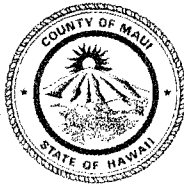


Michael P. Victorino  
Mayor

Sananda K. Baz  
Acting Managing Director



**OFFICE OF THE MAYOR**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.mauicounty.gov](http://www.mauicounty.gov)

RECEIVED

2019 FEB -4 PM 2:01

OFFICE OF THE  
COUNTY COUNCIL

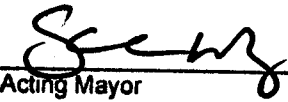
REFERENCE NO. BD-BA 19-72

February 1, 2019

Honorable Michael P. Victorino  
Mayor, County of Maui  
200 South High Street  
Wailuku, Hawaii 96793

APPROVED FOR TRANSMITTAL

For Transmittal to:

 2/2/19  
Acting Mayor Date

Honorable Keani Rawlins-Fernandez, Chair  
Economic Development and Budget Committee  
200 South High Street  
Wailuku, Hawaii 96793

Dear Chair Rawlins-Fernandez:

**SUBJECT: AMENDMENT TO APPENDIX A, GRANT REVENUE -  
SCHEDULE OF GRANTS AND RESTRICT USE REVENUES  
BY DEPARTMENT AND PROGRAMS FOR FISCAL YEAR  
2019 (BF-157)**

On behalf of the Department of Fire and Public Safety, I am transmitting the attached proposed bill for the purpose of adding an appropriation of \$125,000 from the Hawaii Tourism Authority for ocean rescue equipment.

Attached for your information is a copy of a draft Memorandum of Agreement between the Hawaii Tourism Authority and County of Maui.

Thank you for your attention in this matter. Should you have any questions, please feel free to contact me at ext. 7212.

Sincerely,



MICHELE M. YOSHIMURA  
Budget Director

Attachments

cc: David Thyne, Fire Chief



ORDINANCE NO. \_\_\_\_\_

BILL NO. \_\_\_\_\_ (2019)

A BILL FOR AN ORDINANCE AMENDING  
THE FISCAL YEAR 2019 BUDGET FOR THE COUNTY OF MAUI  
AS IT PERTAINS TO APPENDIX A, PART I,  
GRANTS AND RESTRICTED USE REVENUES - SCHEDULE OF GRANTS AND  
RESTRICTED USE REVENUES BY DEPARTMENTS AND PROGRAMS,  
DEPARTMENT OF FIRE AND PUBLIC SAFETY  
(HAWAII TOURISM AUTHORITY)

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

SECTION 1. Ordinance No. 4861, Bill No. 57 (2018), as amended, "Fiscal Year 2019 Budget", Appendix A, Part I, Grants and Restricted Use Revenues – Schedule of Grants and Restricted Use Revenues by Departments and Programs for Fiscal Year 2019, is hereby amended as it pertains to the Department of Fire and Public Safety, by adding a new appropriation entitled, "Hawaii Tourism Authority," in the amount of \$125,000 for the acquisition of emergency rescue equipment relating to ocean safety, to read as follows:

"4. Department of Fire and Public Safety

a. Federal Emergency Management Agency (FEMA) Fire Management Assistance Grant	700,000
b. Federal Emergency Management Agency (FEMA) Public Assistance Grant	500,000
c. Hawaii Medical Service Association (HMSA) Foundation Grant	40,000
d. Hazardous Materials Emergency Preparedness (HMEP) Program	25,000
e. Hazardous Materials Emergency Preparedness (HMEP) Planning and Training Grant	20,000
f. Local Emergency Planning Committee (LEPC)	20,000
g. National Fire Academy Training Program	20,000
h. Private Donations	30,000
i. State of Hawaii Department of Transportation Highway Safety Grants	20,000
j. State of Hawaii Makena Lifeguard Services (1) Provided, that disbursement for salaries and premium pay is limited to 10.5 LTA equivalent personnel.	1,056,059
k. United States Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) Assistance to Firefighters Grant (AFG) Program - Operations and Safety Program	300,000

I. Hawaii Tourism Authority

125,000"

SECTION 2. New material is underscored.

SECTION 3. This Ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:



---

JEFFREY UEOKA  
Deputy Corporation Counsel



**HAWAII TOURISM**  
AUTHORITY

Hawai'i Convention Center  
1801 Kalākaua Avenue, Honolulu, Hawai'i 96815  
kelepona tel 808 973 2255  
kalepa'i fax 808 973 2253  
kahua pa'a web hawaiiitourismauthority.org

David Y. Igo  
Governor

Chris Tatum  
President and Chief Executive Officer

MEMORANDUM OF AGREEMENT

MOA 19142

BETWEEN

THE HAWAII TOURISM AUTHORITY

AND

COUNTY OF MAUI

I. This Memorandum of AGREEMENT (hereinafter "MOA") is entered into as of the date of execution by the HAWAII TOURISM AUTHORITY, an agency of the State of Hawai'i, acting by and through its Head of Purchasing Agency, whose business address is 1801 Kalākaua Avenue, Honolulu Hawai'i 96815, ("HTA") and the COUNTY OF MAUI, by and through its undersigned Mayor Michael P. Victorino, whose business address is 200 South High Street, Wailuku, HI 96793.

II. RECITALS:

Whereas Hawai'i Tourism Authority (HTA) is the official organization responsible for the promotion of Hawai'i as a tourism destination in the national and international markets; and

Whereas HTA has a statutory obligation to "develop, coordinate, and implement state policies and directions for tourism and related activities taking into account the economic, social, and physical impacts of tourism on the State, Hawai'i's natural environment, and areas frequented by visitors" pursuant to Section 201B-3(a)(14); and to "develop and implement emergency measures to respond to any adverse effects on the tourism industry" pursuant to Section 201B-3(a)(24); and

Whereas according to the Hawai'i Department of Health EMS and Injury Prevention System Branch, the number of ocean drownings in Hawai'i had increased to 84 in 2017 from 57 in 2008, of which nearly 60% were visitors to Hawai'i; and

Whereas the lifeguard programs in all four Hawai'i counties have identified a need to acquire more rescue equipment to provide lifesaving services; and

Whereas the HTA Board of Directors has approved acquisition of emergency rescue equipment in response to the increased number of visitors and the rising incidents of ocean drownings, and in coordination with Kevin McAfee, Battalion Chief of Ocean Safety of Maui; and

Whereas the acquisition qualifies as a sole source since it is a government-to-government transaction and since the County of Maui is solely responsible for the running the county's lifeguard program; and

Whereas money is available in adequate amounts to fund this MOA pursuant to Section 237D-6.5, Hawai'i Revised Statutes, which mandates a percentage of funding be provided for safety and security budget; and

Whereas, pursuant to Sections 201B-3 and 201B-7, Hawai'i Revised Statutes, the HTA is authorized to enter into this MOA; and

NOW, THEREFORE, in consideration of the mutual promises contained in this MOA, HTA and COUNTY agree as follows:

**III. SCOPE OF SERVICES:**

A. COUNTY will be responsible for purchasing the following using HTA funds:

1. Three (3) PWCs with trailers and rescue sleds;
2. Eight (8) AEDs;
3. Five (5) rescue boards;
4. Two (2) all-terrain vehicles;
5. Forty-five (45) rescue fins;
6. Thirty (30) PWC fin belts;
7. Forty (40) masks w/snorkel;

COUNTY must also secure matching funds in the amount of \$125,000. The required matching funds must be in cash and may come from any source. These funds would be used to purchase additional equipment in furtherance of the goals of this MOA.

B. HTA will be responsible for:

1. Providing to COUNTY no more than **ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$125,000.00)**, tax inclusive and subject to the availability of funds.

**IV. COMPENSATION SCHEDULE**

- A. **Payment Schedule:** A total sum of money not to exceed **ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$125,000.00)**, tax inclusive, to be paid out as follows:
1. **Initial Payment:** An amount not to exceed **ONE HUNDRED TWELVE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$112,500.00)**, tax inclusive, submitted with original invoice for said amount.
  2. **Final Payment:** An amount not to exceed **TWELVE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$12,500.00)**, tax inclusive, due within thirty (30) days of the STATE's prior receipt and approval of a final financial report; final written report; final schedule and copies of all advertising and promotional activities if applicable; proof of matching funds of \$125,000; and satisfactory completion of all services in accordance with this MOA, and to be submitted with original invoice for said amount on or about December 31, 2019.
- B. **Payments Not Final Acceptance.** Progress or interim payments shall not be construed as final acceptance of any activity or service required under this MOA. COUNTY acknowledges and agrees to perform all the activities and services in accordance with this MOA for the total sum of money not to exceed **ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$125,000.00)**, tax inclusive, as specified above, and subject to the availability of funds.
- C. **Invoice Receipt Date.** Official invoice date is the date that the invoice and all deliverables are received and accepted by HTA. Invoice must include the name of COUNTY exactly as it appears on the MOA and on the certificate of vendor compliance, including any punctuations, entity type, and dba's. Please include MOA number on invoice. All required deliverables must be received along with, or prior to, receipt of invoice. Invoices must be either unsigned, or signed by County in blue ink. Invoices submitted prior to receipt of the necessary deliverables will not be accepted and will have to be resubmitted. Fiscal year ends June 30 and entails the temporary shutdown of fiscal processes. Invoices received at the change of fiscal, between June 15 and July 31, may be subject to delays in processing.
- D. COUNTY acknowledges and agrees that the availability of funds from the Tourism Special Fund established under the laws of the State of Hawai'i for any fiscal year (July 1

to June 30), shall initially be subject to the passage of a budget appropriation of public funds by the Legislature, and subsequently, to the approval of an allotment of the budgeted funds by the Governor, through the Director of Finance, State of Hawai'i. If there are insufficient funds appropriated, allotted, or otherwise made available to HTA to pay COUNTY under this MOA, HTA may, without any liability to HTA, including consequential damages, reduce and amend the contracted amount of compensation previously payable to COUNTY, upon written notification by HTA to COUNTY and amendment of this MOA.

**V. Time of Performance**

A. Complete and satisfactory performance of all the activities, services, terms, and conditions required to be provided and performed by the COUNTY under this Contract shall commence on the EFFECTIVE DATE and said activities and services shall be completed by December 31, 2019, unless this Contract is sooner amended or terminated as provided herein and in the attached General Conditions. The HTA, at its sole discretion, may amend this Contract to extend the time of performance upon the execution of an amendment to this Contract for any reason, including the prior approval by HTA of any required plan or proposal and budget for any revised or additional activities or services to be provided by COUNTY during the extended period of performance. Any request from COUNTY to extend the time of performance shall be in the form of a written request, which shall be dated and received by the HTA no later than 20 days prior to the completion date of this Contract.

**VI. GENERAL CONDITIONS**

A. The STATE'S General Conditions (AG-008 Rev. 4/15/2009) are attached hereto and incorporated herein as a part of this MOA (Exhibit A).

**VII. SPECIAL PROVISIONS**

A. Notwithstanding any provisions or representations to the contrary, any conflict among the various provisions of this MOA shall be resolved by allowing the various provisions in the following documents, in order of priority, to control:

- a. This MOA; and
- b. The General Conditions, attached hereto and incorporated herein (Exhibit A).



- B. For purposes of this MOA, paragraph nos. 2.d., 2.e., 2.f., 2.g., 2.h., 7, 9, 16, 17.d., 19.h., 25 and 26 of the General Conditions are hereby deleted and shall have no operative effect between HTA and COUNTY. All other paragraphs of the General Conditions remain in effect and are incorporated herein.
- C. For purposes of this MOA, paragraph no. 8 of the General Conditions is hereby amended to read as follows:
- a. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees, to the extent permitted by law, subject to Maui County Council approval.
- D. For purposes of this MOA, paragraph no. 33 of the General Conditions is hereby amended to read as follows:
- a. Patented Articles. The CONTRACTOR shall, to the extent permitted by law and subject to Maui County Council approval, defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.
- E. For purposes of this MOA, any reference to "contracts" in the General Conditions is to be changed to "memorandum of agreement" or "MOA."

**VIII. AMENDMENTS TO AGREEMENT AND OTHER GENERAL REQUIREMENTS**

- A. This MOA may be amended through a mutually acceptable written statement.
- B. This MOA may be terminated by mutual agreement with thirty (30) days prior written notice.
- C. The validity of this MOA, and any of its terms or provisions, as well as the rights and duties of the parties to this MOA, shall be governed by the laws of the State of Hawai'i.
- D. This agreement is not intended to create any rights, interest or remedies for any third party beneficiaries and third parties may not rely upon this MOA to assert any claim against the State or any State employee, whether individually or in their official capacity.
- E. This MOA represents the entire agreement and understanding between the parties with respect to its subject matter and supersedes any prior and/or contemporaneous discussions, representations, understandings, or agreements, whether oral or written, of the parties regarding this matter.

**[SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, the parties hereto have executed the Memorandum of Agreement no. 19142 per the below signatures:

**HAWAI'I TOURISM AUTHORITY:**

By \_\_\_\_\_  
(Signature)  
\_\_\_\_\_  
(Print Name)  
\_\_\_\_\_  
(Title)  
\_\_\_\_\_  
(Date)

\*\*\*\*\*

**COUNTY OF MAUI**

By \_\_\_\_\_  
(Signature)  
\_\_\_\_\_  
(Print Name)  
\_\_\_\_\_  
(Title)  
\_\_\_\_\_  
(Date)

**[COUNTY'S PROPOSAL IS INCORPORATED BY REFERENCE.]**

**[THIS IS THE END OF THE MOA.]**



# GENERAL CONDITIONS

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## GENERAL CONDITIONS

1. Coordination of Services by the STATE. The head of the purchasing agency ("HOPA") (which term includes the designee of the HOPA) shall coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Contract. The CONTRACTOR shall maintain communications with HOPA at all stages of the CONTRACTOR'S work, and submit to HOPA for resolution any questions which may arise as to the performance of this Contract. "Purchasing agency" as used in these General Conditions means and includes any governmental body which is authorized under chapter 103D, HRS, or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods or services or both.
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
  - a. In the performance of services required under this Contract, the CONTRACTOR is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE'S opinion, the services are being performed by the CONTRACTOR in compliance with this Contract. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
  - b. The CONTRACTOR and the CONTRACTOR'S employees and agents are not by reason of this Contract, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR'S employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
  - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR'S performance under this Contract. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR'S employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR'S employees or agents in the course of their employment.
  - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Contract, including but not limited to (i) income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
  - e. The CONTRACTOR shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of the Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Contract. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 17 of these General Conditions.
  - f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR'S employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

- g. The CONTRACTOR shall obtain a certificate of compliance issued by the Department of Labor and Industrial Relations, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
- h. The CONTRACTOR shall obtain a certificate of good standing issued by the Department of Commerce and Consumer Affairs, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
- i. In lieu of the above certificates from the Department of Taxation, Labor and Industrial Relations, and Commerce and Consumer Affairs, the CONTRACTOR may submit proof of compliance through the State Procurement Office's designated certification process.

3. Personnel Requirements.

- a. The CONTRACTOR shall secure, at the CONTRACTOR'S own expense, all personnel required to perform this Contract.
- b. The CONTRACTOR shall ensure that the CONTRACTOR'S employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.

4. Nondiscrimination. No person performing work under this Contract, 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.

5. Conflicts of Interest. The CONTRACTOR represents that neither the CONTRACTOR, nor any employee or agent of the CONTRACTOR, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with the CONTRACTOR'S performance under this Contract.

6. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR'S duties, obligations, or interests under this Contract and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE, and (ii) the CONTRACTOR'S assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR'S assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR'S right to compensation under this Contract shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

a. Recognition of a successor in interest. When in the best interest of the State, a successor in interest may be recognized in an assignment contract in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:

- (1) The Assignee assumes all of the CONTRACTOR'S obligations;
- (2) The CONTRACTOR remains liable for all obligations under this Contract but waives all rights under this Contract as against the STATE; and
- (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required bonds.

b. Change of name. When the CONTRACTOR asks to change the name in which it holds this Contract with the STATE, the procurement officer of the purchasing agency (hereinafter referred to as the "Agency procurement officer") shall, upon receipt of a document acceptable or satisfactory to the

Agency procurement officer indicating such change of name (for example, an amendment to the CONTRACTOR'S articles of incorporation), enter into an amendment to this Contract with the CONTRACTOR to effect such a change of name. The amendment to this Contract changing the CONTRACTOR'S name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.

- c. Reports. All assignment contracts and amendments to this Contract effecting changes of the CONTRACTOR'S name or novations hereunder shall be reported to the chief procurement officer (CPO) as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
  - d. Actions affecting more than one purchasing agency. Notwithstanding the provisions of subparagraphs 6a through 6c herein, when the CONTRACTOR holds contracts with more than one purchasing agency of the State, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the CPO's office.
7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR'S employees, officers, agents, or subcontractors under this Contract. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.
  8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
  9. Liquidated Damages. When the CONTRACTOR is given notice of delay or nonperformance as specified in paragraph 13 (Termination for Default) and fails to cure in the time specified, it is agreed the CONTRACTOR shall pay to the STATE the amount, if any, set forth in this Contract per calendar day from the date set for cure until either (i) the STATE reasonably obtains similar goods or services, or both, if the CONTRACTOR is terminated for default, or (ii) until the CONTRACTOR provides the goods or services, or both, if the CONTRACTOR is not terminated for default. To the extent that the CONTRACTOR'S delay or nonperformance is excused under paragraph 13d (Excuse for Nonperformance or Delay Performance), liquidated damages shall not be assessable against the CONTRACTOR. The CONTRACTOR remains liable for damages caused other than by delay.
  10. STATE'S Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Contract, any amounts owed to the State of Hawaii by the CONTRACTOR under this Contract or any other contracts, or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.
  11. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time.
  12. Suspension of Contract. The STATE reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the CONTRACTOR in accordance with the provisions herein.
    - a. Order to stop performance. The Agency procurement officer 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 performance called for by this Contract. This order shall be for a specified



period not exceeding sixty (60) 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 performance order issued pursuant to this section. Stop performance orders shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the CONTRACTOR for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the CONTRACTOR for minimizing costs. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and suspend all performance under this Contract at the time stated, provided, however, the CONTRACTOR shall take all reasonable steps to minimize the occurrence of costs allocable to the performance covered by the order during the period of performance stoppage. Before the stop performance order expires, or within any further period to which the parties shall have agreed, the Agency procurement officer shall either:

- (1) Cancel the stop performance order; or
- (2) Terminate the performance covered by such order as provided in the termination for default provision or the termination for convenience provision of this Contract.

b. Cancellation or expiration of the order. If a stop performance order issued under this section 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 performance. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the Contract shall be modified in writing accordingly, if:

- (1) The stop performance 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
- (2) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of performance stoppage; provided that, if the Agency procurement officer 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.

c. Termination of stopped performance. If a stop performance order is not cancelled and the performance covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop performance order shall be allowable by adjustment or otherwise.

d. Adjustment of price. Any adjustment in contract price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

13. Termination for Default.

a. 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, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of this Contract, the Agency procurement officer 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 Agency procurement officer, 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 delay or a failure to properly perform. In the event of termination in whole or in part, the Agency procurement officer may procure similar goods or services in a manner and upon the terms deemed appropriate by the Agency procurement officer. 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.

b. CONTRACTOR'S duties. Notwithstanding termination of the Contract and subject to any directions from the Agency procurement officer, the CONTRACTOR shall take timely, reasonable, and

necessary action to protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest.

- c. Compensation. Payment for completed goods and services delivered and accepted by the STATE shall be at the price set forth in the Contract. Payment for the protection and preservation of property shall be in an amount agreed upon by the CONTRACTOR and the Agency procurement officer. If the parties fail to agree, the Agency procurement officer shall set an amount subject to the CONTRACTOR'S rights under chapter 3-126, HAR. The STATE may withhold from amounts due the CONTRACTOR such sums as the Agency procurement officer deems to be necessary to protect the STATE against loss because of outstanding liens or claims and to reimburse the STATE for the excess costs expected to be incurred by the STATE in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. 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 performance hereunder which endangers such performance, if the CONTRACTOR has notified the Agency procurement officer 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 State and any other governmental body 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 goods and services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the CONTRACTOR to meet the requirements of the Contract. Upon request of the CONTRACTOR, the Agency procurement officer 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 STATE under this Contract. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.
- e. Erroneous termination for default. If, after notice of termination of the CONTRACTOR'S right to proceed under this paragraph, it is determined for any reason that the CONTRACTOR was not in default under this paragraph, or that the delay was excusable under the provisions of subparagraph 13d, "Excuse for nonperformance or delayed performance," the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to paragraph 14.
- f. Additional rights and remedies. The rights and remedies provided in this paragraph are in addition to any other rights and remedies provided by law or under this Contract.

14. Termination for Convenience.

- a. Termination. The Agency procurement officer may, when the interests of the STATE so require, terminate this Contract in whole or in part, for the convenience of the STATE. The Agency procurement officer shall give written notice of the termination to the CONTRACTOR specifying the part of the Contract terminated and when termination becomes effective.
- b. CONTRACTOR'S obligations. The CONTRACTOR shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination the CONTRACTOR will stop performance to the extent specified. The CONTRACTOR shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The CONTRACTOR shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the STATE'S approval. The Agency procurement officer may direct the CONTRACTOR to assign the CONTRACTOR'S right, title, and interest under terminated orders or subcontracts to the STATE. The CONTRACTOR must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.

- c. Right to goods and work product. The Agency procurement officer may require the CONTRACTOR to transfer title and deliver to the STATE in the manner and to the extent directed by the Agency procurement officer:

- (1) Any completed goods or work product; and
- (2) The partially completed goods 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 Agency procurement officer, protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest. If the Agency procurement officer does not exercise this right, the CONTRACTOR shall use best efforts to sell such goods and manufacturing materials. Use of this paragraph in no way implies that the STATE has breached the Contract by exercise of the termination for convenience provision.

- d. Compensation.

- (1) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, submitted to the extent required by chapter 3-122, HAR, bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Agency procurement officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph 14d(3) below.
- (2) The Agency procurement officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR 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 STATE, the proceeds of any sales of goods and manufacturing materials under subparagraph 14c, and the Contract price of the performance not terminated.
- (3) Absent complete agreement under subparagraph 14d(2) the Agency procurement officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under subparagraph 14d(2) shall not duplicate payments under this subparagraph for the following:
  - (A) Contract prices for goods or services accepted under the Contract;
  - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a fair and reasonable profit on such portion of the performance, such profit shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods 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;
  - (C) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to subparagraph 14b. These costs must not include costs paid in accordance with subparagraph 14d(3)(B);
  - (D) 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 and for the termination 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 14d(2), and the contract price of performance not terminated.

- (4) Costs claimed, agreed to, or established under subparagraphs 14d(2) and 14d(3) shall be in accordance with Chapter 3-123 (Cost Principles) of the Procurement Rules.

15. Claims Based on the Agency Procurement Officer's Actions or Omissions.

a. Changes in scope. If any action or omission on the part of the Agency procurement officer (which term includes the designee of such officer for purposes of this paragraph 15) requiring performance changes within the scope of the Contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

- (1) Written notice required. The CONTRACTOR shall give written notice to the Agency procurement officer:
- (A) Prior to the commencement of the performance involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
  - (B) Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did not have such knowledge prior to the commencement of the performance; or
  - (C) Within such further time as may be allowed by the Agency procurement officer in writing.
- (2) Notice content. This notice shall state that the CONTRACTOR regards the act or omission as a reason which may entitle the CONTRACTOR to additional compensation, damages, or an extension of time. The Agency procurement officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Agency procurement officer;
- (3) Basis must be explained. The notice required by subparagraph 15a(1) describes as clearly as practicable at the time the reasons why the CONTRACTOR believes that additional compensation, damages, or an extension of time may be remedies to which the CONTRACTOR is entitled; and
- (4) Claim must be justified. The CONTRACTOR must maintain and, upon request, make available to the Agency procurement officer within a reasonable time, detailed records to the extent practicable, and other documentation and evidence satisfactory to the STATE, justifying the claimed additional costs or an extension of time in connection with such changes.

b. CONTRACTOR not excused. Nothing herein contained, however, shall excuse the CONTRACTOR from compliance with any rules or laws precluding any state officers and CONTRACTOR from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.

c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

16. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Contract shall be subject to chapter 3-123 (Cost Principles), HAR, and the following guidelines:

- a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
- b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-sized vehicle.
- c. Unless prior written approval of the HOPA is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for inter-island or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.

17. Payment Procedures; Final Payment; Tax Clearance.

- a. Original invoices required. All payments under this Contract shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Contract have been performed by the CONTRACTOR according to the Contract.
- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
- c. Prompt payment.
  - (1) Any money, other than retainage, paid to the CONTRACTOR shall be disbursed to subcontractors 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; and
  - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
- d. Final payment. Final payment under this Contract shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid. Further, in accordance with section 3-122-112, HAR, CONTRACTOR shall provide a certificate affirming that the CONTRACTOR has remained in compliance with all applicable laws as required by this section.

18. Federal Funds. If this Contract is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Contract to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds. Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.

19. Modifications of Contract.

- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract permitted by this Contract shall be made by written amendment to this Contract, signed by the CONTRACTOR and the STATE, provided that change orders shall be made in accordance with paragraph 20 herein.
- b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract shall be permitted.

- c. Agency procurement officer. By written order, at any time, and without notice to any surety, the Agency procurement officer may unilaterally order of the CONTRACTOR:
    - (A) Changes in the work within the scope of the Contract; and
    - (B) Changes in the time of performance of the Contract that do not alter the scope of the Contract work.
  - d. Adjustments of price or time for performance. If any modification increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.
  - e. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if written modification of the Contract is not made prior to final payment under this Contract.
  - f. Claims not barred. In the absence of a written contract modification, nothing in this clause shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under this Contract or for a breach of contract.
  - g. Head of the purchasing agency approval. If this is a professional services contract awarded pursuant to section 103D-303 or 103D-304, HRS, any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract which increases the amount payable to the CONTRACTOR by at least \$25,000.00 and ten per cent (10%) or more of the initial contract price, must receive the prior approval of the head of the purchasing agency.
  - h. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE'S approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract, a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid.
  - i. Sole source contracts. Amendments to sole source contracts that would change the original scope of the Contract may only be made with the approval of the CPO. Annual renewal of a sole source contract for services should not be submitted as an amendment.
20. Change Order. The Agency procurement officer may, by a written order signed only by the STATE, at any time, and without notice to any surety, and subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:
- (1) Drawings, designs, or specifications, if the goods or services to be furnished are to be specially provided to the STATE in accordance therewith;
  - (2) Method of delivery; or
  - (3) Place of delivery.
- a. Adjustments of price or time for performance. If any change order increases or decreases the CONTRACTOR'S cost of, 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 the Contract price made pursuant to this provision shall be determined in accordance with the price adjustment provision 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 Agency procurement officer promptly and duly makes the provisional adjustments 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 any extension of time for completion.

- b. Time period for claim. Within ten (10) days after receipt of a written change order under subparagraph 20a, unless the period is extended by the Agency procurement officer in writing, the CONTRACTOR shall respond with a claim for an adjustment. The requirement for a timely written response by CONTRACTOR cannot be waived and shall be a condition precedent to the assertion of a claim.
- c. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if a written response is not given prior to final payment under this Contract.
- d. Other claims not barred. In the absence of a change order, nothing in this paragraph 20 shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under the Contract or for breach of contract.

21. Price Adjustment.

- a. Price adjustment. Any adjustment in the contract price pursuant to a provision in this Contract shall be made in one or more of the following ways:
  - (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (2) By unit prices specified in the Contract or subsequently agreed upon;
  - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
  - (4) In such other manner as the parties may mutually agree; or
  - (5) In the absence of agreement between the parties, by a unilateral determination by the Agency procurement officer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Agency procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
- b. Submission of cost or pricing data. The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, HAR.

22. Variation in Quantity for Definite Quantity Contracts. Upon the agreement of the STATE and the CONTRACTOR, the quantity of goods or services, or both, if a definite quantity is specified in this Contract, may be increased by a maximum of ten per cent (10%); provided the unit prices will remain the same except for any price adjustments otherwise applicable; and the Agency procurement officer 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.

23. Changes in Cost-Reimbursement Contract. If this Contract is a cost-reimbursement contract, the following provisions shall apply:

- a. The Agency procurement officer may at any time by written order, and without notice to the sureties, if any, make changes within the general scope of the Contract in any one or more of the following:
  - (1) Description of performance (Attachment 1);
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
  - (3) Place of performance of services;

- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the STATE in accordance with the drawings, designs, or specifications;
  - (5) Method of shipment or packing of supplies; or
  - (6) Place of delivery.
- b. If any change causes an increase or decrease in the estimated cost of, or the time required for performance of, any part of the performance under this Contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Contract, the Agency procurement officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the Contract accordingly.
  - c. The CONTRACTOR must assert the CONTRACTOR'S rights to an adjustment under this provision within thirty (30) days from the day of receipt of the written order. However, if the Agency procurement officer decides that the facts justify it, the Agency procurement officer may receive and act upon a proposal submitted before final payment under the Contract.
  - d. Failure to agree to any adjustment shall be a dispute under paragraph 11 of this Contract. However, nothing in this provision shall excuse the CONTRACTOR from proceeding with the Contract as changed.
  - e. Notwithstanding the terms and conditions of subparagraphs 23a and 23b, the estimated cost of this Contract and, if this Contract is incrementally funded, the funds allotted for the performance of this Contract, shall not be increased or considered to be increased except by specific written modification of the Contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract.
24. Confidentiality of Material.
- a. All material given to or made available to the CONTRACTOR by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
  - b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.
25. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any state employee, including the HOPA, the CPO, the Agency procurement officer, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR'S brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Contract shall be referred to the Agency procurement officer.
26. Ownership Rights and Copyright. The STATE shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the STATE upon expiration or termination of this Contract. The STATE, in its sole discretion, shall have the exclusive right to copyright any product, concept, or material developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract.
27. Liens and Warranties. Goods provided under this Contract shall be provided free of all liens and provided together with all applicable warranties, or with the warranties described in the Contract documents, whichever are greater.



28. Audit of Books and Records of the CONTRACTOR. The STATE may, at reasonable times and places, audit the books and records of the CONTRACTOR, prospective contractor, subcontractor, or prospective subcontractor which are related to:

- a. The cost or pricing data, and
- b. A state contract, including subcontracts, other than a firm fixed-price contract.

29. Cost or Pricing Data. Cost or pricing data must be submitted to the Agency procurement officer and timely certified as accurate for contracts over \$100,000 unless the contract is for a multiple-term or as otherwise specified by the Agency procurement officer. Unless otherwise required by the Agency procurement officer, cost or pricing data submission is not required for contracts awarded pursuant to competitive sealed bid procedures.

If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the STATE 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. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data was not used or relied upon, the price will be reduced in such amount.

30. Audit of Cost or Pricing Data. When cost or pricing principles are applicable, the STATE may require an audit of cost or pricing data.

31. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.

32. Antitrust Claims. The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to STATE any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the STATE under an escalation clause.

33. Patented Articles. The CONTRACTOR shall defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.

34. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
35. Compliance with Laws. The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR'S performance of this Contract.
36. Conflict Between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the procurement rules, the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.
37. Entire Contract. This Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Contract. This Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
38. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.
39. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE'S right to enforce the same in accordance with this Contract. The fact that the STATE specifically refers to one provision of the procurement rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Contract shall not constitute a waiver or relinquishment of the STATE'S rights or the CONTRACTOR'S obligations under the procurement rules or statutes.
40. Pollution Control. If during the performance of this Contract, the CONTRACTOR encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in section 128D-1, HRS, the CONTRACTOR shall immediately notify the STATE and all other appropriate state, county, or federal agencies as required by law. The Contractor shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the STATE determines that this Contract requires an adjustment of the time for performance, the Contract shall be modified in writing accordingly.
41. Campaign Contributions. The CONTRACTOR is hereby notified of the applicability of 11-355, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
42. Confidentiality of Personal Information.
- 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 Hawaii 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) All material given to or made available to the CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by the CONTRACTOR and shall not be disclosed without the prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.
- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR 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) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
  - (A) The personal information collected, used, or maintained by the CONTRACTOR will be treated as confidential;
  - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
  - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for the CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, the CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.

**HAWAII TOURISM AUTHORITY  
APPLICATION FORM**

**APPLICANT INFORMATION:**

Organization: County of Maui Department of Fire and Public Safety

Street Address: 200 Dalry Road

Mailing Address: Kahului, HI. 96732

Phone 808-270-7561

Fax 808-270-9515

Federal Taxpayer ID No: 99-6000618 State Taxpayer ID No: WH-079-734-5792-01

Organization is a (check one):  For-profit entity  Non-profit entity  Government entity

**PROJECT INFORMATION:**

Project Title: Hawaii Tourism Authority Support of Hawaii's Ocean Safety

Amount Requested: \$125,000.00

Project Time Period: Anticipated to begin no later than 1 January, 2018

Brief description of your project including a discussion of its significance to Hawaii's visitor industry and community (maximum 50 words): Joint project with HTA for a matching funds opportunity to support and improve the lifesaving work our Lifeguards perform each day to residents and visitors alike.

**PRIMARY CONTACT/PROGRAM MANAGER:**

Contact Person

Kevin McAfee  
Name

Battalion Chief  
Title

Phone: 808-870-4443

Email: kevin.mcafee@mauicounty.gov

**CERTIFICATION:**

The information contained in this application is true and correct to the best of my knowledge and belief. The document has been duly authorized by the governing body of the organization.

  
Signature of Authorized Official

10/25/18  
Date

Kevin McAfee  
Print Name

Battalion Chief  
Title



## PROPOSAL OUTLINE

### A. GENERAL BACKGROUND

#### A.1. MAUI FIRE DEPARTMENT - DESCRIPTION OF ORGANIZATION:

Hawaii became the 50th state in the United States in 1959. Firefighting goes back to the late 1800's as a volunteer organization. At that time most of the fire protection was the result of plantation camps being accomplished by way of bucket brigades. Then in 1924 there were several significant fires that motivated the board of supervisors, predecessor to the county council, to begin upgrading fire protection for the island. The first chief and firefighters were hired July and August 1924.

Lifeguarding on Maui started in about 1977. After 39 years The Ocean Safety Bureau (OSB) merged with the Maui Fire Department in FY16.

According to the United States Census Bureau, the estimated population of Maui was 163,019 as of 2014. This number includes approximately 7,500 residents on Moloka'i and 3,500 on Lana'i islands and 1,000 in Hana district. In addition to the residents the county has an average visitor population of 55,822 per day, with spikes as high as 66,347 during peak travel time in December.

Maui County is unique as it is the only county in the State of Hawaii to have multiple islands. There are five islands that make up the county, of which only three are occupied. The total protected area for the department is 1,162 square miles of land and 1,237 square miles of ocean considered part of the jurisdiction.

The department responded to over 10,000 emergencies in 2017. Many were water related. Calendar year 2018 has already seen almost 30 fatal drownings to date.

The Ocean Safety Bureau of the fire department has managed to evolve with the growth of building stock and related population; it is a career service staffed with 34 uniformed Ocean Safety Officers on a daily basis working out of 12 towers, on 9 beaches.

#### A.2. QUALIFICATIONS AND EXPERTISE:

Battalion Chief (BC) Kevin McAfee, working with the approval and authority of the Chief Officer, David Thyne, will be tasked with the conduct of this project. BC McAfee has 25 year's experience in the fire service on Maui and currently serves in the BC position of the Ocean Safety Bureau.

OSB Operation's Manager Cary Kayama has over 20 years of experience as an Ocean Safety Officer (lifeguard) with Maui County. He currently serves in the senior lifeguard position managing the day to day activities of the OSO's.

## **B. PROJECT DESCRIPTION/HISTORY**

### **B.1. DESCRIPTION OF PROPOSED PROJECT:**

In June of this year the HTA contacted the Ocean/Water Safety agencies within the State of Hawaii to discuss funding needs in support of each counties ocean safety program and mission. On review of the budget request submitted to Maui County Council OSB determined that the rescue equipment requested, but not adopted by Maui County Council, was, and is, still needed to provide ocean safety services to the population base of Maui County and our visitors.

Our work plan with this project will be based on the acquisition of rescue equipment we deemed necessary to provide lifesaving services, but was not adopted by the Maui County Council. OSB will follow the County of Maui and State of Hawaii process of equipment selection (selected to match current inventory and performance), seeking of bids, requisitions, and deliver of Purchase Orders to ultimately acquire the equipment items.

We expect the process to begin as soon as possible following receipt of the funds and anticipate approximately 3 months of time for the overall process to run it's course within the County of Maui's budget and finance department.

### **B.2. COMMUNITY SUPPORT AND INVOLVEMENT:**

Discuss the following:

- a. What is the need in the community for this project?

The growing population on Maui, and the steady flow of visitors means more people in the water on a daily basis. Although most of the ocean related responses are to assist non-residents they are considered a part of the Maui Community.

- b. What is the value to the community?

The ability to respond quickly to a swimmer in distress, in terms of the value of doing so, is critical to a positive outcome. We focus on making the 'rescue' vs a 'recovery'. It's a measurement we hope nobody needs to make.

- c. Identify all entities that support or are directly involved in this project.

County of Maui Department of Fire and Public Safety

### **B.3. PROJECT SUSTAINABILITY:**

The goals of the OSB have, and will always include a sustainability component. Our on-going budget process provides OSB with an annual review of needs, although those needs are not always adopted. We will continue to seek alternative means to support the needs including through funds gained through our new non-profit *Maui Lifeguards Association*.

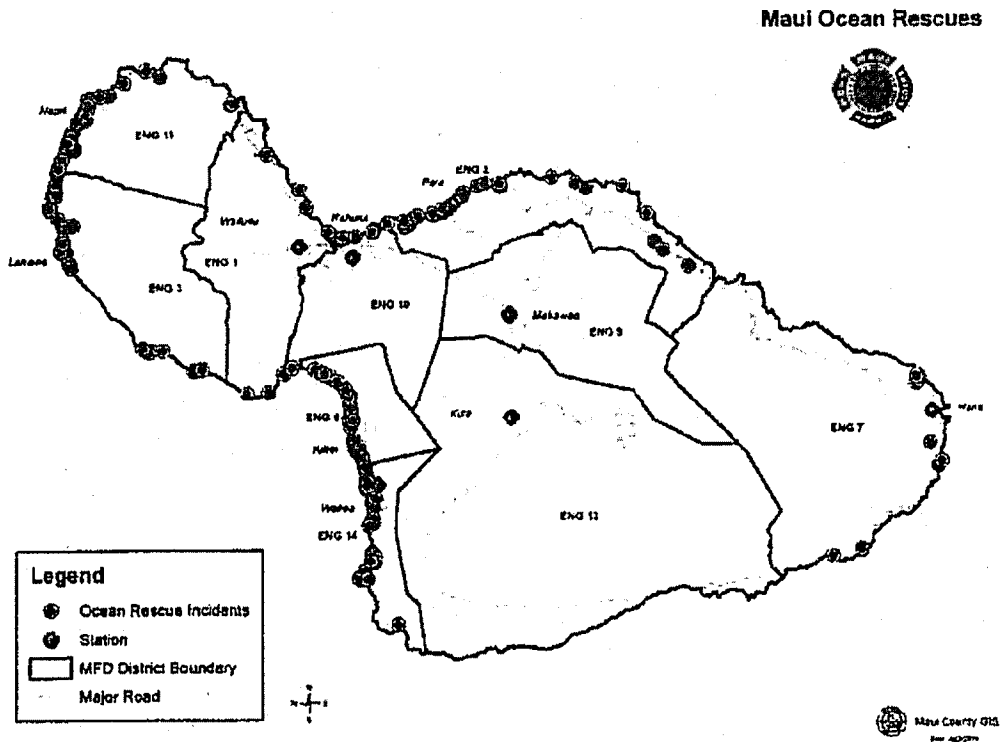


## C. PROJECT IMPACT

### C.1. BENEFITS AND OUTCOMES:

This joint funding opportunity will provide Maui OSB with lifesaving equipment that will replace, and upgrade our current aging equipment inventory. The items listed in Attachment B directly enhance the ability of our Ocean Safety Officers and expand the response area beyond the traditional confines of single beach outward to match the response areas of our Fire companies. See Maui Ocean Rescues map.

Open Water Lifeguard services and specifically equipment like the rescue equipment to be purchased, have benefitted an untold number of persons in distress in the waters of Hawaii, without bias. This equipment has, and will continue to enhance the readiness of our Lifeguards, increase the speed at which they can respond, and expand the range and 'reach' of our ocean safety professionals.





Attachment B

	HTA CASH	OTHER CASH	IN-KIND	TOTAL BUDGETED
<b>Expenses</b>				
Please list specific project expenses and group expense items by category as appropriate (i.e., Marketing, Operations, Administration, Equipment)				
<b>RESCUE EQUIPMENT</b>				
PWC w/ trailer and rescue sled	x 3 = \$60,000.00	x 2 = \$40,000.00		\$100,000.00
AED's	x 8 = \$20,000.00	x 10 = \$25,000.00		\$45,000.00
Rescue Boards	x 5 = \$7,500.00	x 5 = \$7,500.00		\$15,000.00
All-terrain vehicle	x 2 = \$30,000.00	x 1 = \$15,000.00		\$45,000.00
<b>PERSONAL PROTECTIVE EQUIPMENT</b>				
Rescue Fins	x 45 = \$3,000.00	x 15 = \$1,000.00		\$4,000.00
PWC Fin belt	x 30 = \$500.00	x 30 = \$500.00		\$1,000.00
Mask w/snorkel	x 40 = \$4,000.00	x 20 = \$2,000.00		\$6,000.00
Standard Uniform items - Various			\$32,000	\$32,000
Rain / Wind accessories - Various			\$2,000	\$2,000
<b>TOTAL EXPENSES</b>	<b>\$125,000.00</b>	<b>\$125,000.00</b>		<b>\$250,000.00</b>
<b>Income</b>				
	<b>HTA CASH</b>	<b>OTHER CASH</b>	<b>IN-KIND</b>	<b>TOTAL</b>
HTA	\$125,000			\$125,000.00
Other Sponsors/Sources:				
County of Maui adopted budget FY19		\$125,000.00		\$125,000.00
<b>TOTAL INCOME</b>	<b>\$125,000.00</b>	<b>\$125,000.00</b>		<b>\$250,000.00</b>