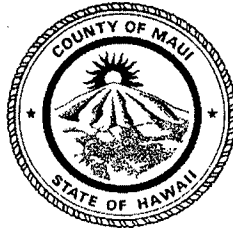


MICHAEL P. VICTORINO
Mayor

MOANA M. LUTEY
Corporation Counsel

EDWARD S. KUSHI, JR.
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761



RECEIVED

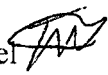
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OFFICE OF THE
COUNTY COUNCIL

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

June 13, 2019

MEMO TO: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee

FROM: Thomas Kolbe, Deputy Corporation Counsel 

SUBJECT: LITIGATION MATTERS – Settlement of Claims and Lawsuits (GET-1)
Kamoku Contracting, LLC v. County of Maui
Civil No.: 18-1-0180 (2)

Our Department respectfully requests the opportunity to present information to the Governance, Ethics, and Transparency Committee, and to discuss settlement options with regard to the above-referenced lawsuit.

Copies of the Resolution authorizing settlement and the Complaint are attached.

It is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities and liabilities of the County, the Council, and the Committee.

We request that a representative from Department of Parks and Recreation be in attendance during discussion of this matter.

Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your anticipated assistance in this matter.

TWK:chs
Enclosures

cc: Karla Peters, Director Department of Parks and Recreation

Resolution

No. _____

AUTHORIZING SETTLEMENT OF
KAMOKU CONTRACTING, LLC VS. COUNTY OF MAUI
CIVIL NO. 18-1-0180(2)

WHEREAS, Plaintiff Kamoku Contracting filed a lawsuit in the Circuit Court of the Second Circuit in the State of Hawaii on April 25, 2018, Civil No. 18-1-0180(2), against the County of Maui, claiming a breach of contract regarding a 2016 Parks construction project at Papohaku Park; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, will attempt to reach a resolution of this case by way of a negotiated settlement or Offer of Judgment; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth in an executive meeting before the Governance, Ethics and Transparency Committee and

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a negotiated settlement or Offer of Judgment by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore,

Resolution No. _____

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Governance, Ethics and Transparency Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

3. That it hereby authorizes the Director of Finance of the County of Maui to satisfy said settlement of this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Director of Parks & Recreation, and the Corporation Counsel.

APPROVED AS TO FORM
AND LEGALITY:



THOMAS KOLBE
Deputy Corporation Counsel
County of Maui
Lit 5720

Rec'd Time
5/4/18 9:48am

Of Counsel:
CLAY CHAPMAN IWAMURA PULICE & NERVELL

FILED

GERALD S. CLAY #1439
SCOTT I. BATTERMAN #5017
Topa Financial Center, Suite 2100
700 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 535-8400

2018 APR 25 AM 8:23

C. VAN HANDEL, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

RECEIVED
CORPORATION COUNSEL
2018 MAY -4 AM 10:20

Attorneys for Plaintiff
KAMOKU CONTRACTING, LLC

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

KAMOKU CONTRACTING, LLC,
Plaintiff,
vs.
COUNTY OF MAUI,
Defendant.

Civil No. 18-1-0180 (2)
(Breach of Contract)
COMPLAINT; SUMMONS

COMPLAINT

COMES NOW Plaintiff KAMOKU CONTRACTING, LLC ("KAMOKU") by and through its counsel of record, Clay Chapman Iwamura Pulice & Nervell, and for its Complaint against Defendant COUNTY OF MAUI alleges as follows:

I. THE PARTIES AND THE PAPOHAKU CONTRACT

1. Plaintiff KAMOKU is a Hawaii limited liability company with its principal place of business in the County of Maui, State of Hawaii, registered to do business in the State of Hawaii and licensed, inter alia, as a General Building contractor in the State of Hawaii.

2. Upon information and belief, Defendant COUNTY OF MAUI (the "COUNTY") is a municipal corporation established and existing pursuant to the laws of the State of Hawaii.

I hereby certify that this is a full, true and correct copy of the Original.

Aaron Keigler

Clerk, Second Circuit Court

3. KAMOKU and the COUNTY entered into Contract No. C6069, Fencing Improvements At Papohaku Park, Job No. P15/026 (the "Papohaku Contract") dated as of June 23, 2009.

4. The Papohaku Contract was to remove and replace fencing at a Maui county baseball field in Papohaku Park.

5. Notice to Proceed with the Papohaku Contract was issued effective Friday, November 25, 2016.

II. PROPOSED CONTRACT MODIFICATION NO. 2.

6. On or about December 5, 2016, as supplemented on January 17, 2017, KAMOKU submitted Proposed Contract Modification No. 2 ("PCM 2"), to Cheryl Akiona, Capital Improvements Project Coordinator, seeking an upward adjustment in the Contract Amount of \$28,200.00.

7. This Proposed Contract Modification dealt with a number of issues that arose during construction, for which KAMOKU was entitled to additional compensation.

A. The Differing Site Condition of the Fence Posts

8. The construction plans for the comfort station provided to KAMOKU after the project was awarded showed the fence posts to be in individual footings 3 feet down. In actuality, they were poured into the concrete foundation at a three foot depth.

9. Because the COUNTY wanted the posts installed at the same location, the foundation now had to be saw cut to remove the concrete foundation slab, to get to the proposed depth of seven feet at that location.

10. The differing site condition was discovered on or about December 1, 2016. Notice of the different site conditions was timely provided to Ms. Akiona on that day and the following day, by telephone and e-mail, prior to the condition being disturbed.

11. In order not to delay the project, KAMOKU continued working.

12. At the same time, KAMOKU requested a site meeting to discuss the issue. KAMOKU was asked to provide a sketch of how and where the poles would be set once the saw cutting and removal of foundation was accomplished, which it did. This is memorialized in e-mails dated December 7 and 8, 2016.

13. The expense of saw cutting the building foundation needed to be saw cut and hoe rammed to install the back stop poles was \$4,700.00

B. The Differing Site Condition of the Boulders

14. The Papohaku Contract plans called out fence posts of two foot diameter at a seven foot depth for each back stop posts.

15. The Papohaku Contract was bid on the assumption that this could be accomplished by drilling holes, as this was a removal and replacement contract.

16. Instead, additional excavation was needed for the depth and due to encountering large boulders and rock conditions at four feet deep. This was unforeseen due to no soil borings or investigation of site conditions at this required depth in the bid package, and an unusual condition for the area, given the existence of the existing fence posts.

17. In other words, this was a removal and replacement as per the existing site, but the unforeseen condition created a whole new scope of work

18. In removing the large boulders and rock KAMOKU exposed holes 4 to 6 feet in width, and sono tubes were used for the placement of the concrete, in lieu of using 6 yards of concrete per post.

19. This type of excavation and construction was the only method available to achieve the purposes, and was made unavoidable by the site conditions.

20. Proper notice was given when these conditions were encountered.

21. The additional expense incurred in this work constituted five days of labor, and five days use of an excavator and operator, at a total cost of \$2,500.00 per day, for a total of \$12,500.00.

22. The additional expense of loading the additional rocks hauling the rock was and \$5,000.00.

C. The Extra Work Requested

23. KAMOKU received direction to do additional compaction, which was not called out on plans or specifications.

24. KAMOKU complied with this request.

25. The additional cost for compacting and two days of testing was \$6,000.00.

D. The Rejection of Proposed Contract Modification 2

26. By e-mail dated February 7, 2017, Cheryl Akiona rejected Proposed Contract Modification 2, asserting that the requested change was due to KAMOKU's means and methods, and that proper notice of a differing site condition was not provided.

27. These assertions were incorrect. There was clearly a differing site condition, which resulted in significant additional costs, as well as time.

28. On or about February 27, 2017, pursuant to Sections 12.3 and 17.2 of the General Conditions of the "Papohaku Contract, KAMOKU requested a final decision from the Procurement Officer (subject to judicial review) with respect to the rejection.

29. By mutual agreement, the Final Decision due date was extended to October 30, 2017.

30. By letter dated October 31, 2017, the COUNTY has rejected KAMOKU's claim, requiring KAMOKU to bring this action.

III. THE IMPROPER BACK CHARGE

31. During the course of the Papohaku Project, KAMOKU repeatedly requested that the COUNTY advise KAMOKU with respect to the location of irrigation lines, so as to avoid damaging them during excavation and construction.

32. The COUNTY failed to advise KAMOKU as to the location of various lines. As a result of the COUNTY's failures, certain lines were damaged during construction.

33. At no time prior to the completion of discovery did the COUNTY provide Kamoku with a basis for, or amount of, any alleged back charge for the damages irrigation lines.

34. By e-mail dated January 12, 2018, after the COUNTY had been using Papohaku Park for many months, the COUNTY finally advised KAMOKU that a final payment of \$15,704.39 (subject to KAMOKU's claim above) would be made. No reference to any further back charge was made.

35. On about February 12, 2018, after the COUNTY had been using Papohaku Park for yet another month, the COUNTY provide KAMOKU with a check for the Papohaku

Contract closeout. That check was not for the \$15,704.39 that had been agreed upon, but was for \$11,410.43.

36. The COUNTY later asserted that this retroactive and untimely deduction of \$4,293.36 was for the irrigation damaged during construction.

37. This deduction was without basis under the facts, and was made well after the request for a Final Decision had been made on what were the known, outstanding issues under the Papohaku contract.

CAUSE OF ACTION FOR BREACH OF CONTRACT

38. KAMOKU repeats and incorporates by reference paragraphs 1 through 37 above.

39. The COUNTY by its actions and/or inaction, and by the actions and/or inaction of its agents, has breached the express and implied obligations of the COUNTY under the Papohaku Contract.

40. The COUNTY's breach of its express and implied obligations under the Papohaku Contract resulted in substantial costs and damages to KAMOKU, and deprived KAMOKU of the benefits that KAMOKU reasonably expected when KAMOKU entered into the Papohaku Contract with the COUNTY.

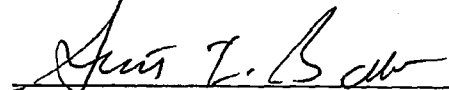
41. KAMOKU presented its claims against the COUNTY, first to the Officer-in-Charge, and then to the Contracting Officer, as required by the Papohaku Contract. Those claims have been rejected. Accordingly, KAMOKU is free to pursue these claims in a judicial forum.

42. As a result of the breaches by the COUNTY of its contractual obligations and its express and implied obligations, the COUNTY is liable to KAMOKU and KAMOKU has

been damaged in an amount to be proved at trial, including but not limited to the amount of \$32,493.36

WHEREFORE, KAMOKU CONTRACTING, LLC prays for the entry of judgment in an amount to be determined at trial, together with interest, costs and attorneys' fees to the extent permitted by law, along with such other, different and additional relief as the Court may deem just under the circumstances.

DATED: Honolulu, Hawaii, April 23, 2018.



GERALD S. CLAY
SCOTT I. BATTERMAN
Attorneys for Plaintiff

STATE OF HAWAII CIRCUIT COURT OF THE SECOND CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER CIV. #
PLAINTIFF, KAMOKU CONTRACTING, LLC	VS.	DEFENDANT, COUNTY OF MAUI
PLAINTIFF'S ADDRESS (NAME, ADDRESS, TEL. NO.) GERALD S. CLAY #1439 SCOTT I. BATTERMAN #5017 Clay Chapman Iwamura Pulice & Nervell 700 Bishop Street, Suite 2100 Honolulu, Hawaii 96813 Telephone No. 535-8400; Facsimile No. 535-844		
<p align="center">TO THE ABOVE-NAMED DEFENDANT(S)</p> <p>You are hereby summoned and required to file with the court and serve upon <u>Gerald S. Clay and Scott I. Batterman</u>, plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.</p> <p align="center">THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.</p> <p align="center">A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.</p>		
DATE ISSUED APR 25 2018	CLERK /sgd/ C. von KUGLER (Seal)	
I do hereby certify that this is full, true, and correct copy of the original on file in this office	Circuit Court Clerk	



In accordance with the Americans with Disabilities Act and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE NO. 539-4333, FAX 539-4322, or TTY 539-4853, at least ten (10) working days prior to your hearing or appointment date.