

MICHAEL P. VICTORINO
Mayor

MOANA M. LUTEY
Corporation Counsel

EDWARD S. KUSHI, JR.
First Deputy


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



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

April 24, 2020

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

FROM: Thomas Kolbe, Deputy Corporation Counsel 

SUBJECT: LITIGATION MATTERS – Settlement of Claims and Lawsuits (GET-1)
Hawaii Pacific Trenchless, Inc. v. Goodfellow Brothers, LLC et al.
Civil No.: 2CC181000436 (2)

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

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

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

We request that a representative from the Department of Environmental Management be in attendance during discussion of this matter.

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

TWK:chs
Enclosures

cc: Eric Nakagawa, Director Department of Environmental Management

Resolution

No. _____

AUTHORIZING SETTLEMENT OF
HAWAII PACIFIC TRENCHLESS, INC. VS.
GOODFELLOW BROTHERS, LLC, ET AL.,
CIVIL NO. 2CC181000436 (2)

WHEREAS, Plaintiff Hawaii Pacific Trenchless, Inc. filed a lawsuit in the Circuit Court of the Second Circuit in the State of Hawaii on November 5, 2018, Civil No. 2CC181000436 (2), against the County of Maui, claiming damages for (1) unjust enrichment; (2) negligent misrepresentation; and (3) promissory estoppel regarding its performance as a subcontractor on the Kihei Force Main No. 16 Project (C6177), a construction project at Kihei, Maui, Hawaii; and

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

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

Resolution No. _____

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

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

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Governance, Ethics, and Transparency Committee on _____; and
2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case; and
3. That it hereby authorizes the Director of Finance to satisfy said settlement of this case; and
4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Director the Department of Environmental Management, and the Corporation Counsel.

APPROVED AS TO FORM
AND LEGALITY:

THOMAS KOLBE
Deputy Corporation Counsel
County of Maui
Lit 5918

Served on TWK
FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

9:50 am
11/21/18

Of Counsel:

BAYS LUNG ROSE & HOLMA

MICHAEL C. CARROLL 7583-0
Attorney at Law
A Law Corporation
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000

2018 NOV -5 PM 2:57
N. ANAYA
EX OFFICIO CLERK

RECEIVED
CORPORATION COUNSEL
2018 NOV 21 AM 9:53

Attorney for Plaintiff
HAWAII PACIFIC TRENCHLESS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

HAWAII PACIFIC TRENCHLESS, INC.

Plaintiff,

vs.

GOODFELLOW BROS. LLC; TRAVELERS
CASUALTY AND SURETY COMPANY OF
AMERICA; COUNTY OF MAUI; JOHN
DOES 1-10; JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE ENTITIES 1-
10; and DOE GOVERNMENTAL ENTITIES
1-10,

Defendants.

CIVIL NO. 18-1-0436 (2)

COMPLAINT; SUMMONS

I do hereby certify that the foregoing
is a true copy of the original.


Ex Officio Clerk

COMPLAINT

Plaintiff HAWAII PACIFIC TRENCHLESS, INC. ("Plaintiff"), by and through its attorneys, Bays Lung Rose & Holma, hereby asserts the following Complaint against Defendants GOODFELLOW BROS. LLC; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; COUNTY OF MAUI; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10 (collectively, "Doe Defendants"), as follows:

THE PARTIES

1. Plaintiff HAWAII PACIFIC TRENCHLESS, INC. ("HPT") is and was, at all times relevant herein, a Hawaii corporation that does business in the State of Hawaii, County of Maui.

2. Upon information and belief, Defendant GOODFELLOW BROS. LLC, formally known as Goodfellow Bros. Inc. ("Goodfellow") is and was, at all times relevant herein, a Washington limited liability company that does business in the State of Hawaii, County of Maui.

3. Upon information and belief, Defendant TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA ("Travelers") is and was, at all times relevant herein, a Connecticut surety company that is authorized to do business in the State of Hawaii, County of Maui as a surety.

4. Upon information and belief, Defendant COUNTY OF MAUI ("County") is a municipal corporation duly organized under the laws of Hawaii with the capacity and power to sue and be sued pursuant to HRS Chapter 46, and other applicable laws.

5. Defendants John Does 1-10, Jane Does 1-10, Doe Corporations 1-10, Doe Partnerships 1-10, Doe Entities 1-10, and Doe Governmental Entities 1-10 (collectively, "Doe Defendants"), are persons, corporations, partnerships, governmental units or entities whose names, identities, capacities, activities and/or responsibilities are presently unknown to Plaintiff or its attorneys except that they are or were the attorneys, agents, principals, parents, subsidiaries, servants, employees, representatives, co-venturers, associates, consultants, owners, lessees, lessors, guarantors, assignees, assignors, licensees, successors in interest, heirs, assigns, and or licensors of the above-named Defendants and who in some manner presently unknown to Plaintiff may be able to provide the relief requested herein. Plaintiff prays for leave to certify the true names, identities, capacities, activities and/or responsibilities of the Doe Defendants when, through further discovery, the same are ascertained. Plaintiff has made a good faith effort to identify said Doe Defendants prior to filing the Complaint.

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to Hawaii Revised Statutes ("HRS") § 603-21.5(a)(3) to decide the actual controversy existing between Plaintiff and the Defendants.

7. This Court has jurisdiction over Defendants under HRS § 634-35(a).

8. Venue is proper in the Circuit Court of the Second Circuit pursuant to HRS § 603-36.

FACTUAL BACKGROUND

9. On April 20, 2015, Goodfellow and HPT entered into a Master Subcontract Agreement ("Subcontract"). The Subcontract was intended to serve as a master agreement for all projects for which Goodfellow engages Subcontractor, unless the parties

expressly agree in writing to the contrary. Under the Subcontract, each project on which GBI is engaged, the parties would execute a Work Authorization Form. The Work Authorization Form would specify the terms, conditions, information, exhibits and descriptions applicable to the specific project on which GBI performs the work.

10. On or about December 19, 2016, Goodfellow, as the general contractor, entered into Contract No. C6177 ("Prime Contract") with the County for the construction of the Kihei Force Main No. 16 project ("Project").

11. Pursuant to its obligations under the Prime Contract and Hawaii Revised Statutes § 103D-324, Goodfellow obtained a payment bond for the Project from Travelers signed December 9, 2016, bearing Bond No. 106614698 ("Bond"). The Bond guarantees payment to all of Goodfellow's subcontractors in the event Goodfellow fails to fulfill its obligation to pay the subcontractors directly.

12. On August 22, 2017, Goodfellow entered into a Work Authorization for HPT to act as a subcontractor on the Project to install by horizontal directional drilling 6,566 linear feet of Goodfellow provided 6" C900 DR14 Fusible PVC Pipe. The original estimated subcontract amount for this work was \$1,674,330.00. Under the Work Authorization, GBI was specifically responsible for inspections, **existing utility location verification**, disposal of mud slurry, surveying and layout, and design engineering. The Work Authorization further recognized that any "**unexpected or unknown objects encountered underground** ... may incur additional costs. Delays not the responsibility of [HPT] affecting the performance of the work, excepting those arising out of acts of God, will be subject to a daily cost of \$2,500."

13. The subcontract price was based on the Contract Documents for the Kihei Force Main No. 16 Replacement, Kihei Maui, Hawaii 96753 dated October 2016 ("Contract

Documents"). The Contract Documents included the Geotechnical Investigation Kihei Wastewater Pump Station (WWPS) No. 16 Sewer Force Main Wailea-Makena, Maui, Hawaii ("Geotech Report"). The Geotech Report represented that the soil conditions at the drill depth were predominantly basalt rock and cobble ground conditions were not present at the drill depth. This was significant to GBI or any other proposed subcontractors because directional drilling through cobble ground conditions is extremely more difficult and expensive than basalt, the condition described in the Geotech Report. The information contained herein constitute representations by the County and Goodfellow to HPT. HPT reasonably relied on these representations in entering into the Work Authorization and determining the price to complete this work.

14. In addition, Section 12 of the Prime Contract provides that subsurface or latent physical conditions at the site that differ materially from those indicated in the Prime Contract (including the Contract Documents) constitutes a differing site condition. If the differing site condition causes an increase in the cost or time to complete the work, an adjustment in the contract price and time will be awarded and other modifications made. HPT further relied on these and other express and implied representations to believe that if the soil conditions deviated materially from the conditions specified in the Contract Documents, that HPT would be entitled to modifications of the Work Authorization, including increasing the costs to perform the work.

15. After entering into the Work Authorization, HPT commenced work on the Project. Shortly after commencing work, it was discovered that the soil conditions at the drill depth were materially different from the condition specified in the Contract Documents. In particular, the soil conditions at the drill depth consisted of predominately cobble ground

conditions and not basalt. This was immediately reported to Goodfellow and the County, and HPT was instructed to continue to drill.

16. Goodfellow also instructed HPT to continue to drill with the understanding that Goodfellow and the County would compensate HPT for the additional costs relating to this work by change orders.

17. Over the course of the next several months, HPT attempted to negotiate a change order for the additional costs caused by the differing site condition. Meanwhile, Goodfellow directed HPT to continue to drill. In the course of these negotiations and performance of the work, Goodfellow and the County made express and implied representations to HPT that they agreed that this condition was a differing site condition, and that HPT would be paid for its additional costs. These representations include the following:

a. By email exchange from HPT to Albert Hahn with the County, HPT explained that the boring logs contained in the Geotech Report did not indicate cobble ground conditions, and the County responded “just asked our consultant to ask hirata. Had the same thought... How much would Pradeep have bid if he was going through cobble? cost/lf [linear feet]”

b. By email dated April 2, 2018 from Mike Jackman at Goodfellow, Mr. Jackman stated: “We are working on a County of Maui project and have had some delays in the work due to unforeseen ground conditions. As part of that delay the County of Maui has agreed to pay for additional time needed for drilling.”

c. By RFI 20 dated May 24, 2018, Goodfellow requested on behalf of HPT to increase the vertical and horizontal tolerance because the two feet tolerance in the

specifications for basalt rock ground conditions cannot be met in the actual cobble ground conditions observed. The County agreed and increased the tolerances.

18. Goodfellows also acted in bad faith and breached its obligations in negotiating change orders. Goodfellow significantly delayed submitting change orders in a timely manner to the County. Goodfellow also changed positions with respect to how to calculate costs for no legitimate reasons. Goodfellow also delayed in requesting information to the County, refusing to request information, and providing conflicting direction to HPT not in conformance with the contract documents or the parties' course of dealing on prior projects.

19. As part of these negotiations, Goodfellow agreed to pay at least \$405,000 for the additional costs, which was still significantly less than the actual costs to perform the work. Despite this acknowledgement, Goodfellow failed to approve a single change order for the additional costs.

20. Finally, rather than continue negotiating the change order, on July 16, 2018, at 4:00 pm, without any prior notice, Goodfellow delivered to HPT notice of termination for convenience of the Work Authorization and instructed HPT to remove all their equipment from the site by the close of business the following day.

21. While the Subcontract permitted Goodfellow to terminate HPT for convenience, if Goodfellow exercised this right, Goodfellow was responsible to pay HPT for its "properly documented direct costs of labor, materials and equipment used in the performance of the Work."

22. On July 17, 2018, HPT complied with Goodfellow's demand to remove the equipment, and further provided notice that HPT will be submitting its costs to GBI for payment of all direct costs for labor, materials and equipment associated with the work as

provided for under the Subcontract. As of July 17, 2018, Goodfellow had failed to pay retention and costs relating to change orders caused by the differing site condition.

23. After July 17, 2018, HPT attempted to negotiate payment of the retention and change orders. Goodfellow continued to refuse to negotiate in good faith to a resolution and failed to pay HPT any portion of its retention or the additional costs incurred and set forth in proposed change orders.

24. On October 3, 2018, and pursuant to HRS § 103D-324, HPT provided written notice to Goodfellow, as the contractor, and Travelers, as the surety, of its claim with substantial accuracy of the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. This written notice was served by registered or certified mailing to Goodfellow and Travelers. Among other things, this notice specified that HPT was owed \$1,100,173.37 for outstanding change orders, and \$59,096.27 for outstanding retainage. The total owed is \$1,159,269.64. These costs are HPT's properly documented direct costs of labor, materials and equipment used in the performance of the Work, and are recoverable costs under the Subcontract.

25. To date, GBI and Travelers have failed and refused to pay any portion of the outstanding amounts.

26. In addition, Goodfellow agreed to select HPT as the subcontractor and award HPT the work authorization on the Hanapepe and Kaumaulii Highway projects on the island of Kauai pursuant to the Subcontract. HPT was ready, willing and able to perform this work. Further, HPT agreed to go forward with these projects once Goodfellow remitted payment for the amounts owed on the Project. Goodfellow has refused to remit the payments preventing

HPT to work on these other projects. Consequently, HPT has lost profits on the Hanapepe and Kaumaulii Highway projects due to Goodfellow's breaches of the Subcontract as outlined herein.

COUNT I
(Breach of Contract Against Goodfellow)

27. HPT repeats, realleges, and incorporates herein by reference the allegations contained in paragraphs 1 through 26 of this Complaint.

28. The Subcontract and Work Authorization are valid contracts between HPT and Goodfellow. Under the Subcontract and Work Authorization, Goodfellow is obligated to pay HPT its properly documented direct costs of labor, materials and equipment used in the performance of the work in the amount of at least \$1,159,269.64.

29. Goodfellow breached the Subcontract and Work Authorization by failing and refusing to pay for this work.

30. In addition, Goodfellow agreed to select HPT as the subcontractor and award HPT the work authorization on the Hanapepe and Kaumaulii Highway projects.

31. Goodfellow breached the Subcontract by its actions as alleged herein and has deprived HPT of the profits that would have been received from these projects.

32. As a direct, proximate, and foreseeable result of Goodfellow's breach of contract, HPT has been damaged in an amount to be proven at trial.

COUNT II
(Breach of the Implied Covenant of Good Faith
And Fair Dealing Against Goodfellow)

33. HPT repeats, realleges, and incorporates herein by reference the allegations contained in paragraphs 1 through 32 of this Complaint.

34. In all contracts, including the Subcontract and Work Authorization, there is an implied covenant of good faith and fair dealing.

35. Goodfellow's conduct, as described herein, constitutes a breach of the implied covenant of good faith and fair dealing.

36. As a direct, proximate, and foreseeable result of Goodfellow's breach of the implied covenant of good faith and fair dealing, HPT has been damaged in an amount to be proven at trial.

COUNT III

(Unjust Enrichment And Quantum Meruit Against Goodfellow and the County)

37. HPT repeats, realleges, and incorporates herein by reference the allegations contained in paragraphs 1 through 36 of this Complaint.

38. HPT provided valuable construction services and materials to Goodfellow and the County for the Project in the amount of at least \$1,159,269.64 to which HPT has not been paid. Goodfellow and the County have been unjustly enriched by accepting and retaining the benefits of the services and materials provided by HPT without payment for its reasonable value.

39. As a direct, proximate, and foreseeable result of Goodfellow and the County's unjust enrichment, HPT has been damaged in an amount to be proven at trial.

COUNT IV

(Promissory Estoppel Against Goodfellow and the County)

40. HPT repeats, realleges, and incorporates herein by reference the allegations contained in paragraphs 1 through 39 of this Complaint.

41. Goodfellow and the County made express and implied promises and representations to HPT, including that HPT will be paid for its additional costs resulting from the differing site condition/cobble ground conditions.

42. HPT reasonably relied on these promises to its detriment.

43. Injustice to HPT can only be avoided by enforcing Goodfellow and the County's promises.

44. Goodfellow and the County should be estopped from asserting that their promises are unenforceable, and the Court should enforce these promises and award HPT its damages in an amount to be proven at trial.

COUNT V

(Negligent Misrepresentation Against Goodfellow and the County)

45. HPT repeats, realleges, and incorporates herein by reference the allegations contained in paragraphs 1 through 44 of this Complaint.

46. As set forth above, Goodfellow and the County negligently made or supplied express and implied representations of material facts to HPT, including the following:

- a. That the soil conditions at the drill depth was primarily basalt and not cobble ground conditions;
- b. That HPT would be compensated for differing site conditions to the soil;
- c. That there was in fact a differing site condition caused by the cobble ground conditions;
- d. That Goodfellow and the County would pay HPT for its continuing work on the Project and additional costs caused by the differing site condition;

47. Goodfellow and the County's representations were false and were made without due care for and/or in reckless disregard for the truth or falsity of such representations.

48. Goodfellow and the County knew or should have known that HPT would reasonably rely upon such representations.

49. HPT did, in fact, reasonably rely upon Goodfellow and the County's misrepresentations to its detriment.

50. As a direct, proximate, and foreseeable result of Goodfellow and the County's negligent misrepresentations, HPT has been damaged in an amount to be proven at trial.

COUNT VI
(Payment Bond Claim Against Travelers)

51. HPT repeats, realleges, and incorporates herein by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

52. Pursuant to the Bond, Travelers agreed to be jointly and severally bound to HPT to pay for all labor, material and equipment furnished for use in the performance of the work on the Project.

53. On October 3, 2018, HPT submitted a payment bond claim to Travelers for the Project pursuant to HRS § 103D-324. Specifically, HPT furnished labor and materials under the Subcontract and Work Authorization with Goodfellow, which is the prime contractor with the County, and Goodfellow benefitted from HPT's performance.

54. Travelers has breached the Bond in violation of its terms and HRS § 103D-324 by failing to make payment to HPT for all amounts owed by Goodfellow on the Project, which is currently at least \$1,159,269.64.

55. As a direct, proximate, and foreseeable result of Travelers' breach, HPT has been damaged in an amount to be proven at trial.

WHEREFORE, HPT respectfully requests that judgment be entered against Defendants as follows:

- A. For general, special, incidental and consequential damages in amounts to be proven at trial;
- B. For pre and post judgment interest;
- C. For its attorneys' fees, costs and expenses; and
- D. For such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, November 5, 2018.



MICHAEL C. CARROLL

Attorney for Plaintiff
HAWAII PACIFIC TRENCHLESS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

HAWAII PACIFIC TRENCHLESS, INC.)	CIVIL NO. _____
)	
Plaintiff,)	SUMMONS
)	
vs.)	
)	
GOODFELLOW BROS. LLC; TRAVELERS)	
CASUALTY AND SURETY COMPANY OF)	
AMERICA; COUNTY OF MAUI; JOHN)	
DOES 1-10; JANE DOES 1-10; DOE)	
CORPORATIONS 1-10; DOE)	
PARTNERSHIPS 1-10; DOE ENTITIES 1-)	
10; and DOE GOVERNMENTAL ENTITIES)	
1-10,)	
)	
Defendants.)	
_____)	

SUMMONS

STATE OF HAWAII

TO DEFENDANTS GOODFELLOW BROS. LLC; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; COUNTY OF MAUI; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10:

You are hereby summoned and required to file with the Court and serve upon MICHAEL C. CARROLL, ESQ., whose address is Topa Financial Center, 700 Bishop Street, Suite 900, Honolulu, Hawaii 96813, Plaintiff' attorneys, an answer to the Complaint which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled Court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: **NOV - 5 2018**, Hawaii, _____.

N. ANAYA

EX OFFICIO

CLERK OF THE ABOVE ENTITLED COURT

