

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Engineering Division

October 10, 2008

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

Authorization to Enter Into a Memorandum of Agreement between the State of Hawaii, Department of Land and Natural Resources, and State of Hawaii, Department of Transportation, Regarding the Implementation of Ferry System Improvements at Lahaina, Maalaea, and Manele Small Boat Harbors

The Department of Land and Natural Resources (DLNR), desires to enter into a Memorandum of Agreement with the State of Hawaii, Department of Transportation (HDOT), to implement ferry system improvements at Lahaina, Maalaea, and Manele Small Boat Harbors.

BACKGROUND:

Section 319 of the United States Department of Transportation FY 2003 to 2006 appropriations have made funding available for Hawaii ferry boats or ferry terminal facilities pursuant to 49 U.S.C. 5302(m)(2)(B) to construct new vessels and facilities, including both the passenger and vehicle-related elements of such vessels and facilities, and to repair facilities.

DLNR owns and operates ferry terminals at the Lahaina and Manele Small Boat Harbors on the islands of Maui and Lanai, respectively. DLNR also owns and operates the proposed ferry terminal for the island of Maui at the Maalaea Small Boat Harbor. DLNR's Engineering Division administers the implementation of improvements to the ferry terminals on behalf of DLNR's Division of Boating and Ocean Recreation.

HDOT has secured funding assistance from the Federal Transit Administration (of the United States Department of Transportation) for the above ferry terminal facilities through Project (Grant) Numbers HI-03-0027, HI-03-0034, HI-03-0038, and HI-03-0044.

Due to recommendations by DLNR's auditors and approval of loans from the State Department of Budget and Finance to temporarily fund grant reimbursable expenses, it is necessary to document the major roles and responsibilities of DLNR and HDOT by a memorandum of agreement. Through a cooperative effort between DLNR and HDOT, respective roles and responsibilities have been mutually agreed to for the implementation of ferry system improvements at Lahaina, Maalaea, and Manele Small Boat Harbors. A copy of the draft Agreement is attached.

RECOMMENDATION:

That the Board of Land and Natural Resources authorize the Chairperson to sign the Agreement and other necessary documents pertaining to the projects, subject to the Deputy Attorney General's approval as to form.

Attachment

Respectfully submitted,



ERIC T. HIRANO
Chief Engineer

REQUESTED BY:



EDWARD R. UNDERWOOD, Administrator
Division of Boating and Ocean Recreation

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN, Chairperson

ITEM L-1

DRAFT

MEMORANDUM OF AGREEMENT

THIS AGREEMENT, made this ___ day of _____, 2008 by and between the State of Hawaii, Department of Transportation, by its Director of Transportation, hereinafter called "HDOT," and the State of Hawaii, Department of Land and Natural Resources, by its Chairperson, hereinafter called "DLNR;

WITNESSETH THAT:

WHEREAS, Public Law 103-272, codifies Federal Transit laws under Title 49, Chapter 53, Section 5309, of the United States Code, July 5, 1995, hereinafter referred to as "Section 5309", provides for capital projects needed for an efficient and coordinated mass transportation system; capital costs of coordinating mass transportation with other transportation; the introduction of new technology into mass transportation; and capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities; and

WHEREAS, the Governor of the State of Hawaii, in accordance with the United States Department of Transportation, Federal Transit Administration, hereinafter referred to as "FTA", has designated HDOT to administer and manage the Section 5309 grant; and

WHEREAS, HDOT and the Subrecipient desire to secure and utilize grant funds to meet the general public transportation needs of the State of Hawaii, in a continuing, cooperative and comprehensive manner; and

WHEREAS, Section 319 of the United States Department of Transportation FY 2003 to 2006 appropriations have made funding available for Alaska or Hawaii ferry boats or ferry terminal facilities pursuant to 49 U.S.C. 5302(m)(2)(B) to construct new vessels and facilities, including both the passenger and vehicle-related elements of such vessels and facilities, and for repair facilities; and

WHEREAS, DLNR owns and operates ferry terminals at the Lahaina and Manele Small Boat Harbors on the islands of Maui and Lanai, respectively. DLNR also owns and operates the proposed second ferry terminal for the island of Maui at the Maalaea Small Boat Harbor. HDOT and DLNR jointly own and operate the ferry terminal facilities at Kaunakakai Harbor on the island of Molokai. A separate Memorandum of Understanding for ferry pier and landside improvements for Kaunakakai Harbor was executed on May 17, 2004; and

WHEREAS, HDOT recognizes that the existing commuter ferry operations between the islands of Lanai, Maui and Molokai are vital to the economic and social well being of the County of Maui, as well as, the to the State. The existing ferry service between these islands provide affordable inter-island transportation for access to employment, government, health services, education and recreational opportunities for the residents of Lanai and Molokai; and

WHEREAS, through a cooperative effort between the HDOT and DLNR, respective roles and responsibilities have been mutually agreed to for the implementation of ferry transit improvements at Lahaina, Maalaea and Manele Small Boat Harbors. However, due to recommendations by DLNR's auditors and recent approval of a loan from the State Department of Budget and Finance to temporarily fund grant reimbursable expenses, it is necessary to document the major roles and responsibilities of DLNR and HDOT.

AGREEMENT:

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, HDOT and DLNR agree as follows:

Section 1. Purpose of Agreement. The purpose of this Agreement is to designate DLNR as the Subrecipient of Section 5309 funds in order to enable the Subrecipient to provide public transportation services to the general public, as described in the Subrecipient's Application filed during the Federal Fiscal Year 2006 and 2007, hereinafter referred to as the "Project", and to HDOT the terms, conditions and mutual understandings of the parties as to the manner in which the Project will be undertaken and completed.

Section 2. Scope of Project. The Subrecipient shall undertake and complete the Project as described in its Application (Exhibit A), filed with and approved by HDOT and FTA, and in accordance with the terms and conditions of this Agreement. Subrecipient Section 5309 Applications filed with HDOT between the Federal Fiscal Years 2006 and

2007 shall be Exhibit A for the Agreement. The Subrecipient further agrees to comply with applicable policies, procedures and provisions of HDOT Management Plan, Chapter 53 of Title 49 of the United States Code, and other related Federal transit laws in the United States Code, as may be amended by any applicable rules and regulations, and/or Federal directives issued subsequent to the execution of this Agreement.

Section 3. Period of Performance. The period of performance of the Agreement shall be for the period the Section 5309 funds are available to HDOT.

Section 4. Cost of Project. The cost of the Project shall be those amounts indicated in the approved Application, and shall be borne in the manner described therein. The Subrecipient agrees that it will cover all costs of any Project remaining after the contribution of Federal Funds, hereafter referred to as the "local share", and shall be covered in cash from sources other than Federal funds or from Federal sources only when appropriate Federal legislation specifically authorizes its use as part of the local share. The Subrecipient shall initiate and complete all actions necessary to enable the Subrecipient to provide or cause to be provided the local share of any Project at or prior to the time that the local share is needed. The Subrecipient further agrees that there shall be no reduction of the local share to be provided by the Subrecipient unless otherwise authorized in writing by HDOT.

Section 5. Operations and Project Administration Projects. FTA funds used for operations or project administration efforts shall be for as described in the Application. The Subrecipient shall ensure that operations and project administration financed by funds through this Agreement are undertaken in accordance to the Agreement. The

Subrecipient shall notify HDOT immediately for funds used for operations or project administration that are not consistent with the use described in the Application.

The Subrecipient shall keep or cause to be kept satisfactory records with regard to the use of all operations and project administration Projects and shall submit or cause to be submitted to HDOT upon request such information as HDOT may require in order to assure compliance with Section 5309 requirements and this Agreement.

Section 6. Capital Project Responsibility. The Subrecipient shall ensure that capital Projects financed by funds through this Agreement are undertaken, completed and operated in accordance to the Agreement.

Section 7. Title to Capital Projects. Title to Projects for capital purchases shall be in the name of the Subrecipient.

Section 8. Use of Capital Projects. The Subrecipient shall ensure that all Projects for capital purchases are used for the provision of general public transportation services as described in the Application. If, at any time, any Project is not used in the manner described in the Application or are withdrawn from transportation service, the Subrecipient shall ensure that HDOT is immediately notified and reimbursed for FTA's proportionate share of the fair market value of the Project, in accordance with OMB Circular A-102 and FTA requirements.

The Subrecipient shall keep or cause to be kept satisfactory records with regard to the use of all capital Projects and shall submit or cause to be submitted to HDOT upon request such information as HDOT may require in order to assure compliance with Section 5309 requirements and this Agreement.

The Subrecipient shall provide or cause to be provided, in amount and form satisfactory to HDOT, such insurance or self-insurance as will be adequate to protect the federal interest in the capital Project throughout the period of required use.

The Subrecipient shall also submit or cause to be submitted to HDOT at the beginning of each calendar year or as otherwise specified by HDOT, a certification that all capital Projects are still being used in accordance with Section 5309 requirements and the terms of this Agreement.

The Subrecipient shall maintain or cause to be maintained all capital Projects at a high level of operational soundness, safety and cleanliness acceptable to HDOT. HDOT and FTA shall have the right to conduct periodic inspections for the purpose of confirming proper Project usage and maintenance pursuant to this Agreement and Section 5309 requirements.

Section 9. Agreements and Contracts Under This Agreement. Agreements and contracts between the Subrecipients and second tier ultimate Subrecipients are subject to all applicable federal, state, and local requirements/regulations governing the receipt and use of FTA funds. Further, the Subrecipient shall not assign any portion of the work to be performed under this Agreement, or execute any agreement or contract, or obligate itself in any manner to, any third party with respect to the Subrecipient's rights and responsibilities under this Agreement without the prior review and approval of HDOT.

In the event that the Subrecipient obtains project services from other than itself, then the following requirements a) through g) shall apply, and the Subrecipient must obtain approval from HDOT prior to the solicitation of project services:

- a) **Federal Requirements.** Each Subrecipient must include all clauses required by Federal statutes and executive orders and related implementing regulations, and obtain the required Federal certifications.
- b) **State Law Compliance.** Each Subrecipient shall follow state law and procedures when awarding and administering agreements and contracts.
- c) **Contract Period of Performance Limitation.** Each Subrecipient shall not enter into any agreement or contract with a period of performance exceeding two (2) years, inclusive of options, without prior written HDOT approval.
- d) **Full and Open Competition.** All project services from other than the Subrecipient under this Agreement will be conducted in a manner providing full and open competition. Some of the situations considered to be restrictive of competition include, but are not limited to:
 - 1) Unreasonable requirements placed on firms in order for them to qualify to do business;
 - 2) Unnecessary experience and excessive bonding requirements;
 - 3) Noncompetitive pricing practices between firms or affiliated companies;
 - 4) Noncompetitive awards to any person or firm on retainer contracts;
 - 5) Organizational conflicts of interest which means that because of activities, relationships, agreements, or contracts: (a) a Subrecipient is unable, or potentially unable, to render impartial assistance or advice to the prospective assignee or any beneficiary of the services to be

provided by the Subrecipient under this Agreement, (b) a Subrecipient's objectivity in performing the contract work is or might be otherwise impaired, or (c) the Subrecipient has an unfair competitive advantage; and

6) Any arbitrary action in the procurement process.

e) Prohibition Against Geographic Preferences. Each Subrecipient shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes, rules, orders or requirements expressly mandate or encourage geographic preference. This does not preempt State licensing laws. However, geographic location may be used as a selection criterion in procurements for architectural and engineering services provided that such use leaves an appropriate numbers of qualified firms, given the nature and size of the project, to compete for the contract or agreement.

f) Procurement By Competitive Bid. If this procurement method is used, the following requirements shall apply:

- 1) Requests for proposals will be publicized. All evaluation factors will be identified along with their relative importance.
- 2) The proposals shall be submitted by sealed bid.
- 3) Awards will be made to the responsible and qualified firm whose proposal is the lowest amount.

g) Procurement By Request for Proposal (RFP). If this procurement method is used, the following requirements shall apply:

- 1) Requests for proposals will be publicized. All evaluation factors will be identified along with their relative importance.
- 2) Proposals will be solicited from an adequate number of qualified sources.
- 3) Subrecipients will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees.
- 4) Awards will be made to the responsible firm whose proposal is most advantageous to the Subrecipient's program with price and other factors considered.

Section 10. Records and Reports. The Subrecipient shall advise HDOT regarding the progress of the Project at such times and in such manner as HDOT and FTA may deem necessary by, including, but not limited to, the submission of interim, periodic, quarterly and/or annual reports and/or the holding of meetings.

The Subrecipient shall collect and submit or cause to be collected and submitted to HDOT, at such time as HDOT may require, such financial statements, data, records, contracts, agreements and other documents related to each Project as may be deemed necessary by HDOT and FTA.

Section 11. Audit and Inspection. The Subrecipient shall ensure that HDOT, the Comptroller General of the United States and the Secretary of the United States Department of Transportation, or their authorized representatives, are permitted to inspect

all vehicles, facilities and equipment purchased and/or operated by the Subrecipient as part of any Project, all transportation services rendered by the Subrecipient by the use of such vehicles, facilities and equipment, and all relevant Project records and documents. The Subrecipient shall also ensure that the above named parties are permitted to audit the books, records, and accounts of the Subrecipient pertaining to the Project.

Section 12. Termination.

- (a) **For Convenience.** HDOT may, with the concurrence of FTA, terminate any Project and cancel this Agreement should HDOT determine, at its sole discretion, that continuation of the Project will not produce sufficient beneficial results to justify the further expenditure of funds.
- (b) **For Cause.** HDOT may, by giving a 30-day written notice to the Subrecipient, terminate any Project and cancel this Agreement for any of the following reasons:
 - (1) The Subrecipient fails to provide the required general public transportation services as described in the Application;
 - (2) The Subrecipient fails to obtain the approval of HDOT in the manner and at the time required under this Agreement;
 - (3) The commencement, prosecution or timely completion of any Project by the Subrecipient is, for any reason, rendered improbable, impossible or illegal; or
 - (4) The Subrecipient shall be in default under any provision of this Agreement.

(c) Action Upon Termination. Upon termination of any Project and cancellation of this Agreement under the provisions of paragraph (a) or (b) of this Section, the Subrecipient agrees to dispose of the Project equipment, vehicles and facilities in accordance with State and FTA procedures.

Section 13. Agreement Changes. Any amendments to this Agreement shall be made in writing signed by HDOT and the Subrecipient.

Section 14. Interest of Members of or Delegates to Congress. No member of or delegate to the Congress of the United States shall be admitted to any share or part of this agreement or to any benefit arising there from.

Section 15. Prohibited Interest. No member, officer, or employee of the Subrecipient during his/her tenure, and for one year thereafter, shall have any monetary interest, direct or indirect, in this Agreement or the proceeds thereof.

Section 16. Equal Employment Opportunity. In connection with the performance of this Agreement, the Subrecipient shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. Such actions shall include, but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertisement; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Section 17. Title VI – Civil Rights Act of 1964. The Subrecipient will comply with all requirements imposed by

Title VI of the Civil Rights Act of 1964 (78 Stat. 252), the regulations of the United States Department of Transportation issued thereunder (CFR Title 49, Subtitle A, Part 21), and the assurance by the Subrecipient pursuant thereto.

Section 18. Minority Business Enterprise. In connection with the performance of this Agreement, the Subrecipient will cooperate with HDOT in meeting HDOT's commitments and goals with regard to the maximum utilization of minority business enterprises and the Subrecipient will use its best efforts to insure that minority business enterprises shall have the maximum practicable opportunity to compete for subcontract work under this Agreement.

Section 19. Americans With Disabilities Act. In connection with the performance of this Agreement, the Subrecipient must comply with 49 CFR Parts 27, 37, and 38 implementing the Americans With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, 2 U.S.C. 794, which prohibits discrimination on the basis of handicap.

Section 20. Drug and Alcohol Program. The Subrecipient and/or Subrecipient contractors that directly operate the transit operation or component parts of the transit operation that utilize the Project must have a drug and alcohol testing program for safety sensitive employees. The drug and alcohol program is a requirement of the Omnibus Transportation Employee Testing Act of 1991. The Subrecipient shall submit to HDOT their drug and alcohol program, and their contractor's drug and alcohol program, if applicable.

Section 21. Financial Audit Report or Single Audit Report Requirements. In connection with the performance of this Agreement, each Subrecipient shall submit to HDOT within nine (9) months of the end of the fiscal year (June 30), two (2) copies of its Annual Single Audit Report in accordance with the Office of Management and Budget Circular No. A-133 Revised June 27, 2003.

Section 22. Indemnification Agreement. The Subrecipient shall hold harmless, indemnify, defend and where appropriate, insure HDOT, its officers, agents, representatives, successors and assigns, and other governmental agencies, from any and all claims, demands, suits, actions, causes of action, judgments, losses, liabilities, damages, costs and expenses, of every nature and kind, including, without limitation, injury to or death of persons and damage to property, arising or growing out of the acts or omissions of the Subrecipient, its officers, agents, servants, employees, and representatives related to or connected with this Agreement.

It is not the intention of the parties to this Agreement to make the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party hereto to maintain a claim, suit, or action for personal injuries or property damage based on a contract theory of liability.

Section 23. Conflict. In case of conflict, the stricter requirement shall prevail.

Section 24. Detailed Responsibilities. Attachment A, herein made part of this agreement, shall describe the duties and responsibilities of HDOT and DLNR. It does not encompass the entirety of this agreement, and is intended to provide an summary of the major responsibilities for audit purposes.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

State of Hawaii
Department of Transportation

By: _____
BRENNON T. MORIOKA
Director of Transportation

Date: _____

Approved by the Board of Land and Natural Resources at its meeting held on _____.

State of Hawaii
Department of Land and Natural Resources

By: _____
LAURA H. THIELEN
Chairperson, Board of Land and Natural Resources

APPROVED AS TO FORM (HDOT):

Deputy Attorney General

APPROVED AS TO FORM (DLNR):

Deputy Attorney General

Responsibilities of DLNR:

1. Provide HDOT with complete concept papers by June 30 of each year to initiate and/or expand existing ferry terminal improvement projects;
2. Secure funding and authority to expend funding from the Legislature to provide the 20% non-Federal (local) matching funds;
3. Obtain and manage a temporary loan from the State Department of Budget and Finance to prepay FTA ferry transit improvements cost reimbursable expenses;
4. Comply with the terms, conditions and scope of work for the FTA approved grants;
5. Project planning and design, including but not limited to providing coordination, development, contracting and directing the services of consultants;
6. Perform competent project management including the necessary coordination and contract execution and management to ensure successful implementation of the ferry transit improvements;
7. Process and provide prompt payment of invoices from consultants and/or contractors for projects covered by this Agreement;
8. Submit reimbursement requests and the necessary back-up documents to HDOT;
9. Provide HDOT with up to date monthly expenditure plans;
10. Provide HDOT with the necessary updates and required supporting documentation for the proper administration and management of the FTA grant.

Responsibilities of HDOT:

1. Secure FTA funding (49 USC Section 5309) and providing such funds to DLNR for the planning, design and construction of proposed ferry transit improvements;
2. Provide project oversight for compliance with Federal Provisions;
3. Provide project oversight for the compliance with the terms and/or conditions of the FTA approved grants;
4. Process approved reimbursement request from DLNR in a timely manner;
5. FTA grant administration and management, including primary coordination and communication with FTA.