

MEMORANDUM OF AGREEMENT

BETWEEN

DEPARTMENT OF LAND AND NATURAL RESOURCES,
STATE OF HAWAII,
DIVISION OF BOATING AND OCEAN RECREATION

AND

THE U.S. ARMY CORPS OF ENGINEERS,
HONOLULU ENGINEER DISTRICT

*Jul 96
Revised*

ARTICLE I - PURPOSE AND AUTHORITY

This Memorandum of Agreement ("MOA") is entered into by and between the U.S. ARMY CORPS OF ENGINEERS, HONOLULU ENGINEER DISTRICT, ("HED") and the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, DIVISION OF BOATING AND OCEAN RECREATION, ("DBOR") ("the parties") for the purpose of establishing a mutual framework governing the respective responsibilities of the parties for the provision of goods and services by the HED. Such services may include construction management, engineering and design, construction, technical services to include studies and planning activities and other professional services to assist in implementing water resource and infrastructure developments. This MOA is entered into pursuant to 10 U.S.C. § 3036(d)(2), and the Intergovernmental Cooperation Act (31 U.S.C. §6505).

ARTICLE II - SCOPE

Under the authority of 10 U.S.C. § 3036(d)(2), the HED may provide assistance only if Federal funding assistance is involved. Services which the HED may provide under this authority include the HED being the construction contracting agency for DBOR, planning, engineering, construction management, technical and design services or other professional services to assist in implementing water resource and infrastructure developments or repairs including the areas of navigation, shore erosion control, facilities improvements, miscellaneous utilities and roadways for the DBOR.

Under the authority of the Intergovernmental Cooperation Act, 31 U.S.C. §6505, which does not involve Federal funding, services which the HED may provide include planning, engineering, construction management assistance (limited to technical advice to improve State and local management capability in contract preparation, negotiating, and evaluation; contract administration; quality assurance; and supervision and inspection), engineering, construction, technical and design services to assist in implementing water resource and infrastructure

developments or repairs including the areas of navigation, shore erosion control, facilities improvements, miscellaneous utilities and roadways.

Nothing in this MOA shall be construed to require the DBOR to use the HED or to require the HED to provide any services to the DBOR, except as may be set forth in individual Work Orders ("WO(s)") under this MOA.

ARTICLE III - INTERAGENCY COMMUNICATIONS

To provide for consistent and effective communication between the HED and the DBOR, each party shall appoint a Principal Representative to serve as its central point of contact on matters relating to this MOA. Additional representatives may also be appointed to serve as points of contact on individual WOs.

ARTICLE IV - WORK ORDERS

In response to requests from the DBOR for the HED assistance under this MOA, the HED and the DBOR shall conclude mutually agreed upon written WOs, which shall include the following:

- a detailed scope of work statement;
- schedules;
- the amount of funds required and available to accomplish the scope of work as stated above in advance of the actual work being performed; and

The following must be addressed in each WO, or in other implementing arrangements:

- identification of individual project managers;
- identification of types of contracts to be used (if known);
- types and frequencies of reports;
- identification of which party is to be responsible for government-furnished equipment, contract administration, records maintenance, rights to data, software and intellectual property, and contract audits;
- procedure for amending or modifying the WO; and
- such other particulars as are necessary to describe clearly the obligations of the parties with respect to the requested goods and services.

Services shall be provided under this MOA only after an appropriate WO has been signed by a representative of each party authorized to execute that WO. Upon signature by each parties' representative, a WO shall constitute a valid order. In the case of conflict between this MOA and a WO or implementing arrangement, this MOA shall control.

ARTICLE V - RESPONSIBILITIES OF THE PARTIES

A. Responsibilities of the U.S. Army Corps of Engineers, Honolulu Engineer District

1. The HED shall provide the DBOR with goods or services in accordance with the purpose, terms, and conditions of this MOA and with specific requirements set forth in the individual WOs and implementing arrangements.
2. The HED shall use its best efforts to provide such services either by contract or by in-house effort.
3. The HED shall provide detailed periodic progress, financial and other reports to the DBOR as agreed to in the individual WO. Financial reports shall include information on all funds received, obligated, and expended, and on forecast obligations and expenditures.
4. The HED shall inform the DBOR of all contracts entered into under each WO.

B. Responsibilities of the Division of Land and Natural Resources, State of Hawaii, Division of Boating and Ocean Recreation.

1. If the work involves federal funding assistance, the DBOR shall certify in writing on each WO under this MOA, that the work to be undertaken on behalf of the DBOR involves Federal funding assistance and the head of the department or agency providing the Federal assistance to the DBOR for the work does not object to the provision of services by the HED.
2. If the work does not involve federal funding assistance, the DBOR shall certify in writing on each WO under this MOA, that the work to be undertaken on behalf of the DBOR does not involve Federal funding assistance and that the DBOR complies with the requirements of this MOA and implementing WO.
3. The DBOR shall certify in writing that the services to be provided by the HED cannot be procured reasonably and expeditiously through ordinary business channels.
4. The DBOR shall pay all costs associated with the HED's provisions of goods or services under this MOA and shall certify, at the time of signature of the individual WO, the availability of funds necessary to accomplish that WO.
5. The DBOR shall ensure that only authorized DBOR representatives sign WOs and that only authorized DBOR representatives sign implementing arrangements.
6. The DBOR shall develop draft WOs to include scope of work statements.

7. The DBOR shall obtain for the HED all necessary real estate interests and access to all work sites and support facilities, and shall perform all coordination with and obtain any permits from state and local agencies, as necessary during the execution of each WO.

ARTICLE VI - FUNDING

The DBOR shall pay in advance all costs associated with the HED's provision of services under this MOA. The HED shall bill the DBOR in advance and the DBOR shall provide the necessary funds in advance.

If the HED forecasts its actual costs under the individual WO to exceed the amount of funds available under that WO, it shall promptly notify the DBOR of the amount of additional funds necessary to complete the work under that WO. The DBOR shall either provide the additional funds to the HED, or require that the scope of work be limited to that which can be paid for by the then-available funds, or direct termination of the work under that WO.

Within 90 days of completing the work under a WO, the HED shall conduct a final accounting to determine the actual costs of the work. Within 30 days of completion of this accounting, the HED shall return to the DBOR any funds advanced in excess of the actual costs as then known, or the DBOR shall provide any additional funds necessary to cover the actual costs as then known. Such a final accounting shall in no way limit the DBOR's duty in accordance with ARTICLE X to pay for any costs, such as contract claims or other liability, which may become known after the final accounting.

ARTICLE VII - APPLICABLE LAWS

This MOA and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives, and procedures of the United States. Unless otherwise required by law, all contract work undertaken by the HED shall be governed by Department of Army policies and procedures.

ARTICLE VIII - CONTRACT CLAIMS AND DISPUTES

All claims and disputes by contractors arising under or relating to contracts awarded by the HED shall be resolved in accordance with federal law and the terms of the individual contract. The HED shall have dispute resolution authority for these claims. Any contracting officer's final decision may be appealed by the contractor pursuant to the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613). The U.S. Army Corps of Engineers Board of Contract Appeals ("ENG BCA") is designated as the appropriate board of contract appeals. In lieu of appealing to the ENG BCA, the contractor may bring an action directly to the United States Court of Federal Claims.

The HED shall be responsible for litigating all disputes and appeals, and for coordinating with the DBOR as appropriate. The HED shall notify the DBOR of any such litigation and

afford the DBOR an opportunity to review and comment on the litigation proceedings and any resulting settlement negotiations.

ARTICLE IX - DISPUTE RESOLUTION

The parties agree that, in the event of a dispute between the parties, the DBOR and the HED shall use their best efforts to resolve that dispute in an informal fashion through consultation and communication, or other forms of non-binding alternative dispute resolution mutually acceptable to the parties. The parties agree that, in the event such measures fail to resolve the dispute, they shall refer it for resolution to the Office of Management and Budget pursuant to Executive Orders 12088 and 12146, as modified by Executive Order 12608 or other entity as may be appropriate.

ARTICLE X - LIABILITY

The State will hold and save the Government free from all damages arising from the performance of the work done under this Agreement, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE XI - PUBLIC INFORMATION

Justification and explanation of the DBOR's programs before Congress or the State Legislature and other agencies, departments, and offices of the Federal Executive Branch and the State of Hawaii shall be the responsibility of the DBOR. The HED may provide, upon request, any assistance necessary to support the DBOR's programs conducted under this MOA. In general, the DBOR is responsible for all public information. The HED may make public announcements and respond to all inquiries relating to the ordinary procurement and contract award and administration process. The DBOR or the HED shall make its best efforts to give the other party advance notice before making any public statement regarding work contemplated, undertaken, or completed pursuant to WOs under this MOA.

ARTICLE XII - MISCELLANEOUS

A. Other Relationships or Obligations

This MOA shall not affect any pre-existing or independent relationships or obligations between, the DBOR and the HED.

B. Survival

The provisions of this MOA which require performance after the expiration or termination of this MOA shall remain in force notwithstanding the expiration or termination of this MOA.

C. Severability

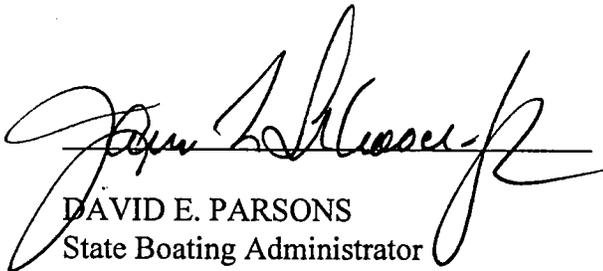
If any provision of this MOA is determined to be invalid or unenforceable, the remaining provisions shall remain in force and unaffected to the fullest extent permitted by law and regulation.

ARTICLE XIII - AMENDMENT, MODIFICATION AND TERMINATION

This MOA may be modified or amended only by written, mutual agreement of the parties. Either party may terminate this MOA by providing written notice to the other party. The termination shall be effective upon the sixtieth calendar day following notice, unless a later date is set forth. In the event of termination, the DBOR shall continue to be responsible for all costs incurred by the HED under this MOA and for the costs of closing out or transferring any on-going contracts.

ARTICLE XIV - EFFECTIVE DATE

This MOA shall become effective when signed by both the DBOR and the HED



DAVID E. PARSONS
State Boating Administrator
Division of Boating and Ocean
Recreation
Department of Land and
Natural Resources
State of Hawaii



RALPH H. GRAVES
Lieutenant Colonel, U.S. Army
District Engineer

JULY 10, 1996
DATE

1 July 96
DATE

APPROVED AS TO FORM:



July 15, 1996
DATE