

ORDINANCE NO. _____

BILL NO. 196 (2022)

**A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE
COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT
WITH THE UNITED STATES DEPARTMENT OF THE ARMY (US ARMY)
REGARDING A DESIGN AGREEMENT FOR THE
IAO STREAM, MAUI, HAWAII – FLOOD RISK MANAGEMENT**

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

SECTION 1. Purpose. The County of Maui and the United States Department of the Army (US ARMY) wish to enter into a Design Agreement (“the Agreement”) to establish the procedures and responsibilities of County of Maui Department of Public Works and the US ARMY for shared costs related to the design for correcting the design deficiency of the existing Iao Stream Flood Control Project, as more fully described in the “Design Agreement Between the Department of the Army and County of Maui for Design for the Iao Stream, Maui, Hawaii – Flood Risk Management” attached hereto and incorporated herein by reference as Exhibit “1.”

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

SECTION 2. Council authorization. Pursuant to Section 2.20.020, Maui County Code, the Council of the County of Maui hereby authorizes the Mayor to execute the Agreement, all other necessary documents relating to the Agreement, and any amendments thereto.

SECTION 3. Effective date. This ordinance takes effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

/s/ Michael J. Hopper

MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

LF2022-1442
2022-10-21 IGA Ord Iao Stream Flood Risk Management

INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Chris R. Lee", is written over a horizontal line.

Upon the request of the Mayor.

**DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
COUNTY OF MAUI
FOR
DESIGN
FOR THE
IAO STREAM, MAUI, HAWAII – FLOOD RISK MANAGEMENT**

THIS AGREEMENT is entered into this ____ day of _____, _____, by and between the Department of the Army (hereinafter the “Government”), represented by the District Commander for **Honolulu District** (hereinafter the “District Commander”) and the **County of Maui** (hereinafter the “Non-Federal Sponsor”), represented by the **Mayor**.

WITNESSETH, THAT:

WHEREAS, construction of the Iao Stream, Hawaii (hereinafter the “Existing Project”) was authorized by Section 203 of the Flood Control Act of 1968 (Public Law (P.L.) 90-483);

WHEREAS, on 3 May 1976, the Government and the Non-Federal Sponsor entered into a Local Cooperation Agreement for construction of the Existing Project and construction was completed in 1981;

WHEREAS, on 24 November 1995, the Acting Assistant Secretary of the Army (Civil Works) approved a project to correct the design deficiency associated with the Existing Project;

WHEREAS, Federal funds were provided in **Public Law 115-141, Consolidated Appropriations Act, 2018** to initiate design of the design deficiency corrections for the Existing Project (hereinafter the “Project,” as defined in Article I.A. of this agreement);

WHEREAS, **Section 103** of the Water Resources Development Act of 1986, as amended (**33 U.S.C. 2213**), specifies the cost-sharing requirements applicable to construction of the Project, and **Section 105(c)** of the Water Resources Development Act of 1986 (**33 U.S.C. 2215(c)**), provides that the costs of design shall be shared in the same percentages as construction of the Project;

WHEREAS, based on the Project’s primary purpose of **flood risk management**, the parties agree that the Non-Federal Sponsor shall contribute **35 percent** of the design costs under this Agreement; and

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term “Project” means **correcting the design deficiency of the Existing Project by removing Revetement X, installing a pre-formed scour hole and implementing a flood warning system allowing for greater energy dissipation and decreasing scouring forces along the toes of the levee system, as generally described in the Memorandum for Assistant Secretary of the Army (Civil Works), dated March 2022 and approved by Director of Civil Works on 8 March 2022.**

B. The term “Design” means **perform detailed Pre-Construction Engineering and Design up through preparation of the plans and specifications for the initial construction contract for the Project.**

C. The term “design costs” means the sum of all costs that are directly related to the Design and cost shared in accordance with the terms of this Agreement. Subject to the provisions of this Agreement, the term shall include the Government’s costs for engineering and design, including economic, real estate, and environmental analyses, a safety assurance review, if required, and supervision and administration; and the Non-Federal Sponsor’s creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; participation by the Government and Non-Federal Sponsor in the Design Coordination Team to discuss significant issues and actions; audits; betterments; or the Non-Federal Sponsor’s cost of negotiating this Agreement.

D. The term “HTRW” means hazardous, toxic, and radioactive wastes, which includes any material listed as a “hazardous substance” (42 U.S.C. 9601(14)) regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter “CERCLA”) (42 U.S.C. 9601-9675) and any other regulated material in accordance with applicable laws and regulations.

E. The term “in-kind contributions” means those creditable materials or services provided by the Non-Federal Sponsor that are identified as being integral to Design of the Project by the Division Commander for **Pacific Ocean Division** (hereinafter the “Division Commander”). To be integral, the material or service must be part of the work that the Government would otherwise have undertaken for Design of the Project. In-kind contributions also include any investigations performed by the Non-Federal Sponsor to identify the existence and extent of any HTRW as required for Design of the Project.

F. The term “betterment” means a difference in the Design of the Project that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to Design of the Project.

G. The term “fiscal year” means one year beginning on October 1st and ending on September 30th of the following year.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Design using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all requirements of applicable Federal laws and implementing regulations, including but not limited to, if applicable, Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

B. The Non-Federal Sponsor shall contribute 35 percent of design costs in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall be responsible for undertaking any investigations that the Government determines are required for Design of the Project to identify the existence and extent of any HTRW.

2. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor to meet its cost share for the initial fiscal year of the Design. No later than 60 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government in accordance with Article III.C.

3. No later than August 1st prior to each subsequent fiscal year of the Design, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year to meet its cost share. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.C.

C. The Government shall include in design costs and credit towards the Non-Federal Sponsor's share of such costs, the cost of in-kind contributions performed by the Non-Federal Sponsor that are determined by the Government to be integral to Design of the Project. Creditable in-kind contributions may include costs for engineering, design, and supervision and administration, but shall not include any costs associated with betterments. Such costs shall be subject to audit in accordance with Article VII to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar days after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation for the Government to determine the costs that are creditable to the Non-Federal Sponsor's share of design costs. Failure to provide such documentation in a timely manner may

result in denial of credit. Appropriate documentation includes invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees.

2. No credit shall be afforded for the following: interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; any items provided or performed prior to the effective date of this Agreement unless covered by an In-Kind Memorandum of Understanding; any items not identified as integral in the integral determination report; or costs that exceed the Government's estimate of the cost for such in-kind contributions.

3. No reimbursement will be provided for any in-kind contributions that exceed the Non-Federal Sponsor's share of the design costs under this Agreement.

D. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on contracts solicitations prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

E. The Non-Federal Sponsor shall not use Federal program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Project. Federal program funds are those funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

F. In addition to the ongoing, regular discussions between the parties regarding Design delivery, the Government and the Non-Federal Sponsor may establish a Design Coordination Team to discuss significant issues or actions. Neither the Government's nor the Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be included in the design costs. The Non-Federal Sponsor's costs for participation on the Design Coordination Team shall be paid solely by the Non-Federal Sponsor without reimbursement or credit.

G. The Non-Federal Sponsor may request in writing that the Government include betterments in the Design of the Project. Each request shall be subject to review and written approval by the Division Commander. If the Government agrees to such request, the Non-Federal Sponsor, in accordance with Article III.F., must provide funds to cover the difference in the costs for design of such work, as determined by the Government, in advance of the Government performing the work.

H. If the Government and Non-Federal Sponsor enter into a Project Partnership Agreement for construction of the Project, the Government shall include the design costs in the calculation of construction costs for the Project in accordance with the terms and conditions of the Project Partnership Agreement.

ARTICLE III - PAYMENT OF FUNDS

A. As of the effective date of this Agreement, design costs are projected to be \$525,000, with the Government's share of such costs projected to be \$342,000, and the Non-Federal Sponsor's share of such costs projected to be \$184,000, which includes creditable in-kind contributions projected to be \$0 and the amount of funds required to meet its cost share projected to be \$184,000. Costs for betterments are projected to be \$0. These amounts are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Government shall provide the Non-Federal Sponsor with monthly reports setting forth the estimated design costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Design.

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, Honolulu (J3)" to the District Commander, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of the design costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's required share of the design costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional funds.

E. Upon completion of the Design and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds by delivering a check payable to "FAO, USAED, Honolulu (J3)" to the District Commander, or by providing an Electronic Funds Transfer of such funds in accordance with procedures established by the Government. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds or if requested by the Non-Federal Sponsor, apply the excess amount towards the non-Federal share of the cost of construction of

the Project in the event a Project Partnership Agreement is executed for the Project. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of design costs, including contract claims or any other liability that may become known after the final accounting.

F. If the Government agrees to include betterments on the Non-Federal Sponsor's behalf, the Government shall provide written notice to the Non-Federal Sponsor of the amount of funds required to cover such costs. No later than 30 calendar days after receipt of such written notice, the Non-Federal Sponsor shall make the full amount of such required funds available to the Government through either payment method specified in Article III.E. If at any time the Government determines that additional funds are required to cover any such costs, as applicable, the Non-Federal Sponsor shall provide those funds within 30 calendar days from receipt of written notice from the Government. If the Government determines that funds provided by the Non-Federal Sponsor exceed the amount required for the Government to complete such work, the Government shall refund any remaining unobligated amount.

ARTICLE IV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Government may suspend or terminate Design unless the Assistant Secretary of the Army (Civil Works) determines that continuation of the Design is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government determines at any time that the Federal funds made available for the Design are not sufficient to complete such work, the Government shall so notify the Non-Federal Sponsor in writing within 30 calendar days, and upon exhaustion of such funds, the Government shall suspend Design until there are sufficient Federal funds appropriated by the Congress and funds provided by the Non-Federal Sponsor to allow Design to resume.

C. In the event of termination, the parties shall conclude their activities relating to the Design and conduct an accounting in accordance with Article III.E. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

D. Any suspension or termination shall not relieve the parties of liability for any obligation incurred. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE V - HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from the Design, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE VI - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to the parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VII - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Design. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Design shall not be included in design costs.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the Non-Federal Sponsor's request, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The Non-Federal Sponsor shall pay the costs of non-Federal audits without reimbursement or credit by the Government.

ARTICLE VIII - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party shall provide, without

the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE IX - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Sponsor:

Director
Department of Public Works
County of Maui
200 South High Street, 4th Floor
Wailuku, Hawaii 96793

If to the Government:

District Commander
U.S. Army Corps of Engineers, Honolulu District
230 Otake Street, Building 230, Room 305
Fort Shafter, Hawaii 96858-5440

B. A party may change the recipient or address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

ARTICLE X - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XI - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Commander.

DEPARTMENT OF THE ARMY

COUNTY OF MAUI

BY: _____
CHRISTOPHER R. PEVEY
Lieutenant Colonel, U.S. Army
District Commander

BY: _____
MICHAEL P. VICTORINO
Mayor

DATE: _____

DATE: _____

CERTIFICATE OF AUTHORITY

I, _____, do hereby certify that I am the principal legal officer for the County of Maui, that the County of Maui is a legally constituted public body with full authority and legal capability to perform the terms of the Design Agreement between the Department of the Army and the County of Maui in connection with the Iao Stream project, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Design Agreement, as required by Section 221 of Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the person who executed this Design Agreement on behalf of the County of Maui acted within his/her statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
_____ day of _____ 20__.

MOANA M. LUTEY
CORPORATION COUNSEL

**NON-FEDERAL SPONSOR'S
SELF-CERTIFICATION OF FINANCIAL CAPABILITY
FOR AGREEMENTS**

I, _____, do hereby certify that I am the Finance Director of the County of Maui (the "Non-Federal Sponsor"); that I am aware of the financial obligations of the Non-Federal Sponsor for the Iao Stream, Maui, Hawaii – Flood Risk Management; and that the Non-Federal Sponsor has the financial capability to satisfy the Non-Federal Sponsor's obligations under the Iao Stream, Maui, Hawaii – Flood Risk Management project .

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____, _____.

BY: _____
SCOTT TERUYA

TITLE: DIRECTOR OF FINANCE_____

DATE: _____

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

MICHAEL P. VICTORINO
MAYOR
COUNTY OF MAUI

DATE: _____

DIGEST

ORDINANCE NO. _____
BILL NO. 196 (2022)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE
COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT
WITH THE UNITED STATES DEPARTMENT OF THE ARMY (US ARMY)
REGARDING A DESIGN AGREEMENT FOR THE
IAO STREAM, MAUI, HAWAII – FLOOD RISK MANAGEMENT

This bill proposes to authorize the Mayor to enter into an intergovernmental agreement with United States Department of the Army, Corps of Engineers, to complete the design of the Iao Stream Flood Control Project.

I, KATHY L. KAOHU, County Clerk of the County of Maui, State of Hawaii, DO
HEREBY CERTIFY that the foregoing BILL NO. 196 (2022) was passed on First Reading
by the Council of the County of Maui, State of Hawaii, on the 18th day of November, 2022,
by the following vote:

AYES: Councilmembers Gabriel Johnson, Natalie A. Kama, Michael J. Molina, Tamara A. M. Paltin, Shane M. Sinenci, Vice-Chair Keani N. W. Rawlins-Fernandez, and Chair Alice L. Lee.

NOES: None.

EXCUSED: Councilmembers Kelly T. King and Yuki Lei K. Sugimura.

DATED at Wailuku, Maui, Hawaii, this 21st of November, 2022.



KATHY L. KAOHU, COUNTY CLERK
COUNTY OF MAUI, STATE OF HAWAII

Copies of the foregoing Bill, in full, are on file in the Office of the County Clerk, County of Maui, for use and examination by the public.