (30) days after receipt of a written change order under Paragraph (1) (Change Order) of this clause, unless such period is extended by the Hospital Administrator in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the hospital is prejudiced by the delay in notification.
4. **Claims Barred After Final Payment**. No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.
5. **Other Claims not Barred**. In the absence of such a change order, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim arising under the contract if pursued in accordance with item (1) Notice of Claim under the clause entitled "Claims Based on the Hospital Administrator Actions or Omissions," or for breach of contract.

(d) **Stop Work Order Clause**

(1) **Use of Clause.** The clause set forth in Subsection (d)(3) of this section is authorized for use in any fixed-price contract under which work stoppage may be required for reasons such as advancements in the state-of-the-art, production modifications, engineering changes, or realignment of programs.

(2) **Use of Orders.**

(A). Because stop work orders may result in increased costs by reason of standby costs, such orders shall be issued only with prior approval of the Hospital Administrator or the designee of such officer. Generally, use of a stop work order will be limited to situations in which it is advisable to suspend work pending a decision to proceed by the hospital and a supplemental agreement providing for such suspension is not feasible. A stop work order may not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

(B) Stop work orders shall not exceed ninety (90) consecutive days and shall include, as appropriate:

(i) a clear description of the work to be suspended;

(ii) instructions as to the issuance of further orders by the contractor for material or services;

(iii) guidance as to action to be taken on subcontracts; and

(iv) other instructions and suggestions to the contractor for minimizing costs.

(C) Promptly after issuance, stop work orders should be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

(i) As soon as feasible after a stop work order is issued:

(1) the contract will be terminated; or

(2) the stop work order will be cancelled or extended in writing beyond the period specified in the order.

In any event, some such action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

(c) **Clause.**

STOP WORK ORDER

1. **Order to Stop Work**. The Hospital Administrator may, by written order to the contractor, at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding ninety (90) days after the order is delivered to the contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Hospital Administrator shall either:

   (a) cancel the stop work order; or

   (b) terminate the work covered by such order as provided in the 'Termination for Default Clause' or the 'Termination for Convenience Clause' of this contract.

2. **Cancellation or Expiration of the Order**. If a stop work order issued under this clause is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule, or the contract price shall be modified in writing accordingly, if:

(a) the stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and

(b) the contractor asserts a claim for such an adjustment within thirty (30) days after the end of the period of work stoppage; provided that, if the Hospital Administrator decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

3. **Termination of Stopped Work.** If a stop work order is not cancelled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

4. **Adjustments of Price**. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

(e)(1) **Definite Quantity Contracts.** The following clause is authorized for use in definite quantity supply or service contracts:

VARIATION IN QUANTITY

Upon the agreement of the parties, the quantity of supplies or services or both specified in this contract may be increased by a maximum of ten percent (10%) provided:

(A) the unit prices will remain the same (except for any price adjustments otherwise applicable); and

(B) the Hospital Administrator makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

(2) **Indefinite Quantity Contracts.** No clause is provided here because in indefinite quantity contracts the flexibility as to the hospital's obligation to order and the contractor's obligation to deliver should be

designated to meet using department needs while making the contract as attractive as possible to potential contractors, thereby attempting to obtain maximum practicable competition in order to assure the best economy for the hospital. However, in each case, the contract should state:

(A) the minimum quantity, if any, the hospital is obligated to order and the contractor to provide;

(B) whether there is a quantity the hospital expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;

(C) any maximum quantity the hospital may order and the contractor must provide; and

(D) whether the hospital is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in §2325 (Multiple Source Contracting) of these Regulations that the hospital will order its actual requirements from the contractors under the multiple award subject to any minimum or maximum quantity stated.

(f) **Price Adjustment Clause.**

PRICE ADJUSTMENT

1. **Price Adjustment Methods**. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:

(a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(b) by unit prices specified in the contract or subsequently agreed upon;

(c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;

(d) in such other manner as the parties may mutually agree; or

(e) in the absence of agreement between the parties, by a unilateral determination by the Hospital Administrator of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the Hospital Administrator in accordance with generally accepted accounting principles and applicable sections of the regulations promulgated under Article 7 (Cost Principles), subject to the provisions of Article 9 (Legal and Contractual Remedies) of the GMHA Procurement Regulations.

2. **Submission of Cost or Pricing Data**. The contractor shall provide cost or pricing data for any price adjustments subject to the provisions of §16303 (Cost or Pricing Data) of the GMHA Procurement Regulations.

(g) **Claims Based on a Procurement Officer's Actions or Commissions Clause.** The clause set forth in §16506(h) (Claims Based on the Hospital Administrator's Actions or Omissions Clause) of these Regulations may be used in supply or service contracts.

(h) **Termination for Default Clause.** This section applies to construction contracts and not to supply or other type of contracts where notice of liquidated damages will apply immediately upon notification of breach or default of the contract is provided in the bid terms or conditions, or in the purchase order itself.

TERMINATION FOR DEFAULT

1. **Default.** If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, or otherwise fails to timely satisfy the contract provisions or commits any other substantial breach of this contract, the Hospital Administrator may notify the contractor in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Hospital Administrator, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has

been a delay or a failure to properly perform. In the event of termination in whole or in part, the Hospital Administrator may procure similar supplies or services in a manner and upon terms deemed appropriate by the Hospital Administrator. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

2. **Contractor's Duties**. Notwithstanding termination of the contract and subject to any directions from the Hospital Administrator, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the hospital has an interest.

3. **Compensation**. Payment for completed supplies delivered and accepted by the hospital shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the contractor and the Hospital Administrator; if the parties fail to agree, the Hospital Administrator shall set an amount subject to the contractor's rights under Article 9 (Legal and Contractual Remedies) of the GMHA Procurement Regulations. The hospital may withhold from amounts due the contractor such sums as the Hospital Administrator deems to be necessary to protect the hospital against loss because of outstanding liens or claims of former lien holders and to reimburse the hospital for the excess costs incurred in procuring similar goods and services.

4. **Excuse for Nonperformance or Delayed Performance.** Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the Hospital Administrator within fifteen (15) days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of a public enemy; acts of the

hospital or any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the supplies or services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements. Upon request of the contractor, the Hospital Administrator shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the hospital under the clause entitled "Termination for Convenience in fixed price contracts; or "Termination" in cost-reimbursement contracts. (As used in this Paragraph of this clause the term "subcontractor" means subcontractor at any tier.)

5. **Erroneous Termination for Default**. If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the hospital, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the hospital, the contract shall be adjusted to compensate for such termination and the contract modified

accordingly subject to the contractor's rights under Article 9 (Legal and Contractual Remedies) of the GMHA Procurement Regulations.

6. **Additional Rights and Remedies.** The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(i) **Liquidated Damages Clause.**

(1) **With Termination for Default Clause.** The following clause is authorized for use in supply or service contracts when it is difficult to determine with reasonable accuracy the amount of damage to the hospital due to delays caused by late contractor performance or non-performance and the contract contains the termination for default clause set forth in Subsection (h) of this article.

LIQUIDATED DAMAGES

When the contractor is given notice of delay or nonperformance as specified in Paragraph (1) (Default) of the Termination for Default Clause of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of one-half (1/2) of one percent (1%) of outstanding order per calendar day from date set for cure until either the hospital reasonably obtains similar supplies or services if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination for Default Clause of this contract, liquidated damages shall not be due the hospital. The contractor remains liable for damages caused other than by delay.

(2) **In Other Situations.** If the contract will not have a Termination for Default Clause or liquidated damages are to be assessed for reasons other than delay, the Hospital Administrator may approve the use of any appropriate liquidated damages clause.

(j) **Termination for Convenience Clause.**

TERMINATION FOR CONVENIENCE

1. **Termination**. The Hospital Administrator may, when the interest of the hospital so requires, terminate this contract in whole or in part, for the convenience of the hospital. The Hospital Administrator shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

2. **Contractor's Obligations**. The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Hospital Administrator may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the hospital. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

3. **Right to Supplies.** The Hospital Administrator may require the contractor to transfer title and deliver to the hospital in the manner and to the extent directed by the Hospital Administrator:

   (a) any completed supplies; and

   (b) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

   The contractor shall, upon direction of the Hospital Administrator, protect and preserve property in the possession of the contractor in

which the hospital has an interest. If the Hospital Administrator does not exercise this right, the contractor shall use its best efforts to sell such supplies and manufacturing materials in accordance with the standards of Uniform Commercial Code of Guam, §2706 (U.S.C.G. 2706 is quoted at the end of this Subsection(j)(4)(d). Utilization of this section in no way implies that the hospital has breached the contract by exercise of the Termination for Convenience Clause.

4. Compensation.

(a) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by §162319 (Cost or Pricing Data) of the GMHA Procurement Regulations bearing on such claim. If the contractor fails to file a termination claim within one (1) year from the effective date of termination, the Hospital Administrator may pay the contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(b) The Hospital Administrator and the contractor may agree to a settlement, provided the contractor has filed a termination claim supported by cost or pricing data to the extent required by §16319 (Cost or Pricing Data) of the GMHA Procurement Regulations and that the settlement costs are reduced by payments previously made by the hospital, the proceeds of any sales of supplies and manufacturing materials under Paragraph (3) of this clause, and the contract price of the work not terminated.

(c) Absent complete agreement under Subparagraph (b) of this Paragraph, the Hospital Administrator shall pay the contractor the following amounts, provided payments agreed to under Subparagraph (b) shall not duplicate payments under this Subparagraph:

(i) contract prices for supplies or services accepted under the contract;

(ii) costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(iii) costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause. These costs must not include costs paid in accordance with Subparagraph (c) (ii) of this Paragraph;

(iv) the reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract. The total sum to be paid the contractor under this Subparagraph shall not exceed the total contract price plus the reasonable settlement costs of the contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under Subparagraph (b) of this Paragraph, and the contract price of work not terminated.

(d) Costs claimed, agreed to, or established under Subparagraph (b) and (c) of this Paragraph shall be in accordance with Article 7 (Cost Principles) of the GMHA Procurement Regulations.

14 GCA §2796 (UCC) states:

§2076. Seller's Resale Including Contract for Resale.

1. Under the conditions stated in §2703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this division (§2710), but less expenses saved in consequence of the buyer's breach.

2. Except as otherwise provided in Subsection (3) or unless otherwise agreed, resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

3. Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

4. Where the resale is at public sale:

   (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

   (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must `prospective bidders; and

   (d) the seller may buy.

5. A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

6. The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§16707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (Subsection 3 of §16711).

(k) **Termination Clause for cost Reimbursement Contracts.**

(l) **Remedies Clause.** The clause set forth in §16506(l) (Remedies Clause) of these Regulations may be used in supply or service contracts.

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