

REQUEST FOR LEGAL SERVICES

Date: November 19, 2024
From: Tom Cook, Chair
Water and Infrastructure Committee


TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Caleb P. Rowe, Esq.

Subject: BILL 135 (2024), AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE UNITED STATES ARMY CORPS OF ENGINEERS FOR TECHNICAL SERVICES (WAI-32)

Background Data: Please see CD1 version of bill. Please submit your response to wai.committee@mauicounty.us with a reference to WAI-32.

Work Requested: ☒ FOR APPROVAL AS TO FORM AND LEGALITY
☐ OTHER:

Requestor's signature  Tom Cook, Chair	Contact Person <u>Jarret Pascual or Carla Nakata</u> (Telephone Extension: <u>7141 or 5519, respectively</u>)
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☐ ROUTINE (WITHIN 15 WORKING DAYS) ☐ RUSH (WITHIN 5 WORKING DAYS)
☐ PRIORITY (WITHIN 10 WORKING DAYS) ☐ URGENT (WITHIN 3 WORKING DAYS)

☒ SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): November 26, 2024
REASON: For posting on the December 6, 2024, Council meeting agenda.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO:	ASSIGNMENT NO.	BY:
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TO REQUESTOR: ☒ APPROVED ☐ DISAPPROVED ☐ OTHER (SEE COMMENTS BELOW)
☐ RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE): _____

DEPARTMENT OF THE CORPORATION COUNSEL

Date 11/20/24

By 

(Rev. 7/03)

wai:ltr:032acc01:jpp

Attachment

ORDINANCE NO. _____

BILL NO. 135, CD1 (2024)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR TO ENTER INTO AN
INTERGOVERNMENTAL AGREEMENT WITH THE UNITED STATES ARMY
CORPS OF ENGINEERS FOR TECHNICAL SERVICES

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The County of Maui and the United States Army Corps of Engineers seek to enter into an agreement for technical services, as described in the Memorandum of Agreement attached as Exhibit “1.”

Section 2.20.020, Maui County Code, provides, “Unless authorized by ordinance, the Mayor shall not enter into any intergovernmental agreement or any amendment thereto which places a financial obligation upon the county or any department or agency thereof.”

SECTION 2. Under Section 2.20.020, Maui County Code, the Council authorizes the Mayor or the Mayor’s authorized representative to execute the Memorandum of Agreement and any amendments consistent with its purpose and scope that do not increase the County’s financial obligation or the agreement’s duration.

SECTION 3. This Ordinance takes effect on approval.

APPROVED AS TO FORM AND LEGALITY:



Department of the Corporation Counsel
County of Maui

wai:misc:032abill01:jpp

INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Alice L. Lee".

ALICE L. LEE

Upon the request of the Mayor.

MOA: (MAUI-USACE-FY24-001)

MEMORANDUM OF AGREEMENT
BETWEEN
THE COUNTY OF MAUI
AND
THE U.S. ARMY CORPS OF ENGINEERS
FOR
TECHNICAL SERVICES
(MAUI-USACE-FY24-001)

ARTICLE I - PURPOSE AND AUTHORITY

This Memorandum of Agreement (MOA) is entered into by and between the U.S. Army Corps of Engineers (USACE) and the County of Maui, (COM) (collectively "the Parties") for the purpose of establishing a mutual framework governing the respective responsibilities of the Parties for the provision of USACE engineering and construction technical services and any goods related thereto. This MOA is entered into pursuant to 10 U.S.C. § 7036(e).

ARTICLE II - SCOPE

Services and any goods related thereto which USACE may provide under this MOA include:

- 1) Planning & Design
- 2) Engineering
- 3) Contracting & Contracting Assistance
- 4) Quality Assurance & Quality Control
- 5) Construction Management
- 6) Professional services to assist in implementing infrastructure development or repairs.
- 7) Other related goods or services as may be agreed upon in the future.

Nothing in this MOA shall be construed to require the COM to use USACE or to require USACE to provide any services and any goods related thereto to the COM, except as may be set forth in orders executed pursuant to Article IV of this MOA.

ARTICLE III - INTERAGENCY COMMUNICATIONS

To provide for consistent and effective communication between USACE and the COM, each Party shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA. Additional representatives may also be appointed to serve as points of contact on individual orders. The Principal Representatives are as follows:

For USACE:

Primary POC
IIS Program Manager

MOA: (MAUI-USACE-FY24-001)

Attn: Charles D. Schiers
Honolulu District, U.S. Army Corps of Engineers
Programs & Project Management Division
CEPOH-PPC, Bldg. 230 Rm. 305
Fort Shafter, Hawaii 96858-5440
Phone: (808) 835-4026
Email: Charles.D.Schiers@usace.army.mil

Alternate POC

Chief Civil and Public Works Branch
Attn: Rhiannon L. Kucharski
Honolulu District, U.S. Army Corps of Engineers
Programs & Project Management Division
CEPOH-PPC, Bldg. 230 Rm. 305
Fort Shafter, Hawaii 96858-5440
Phone: (808) 835-4028
Email: Rhiannon.L.Kucharski@usace.army.mil

For the County of Maui:

Primary POC

Director Department of Public Works
Attn: Jordan Molina
Department of Public Works
County of Maui
200 South High Street, 4th Floor
Wailuku, HI 96793
Phone: (808) 270-7845
Email: Jordan.K.Molina@co.maui.hi.us

Alternate POC

Engineering Division Chief
Attn: Rodrigo "Chico" Rabara
Engineering Division
Department of Public Works
County of Maui
200 South High Street, 4th Floor
Phone: (808) 270-7745
Email: Chico.Rabara@co.maui.hi.us

ARTICLE IV - ORDERS

In response to requests from the COM for USACE assistance under this MOA, USACE and the COM shall conclude mutually agreed upon written orders. Services and any goods related

thereto shall be provided under this MOA only after an appropriate order has been signed by an authorized representative of each Party and the COM has provided, in advance, the full amount of funding necessary to complete the order. Orders will be executed on FS Form 7600B, ENG Form 4914-R, or another format acceptable to both Parties containing the same substantive information.

Prior to executing an order:

1) The COM must certify, in writing, that the work contemplated under the order involves Federal monetary assistance (e.g., funding from a Federal grant); and

2) The COM must obtain a written statement from the head, or his/her delegee, of the department or agency providing the Federal monetary assistance that such department or agency does not object to the COM's use of the Federal monetary assistance to fund USACE to provide the requested services.

Orders must include:

- A detailed scope of work statement;
- Schedules;
- Funding arrangements, including an express requirement that all funding shall be provided in advance;
- The amount of funds required and available to accomplish the scope of work;
- the COM's fund citation and the date upon which the cited funds expire for obligation purposes;
- Identification of individual Project Managers;
- Identification of types of contracts to be used (if known);
- Types and frequencies of reports;
- Identification of which party is to be responsible for government furnished equipment, contract administration, records maintenance, rights to data, software and intellectual property, and contract audits;
- An express statement that incorporates the terms and conditions of this MOA by reference;
- Procedures for amending or modifying the order; and
- Such other particulars as are necessary to clearly describe the obligations of the Parties with respect to the requested services and any goods related thereto.

In the event of a conflict between this MOA and an order, this MOA shall control.

ARTICLE V - RESPONSIBILITIES OF THE PARTIES

USACE shall:

1. Provide the COM with services and any goods related thereto in accordance with the purpose, terms, and conditions of this MOA and any specific requirements set forth in orders, either by contract or by in-house effort.

2. Ensure that only authorized USACE representatives sign orders.

3. Provide detailed periodic progress, financial and other reports to the COM as agreed to in an order. Financial reports shall include information on all funds received, obligated, and expended, and any forecasted obligations and expenditures.

4. Inform the COM of all contracts entered into under each order.

The COM shall:

1. Provide, prior to executing an order, the certification and written statement of no objection described in Article IV of this MOA.

2. Pay all costs associated with USACE's provisions of services and any goods related thereto under this MOA and provide, at the time of signature of an order, the full amount of funding necessary to accomplish that order.

3. Ensure that only authorized COM representatives sign orders.

4. Develop draft orders to include scope of work statements.

5. Obtain for USACE all necessary real estate interests, access to all work sites, and support facilities, as necessary during the execution of each order.

ARTICLE VI - FUNDING

This MOA does not document the obligation of funds between the Parties, nor does it memorialize any commitment by USACE to provide specific services or any goods related thereto to the COM. Any such obligation of funds and commitment by USACE will be accomplished by executing an order in accordance with Article IV and the COM providing, in advance, the full amount of funding necessary to accomplish that order.

The COM shall pay all costs associated with USACE's provision of services and any goods related thereto under this MOA. USACE shall assess charges against funds advanced by the COM on a monthly basis. Charges assessed by USACE will not be subject to audit in advance of payment.

If USACE forecasts its actual costs under an order to exceed the amount of funds available under that order, it shall promptly notify the COM of the amount of additional funds necessary to complete the work under that order. The COM shall either provide the additional funds to USACE, require that the scope of work be limited to that which can be paid for by the then-available funds, or direct termination of the work under that order.

Within 90 days of completing the work under an order, USACE shall conduct an accounting to determine the actual costs of the work. Within 30 days of completion of this accounting, USACE shall return to the COM any funds advanced in excess of the actual costs as then known, or the COM shall provide any additional funds necessary to cover the actual costs as then known. Such an accounting shall in no way limit the COM's duty in accordance with Article X to pay for any costs, such as contract claims or other liability, which may become known after the final accounting.

ARTICLE VII - APPLICABLE LAWS

This MOA and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives, and procedures of the United States. Unless otherwise required by law, all contract work undertaken by USACE shall be governed by USACE policies and procedures.

ARTICLE VIII - CONTRACT CLAIMS AND DISPUTES

All claims and disputes by contractors arising under or relating to contracts awarded by USACE shall be resolved in accordance with Federal law and the terms of the individual contract. USACE shall have dispute resolution authority for these claims. Any contracting officer's final decision may be appealed by the contractor pursuant to the Contract Disputes Act of 1978 (41 U.S.C. §§ 7101-7109). The Armed Services Board of Contract Appeals (ASBCA) is designated as the appropriate board of contract appeals. In lieu of appealing to the ASBCA or its successor, the contractor may bring an action directly to the United States Court of Federal Claims.

USACE shall be responsible for handling all disputes arising under or relating to the contracts, including litigation involving disputes and appeals, and for coordinating with the Department of Justice as appropriate. USACE shall notify the COM of any such disputes and litigation and afford the COM an opportunity to review and comment on the proceedings and any resulting settlement negotiations, however, as provided above, USACE shall be the dispute resolution authority and will make all decisions regarding contractor claims and disputes, including whether to accept or propose any settlement. The COM shall be responsible for all such costs in accordance with Article X.

ARTICLE IX - DISPUTE RESOLUTION

The Parties agree that, in the event of a dispute between the Parties, the COM and USACE shall use their best efforts to resolve any such dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the Parties.

ARTICLE X — RESPONSIBILITY FOR COSTS

If liability of any kind is imposed on the United States relating to USACE's provision of services and any goods related thereto under this MOA, USACE will accept accountability for its actions, but the COM shall remain responsible as the program proponent for providing such funds as are necessary to discharge the liability and all related costs, to include any litigation expenses incurred by USACE in defending a claim or dispute associated with the work. This obligation extends to all funds legally available to discharge this liability, including funds that may be made legally available through transfer, reprogramming or other means. Should the COM have insufficient funds legally available, including funds that may be made legally available through transfer, reprogramming or other means, the COM remains responsible for seeking additional funds for such purposes.

Notwithstanding the above, this MOA does not confer any liability upon the COM for claims payable by USACE under the Federal Torts Claims Act. Provided further that nothing in this MOA is intended or will be construed to create any rights or remedies for any third party and no third party is intended to be a beneficiary of this MOA.

ARTICLE XI - PUBLIC INFORMATION

Justification and explanation of the COM's programs before Congress and other agencies, departments, and offices of the Federal Executive Branch or state or local governments shall be the responsibility of the COM. USACE may provide, upon request, any assistance necessary to support the COM's justification or explanations of the COM's programs conducted under this MOA. In general, the COM is responsible for all public information. USACE may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The COM or USACE shall make its best efforts to give the other Party advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant to orders under this MOA.

ARTICLE XII - MISCELLANEOUS

A. Other Relationships or Obligations: This MOA shall not affect any pre-existing or independent relationships or obligations between the COM and USACE.

B. Survival: The provisions of this MOA that require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

C. Severability: If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and unaffected to the fullest extent permitted by law and regulation.

D. Transferability: This MOA is not transferable except with the written consent of the Parties.

ARTICLE XIII – REQUIRED REVIEWS

The Parties will review this MOA annually on or around the anniversary of its effective date for financial impacts and triennially in its entirety.

ARTICLE XIV - AMENDMENT, MODIFICATION AND TERMINATION

This MOA may be modified or amended only by written, mutual agreement of the Parties. Either Party may unilaterally terminate this MOA by providing at least 180 days written notice to the other Party. In the event of termination, the COM shall continue to be responsible for all costs incurred by USACE under this MOA and for the costs of closing out or transferring any on-going contracts.

ARTICLE XV - EFFECTIVE DATE

This MOA takes effect beginning on the day after the last Party signs.

ARTICLE XVI – EXPIRATION DATE

This MOA shall expire no later than 5 years from the date of latest agreement signature below.

AGREED:

For the County of Maui

For the U.S. Army Corps of Engineers

Richard T. Bissen Jr.
Mayor
County of Maui

Adrian O. Biggerstaff, Ph.D., P.E., PMP
Lieutenant Colonel, U.S. Army
District Engineer

DATE: _____

DATE: _____

APPROVED FOR FORM AND LEGALITY:

Michael J. Hopper
Deputy Corporation Counsel
County of Maui

DATE: _____

WAI Committee

From: Caleb P. Rowe <Caleb.Rowe@co.maui.hi.us>
Sent: Wednesday, November 20, 2024 8:50 AM
To: WAI Committee
Cc: Jarret P. Pascual; Carla M. Nakata
Subject: WAI-32
Attachments: WAI-32 Bill 135 (2024) 2024-11-19 RAFL Pascual The U.S. Maui Corps of Engineers.pdf

Please see attached

With Aloha,

Caleb P. Rowe
Deputy Corporation Counsel
County of Maui