

C O N T R A C T

THIS AGREEMENT, made and entered into as of this 12th day of January, 2018 by and between the COUNTY OF HAWAI'I, a municipal corporation duly organized and existing under the laws of the State of Hawai'i, by HARRY KIM, its Mayor, hereinafter called the "COUNTY," and Brown and Caldwell, a corporation organized under the laws of the State of California, whose business address is 737 Bishop Street, Suite 3000 Pacific Guardian Center - Mauka Tower, Honolulu, Hawaii 96813-4020, a corporation organized under the laws of the State of California, hereinafter called the "CONSULTANT."

W I T N E S S E T H:

WHEREAS, the COUNTY wishes to obtain the services of the CONSULTANT to render the necessary professional engineering services for preliminary engineering, initial planning study, and public outreach services associated with installation of a wastewater treatment and disposal system for the community of Na'alehu, Hawai'i as part of the large capacity cesspool (LCC) closure project as described in Exhibit A; hereinafter called the "PROJECT;" and

WHEREAS, the CONSULTANT is qualified, ready, willing and able to provide such services; and

WHEREAS, the COUNTY and the CONSULTANT have detailed the scope of work to be performed by the CONSULTANT on the PROJECT in a separate attachment entitled "EXHIBIT A – SCOPE OF WORK", a copy of which is attached hereto; and

NOW, THEREFORE, the COUNTY and the CONSULTANT, in consideration of the mutual promises hereinafter set forth, hereby agree as follows:

1. That the CONSULTANT shall perform all of the services as described in Exhibit A - Scope of Work for the PROJECT in accordance with the General Terms and Conditions for Consultant Services Contracts dated October 22, 2014; hereinafter called the GENERAL TERMS & CONDITIONS; and

2. That the compensation for the work covered under the CONTRACT, subject to the General Terms and Conditions, shall consist of a fee not to exceed TWO HUNDRED NINETY-THREE THOUSAND TWO HUNDRED FOUR DOLLARS AND NO/100 (\$293,204.00) except in the case of contract amendment increasing or decreasing the scope of work; and,

3. That the work under of "EXHIBIT A – SCOPE OF WORK" on this CONTRACT shall be completed within the time periods established in "EXHIBIT A – SCOPE OF WORK" after the COUNTY has given the official written notice to proceed, exclusive of review time as may be required by the COUNTY and other agencies;

4. That liquidated damages for failure to perform the work within the time fixed or any extension thereof exclusive of review time or any delays beyond the control of the Consultant shall be ONE HUNDRED FIFTY DOLLARS (\$150.00) per calendar day. Project schedule and completion dates shall be as specified under EXHIBIT A herein.

5. That if a disagreement concerning this agreement or CONSULTANT'S work on the PROJECT arises which the parties cannot settle pursuant to the dispute resolution clause of the General Terms and Conditions for Consultant Contracts appended hereto and incorporated by reference herein, the parties agree that no action or proceeding involving this Agreement or Consultant's work on the Project shall be commenced by either party except in the Circuit or District Courts of the Third Circuit, County of Hawai'i, State of Hawai'i; nor shall any action commenced in such court be removed or transferred to any other state or federal court.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed as of the day and year first above written.

RECOMMEND APPROVAL:


WILLIAM A. KUCHARSKI
Director of Environmental Management


APPROVED AS TO FORM AND LEGALITY;


Deputy Corporation Counsel
County of Hawai'i

COUNTY:


WILFRED M. OKABE
Managing Director

CONSULTANT:


PETER R. ONO, P.E.
Executive Engineer, Brown and Caldwell

Date Signed: _____

Date Signed 11/28/2017

DESIGNATED REPRESENTATIVE:

DORA BECK, P.E.
Wastewater Division Chief

Phone Number: (808) 961-8513

Facsimile Number: (808) 961-8644

Email Address: dora.beck@hawaiicounty.gov

DESIGNATED REPRESENTATIVE:

CRAIG LEKVEN, P.E.
Title: Managing Engineer

Phone Number: (808) 442-3301

Facsimile Number: (808) 244-9026

Email Address: clekven@brwncald.com

EXHIBIT A - NAALEHU SCOPE OF WORK
Preliminary Engineering, Public Outreach, and Initial Planning Study

1. GENERAL DESCRIPTION:

1.1 The Consultant shall provide all engineering and related services for Preliminary Engineering, Public Outreach and Initial Planning Study for a Wastewater Collection, Treatment and Disposal system in Naalehu, Hawai'i in order to replace the existing Collection System as well as to allow closure of three (3) each existing Large Capacity Cesspools (LCC's) in accordance United States Environmental Protection Agency Administrative Order of Consent Docket No. SDWA-UIC-AOC-2017-0002.

1.2 The work under this contract shall include but is not limited to:

1.2.1 Preliminary Engineering Report (PER) – A PER will be provided for the new wastewater treatment facility that outlines the design criteria, design features, equipment sizing, and performance requirements.

1.2.1.1 Revisions to the existing PER for the Collection system, if required, will be performed via a separate contract.

1.2.1.2 The PER will be developed in parallel with Community Outreach in order to ensure that community concerns are addressed.

1.2.2 Community Outreach – Community Outreach will be conducted in order to ensure that community concerns are addressed as well as to ensure that the community is kept informed with regard to proposed methods of providing sustainable Wastewater Treatment and Disposal for the community.

1.2.2.1 While revisions to the existing PER for the Collection System will be provided via a separate contract, if required, Community Outreach shall include discussions regarding the proposed Collection System for the community.

1.2.3 Permitting Analysis – A permitting analysis for the project shall be performed to identify land entitlement permits which would be required for the Wastewater Treatment and Disposal System as well as the time and estimated costs for obtaining the required permits.

1.2.3.1 The County is currently in the processes of acquiring approximately eight (8) acres of land on TMK 9-5-011:003 which is intended to be utilized as a land application site and approximately four (4) acres of land on TMK 9-5-012:002 adjacent to TMK 9-5-011:003 which is intended to be utilized for the treatment processes.

1.2.3.2 A permitting analysis of properties required for installation of the proposed Collection System would be provided under separate contract.

2. SCOPE OF WORK:

2.1 TASK No. 1 – Project Management

2.1.1 Manage the project from inception through completion to include coordination with County and State agencies, perform budget tracking and scheduling and serve as the single point of contact for the County.

2.1.2 Clarify and accurately document any changes in scope of work, schedule, and budget.

2.1.3 Schedule, coordinate, and lead progress meetings regarding work performed under this Contract. Issue meeting minutes and memoranda of significant events and decisions as necessary.

2.1.4 Conduct Quality Assurance and Control review of all documents and submittals prior to presentation to the County.

2.1.5 Provide overall Project Management duties to ensure the project maintains project schedules as well as prepare monthly reports provided project status to the County.

2.1.5.1 Ensure that all deliverables are in compliance with the Project Schedule attached herein in order that deliverables to the EPA can be made by the County in accordance with USEPA Administrative Order of Consent (SDWA-UIC-AOC-2017-0002).

2.1.6 Project management duties shall include up to three (3) trips to Hilo for project review meetings with the County as well as up to three (3) trips to Nā'ālehu for site visits and data-gathering.

2.2 TASK NO. 2 – Preliminary Engineering Report (PER)

2.2.1 The PER for the new Wastewater Treatment and Disposal Facility (WWTP) shall outline design criteria, design features, equipment sizing, and performance requirements for the system.

2.2.2 Figures to illustrate design concepts as well as preliminary design criteria, layouts, process diagrams, and hydraulic profiles shall be provided.

2.2.3 The PER will compare nutrient loading to the environment from the WWTP as compared to status quo as well as conventional activated sludge processes and treatment systems proposed by the community.

- 2.2.4 The PER will make comparisons with the proposed WWTP and other options provided by the community including R-1 water recycling and advanced treatment.
 - 2.2.4.1 The comparison shall include a comparison of anticipated impacts to the environment as well as sustainability of the systems.
 - 2.2.4.2 Anticipated O&M costs for advanced treatment as well as R-1 shall be provided.
- 2.2.5 The PER shall be developed in parallel with Task 4 – Community Outreach in order that community concerns can be addressed.
 - 2.2.5.1 An initial system proposal consisting of graphics (maps, figures, photos, etc.) shall be developed to facilitate discussion with the community.
 - 2.2.5.2 The initial system proposal is anticipated to include headworks with odor control, aerated lagoons, calcium hypochlorite disinfection, and a slow rate land treatment system that incorporates native trees and shrubs.
 - 2.2.5.3 The initial system proposal shall be modified based on community and County input prior to development of the Draft PER.
- 2.2.6 An implementation schedule and plan for the project shall be developed incorporating the results of the public outreach, permitting analysis, and any other schedule drivers that are identified during the preliminary design effort.
- 2.2.7 The Draft and Final PER's shall include the results of the Permitting Analysis under Task 3 as well as the Community Outreach results obtained under Task 4.
 - 2.2.7.1 Three (3) hardcopies and PDF file shall be provided of the Draft PER.
 - 2.2.7.2 Three (3) hardcopies and PDF file shall be provided of the Final PER after County review and approval.

2.3 TASK 3 – Permitting Analysis

- 2.3.1 A permitting analysis will be performed to identify land entitlement permits that will be required for the WWTP as well as the time and estimated costs to obtain the required permits for the WWTP.

2.4 TASK 4 – Community Outreach

- 2.4.1 The objective of this task are to identify key issues affecting project acceptance, disseminate accurate project information, and to recognize and develop the most effective ways to have community conversations as it has been established that this project is currently a significant as well as controversial project within the community.

2.4.2 The Community Outreach shall include discussions related to the proposed Wastewater Collection System as well as the Wastewater Treatment and Disposal (WWTP) system.

2.4.3 The Community Outreach efforts will consist of three (3) separate sub-tasks as established below.

2.4.3.1 Subtask 4.1 – Develop Community Outreach Plan

2.4.3.1.1 Research the Nā'ālehu social infrastructure and previous efforts that highlight community issues and concerns.

2.4.3.1.2 Prepare and attend project team meetings to determine the outreach objectives, schedule, deliverables, and other factors, as well as the County's interactions with the community to date.

2.4.3.1.3 Prepare a draft outreach plan that includes the most effective ways to "talk story" with the community in order to develop a relationship with the community.

2.4.3.1.4 Prepare a draft plan for County review and comment, and prepare a pre-final Community Outreach Plan.

2.4.3.2 Subtask 4.2 – Implement Approved Community Outreach Plan

2.4.3.2.1 Prepare, organize, and attend each identified activity.

2.4.3.2.2 Document each activity.

2.4.3.2.3 Conduct up to three (3) round table meetings with groups of homogeneous interests (i.e., environmental, business, cultural) to discuss analysis of project reactions, preliminary project messages, and various stakeholder groups.

2.4.3.2.4 Finalize the Community Outreach Plan based on interview and round table meeting findings.

2.4.3.3 Subtask 4.3 – Prepare Final Community Outreach Report

2.4.3.3.1 Prepare a final report that analyzes reactions to the project and present recommendations on future community outreach efforts.

2.4.3.3.2 The final report shall be included in the final PER for the WWTP.

PROJECT SCHEDULE:

Task	Description	Completion Date	AOC Deadline
--	Estimated Contract Execution	November 27, 2017	--
	Draft Initial System Proposal	January 19, 2018	--
	County Review Complete	February 2, 2018	--
Task 2.2.5	Initial System Proposal for Community	February 16, 2018	--
	Community Outreach Plan Complete	February 16, 2018	--
	Begin Community Outreach	February 19, 2018	May 28, 2018
	Complete Community Outreach	June 8, 2018	--
	Submit Community Outreach Report	July 6, 2018	--
	Submit Draft PER	August 31, 2018	--
	County Review Complete	September 14, 2018	--
Task 2.2.7	Submit Final PER	October 12, 2018	October 25, 2018

PROJECT COSTS:

Task No.	Description	Cost
Task 1	Project Management	\$34,186.00
Task 2	Preliminary Engineering Report	\$121,522.00
Task 3	Permitting Analysis	\$22,584.00
Task 4	Community Outreach	\$114,912.00
	Total	\$293,204.00

**GENERAL TERMS AND CONDITIONS
for
CONSULTANT SERVICES CONTRACTS**

SECTION 1 - DEFINITIONS

When used in these General Terms and Conditions or elsewhere in the contract, the following terms, or pronouns used in place of them, shall have meaning ascribed to them in this section, unless it is apparent from the context that a different meaning is intended.

1.1 **CONSTRUCTION MANAGEMENT SERVICES.** The endeavor to provide inspection services as an authorized representative of the Director.

1.2 **CONSULTANT.** Any individual, partnership, firm, corporation or joint venture engaged by the County to perform the services under the contract.

1.3 **CONTRACT.** The written agreement covering the performance of the services required for the project by the consultant. It shall include these general terms and conditions, and the special provisions. It shall also include all modifications of the contract by supplemental agreements thereto in writing and written orders of the Mayor and Director.

1.4 **COUNTY.** The County of Hawaii, State of Hawaii.

1.5 **DESIGNS AND PLANS.** Any and all designs, plans, construction drawings, specifications, cost estimates, work schedules, proposals, studies, reports and other items.

1.6 **DIRECTOR.** The Director of Environmental Management of the County of Hawaii, Department of Environmental Management, directly or through an assistant or representative.

1.7 **ENGINEER.** The Director of Public Works of the County of Hawaii, Department of Public Works, directly or through an assistant or representative.

1.8 **INSPECTION.** Visual observation of materials, equipment, or construction work for the purpose of ascertaining that the work is in substantial conformance with the contract documents and with the design intent. Such inspection shall not be relied upon by others as acceptance of the work, nor shall it be construed to relieve the Contractor in any way from his obligations and responsibilities under the construction contract.

1.9 **MAYOR.** The Mayor of the County of Hawaii.

1.10 **SRF.** State Revolving Fund.

SECTION 2 - AWARD AND EXECUTION OF CONTRACT

2.1 **AWARD OF CONTRACT:** The CONSULTANT, upon being selected to render certain professional services for the project, will be notified of his commission by the DIRECTOR. Said notice shall not be construed to be authorization to proceed with performance of services under the contract.

Any services performed by the CONSULTANT prior to the date indicated in the notice to proceed from the DIRECTOR shall be at his own risk.

2.2 **EXECUTION OF CONTRACT:** Prior to the drafting of the contract, discussions will be held between the parties relative to the extent of the services to be performed by the CONSULTANT and other pertinent matters. Based on said discussions, the COUNTY will draft the contract and submit the same to the CONSULTANT for review and signature. If the CONSULTANT is an individual, or partnership, the CONSULTANT shall sign the contract in the office of the DIRECTOR or before a notary public. If the CONSULTANT is a corporation, the CONSULTANT shall cause the contract to be signed before a notary public by an officer authorized to do so and shall affix to the contract its corporate certificate, resolution or other instrument vesting such officer with authority to sign the contract on its behalf. The signed contract shall be returned to the COUNTY for signature and further processing.

General Terms and Conditions

October 22, 2014

2.3 TAX CLEARANCES/COMPLIANCE WITH LAWS:

A. In accordance with Section 103-53, Hawaii Revised Statutes (HRS), tax clearances from the State Director of Taxation and the Internal Revenue Service to the effect that due tax returns have been filed and all taxes, penalties and interest have been paid are prerequisites to entering into the contract and to receipt of final payment, except as otherwise provided by rule or statute. Progress payments are subject to statutory assignment to satisfy delinquent taxes, interest and penalties.

B. Consultant is also required to furnish proof of compliance with the requirements of Section 3-122-112, Hawaii Administrative Rules (HAR):

- a. Chapter 237, tax clearance;
- b. Chapter 383, unemployment insurance;
- c. Chapter 386, workers' compensation;
- d. Chapter 392, temporary disability insurance;
- e. Chapter 393, prepaid health care; and
- f. One of the following:
 - (1) Be incorporated or organized under the laws of the State of (hereinafter referred to as a "Hawaii business"); or
 - (2) Be registered to do business in the State (hereinafter referred to as a "compliant non-Hawaii business").

C. Effective July 1, 2011, the Governor of Hawai'i signed Act 190 into law, which requires compliance documentation for awards of \$2,500.00 or more:

The responsibility of all Offerors doing business with the State or County are required to comply with all applicable statutes, administrative rules and procedures. State or County agencies must verify compliance prior to award. Acceptable verification is through Hawai'i Compliance Express (HCE). Vendors wishing to do business with the State or County must register in HCE and be in compliance.

HCE is a one-stop online program where vendors verify and manage their compliance. Once a vendor is registered, HCE provides the following proof of compliance/ compliance documentation:

- Certificate of Good Standing (COGS) from the Department of Commerce and Consumer Affairs (DCCA) Business Registration Division
- Tax clearances (federal and state) from the Department of Taxation (DOTAX)
- Compliance with HRS Chapters 383 Hawai'i Employment Security Law (Unemployment Insurance), 386 (Worker's Compensation Law), 392 Temporary Disability Insurance and 393 Prepaid Healthcare Act, from the Department of Labor and Industrial Relations (DLIR)

There is a nominal fee to subscribe to HCE. Please note that it may take two or more weeks to establish a vendor account in HCE. For more information and to register, see <http://vendors.ehawaii.gov>.

D. The above certificates should be applied for and submitted to the Department as soon as possible. If a valid certificate is not submitted on a timely basis for award of a contract, an offeror otherwise responsive and responsible may not receive the award.

E. In addition to a tax clearance certificate, an original "Certification of Compliance for Final Payment" (SPO Form-22) will be required for final payment. A copy of the form is also available at www.spo.hawaii.gov. Select "Forms for Vendors/Contractors" from the Chapter 103D, HRS, pop-up menu. A consultant making a false affirmation shall be suspended and may be debarred pursuant to Section 103D-702, HRS.

2.4 **CONTRACT NOT BINDING:** The Contract shall not be binding or of any force until said contract has been fully and properly signed by all of the parties thereto, certified by the Director of Finance as to availability of funds in the amounts and for the purpose set forth therein and signed by the Mayor.

SECTION 3 - LEGAL RELATIONS AND RESPONSIBILITY

3.1 **INDEPENDENT CONTRACTOR:** In the performance of the services required under this Agreement, the CONSULTANT shall be an independent contractor with the authority to control and direct the performance and details of the work and services required under this Agreement; however, the COUNTY shall have a general right to inspect work in progress, with proper and reasonable notice, to determine whether, in the opinion of the COUNTY, the work is being performed by the CONSULTANT in accordance with the provisions of this Agreement.

All persons hired or used by the CONSULTANT shall be the CONSULTANT'S agents and employees and the CONSULTANT shall be responsible for the accuracy, completeness, and adequacy of any and all work and services performed by its agents and employees.

Furthermore, the CONSULTANT intentionally, voluntarily, and knowingly assumes the sole and entire liability, if any such liability is determined to exist, to its agents and employees, or to third persons, for all loss, cost, damage, or injury to the extent caused by the negligence of CONSULTANT'S agents and employees in the course of their employment.

The performance of work under this Agreement alone shall not be construed as employment with the COUNTY and shall not entitle the CONSULTANT or the CONSULTANT'S agents, employees, to vacation, sick leave, retirement, or other benefits directly afforded COUNTY employees. The CONSULTANT shall be responsible for payment of income, social security, and any other federal, state, or local taxes that it may be required to pay.

3.2 **INDEMNIFICATION:** The Consultant shall indemnify and hold harmless the County, its officers, agents and employees, from and against any and all actions, claims, suits, damages, losses, costs, and expenses to the extent arising out of the negligent, reckless, intentional or wrongful acts, errors or omissions of the Consultant, its officers, agents, employees or subcontractors occurring during or in connection with the performance of the Consultant's services under this contract, or to the extent arising out of the breach of this Contract by the Consultant. It is strictly understood that the County, its officers, agents and employees shall in no way be held liable for any damages, cause of action or suits resulting from the negligent, reckless, intentional or wrongful acts, errors, or omissions of the Consultant, its officers, agents, employees, or subcontractors. The Consultant shall reimburse the County and its officers, agents, and employees for their defense costs, including but not limited to attorney's fees and costs, to the extent attributable to the negligent, reckless intentional or wrongful acts or omissions of the Consultant, or its subcontractors and their officers, agents, and employees.

3.3 **LIABILITY INSURANCE:** The Consultant shall secure adequate public or commercial liability insurance covering death or bodily injury with limits not less than FIVE HUNDRED THOUSAND AND NO/ 100 DOLLARS (\$500,000.00) for personal injury, and for injury or damage to property, which policy shall remain in full force and effect for the term of this contract and which further names the County of Hawai'i as additional insured. Proof of workers compensation coverage and motor vehicle coverage (assuming consultant will be using vehicle(s) in performance of the scope of work) be provided compliant with laws of the State of Hawai'i.

The Consultant shall file with the Department of Environmental Management copies of a certificate of insurance showing it has in full force and effect the required insurance. The Consultant shall give the County thirty (30) days notice of any cancellation in the policy."

3.4 **NONDISCRIMINATION IN COUNTY CONTRACTS:**

A. Pursuant to Executive Order No. 142, County of Hawaii, dated February 11, 2005, during the performance of this contract, the contractor agrees as follows:

- 1) The contractor shall comply with all requirements set forth in Federal and State laws and regulations relative to Title VI of the Civil Rights Act of 1964, as amended, which provide for non-discrimination in Federally assisted programs.
- 2) The contractor shall not discriminate against any employee or applicant for employment because of race, ancestry/national origin, religion, color, disability, age, marital status, military status, veteran's status, sexual orientation, lactation, arrest and court record, citizenship, or any other classification protected by state and federal law. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training. The contractor agrees to post in conspicuous places notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

- 3) The contractor shall in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants shall receive consideration for employment without regard to race, ancestry/national origin, religion, color, disability, age, marital status, military status, veteran's status, sexual orientation, lactation, arrest and court record, citizenship, or any other classification protected by state or federal law.
- 4) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract, this contract may be canceled or suspended in whole or in part and the contractor may be declared ineligible for further County contracts until such time that the contractor by satisfactory evidence, in good faith, ceases such discriminatory practices or procedures.
- 5) The contractor who subcontracts any portion of the contract shall assure the County that such subcontractor shall abide by the nondiscrimination provisions stated herein and agrees that any subcontractor who is found in violation of such provisions shall subject the principal contractor's contract with the County to be terminated or suspended pursuant to Section (4) above.
- 6) The County may direct any bidder, prospective contractor, or subcontractor to submit a statement in writing signed by an authorized officer, agent, or employee of the contracting party that the signer's practices and policies do not discriminate on the grounds of race, ancestry/national origin, religion, color, disability, age, marital status, military status, veteran's status, sexual orientation, lactation, arrest and court record, citizenship, or any other classification protected by state or federal law, and that the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions stated herein.

3.5 LAWS & REGULATIONS: The CONSULTANT shall keep himself fully informed of all laws, ordinances, codes, rules and regulations, governmental changes and development plans, setback limitations, rights-of-way, and all changes thereto, which in any manner affect the contract and the performance thereof.

The CONSULTANT shall comply with all such present laws, ordinances, codes, rules, regulations, design standards and criteria, governmental general and development plans, set back limitations, rights-of-way, including the giving of all notice necessary and incident to the proper and lawful prosecution of the work, and all changes thereto. If any discrepancy or inconsistency is discovered between the contract and any such law, ordinance, code, rule, regulation, design standard, design criterion, governmental general and development plans, setback limitation, rights-of-way, the CONSULTANT shall forthwith report the same in writing to the DIRECTOR.

3.6 SRF BOILERPLATE: When the Project is to be funded through the State Revolving Fund, the consultant shall comply with all federal regulations as listed in the "SRF Boilerplate" Federal Requirements for SRF Projects dated June 1997 as applicable "Cross-cutter" regulations which have been determined as applying to the SRF loan program.

3.7 H.A.R. 3-125 (CHAPTER 125) REQUIREMENTS:

A. The language contained in the following provisions of the Hawaii Administrative Rules, Title 3, Subtitle 11, Chapter 125, are adopted and included by reference:

- 1) §3-125-2 Change order to goods and services contracts;
- 2) §3-125-3 Modifications to goods and service contracts;
- 3) §3-125-5 Authorization for a stop work order for goods and services contracts;
- 4) §3-125-6 Stop work orders for goods and services contracts;
- 5) §3-125-8 Variations in quantities for definite quantity goods and services contracts;
- 6) §3-125-9 Variations in quantities for indefinite quantity goods and services contracts;
- 7) §3-125-12 Price adjustment for goods and services contracts;
- 8) §3-125-14 Novation or change of name;
- 9) §3-125-15 Claims based on a procurement officer's actions or omissions for goods and services contracts;
- 10) §3-125-16 Claims based on oral directives;
- 11) §3-125-17 Termination for default in goods and services contracts;
- 12) §3-125-19 Liquidated damages for goods and services contracts;
- 13) §3-125-21 Termination for convenience of goods and services contracts;
- 14) §3-125-23 Prompt payment by contractors to subcontractors; and
- 15) §3-125-24 Remedies.

B. In the event of conflict or omission between the language of this contract and the intent of Chapter 125, H.A.R., the contract shall not be void or voidable, but the intent of Chapter 125 shall prevail.

SECTION 4 - MODIFICATIONS

4.1 **MODIFICATION OF CONTRACT:** The COUNTY may at any time make such modifications in the contract, as it deems necessary and advisable. Such modifications shall be made by a supplemental agreement in writing or by a written order of the Mayor provided that modifications by such a written order shall be limited to modifications in the scope of services and provided further that modifications involving no reduction or increase in compensation of the CONSULTANT may be made by written order of the DIRECTOR.

Upon receipt of a written order, the CONSULTANT shall proceed with the modification as ordered. If the CONSULTANT does not agree with any of the terms or conditions of or with the amount of the reduction, increase in compensation provided for in the order, he shall file with the DIRECTOR a written protest setting forth his reasons in detail within ten (10) calendar days after receipt of the order. The protest shall be disposed of pursuant to the provisions of subsection 5.4. Failure to file such protest within the time specified shall constitute agreement on the part of the CONSULTANT with the terms, conditions and amount in the order.

In the event the CONSULTANT for reasons related to safety does not agree with and refuses to proceed with the modifications required by the COUNTY in the written order, the Mayor may allow the CONSULTANT to withdraw from the contract without breach, provided the CONSULTANT files with the Mayor a written protest setting his reasons in detail within ten (10) calendar days after receipt of the order. If withdrawal is allowed, the CONSULTANT shall be compensated in the same proportion of the compensation under the contract as the services performed bear to the services to be performed under the contract.

SECTION 5 - PERFORMANCE OF CONTRACT

5.1 **TIME:** Time is of the essence of the contract. Performance of the services under the contract shall begin on the commencement date designated in the notice to proceed and be completed within the number of calendar days specified.

5.2 **DELAY:** If any delay in the performance of the services under the contract occurs as a result of unforeseeable causes beyond the control and without fault or negligence of the CONSULTANT, including but not limited to, acts of God, acts of the public enemy, acts of the COUNTY with respect to the contract, acts of another contractor in the performance of a contract with the COUNTY, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers, then the CONSULTANT shall be granted an extension of the time for performance corresponding to the delay. If as a result of the delay completion of performance within the extended time would cause undue hardship to the CONSULTANT, the DIRECTOR may, in his discretion, grant further extension of the time for performance. No extension of time, however, shall be granted unless a written application therefore stating in detail the cause or cause of delay is filed by the CONSULTANT with the DIRECTOR within ten (10) calendar days after commencement of the delay. The number of days of each extension of time shall be determined by the DIRECTOR.. No such extension shall be deemed a waiver of the right of the COUNTY to require the completion of the services under the contract within the time required herein as so extended by the specific terms of such extension or extensions, nor a waiver of right to terminate the contract for any other or additional delay not covered by the specific terms of such extension or extensions.

5.3 **PROSECUTION OF THE WORK:** The CONSULTANT shall be available upon reasonable demand to discuss the progress of the services being performed under contract. All questions arising during the performance of the contract that must be resolved by the Mayor or DIRECTOR shall be brought to their immediate attention.

The CONSULTANT shall direct his work to relate appropriately to, and in accordance with, established and generally accepted engineering, planning and/or architectural design principles and practices in effect at the time that CONSULTANT'S professional services are rendered.

The CONSULTANT shall be responsible for the accuracy of all computations and completeness of all work.

All notes, including field notes, designs, drawings, tracings and other data produced in the performance of the contract shall be the property of the COUNTY.

The DIRECTOR shall have access, at all reasonable times, to all notes, designs, drawings, tracings or other technical data pertaining to the services being performed under the contract for the purpose of inspection and making copies of them. Upon completion of the services under the contract, any and all such notes, studies, designs, drawings, tracings or other technical data shall be delivered and surrendered to the COUNTY on demand, provided that copies of notes, studies and other technical data may be delivered and surrendered instead of originals.

5.4 **MEDIATION:** At the option of, and in the sole discretion of the Director, any dispute, controversy or claim arising out of or in connection with the interpretation or performance of any term or condition of this Agreement or any breach or alleged breach of this Agreement, shall be submitted to and resolved by non-binding mediation by a neutral and independent mediator, who shall be selected by the parties by mutual agreement, or if the parties are unable to agree upon the selection of a mediator, then in accordance with the commercial arbitration rules of the American Arbitration Association. The mediation shall take place in the County of Hawaii, State of Hawaii. The cost of the mediator and other mediation costs shall be borne equally by the parties. The mediation process and the outcome of the mediation shall remain confidential to the maximum extent permissible by law. Notwithstanding the foregoing terms, the parties shall make every reasonable effort to resolve disputes, controversies or claims between themselves in a cooperative fashion prior to submitting a dispute to mediation.

5.5 **SUBCONTRACTING OR ASSIGNMENT OF CONTRACT:** The CONSULTANT shall not subcontract or assign all or any part of the services under the contract without the prior written consent of the DIRECTOR. Any consent by the COUNTY to subcontract, assign or otherwise dispose of any portion of the contract shall not be construed to relieve the CONSULTANT of any responsibility for the performance of the contract.

5.6 **STANDARDS:** All work related to wastewater projects shall be performed in conformance with the Design Standards of the Department of Wastewater Management, City and County of Honolulu. Where there are no established Standards, the CONSULTANT shall submit the proposed Standard(s) for approval.

5.7 **OWNERSHIP OF DOCUMENTS:** Upon completion, the CONSULTANT agrees to relinquish and furnish to the COUNTY all original tracings of any and all plans and stencils which hereafter shall become the property of the COUNTY.

SECTION 6 - SERVICES TO BE PERFORMED BY THE COUNTY

6.1 **COOPERATION BY THE COUNTY:** The COUNTY shall, without cost to the CONSULTANT, through the DIRECTOR, cooperate fully with the CONSULTANT and will promptly place at the disposal of the CONSULTANT all available pertinent information which the COUNTY may have in its possession. The County will certify to the accuracy of certain information in writing whenever it is possible to do so. The COUNTY does not represent that other information not certified as accurate is so and takes no responsibility therefore, and the CONSULTANT shall rely on such information at his own risk.

SECTION 7 - COMPENSATION

7.1 **COMPENSATION:** The CONSULTANT shall be paid the amount stated in the written agreement, less any reduction in compensation and plus any increase in compensation pursuant to subsection 7.4 as full compensation for the performance of the services under the contract.

7.2 **ABANDONMENT OF THE PROJECT; DEATH OR DISABILITY OF CONSULTANT:** In the event the COUNTY terminates the contract because it wishes to abandon, defer, restudy or revise the project, or in the event the CONSULTANT, in the case of an individual, dies or become physically or mentally disabled, the CONSULTANT or his estate shall be compensated in the same proportion of the compensation under the contract as the services performed bear to the services to be performed under the contract.

7.3 **PROGRESS PAYMENTS:** Prior to any progress payment authorization, the CONSULTANT shall submit and the COUNTY shall approve a detailed schedule of values corresponding to the specific services to be performed. As long as the services of the CONSULTANT are being performed in a manner satisfactory to the COUNTY, the COUNTY shall pay the CONSULTANT monthly partial payments in amounts proportionate to the value of the services performed by the CONSULTANT as indicated in the schedule of values.

7.4 **REDUCTION OR INCREASE IN COMPENSATION:** The compensation of the CONSULTANT shall be reduced whenever modification of the contract pursuant to subsection 4.1 reduces the services to be performed by the CONSULTANT.

The compensation of the CONSULTANT shall be increased to reimburse him for increased costs to perform the services under contract if performance of the services was delayed for more than six months by an act or omission of the COUNTY. No such reimbursement, however, shall be made unless he files a written application therefore with the DIRECTOR within thirty (30) calendar days after termination of the delay. In addition, the compensation of the CONSULTANT shall be increased whenever modification of the contract pursuant to subsection 4.1 requires the CONSULTANT to perform services not required under the contract. For each such modification and each modification reducing the services to be performed by the CONSULTANT, the compensation of the

CONSULTANT shall be increased or reduced in accordance with the supplemental agreement or if no supplemental agreement has been entered into, by an amount equal to the sum total of the following:

- a) Wages of employees actually engaged in the services required by the modification and the salary cost of principals when actually engaged in such services in the case of an increase in compensation or the wages of employees and the salary cost of principals who would have been engaged in the case of a reduction in compensation;
- b) One hundred fifty percent (150%) of (a) for all other overhead, including bonus allowances, cost of supplies used, cost of transportation within the State of Hawaii required for the project and profit; and
- c) Other direct costs, including the cost of transportation to and from destination outside of the County of Hawaii and long distance telephone calls.
- d) The State of Hawaii General Excise Tax payable by the CONSULTANT on (a), (b) and (c).

7.5 ASSIGNMENT OF MONEY DUE OR PAYABLE: Assignment of money due or to become payable to the CONSULTANT under the contract shall not be valid without the prior written consent of the Mayor. The rights of the assignee to moneys due or to become due to the CONSULTANT shall be subject to subsection 8.4.

7.6 ACCEPTANCE AND FINAL PAYMENT: Final payment will be made only after the issuance of a notice of final approval and acceptance by the Mayor advising the CONSULTANT of the satisfactory fulfillment of the terms of the contract and receipt of a certificate from the Director of Taxation, as provided in Section 103-53, HRS, relating to prerequisite for final settlement of contracts.

Acceptance by the CONSULTANT of the final payment shall constitute payment in full for all services performed under the contract.

SECTION 8 - REMEDIES

8.1 RIGHT OF THE COUNTY TO TERMINATE: The COUNTY shall have the right to suspend performance of the services under the contract or terminate the contract in whole or in part at any time by written notice to the CONSULTANT. Upon termination all data, plans, specifications, reports, estimates, summaries, completed work and work in progress and such other information and materials as may have been accumulated by the CONSULTANT in the performance of his services shall, in the manner and to the extent determined by the DIRECTOR, become the property of and be delivered to the COUNTY. If the termination is for reasons other than default of the CONSULTANT as provided in subsection 8.2, the CONSULTANT shall be compensated in accordance with subsection 7.2.

It is understood and agreed that any services to be provided in accordance with the terms of this contract may be terminated immediately, in whole or in part, upon a finding by the County that the services must be provided by public employees pursuant to Civil Service Laws or that such services will be discontinued. It is further understood, that should such a finding be made, the COUNTY will not be liable under this contract for any resulting damages, and such a termination will not be considered a breach of this agreement.

8.2 TERMINATION BECAUSE OF CONSULTANT'S DEFAULT: The COUNTY shall have the right to enter into a new contract with another CONSULTANT and pay a reasonable compensation for such services as may be necessary to properly complete the services under the contract if it terminates the same because the CONSULTANT:

- a) fails to begin work under the contract at the time required,
- b) is unnecessarily delaying the performance of the contract or any part thereof,
- c) is failing to perform the contract with sufficient or adequate personnel, equipment or materials or is making sufficient progress to ensure the completion of the contract with the time specified,
- d) fails to perform the contract in accordance with directions of the DIRECTOR,
- e) discontinues performance of the contract,
- f) fails to recommence performance of the contract within a reasonable time after service of a written order to do so if the performance has been suspended,
- g) becomes insolvent or is declared bankrupt,

- h) commits any act of bankruptcy or insolvency,
- i) allows any final judgment to stand against him unsatisfied for a period of ten (10) calendar days,
- j) makes an assignment for the benefit of creditors,
- k) fails to pay for all labor, tools, materials and equipment,
- l) has abandoned the contract,
- m) or violates or fails to comply with any of the terms, covenants and conditions of the contract.

The fee of such other CONSULTANT shall be paid from said unexpended amount of the compensation under the contract. Should the compensation of such other CONSULTANT exceed such unexpended amount, the CONSULTANT shall reimburse the COUNTY for the difference as part of the damages caused by CONSULTANT'S default. The provisions of this subsection shall not apply if the CONSULTANT is an individual and the default is due to his death or mental or physical disability.

8.3 LIQUIDATED DAMAGES: The amount of damage to the COUNTY as a result of failure to complete performance of specified services under the contract within the time fixed or any extension thereof, exclusive of overhead expenses, being certain but difficult, it not impossible, to ascertain, the CONSULTANT agrees to pay the sum stated in the contract as liquidated damages, and not by way of penalty, for every day delay until the services are completed and accepted, or a reasonable time has expired for completion and acceptance of the services remaining to be performed.

8.4 AUTHORITY TO WITHHOLD MONEY DUE OR PAYABLE: The COUNTY may withhold such amount from the money due or to become payable under the contract to the CONSULTANT, or any assignee under subsection 7.5, as may be necessary to protect the COUNTY against liability or to satisfy the obligations of the CONSULTANT to the COUNTY and to employees, subcontractors and material men who have performed labor or furnished material and equipment under the contract and may make such payments from such amounts as may be necessary to discharge such obligations and protect the COUNTY.

8.5 DISPUTES (HAR § 3-126-31)

(1) All controversies between the County and the Consultant which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the Procurement Officer in writing, within ninety (90) calendar days after a written request by the Consultant for a final decision concerning the controversy; provided that if the Procurement Officer does not issue a written decision within ninety (90) calendar days after written request for a final decision, or within such longer period as may be agreed upon by the parties, the Consultant may proceed as if an adverse decision had been received

(2) The Procurement Officer shall immediately furnish a copy of the decision to the Consultant, by certified mail, return receipt requested, or by any other method that provided evidence of receipt.

(3) Any such decision shall be final and conclusive, unless fraudulent, or unless the Consultant brings an action seeking judicial review of the decision in a circuit court of the State within six (6) months from the date of the receipt of the decision.

(4) The Consultant shall comply with any decision of the Procurement Officer and proceed diligently with performance of this contract pending final resolution by a circuit court of this State of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of contract by the Count; provided that in any event the Consultant shall proceed diligently with the performance of the contract where the Chief Procurement Officer has made a written determination that continuation of work under the contract is essential to public health and safety.

8.6 REMEDIES NOT EXCLUSIVE: The express provision herein of certain measures which may be exercised by the COUNTY for its protection shall not be construed to preclude the COUNTY from exercising any other or further legal or equitable right to protect interest.