

STATE OF HAWAII
Department of Land and Natural Resources
Engineering Division

September 28, 2012

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

**Approval to Execute Amendment No. 2 to Agreement (Feasibility Cost Sharing Agreement)
Between the Department of Army and the State of Hawaii Department of Land and
Natural Resources for the Ala Wai Watershed Feasibility Study**

The Engineering Division desires to execute an Amendment No. 2 to the Feasibility Cost Sharing Agreement (FCSA), with the Department of Army U.S. Corps of Engineers (COE) for the Ala Wai Watershed Feasibility Study.

BACKGROUND:

The FCSA for the Ala Wai Watershed Feasibility Study was originally executed on April 11, 2001 (initially under Contract no. 47834, as the "Ala Wai Canal Project – Feasibility Phase – Feasibility Cost Sharing Agreement (FCSA) and Project Study Plan (PSP)"), between the COE and the State of Hawaii Department of Land and Natural Resources (DLNR). The purpose of the feasibility study is to investigate the requirements for ecosystem restoration, and the identification and formulation of alternatives to address flood mitigation in the McCully and Manoa drainage basins. Part of the impetus for this continuing study is the 2004 flood which caused the Manoa stream to overrun its banks and inundate homes along the stream, as well as the University of Hawaii at Manoa. The total estimated cost of the feasibility study was \$1,520,000. In accordance with the FCSA, DLNR is required to contribute 50% of the estimated study costs or \$760,000. DLNR may contribute up to 25% of the study costs through the provision of in-kind services (providing services, materials, supplies, or other services necessary to prepare feasibility report).

The scope of the initial project was substantially increased. Amendment No. 1 to the FCSA was executed on December 7, 2006. This amendment increased the estimated cost of the feasibility study to \$5,120,000 and DLNR's share to \$2,560,000. The increased costs were due to the expansion of the study area from the initial McCully and Manoa drainage basins, to the entire Ala Wai Watershed, which consists of the three major drainage basins for Makiki, Manoa, and Palolo Streams.

Amendment No. 2 will amend the FCSA to increase the estimated feasibility study costs to \$9,259,000 and DLNR's share to \$4,553,000, with the COE to fund the remainder. The Amendment will increase DLNR's share of in-kind services to \$2,593,000, for work under this Agreement not yet undertaken. The increased costs are due to the complexity of the multi-purpose scope of this project and new review requirements by the COE.

The Project Study Plan (PSP) which was originally part of the FCSA, has been revised and is now called the Project Management Plan (PMP). The PMP was originally approved on July 2, 2002, and was amended on October 15, 2006 to support Amendment No. 1. The current version of the PMP was last amended on June 25, 2012.

COE Requirements

As part of the FCSA, the COE requires the State of Hawaii's chief legal counsel (Attorney General David Louie) to certify that DLNR: 1) has the requisite authority to perform the terms of the agreement; 2) will pay damages, if necessary, if DLNR fails to perform; and 3) is acting within its statutory authority by signing the agreement. Although the agreement was initially signed in 2001, this Amendment No. 2 has significantly

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increased the scope and funding commitments for the feasibility study, and therefore permission is being sought for confirmation of these COE requirements. Any damages to be paid are subject to approval by the legislature and the governor.

Chapter 343 Environmental Compliance

According to HRS §343-5 and HAR §11-200-5, proposed agency actions which involve feasibility or planning studies generally do not require the preparation of an environmental assessment unless the possible project or program has been "approved, adopted, or funded." This feasibility study will include environmental documentation to satisfy the National Environmental Policy Act (NEPA) and Hawaii Revised Statutes (HRS) chapter 343 requirements, and compliance information to justify further COE involvement. The Department will seek construction funding if the projects determined in this study are deemed feasible and necessary to enhance the Department's functions.

All other compliance or agency approvals for the study will be obtained as necessary.

Funding Source

Funds for the Ala Wai Watershed Feasibility Study were appropriated by Act 160, SLH 2006, Item A-7 and Act 178, SLH 2005, Item A-7, as amended by Act 160, SLH 2006, Item A-7.

Anticipated Timeline for Study Period

The Feasibility Study started upon the execution of the FCSA on April 11, 2001 and is anticipated to be completed in September 2015.

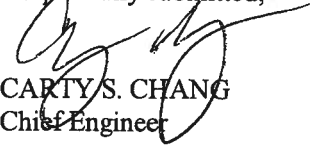
Copies of Amendment No. 1 and Draft Amendment No. 2 are attached. Copies of the original FCSA and the PMP are on file in the Engineering Division office and are available upon request.

RECOMMENDATION:

That the Board:

1. Authorize the Chairperson, subject to review and approval by the Department of the Attorney General, to sign Amendment No. 2 to the FCSA and enter into subsequent amendments to address unforeseen conditions and sign the necessary documents to implement the additional work provided that such changes are not of a substantial nature.
2. Acknowledge that the Project Study Plan, dated March 2001, which was an attachment to the FCSA, has been replaced with the Project Management Plan, dated June 25, 2012.
3. Acknowledge and approve Amendment No. 1 to the FCSA, which was executed on December 7, 2006.
4. Acknowledge that the Attorney General (AG) has the authority to certify that they are the principal legal officer of the State of Hawaii, and the Department of Land and Natural Resources (DLNR) is a legally constituted public body with full authority and legal capability to:
 - a. perform the terms of the FCSA and its amendments;
 - b. pay damages, if necessary, if DLNR fails to perform; and
 - c. that persons who have executed the Agreement on behalf of the State of Hawaii, DLNR have "acted within their statutory authority".

Respectfully submitted,


CARTY S. CHANG
Chief Engineer

Attach.

APPROVED FOR SUBMITTAL:


WILLIAM J. AILA, JR., Chairperson
Board of Land and Natural Resources

AMENDMENT NO. 1
TO THE AGREEMENT
BETWEEN THE DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS, HONOLULU DISTRICT
AND
THE STATE OF HAWAII - DEPARTMENT OF LAND AND NATURAL RESOURCES
FOR THE ALA WAI CANAL PROJECT FEASIBILITY STUDY

THIS AMENDMENT NO. 1 is entered into this 7th day, of December, 2006, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Corps of Engineers, Honolulu District executing this Amendment, and the State of Hawaii - Department of Land and Natural Resources (hereinafter the "Sponsor").

WITNESSETH, THAT:

WHEREAS, the Government and the Non-Federal Sponsor entered into a Feasibility Cost Share Agreement on April 11, 2001 (hereinafter the "Agreement") for a feasibility study of the Ala Wai Canal Project (hereinafter the "Project");

NOW, THEREFORE, the Government and the Sponsor agree to amend the Agreement as follows:

1. Delete the text of Article III.A. and replace with the following:

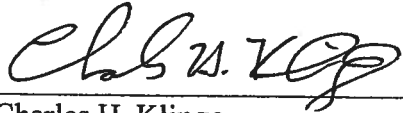
The Government shall maintain current records of contributions provided by the parties, current projections of Study Costs, current projections of each party's share of Study Costs, and current projections of the amount of Study Costs that will result in excess Study Costs. At least quarterly, the Government shall provide the Sponsor a report setting forth this information. As of the effective date of this Agreement, estimated Study Costs are \$5,120,000 and the Sponsor's share of estimated Study Costs is \$2,560,000. In order to meet the Sponsor's cash payment requirements for its share of estimated Study Costs, the Sponsor must provide a cash contribution currently estimated to be \$1,960,000. The dollar amounts set forth in this Article are based upon the Government's best estimates, which reflect the scope of the study described in the PSP, projected costs, price-level changes, and anticipated inflation. Such cost estimates are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Sponsor.

2. All other terms and conditions of the Agreement remain unchanged.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 1 which shall become effective upon the date it is signed by the District Engineer for the U.S. Army Corps of Engineers, Honolulu District.

DEPARTMENT OF THE ARMY

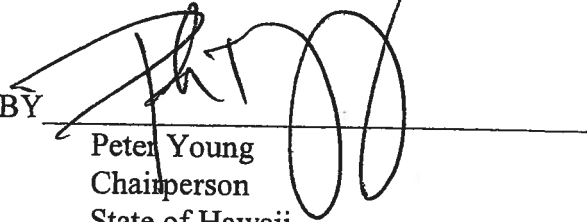
BY



Charles H. Klinge
Lieutenant Colonel, U.S. Army
District Commander
Honolulu District

THE STATE OF HAWAII -
DEPARTMENT OF LAND AND
NATURAL RESOURCES

BY



Peter Young
Chairperson
State of Hawaii
Board of Land and Natural Resources

APPROVED AS TO FORM

BY



Deputy Attorney General
State of Hawaii
Department of the Attorney General

AMENDMENT NO. 2
TO THE AGREEMENT
BETWEEN THE DEPARTMENT OF THE ARMY
AND
THE STATE OF HAWAII - DEPARTMENT OF LAND AND NATURAL RESOURCES
FOR THE ALA WAI WATERSHED FEASIBILITY STUDY

THIS AMENDMENT NO. 2 is entered into this ___ day, of _____, _____, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Honolulu District (hereinafter the "District Engineer"), and the State of Hawaii - Department of Land and Natural Resources (hereinafter the "Sponsor"), represented by the Chairperson, State of Hawaii, Board of Land and Natural Resources.

WITNESSETH, THAT:

WHEREAS, the Government and the Sponsor entered into an Agreement on April 11, 2001 to perform a feasibility study of the Ala Wai Canal Project (hereinafter the "Study");

WHEREAS, the Government and the Sponsor entered into Amendment No. 1 to the Agreement on December 7, 2006;

WHEREAS, while the Ala Wai Canal Project is known in the community as the Ala Wai Watershed project, the name of the Agreement should refer to the Ala Wai Canal Project by its authorized name;

WHEREAS, the estimated Study Costs have increased significantly due to the complexity of the multipurpose scope of the Ala Wai Canal Project and the new review processes required by the U.S. Army Corps of Engineers;

WHEREAS, Section 225 of the Water Resources Development Act of 2000 (Public Law 106-541) (hereinafter "Section 225") amended Section 105(a)(1)(E) of the Water Resources Development Act of 1986 (Public Law 99-662) (33 U.S.C. 2215(a)(1)(E)) to allow a sponsor to provide its entire share of Study Costs through the provision of in-kind services; and

WHEREAS, the Government and the Sponsor desire to amend the Agreement to allow the increase in in-kind services provided by Section 225 to apply to work under this Agreement that has not yet been undertaken.

NOW, THEREFORE, the Government and the Sponsor agree to amend the Agreement as follows:

1. The name of the Agreement is changed by replacing "Watershed" with "Canal Project".

2. In Article II.B, the second sentence is changed by replacing "25" with "50".

3. Article III.A. is changed as follows:

a. In the third sentence, "\$5,120,000" is replaced with "\$9,259,000" and "\$2,560,000" is replaced with "\$4,553,000".

b. The fourth sentence is deleted and replaced with: "In order to meet its requirements for its share of estimated Study Costs, the Sponsor is currently anticipating providing a cash contribution of \$1,960,000 and in-kind services at an estimated dollar value of \$2,593,000."

4. Notwithstanding the above, nothing in this Amendment requires the Government to refund or reimburse the Sponsor for funds previously contributed by the Sponsor to the Government for the Study.

5. All other terms and conditions of the Agreement remain unchanged.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 2 which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

THE STATE OF HAWAII -
DEPARTMENT OF LAND AND
NATURAL RESOURCES

BY _____
THOMAS D. ASBERY, P.E.
LIEUTENANT COLONEL, U.S. ARMY
DISTRICT ENGINEER

BY _____
WILLIAM J. AILA, JR.
CHAIRPERSON
STATE OF HAWAII
BOARD OF LAND AND NATURAL
RESOURCES

DATE: _____

DATE: _____

CERTIFICATE OF AUTHORITY

I, David M. Louie, do hereby certify that I am the principal legal officer of the State of Hawaii, Department of Land and Natural Resources, that the State of Hawaii, Department of Land and Natural Resources is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the State of Hawaii, Department of Land and Natural Resources in connection with the feasibility study for the Ala Wai Canal Project, Island of Oahu, Hawaii, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement and that the persons who have executed this Agreement on behalf of the State of Hawaii, Department of Land and Natural Resources have acted within their statutory authority.

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

DAVID M. LOUIE
ATTORNEY GENERAL
STATE OF HAWAII

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.

WILLIAM J. AILA, JR.
CHAIRPERSON
STATE OF HAWAII
BOARD OF LAND AND NATURAL
RESOURCES

DATE: _____