

OFFICE OF HAWAIIAN AFFAIRS

CONTRACT NUMBER 2550

CONTRACT BETWEEN

OFFICE OF HAWAIIAN AFFAIRS

AND

**DEPARTMENT OF TRANSPORTATION
STATE OF HAWAII
(Halawa-Luluku Interpretive Development Project)**

AGREEMENT

THIS AGREEMENT, made and entered into as of _____, 2010, by and between the OFFICE OF HAWAIIAN AFFAIRS, a body corporate existing under the Constitution and laws of the State of Hawai'i by its Chief Executive Officer, CLYDE W. NAMU'O, and its Chief Operating Officer, STANTON ENOMOTO, respectively, acting on behalf of the Board of Trustees, whose principal place of business and mailing address is 711 Kapi'olani Boulevard, Suite 500, Honolulu, Hawai'i, 96813, hereinafter referred to as "OHA," and the DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I, hereinafter called "HDOT".

W I T N E S S E T H :

WHEREAS, a Memorandum of Agreement (MOA) pursuant to regulations implementing Section 106 of the National Historic Preservation Act and relating to the construction of Interstate Route H-3 had been previously entered into on July 21, 1987 by the Federal Highway Administration, U.S. Department of Transportation (FHWA); the State Historic Preservation Officer, State of Hawaii (SHPO); and the Advisory Council on Historic Preservation (ACHP) in consultation with and the concurrence of OHA and HDOT to mitigate adverse impacts created by and resulting from the construction of the H3 freeway (see Exhibit "A" attached hereto and made a part hereof); and

WHEREAS, said MOA required that any adverse impact of H-3 on the Luluku Discontiguous Archaeological District and any historic property within the highway corridor eligible for inclusion in the National Register of Historic Places, be mitigated through the development and implementation of, among other measures an Interpretive Development Plan (IDP); and

WHEREAS, HDOT and OHA entered into an agreement dated August 10, 1999 whereby OHA would prepare and implement the Halawa Luluku Development Project (the "Project") in

three phases:

1. Preliminary Design of IDP
2. Final Design of the IDP
3. Implementation of the IDP

WHEREAS, OHA with the assistance of the Project's working group made up of concerned community members and the general public, after several years of research, dialogue, interpretation, and planning in collaboration with the public, helped develop an IDP for the mitigation of impacts caused by the construction of Interstate H-3 on Project lands and this IDP has been approved by HDOT and FHWA which satisfies the requirement to complete the IDP; and

WHEREAS, the completed and approved IDP reclassifies the phases for the project as Phase 1- Planning, Phase 2- Design and Development and Phase 3- Implementation; and

WHEREAS, the approved IDP by HDOT and FHWA represents completion of Phase 1 of the IDP; and

WHEREAS, HDOT and Federal funding currently exists to proceed to Phases 2 and 3; and

WHEREAS, HDOT and FHWA desire that OHA continue with Phases 2 and 3 of the IDP and OHA agrees to continue with the Project if financial compensation is made by HDOT; and

WHEREAS, the parties hereto desire to enter into a Cooperative Agreement to memorialize their mutual understandings of the responsibilities of HDOT and OHA relative to Phases 2 and 3; and

WHEREAS, the parties mutually agree that this Cooperative Agreement shall supersede that certain Contract No. 1385 dated August 10, 1999 by and between OHA and HDOT.

NOW, THEREFORE, in consideration of mutual promises, the parties hereto agree to

the following:

1. Scope of Services. Subject to the availability of sufficient HDOT and FHWA funding for Phases 2 and 3 of the Project as defined by the IDP, OHA shall act as HDOT's project manager as described in Paragraph 3.A below, for Phases 2 and 3 of the Project which includes design and construction of mitigation measures as described in the IDP and as will be further defined during the design and development phase.

2. Term of Agreement. This Agreement shall be in effect for three years following the date of execution and shall be extended as necessary upon mutual written consent of the parties hereto to permit the continued operation of OHA's HLID office to oversee the design and implementation of the Project until completed or unless either party terminates this agreement pursuant to paragraph 14 below.

3. Responsibilities of the Parties.

A. Subject to the availability of HDOT and FHWA funding, OHA shall perform the following functions and responsibilities:

- (1) As Project Manager, OHA shall be responsible for coordination and management of Project design and construction activities.
- (2) OHA shall also develop a Stewardship and Management plan (the "Plan") that will guide the management and stewardship of the Project after completion of the Implementation phase. The Plan shall be approved by HDOT and FHWA and shall guide the organization(s) selected to manage the project for HDOT once the Implementation phase is complete.
- (3) OHA shall identify the specific projects from the list enumerated in the IDP to be undertaken in Phases 2 and 3 of the project and coordinate with HDOT for procurement of necessary services and

materials as described in section 3.B.(2) below.

(4) OHA shall assist with the development of the scope of work of the selected projects to be undertaken in Phases 2 and 3 and shall serve on any procurement committees which HDOT forms to procure any goods and services required for the Project.

(5) Subject to HDOT's approval as detailed in Paragraph 8 Subcontracting or Assignment of Agreement herein, OHA may elect to procure with approval from HDOT and coordinate the services of Native Hawaiian organizations or consultants that it deems necessary to the execution of the Project. To the extent OHA elects to procure for services related to the Project, any related contract, architectural drawings and building plans shall be submitted to HDOT and FHWA for approval.

(6) OHA shall obtain the prior approval of HDOT and FHWA for any consultant and contractor selections, and all expenditures which shall be subject to the following procedure:

(a) OHA shall submit its (1) proposed HLID annual expenditure report, and (2) proposed HLID annual administrative costs to HDOT no later than 90 days prior to the start of each fiscal year. Upon submission of the proposed expenditure reports and/or administrative costs by OHA to HDOT, HDOT shall complete its review and provide written approval within 30 calendar days of receipt. If HDOT does not approve the expenditure reports and/or administrative costs, HDOT and OHA shall work to resolve the matter in a reasonable amount of time. No work shall be performed by OHA

until and unless HDOT has provided written approval of the annual expenditure report and OHA's proposed administrative costs report.

(b) Any unplanned expenditures or increases in planned expenditures shall be submitted to HDOT as a supplemental expenditure report. No supplemental work shall be performed by OHA until HDOT has approved of, in writing, the supplemental expenditure report. HDOT shall complete its review of any supplemental expenditure reports and provide written approval within 30 calendar days of receipt of OHA's submission of the supplemental report.

(c) OHA shall prepare and submit a quarterly progress report which provides a summary of the work progress which shall include, but not be limited to, the costs incurred and the work performed on both a quarterly and cumulative basis. OHA shall submit the quarterly progress reports no later than the 20th day of the month following the end of the quarter.

(d) As soon as reasonably possible, OHA shall report to HDOT any event that OHA believes may materially affect OHA's ability to proceed with the work required by the Agreement. HDOT, in consultation with OHA, shall determine the course of action to be taken in response to OHA's report.

(e) OHA may be reimbursed for administrative costs for this project, including costs for the services of non-HLID OHA employees, subject to pre-approval by HDOT.

B. HDOT's responsibilities:

(1) HDOT will monitor and review OHA's work for conformity with Federal and State standards and procedures, and shall reimburse OHA for all of its authorized expenses.

(2) HDOT, in coordination with OHA's HLID office, shall be responsible for procuring all materials, equipment, labor and professional services, including without limitation the services of architects, engineers, contractors, surveyors and consultants that are required for Phases 2 and 3 of the Project. HDOT will contract with these vendors and contractors to provide the necessary materials, equipment and services and shall be responsible for payment to these providers.

(3) HDOT, in coordination with OHA's HLID office, will be responsible for technical review and approval of all engineering, architectural and building specifications, designs, and plans. HDOT, in coordination with OHA's HLID office, shall also be responsible for all other studies, assessments, or reporting that may be required by federal, state or local law and for obtaining all necessary governmental approvals including, without limitation, all building and use permits necessary to complete Phases 2 and 3 of the project.

(4) OHA shall not be responsible for maintaining the Halawa Stream and the Halawa Access Road.

(5) HDOT shall maintain a minimum balance of ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$150,000.00) on deposit with OHA as HLID funds to eliminate the need for OHA to use its non-HLID funds to finance expenses incurred under this Agreement. OHA shall draw against HLID funds for all expenses necessary and proper to meet its responsibilities under the terms of this Agreement. OHA shall submit receipts for all work expenses previously

authorized by HDOT in meeting its responsibilities under the terms of this Agreement. HDOT shall as soon as reasonably practical, but no later than 45 days after expense submittal, replenish this HLID Fund on deposit with OHA for the amount of these receipts.

C. Joint Responsibilities:

(1) Monthly review meetings. The parties shall meet once a month at a minimum, to review the progress of the Project and to address and resolve issues and concerns related to the project.

4 . Use and Occupancy Provisions. OHA and its sub-contractors shall prepare and execute right of entry and/or use and occupancy agreements with HDOT, prior to using or occupying the property for any work authorized by HDOT in implementing the Project.

5. Procurement Standards. The employment of contractors and administration of the Project by OHA and HDOT shall be in conformance with Chapter 103D of the Hawaii Revised Statutes and Section 3-122, Subchapter 7, Hawaii Administrative Rules C (“HAR”), Title 3, Department of Accounting and General Services, Title 3, Subtitle II regarding professional services, and 23 CFR-172 governing the administration of engineering and design-related service contracts. Competitive negotiation shall be employed and Disadvantaged Business Enterprise (DBE) firms shall be considered.

6. Project Funds. This agreement is to be funded completely by HDOT and Federal funds administered by FHWA. The parties have no obligation to complete the work and services contemplated by this Agreement if these funds are exhausted and no additional funding becomes available. The parties acknowledge that the original approved budget for this Project was ELEVEN MILLION AND NO/100 DOLLARS (\$11,000,000.00) of which approximately \$8.5 million remains unspent and available.

7. Financing. This Agreement is financed by State funds and Federal funds administered by FHWA. Eligibility of costs for Federal reimbursement shall be as prescribed in 48 CFR 31 (Federal Acquisition Regulations).

Ninety percent (90%) of the cost of this Project is Federally funded. It is covenanted and agreed to, by and between the parties hereto, that as to the portion of the obligation under this contract to be payable out of Federal funds, that this contract shall be construed to be an agreement to pay such portion to OHA only out of Federal funds if and when such Federal funds shall be received from the Federal government for the purpose of such payment, and that this contract shall not be construed to be a general agreement to pay such portion in all events out of any funds other than those which may be so received from the Federal government

8. Subcontracting or Assignment of Agreement. OHA shall not subcontract or assign all or any part of the work under this agreement without the prior written consent of HDOT, and any consent by HDOT to subcontract, assign, or otherwise dispose of any portion of this Agreement shall not be construed to relieve OHA of any responsibility for the fulfillment of the Agreement.

The parties understand OHA may subcontract or assign all or part of the work required by this agreement to a subsidiary Limited Liability Company. Approval by HDOT for such an assignment shall not be unreasonably withheld.

9. Prosecution of the Work. HDOT and OHA acknowledge to each other that in drafting this Agreement, the parties did not anticipate all possible circumstances or contingencies that might arise, and therefore this Agreement may need to be supplemented or amended from time to time as the Project progresses. The parties agree that they shall cooperate in good faith with each other with regard to this Agreement and the execution of the work contemplated hereunder, in order to fulfill the intended purpose of this Agreement. HDOT and OHA shall mutually resolve all questions regarding the manner of performance and progress of the work,

compliance with the Agreement provisions, compensation, and any other question which may arise under the Agreement. Any irreconcilable differences shall be resolved to the extent provided with Paragraph No. 16 below.

10. Alterations or Revisions to the Agreement. HDOT and OHA reserve the right to increase or decrease the scope of services to be provided by OHA under the Agreement. Any such amendment, however, must be agreed to, in writing, by both parties.

11. Time of Completion and Extension Thereof. OHA shall complete the work within the three years from the date of execution of this Agreement. Any delay in the progress of the work which may adversely affect the completion of work within the required time shall be promptly reported to HDOT in writing. If OHA's work is delayed by conditions beyond its control, OHA shall, subject to approval by HDOT, be entitled to a reasonable extension of time to complete its work. Additionally HDOT may, upon request by OHA and regardless of cause, extend the completion date of the Agreement at HDOT's sole discretion.

12. Accounting Records. OHA shall maintain accounting records and other evidence pertaining to costs incurred, and shall make such materials available for audit by authorized representatives of HDOT and FHWA.

13. Publication and Ownership. Maps, records, and reports resulting from this Project shall be provided to HDOT. HDOT reserves the right to publish the results or, if already published by OHA, shall, upon request, be furnished the number of copies requested. The maps, records and reports published by either OHA or HDOT shall contain a statement of the cooperative relationship of OHA, HDOT, and FHWA in the program.

Upon termination or completion of this Agreement, all maps, records, reports, equipment, structures, improvements, and any incidentals purchased with Project funds shall become the property of HDOT. OHA may obtain and keep copies of all maps, records, and reports pertaining to this Project.

14. Terminations. The Agreement may be terminated by OHA or HDOT without cause at any time by delivering written notice to the other party of such termination at least eighteen months before the effective date of termination (“the Termination Period”); provided, however that the parties may agree to shorten the termination period by written agreement. During the Termination Period, the parties shall continue with all of their obligations under this Agreement, which shall continue in full force and effect. Completion of this Agreement shall be upon implementation of the Interpretive Development Plan to the extent of available funding as identified herein.

The Agreement may also be terminated by OHA or HDOT for cause by delivering written notice to the other party of such termination at least THIRTY (30) days before the effective date of termination. For cause termination would be based on a failure of either party to fulfill any obligation as described in this Agreement. Termination is HDOT’s sole remedy in the event that OHA fails to complete the work through its own fault.

15. Dispute Resolution. Should any irreconcilable differences between OHA and HDOT arise during the Project, the disagreement shall be presented to FHWA for resolution as provided in the 1987 Memorandum of Agreement which is attached hereto as Exhibit “A”.


16. Scope of Payment. Except as otherwise provided herein, the amount set forth in this Agreement and any subsequent amendment to this Agreement shall be deemed full compensation for all work performed by OHA. Said compensation shall include all services, materials, supplies, equipment, overhead, incidentals and operating expenses.

17. Reimbursements. As long as the services of OHA and its subcontractors are authorized and performed in a satisfactory manner, HDOT will make reimbursements based upon the receipts and timesheets rendered and the costs that were incurred, subject to the financing provisions set forth in Paragraphs 6 and 7 above as well as any applicable federal, state and county laws.


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

OFFICE OF HAWAIIAN AFFAIRS

Date: June 25, 2010

By 
CLYDE W. NAMU'O
Its Chief Executive Officer


Date: June 24, 2010

By 
STANTON ENOMOTO
Its Chief Operating Officer

"OHA"


DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII

Date: 6-29 2010

By 
BRENNON T. MORIOKA, Ph.D, P.E.
Its Director of Transportation

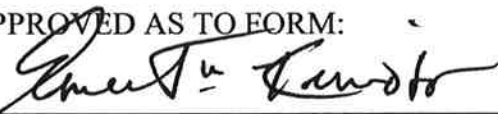
"HDOT"

APPROVED AS TO CONTENT:


RICHARD PEZZULO
OHA's Chief Financial Officer

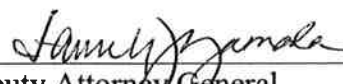
Date: 6-23, 2010

APPROVED AS TO EORM:


ERNEST M. KIMOTO
OHA's Corporate Counsel

Date: June 23, 2010

APPROVED AS TO FORM:


Deputy Attorney General
Land Transportation Division

Date: June 29, 2010

STATE OF HAWAI'I)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 25th day of June, 2010, in the First Circuit of the State of Hawai'i, before me personally appeared CLYDE W. NĀMU'O, to me personally known or proved to me on the basis of satisfactory evidence of his signature and identity to be the aforesaid person, who, by me duly sworn or affirmed, did say that he is he is the Chief Executive Officer of OFFICE OF HAWAIIAN AFFAIRS, a body corporate and instrumentality of the State, and that in the absence of a seal, said instrument was signed in behalf of said corporation by authority of its Board of Trustees, and the said CLYDE W. NĀMU'O acknowledged said instrument to be the free act and deed of said corporation.

I hereby certify that the instrument to which this notary acknowledgment is attached is entitled CONTRACT 2550 between OFFICE OF HAWAIIAN AFFAIRS and DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I, and dated June 25, 2010 at the time of notarization. The entire instrument, including the notary acknowledgement page(s) and attachment(s), if any, consists of ONE HUNDRED THIRTY-TWO (132) pages.



[Signature]
Notary Public, State of Hawai'i
Print Name: S. E. Okamoto
My commission expires: 5/29/14

STATE OF HAWAI'I)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 25th day of June, 2010, before me personally appeared RICHARD PEZZULO, Chief Financial Officer for and in behalf of STANTON ENOMOTO, Chief Operating Officer, to me known, who being by me duly sworn, did say that he is the Chief Financial Officer of the Office of Hawaiian Affairs, a body corporate and said instrumentality of the State and that in the absence of a seal that said instrument was signed in behalf of said corporation by authority of its Board of Trustees, and the said Chief Financial Officer, for and in behalf of the Chief Operating Officer, acknowledged said instrument to be the free act and deed of said corporation.

I hereby certify that the instrument to which this notary acknowledgment is attached is entitled CONTRACT 2550 between OFFICE OF HAWAIIAN AFFAIRS and DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I, and dated June 25, 2010 at the time of notarization. The entire instrument, including the notary acknowledgement page(s) and attachment(s), if any, consists of ONE HUNDRED THIRTY-TWO (132) pages.



[Signature]
Notary Public, State of Hawai'i
Print Name: S. E. Okamoto
My commission expires: 5/29/14

STATE OF HAWAI'I)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 29th day of June, 2010, before me personally appeared BRENNON T. MORIOKA, Ph.D, P.E. to me known, who being by me duly sworn, did say that he is the Director of the DEPARTMENT OF TRANSPORTATION, a body corporate of the State of Hawaii, and that in the absence of a seal that said instrument was signed in behalf of said body corporate by authority of its Directors, and the said Director acknowledged said instrument to be the free act and deed of said Department.

Denise M. Uemoto

Notary Public, State of Hawai'i
Print Name: DENISE M. UEMOTO
My commission expires: 3.17.2014



Doc. Date: 6.29.10 # Pages: 132
Denise M. Uemoto First Circuit
Doc. Description OHA CONTRACT
2550 between OHA and
DOT (Halawa-Luiuku)



Denise M. Uemoto 6.29.10
Notary Signature Date

NOTARY CERTIFICATION

EXHIBIT "A"

Memorandum of Agreement entered into on July 21, 1987

by and among Federal Highway Administration;

U.S. Department of Transportation (FHWA);

State Historic Preservation Officer, State of Hawaii (SHPO);

and Advisory Council on Historic Preservation (ACHP)

EXHIBIT "B"

Final Interpretive Development Plan