

State of Hawaii
Department of Land and Natural Resources
Division of Forestry and Wildlife

January 14, 2022

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

Land Board Members:

SUBJECT: REQUEST APPROVAL FOR ASSIGNMENT OF LIVING PONO PROJECT AS THE SUBCONTRACTOR FOR IMPLEMENTING THE PU'U KUKUI WATERSHED PRESERVE NATURAL AREA PARTNERSHIP AGREEMENT WITH MAUI LAND & PINEAPPLE, INC, TAX MAP KEY 4-1-1-17, 4-2-1-1: POR, 4-1-4-12: POR, 4-1-5-10, 4-1-5-13, 4-1-5-16, 4-1-5-17, 4-3-1-1: POR, 4-3-1-17: POR, MAUI

BACKGROUND:

The Department of Land and Natural Resources is contracting with Maui Land & Pineapple, Inc. (MLP), to manage the Pu'u Kukui Watershed Preserve as part of the Natural Area Partnership Program. The Board approved the FY 18-24 Long-Range Management Plan and contract with MLP during the May 26, 2017 meeting, Item C-4. MLP is transitioning from employing conservation staff that manage the preserve to subcontracting those duties to the Living Pono Project (LPP). LPP is a private non-profit organization on Maui. MLP has created a Memorandum of Agreement and Managing Contract with LPP (Exhibit 1) to authorize the non-profit to manage the Preserve and use MLP facilities. MLP has requested the authority to subcontract the Natural Area Partnership contract work to LPP, which requires Board approval pursuant to Special Condition #3 of the contract, which is attached as Exhibit 2.

DISCUSSION:

Under the proposed subcontracting arrangement, MLP would still be required to provide 1/3 share of the management costs per the contract requirements. The required match for the duration of the existing management plan is shown below.

Fiscal Year	2022	2023	2024
MLP Required 1/3 match	\$ 108,549	\$ 112,891	\$ 117,407
State NAPP Funding (2/3)	\$ 217,099	\$ 225,783	\$ 234,814

Total Budget	\$ 325,648	\$ 338,674	\$ 352,221
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Per the attached agreement (Exhibit 1), MLP will be charging LPP a discounted rent for use of a MLP baseyard (which MLP has indicated is worth \$112,460 per year, compared to market rent values) and contributing \$120,000 each year in FY 22-23 and \$60,000 in FY24 to satisfy the 1/3 match requirement.

While NAPP agreements are automatically renewed each year for an additional six-year term, the budget after Fiscal Year 2024 has not been determined yet and will undergo future Board review.

LPP has hired the conservation staff that were formerly MLP employees to ensure continuity of personnel who manage the Preserve.

RECOMMENDATIONS: That the Board:

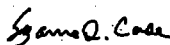
1. Approve the assignment of Living Pono Project as the subcontractor for implementing the Pu'u Kukui Watershed Preserve Natural Area Partnership Agreement with Maui Land & Pineapple, Inc.; and
2. Authorize the Chairperson to sign a consent to subcontract agreement with Maui Land & Pineapple, Inc.

Respectfully submitted,



DAVID G. SMITH, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachments

Exhibit 1: Memorandum of Agreement and Managing Contract between MLP and LPP
Exhibit 2: Natural Area Partnership Agreement #66114



**Memorandum of Agreement & Management Contract
Living Pono Project
and
Maui Land & Pineapple Company, Inc.**

This document will serve as a Memorandum of Agreement (MOA) between the Living Pono Project (LPP) and Maui Land & Pineapple Company, Inc. (MLP). MLP owns land known as Pu'u Kukui Watershed Preserve (PKW), the Honolua Valley Conservation Easement (HVCE), as well as other conservation and agriculture-zoned lands in West Maui.

In support of the PKW, HVCE, and the surrounding lands, LPP and MLP share common goals to preserve and enhance these areas. LPP and MLP recognize that through mutual understanding, efficient administration and working cooperatively, these goals can be achieved. Nothing in this MOA is construed as interfering in any way with the basic responsibilities and authority of each party.

The MLP Field Crew (FC) currently performs much of the work that is encompassed in this agreement and both MLP and LPP agree to transfer the FC to LPP. Upon the transfer, LPP agrees to provide certain management services to PKW and HVCE. Services may also be provided to other MLP conservation and agriculture-zoned lands when MLP and LPP agree it is the best solution for meeting conservation objectives.

Transition Date

The Transition Date is defined to be September 1, 2021.

All FC employees currently employed by MLP will become LPP employees. All employment and related benefits through MLP will end on the Transition Date. All accrued benefits, including but not limited to, accrued Paid Time Off (PTO) for each employee will be transferred from MLP to LPP. Effective on the Transition Date, all employment-related costs will be the responsibility of LPP. For clarity, LPP will be responsible for the employee salaries, benefits, insurance, and other employee expenses.

Term of the Agreement

The term of this agreement is for ten (10) years from the Transition Date. It will automatically ~~renew~~ every five (5) years, unless MLP or LPP notifies all parties that they do not want to renew.

Transfer or Assignment of PKW Grants to LPP

MLP has begun the process to transfer, assign, or subcontract to LPP the existing grants from Department of Health (DOH), Department of Land and Natural Resources (NAPP), and

Department of Water Supply (DWS). Effective on the Transition Date, LPP will perform all accounting and reporting duties, including but not limited to bookkeeping, budgeting, development of management plan, donation(s) and grant solicitation(s), etc.

LPP will be responsible and liable for all compliance to government regulations and compliance to government requirements including conservation and grant requirements. Reports to be submitted to the various agencies will be reviewed by MLP prior to submission.

Honolua Baseyard Location

LPP will lease space within the Honolua Baseyard as shown in the diagram. LPP will complete their move into the space no later than two months after the Transition Date.

The small outlined area includes the fuel tank location. The larger area is approximately 10,000 square feet.



Other Facilities Locations

MLP & LPP can mutually agree on other areas to be used by the FC for operations and storage of materials.

Rents

For the first five (5) years of this agreement, LPP's base rent and Common Area Maintenance (CAM) will be ten thousand dollars (\$10,000.00) per month. Beginning on the first day of year six (6), the base rent and CAM will be based on market rates. Structural maintenance and real property taxes will be the responsibility of MLP. Interior maintenance and utilities will be the responsibility of LPP.

These terms will be included in a lease/license agreement to further clarify the various matters dealing with the Honolua base yard facilities. If the leased area is used for retail or other revenue generating purposes, it will be subject to a percentage rent, which will be outlined in the lease/license agreement.

LPP Obligations

LPP will be responsible for contracted services, repairs, maintenance, supplies, license fees, permits, utilities, and broadband internet connectivity from the effective date. There may be certain expenses, such as utilities, which require proration by MLP and will be billed to LPP accordingly.

LPP will generate a management plan for PKW and HVCE. The management plan will include the scope of work to be completed as well as the source of funding of proposed work. MLP will review LPP's proposed management plan and mutually discuss the proposed management plan, which will be in the best interest of PKW, HVCE and surrounding MLP lands.

If the source of funding for the proposed management plan comes from a grant and/or private donation, LPP is responsible to execute the work while complying to all grant &/or private donation's specific conditions, which includes but not limited to proper procurement and reporting as directed in grant and/or private donation instruction(s).

Reporting to the press, or planning activities with an outside organization will be reviewed and approved by MLP in advance.

Asset List

The vehicle list, other asset list, and the IT equipment lists were all previously provided by MLP to LPP.

Information Technology (IT) Support

Continued IT support for administrative office services from MLP to LPP will be provided by Danny San Miguel for two months after the Transition Date. IT matters outside of the baseyard administrative office such as mesh networks, IP cameras and the like are not covered within the scope of MLP's IT services.

All operational costs which include but not limited to IT should be transferred from MLP to LPP on the Transition Date. Wireless plans, porting of existing numbers, establishing email and domain names, and migration off the MLP network should be done by the Transition Date, or as quickly as possible if beyond such date.

Insurance

LPP is responsible for insurance, including but not limited to, Commercial General Liability Insurance, covering the insured and landlord parties against claims of bodily injury, personal injury and property damage arising out of LPP's operations, assumed liabilities or use of the premises, including a Commercial General Liability endorsement covering the insuring provisions of the lease and the performance by LPP of the indemnity agreements set forth in the lease for limits of liability not less than:

1. Bodily Injury and Property Damage Liability - \$2,000,000 each occurrence and \$4,000,000 annual aggregate
2. Personal Injury Liability - \$2,000,000 each occurrence and \$4,000,000 annual aggregate

The minimum limits of policies of insurance required of LPP shall in no event limit the liability of LPP. Such insurance shall name MLP, its subsidiaries, directors, officers, employees, and agents as an additional insured on a primary basis incidental to this Agreement.

Indemnification

LPP agrees to indemnify, defend, protect, and hold MLP and MLP's parties harmless from and against any and all claims, actions, administrative proceedings, judgments, damages, punitive damages, penalties, fines, costs, liabilities, interests or losses, including reasonable attorneys' fees and expenses of any kind or nature that arise during this agreement.

Other Key Considerations

Effective on the Transition Date, LPP will be responsible for services in the PKW Preserve and HVCE at the same level as have been performed in the last five years.

These services will include maintaining access roads, control and eradication of invasive species and feral animals, creating and maintaining adequate fire breaks, maintenance and erosion control initiatives, reporting trespassers and assisting in the event of emergency such as fire or flooding.

If there is additional work beyond this scope which LPP cannot do and if these result in additional costs to MLP, such work will be submitted to MLP for discussion, review, and approval prior to incurring such costs.

Use of Kapalua Name & Marks

MLP has registered trademark names and logos regarding Kapalua, Pu'u Kukui Watershed Preserve, and others. The use of MLP registered trademark name(s) and logo(s) is strictly prohibited without the written approval of MLP. That said, MLP is desirous of having LPP use these name and marks in various collateral materials, webpages, or other promotional items. If LPP would like to use the name "Kapalua" or any MLP registered trademark name(s) and logo(s) (collectively the "Kapalua Marks") for promotion, marketing, education, outreach, and other similar activities, MLP is certainly open to this possibility.

Right to Terminate

MLP and LPP reserves the right to terminate this agreement at any time should either party intentionally block the completion of grant deliverables, violate any government rules and regulations, or puts the other party at risk.

Accounting Cut Off & True-Up Reconciliation

MLP will provide financial report(s) and supporting information for grant reporting up to the Transition Date. LPP will be responsible for all financing functions from the Transition Date, as well as any grant reporting, which includes quarter-end reports.

LPP and MLP acknowledge that there will be a transitional period where MLP and LPP may incur expenditures on behalf of each other. MLP will pay expenses incurred up to the Transition Date and LPP will pay expenses incurred beginning on the Transition Date.

MLP Contribution to LPP

MLP desires to provide financial support to LPP and will commit to contributing a total of three hundred thousand dollars (\$300,000.00). This amount will be contributed in advance on a monthly, quarterly, semi-annually, or annually, based on MLP's timing choice, such that the total amount received by LPP is in accordance with this:

Fiscal Period – September 1, 2021 – August 31, 2022:	\$120,000
Fiscal Period – September 1, 2022 – August 31, 2023:	\$120,000
Fiscal Period – September 1, 2024 – August 31, 2024:	\$ 60,000

IN WITNESS WHEREOF, the Parties hereto have executed this MOA to be binding and effective as of the day and year first written below.

MAUI LAND & PINEAPPLE COMPANY, INC.

Date: _____, 2021

By: _____

Name: _____

Its: _____

LIVING PONO PROJECT

Date: Aug. 30, 2021

By: MERCK K. VICARIO

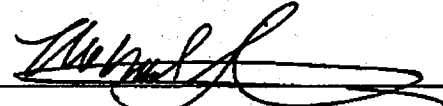
Name: MARCO E. CILANO

Its: President

IN WITNESS WHEREOF, the Parties hereto have executed this MOA to be binding and effective as of the day and year first written below.

MAUI LAND & PINEAPPLE COMPANY, INC

Date: August 30, 2021

By: 
Name: MICHAEL HOTTA
Its: CFO

LIVING PONO PROJECT

Date: _____, 2021

By: _____
Name: _____
Its: _____



**First Amendment to
Memorandum of Agreement & Management Contract
Living Pono Project
and
Maui Land & Pineapple Company, Inc.**

This document will serve as the First Amendment ("First Amendment") to that Memorandum of Agreement between the Living Pono Project (LPP) and Maui Land & Pineapple Company, Inc. (MLP) executed on August 30, 2021 ("MOA"). MLP and LPP are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

AMENDMENT

The provisions of this First Amendment are hereby added, changed, and/or incorporated in the MOA. The other provisions of the MOA shall remain unchanged and fully valid. The Parties agree to modify the **Rents** section of the MOA as follows:

The Base Rent and Common Area Maintenance is \$10,000/month for the first five (5) years, inclusive of general excise tax, which include the 10,000 square feet of building space and approximately 5,000 square feet of yard space and the fuel tank area ("Premises").

Since MLP is charging LPP only \$10,000/month, or \$120,000 annually, MLP is already reduced the rent for the 15,000 square feet significantly, which is substantially below the market rate by approximately 48% for the first five (5) years).

The MLP in-kind contribution on the rents alone amount \$112,460.

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Monthly Market Rate	Sq. Ft.	Areas	Market Rent
\$1.27/SF	10,000	Baseyard	\$ 12,700
\$0.38/SF	10,000	CAM	\$ 3,800
\$0.40/SF	5,000	Yard Space	\$ 2,000
Monthly Market Rent			\$ 18,500
Annual Market Rent			\$ 222,000
Annual Market Rent Inclusive of GET			\$ 232,460
Annual MLP Rent to LPP			\$ 120,000
Reduction from Market Rate			\$ 112,460
MARKET RENT DISCOUNT TO LPP			48%

Beginning the first day of year six (6), the Base Rent and Common Area Maintenance (CAM) will increase by 20% to \$12,000, plus general excise tax. Landlord may increase the Base Rent and Common Area Maintenance by up to 3% in each successive year starting on the first day of year seven (7). Structural maintenance and real property taxes will be the responsibility of MLP. Interior maintenance and utilities will be the responsibility of LPP.

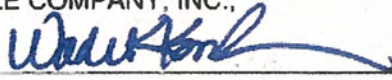
These terms will be included in a lease/license agreement to further clarify the various matters dealing with the Honolulu base yard facilities. If the leased area is used for retail or other revenue generating purposes, it will be subject to a percentage rent, which will be outlined in the lease/license agreement.

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ACCEPTANCE

IN WITNESS WHEREOF, the Parties hereto have executed this First Amendment to the Agreement as of the date and year first set forth above.

Date: 11/1/2021, 2021 MAUI LAND & PINEAPPLE COMPANY, INC.,

By: 

Name: Wade Kodama

Its: CFO

Date: 11/1/2021, 2021 LIVING PONO PROJECT

By: Neal Hoapili Ane

Name: Neal Hoapili Ane

Its: Executive Director

**STATE OF HAWAII
NATURAL AREA PARTNERSHIP MANAGEMENT AGREEMENT**

This Agreement, effective the 11 day of July, 2017, is entered into between the BOARD OF LAND AND NATURAL RESOURCES, State of Hawaii (hereinafter "STATE"), by its Chairperson of the Board of Land and Natural Resources (hereinafter "CHAIRPERSON"), and MAUI LAND & PINEAPPLE COMPANY, INC., (hereinafter "MANAGING PARTNER" or "CONTRACTOR"), a Hawaii corporation whose business address is P.O. Box 187 Kahului, HI 96733-6687, collectively, the "PARTIES."

RECITALS

- A. The STATE and MANAGING PARTNER desire to provide for the management of private lands for conservation purposes under the auspices of the NATURAL AREA PARTNERSHIP PROGRAM.
- B. Due to the MANAGING PARTNER'S special expertise and experience, the MANAGING PARTNER is uniquely qualified to perform the services contemplated by this AGREEMENT and is deemed an appropriate cooperating entity under HRS § 195-2.
- C. The STATE and the MANAGING PARTNER have agreed that the MANAGING PARTNER shall perform these services. The STATE has agreed to fund 2/3 of the cost and the MANAGING PARTNER has agreed to fund 1/3 of the cost of these services as provided in this AGREEMENT.
- D. The Legislature has appropriated money to provide state funds on a two-for-one basis with private funds for the management of private lands that are dedicated to conservation. Further funding after the first six years and each additional six years shall be contingent upon reauthorization by the Board.
- E. Pursuant to HRS § 195-6.5, the STATE is authorized to enter into this AGREEMENT which shall be administered according to HAR Chapter 13-210.
- F. MAUI LAND AND PINEAPPLE COMPANY, INC., (hereinafter "PRIVATE LANDOWNER"), a Hawaii Corporation whose address is P.O. Box 187 Kahului, HI 96733-6687, holds the fee title to certain real property on the Island of Maui in the County of Maui, State of Hawai'i, known as the Puu Kukui Watershed Preserve, consisting of 8,660 acres, more or less, identified as Tax Map Key Parcel 4-1-1-17, 4-2-1-1:por, 4-1-4-12:por, 4-1-5-10, 4-1-5-13, 4-1-5-16, 4-1-5-17, 4-3-1-1:por, 4-3-1-17:por, and shown generally on the map attached to this AGREEMENT as Exhibit A (the "PRESERVE").
- G. The parties have identified the PRESERVE as a priority for conservation management under the NATURAL AREA PARTNERSHIP PROGRAM.

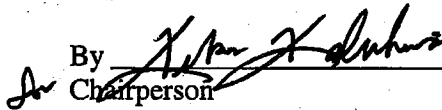
- H. The PRIVATE LANDOWNER has dedicated the PRESERVE to conservation purposes through a conservation easement conveyed to The Nature Conservancy. The Nature Conservancy is a COOPERATING ENTITY under the NATURAL AREA PARTNERSHIP PROGRAM. A copy of a recorded conservation easement is attached as Exhibit B to this AGREEMENT. STATE has reviewed the full conservation easement and acknowledges that it meets the requirements of Chapter 195, Hawaii Revised Statutes.
- I. The STATE and the MANAGING PARTNER have agreed on a six-year MANAGEMENT PLAN for the PRESERVE, a copy of which is attached to this AGREEMENT as Exhibit C.
- J. This agreement is also subject to the requirements of HAR Chapter 13-210. Execution of this partnership agreement is contingent both upon the completion of environmental review as per HAR § 13-210-9, and upon DLNR's recommendation of this agreement and approval by the Board.

NOW, THEREFORE, in consideration of the promises contained in this AGREEMENT, the STATE and MANAGING PARTNER agree as follows:

- 1. Scope of Services. The MANAGING PARTNER shall, in a proper and satisfactory manner as determined reasonably by the STATE, provide all the services set forth in Attachment 1, which is hereby made a part of this AGREEMENT.
- 2. Compensation. The MANAGING PARTNER shall be compensated for services rendered and costs incurred under this AGREEMENT according to the "Compensation and Payment Schedule" set forth in Attachment 2, which is hereby made a part of this AGREEMENT.
- 3. Time of Performance. Services required of the MANAGING PARTNER under this AGREEMENT shall be performed and completed in accordance with the "Time of Performance" set forth in Attachment 3, which is hereby made a part of this Agreement.
- 4. Other Terms and Conditions. The Special Conditions and General Conditions, set forth in Attachments 4 and 5, are hereby made a part of this AGREEMENT. In the event of a conflict between the General Conditions and the Special Conditions, the Special Conditions shall control.
- 5. Standards of Conduct Declaration. The Standards of Conduct Declaration by the MANAGING PARTNER, set forth in Attachment 6, is hereby made a part of this Agreement.


IN WITNESS WHEREOF, the STATE and the MANAGING PARTNER have executed this AGREEMENT effective as of the date first above written.

STATE

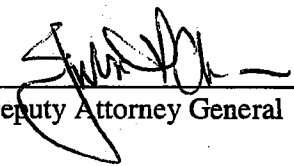
By 
Chairperson
Board of Land and Natural Resources
Date: 7/11/17

MANAGING PARTNER:

Maui Land & Pineapple Company, Inc.
A Hawaii corporation

By 
Its Chief Financial Officer
Date: 6/21/17

APPROVED AS TO FORM:


Deputy Attorney General

Evidence of authority of the MANAGING PARTNER's representative to sign this AGREEMENT for the MANAGING PARTNER must be attached.



STATE OF HAWAII
CONTRACTOR'S
STANDARDS OF CONDUCT DECLARATION

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Maui Land & Pineapple Company, Inc., CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR ☐ is* ☒ is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

* Reminder to Agency: If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the Agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).

CONTRACTOR

By

(Signature)

Print Name

Tim T. Esaki

Print Title

Chief Financial Officer

Name of Contractor Maui Land & Pineapple Company, Inc.

Date

6/21/17



STATE OF HAWAII

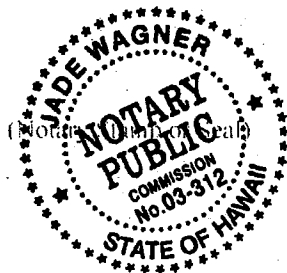
CONTRACTOR'S ACKNOWLEDGMENT

STATE OF Hawaii)
) SS.
)
COUNTY OF Maui)

On this 21st day of June, 2017 before me appeared

TIM T. ESAKI and _____, to me known, to be the person(s) described in and, who, being by me duly sworn, did say that he/~~she~~/they is/~~are~~

Chief Financial Officer and _____ of Maui Land & Pineapple Company, Inc., the CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said instrument as the free act and deed of the CONTRACTOR.



Jade Wagner
(Signature)

Jade Wagner
(Print Name)

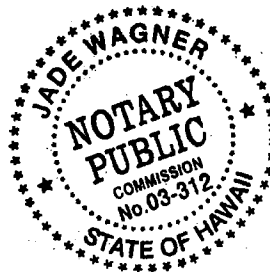
Notary Public, State of Hawaii

My commission expires: June 1, 2019

Doc. Date: undated # Pages: 122
Notary Name: Jade Wagner Second Circuit
Doc. Description: State of Hawaii Natural Area Partnership Management Agreement

Jade Wagner June 21, 2017
Notary Signature Date

NOTARY CERTIFICATION





STATE OF HAWAII

**CERTIFICATE OF EXEMPTION
FROM CIVIL SERVICE****1. By Heads of Departments Delegated by the Director of the Department of Human Resources Development ("DHRD").***

Pursuant to a delegation of the authority by the Director of DHRD, I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to § 76-16, Hawaii Revised Statutes (HRS).


(Signature)

7/11/17
(Date)

Suzanne D. Case

(Print Name)

Chairperson, DLNR

(Print Title)

* This part of the form may be used by all department heads and the heads of attached agencies to whom the Director of DHRD expressly has delegated authority to certify § 76-16, HRS, civil service exemptions. The specific paragraph(s) of § 76-16, HRS, upon which an exemption is based should be noted in the contract file. If an exemption is based on § 76-16(b)(15), the contract must meet the following conditions:

- (1) It involves the delivery of completed work or product by or during a specific time;
- (2) There is no employee-employer relationship; and
- (3) The authorized funding for the service is from other than the "A" or personal services cost element.

NOTE: Not all attached agencies have received a delegation under § 76-16(b)(15). If in doubt, attached agencies should check with the Director of DHRD prior to certifying an exemption under § 76-16(b)(15). Authority to certify exemptions under §§ 76-16(b)(2), and 76-16(b)(12), HRS, has not been delegated; only the Director of DHRD may certify §§ 76-16(b)(2), and 76-16(b)(12) exemptions.

2. By the Director of DHRD, State of Hawaii.

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to § 76-16, HRS.

(Signature)

(Date)

(Print Name)

(Print Title, if designee of the Director of DHRD)

ATTACHMENT 1

SCOPE OF SERVICES

SECTION 1 – BACKGROUND RECITALS

A. The STATE and the CONTRACTOR desire to provide for the management of private lands for conservation purposes under the auspices of the NATURAL AREA PARTNERSHIP PROGRAM.

B. The STATE and the CONTRACTOR have agreed to a partnership to perform these services. The STATE has agreed to fund 2/3 of the cost, and the CONTRACTOR has agreed to fund 1/3 of the cost of these services and perform the work as outlined in this AGREEMENT.

C. The CONTRACTOR, a non-profit corporation committed to the preservation of biotic diversity, holds the conservation easement to certain real property on the Island of Maui in the County of Maui, State of Hawai'i, known as the Puu Kukui Watershed Preserve, consisting of 8,660 acres, more or less, identified as Tax Map Key Parcel 4-1-1-17, 4-2-1-1:por, 4-1-4-12:por, 4-1-5-10, 4-1-5-13, 4-1-5-16, 4-1-5-17, 4-3-1-1:por, 4-3-1-17:por, and shown generally on the map attached to this AGREEMENT as Exhibit A (the "PRESERVE"). A copy of the conservation easement is attached as Exhibit B to this AGREEMENT.

D. The STATE and the CONTRACTOR have agreed on a six-year MANAGEMENT PLAN for the PRESERVE, a copy of which is attached to this AGREEMENT as Exhibit C.

SECTION 2 – DEFINITION OF TERMS

Whenever the following terms or their pronouns are used in these requirements or in any documents or instruments where these requirements govern, the following definitions of the terms shall apply, unless a different meaning is clearly apparent from the context:

"AGREEMENT" means this written management agreement between the STATE and the CONTRACTOR setting forth the agreement of the parties for the conservation management of the PRESERVE and the funding therefore in accordance with the NATURAL AREA PARTNERSHIP PROGRAM.

"BOARD" means the Board of Land and Natural Resources of the State of Hawaii which is the governing body of the Department of Land and Natural Resources.

"CHAIRPERSON" means the Chairperson of the Board of Land and Natural Resources.

"COMMISSION" means the Natural Area Reserves System Commission established by section 195-6, Hawaii Revised Statutes.

"CONTRACT" means AGREEMENT as defined above.

"COOPERATING ENTITY" means a private, nonprofit land-holding organization, or any other body as defined by section 195-2, Hawaii Revised Statutes, deemed by the DEPARTMENT as satisfactorily able to assist in the identification, acquisition, and management of natural area reserves.

"DEPARTMENT" means the Department of Land and Natural Resources, State of Hawaii. The DEPARTMENT may delegate its responsibilities as listed in the AGREEMENT to either the COMMISSION or the DIVISION.

"DIVISION" means the Division of Forestry and Wildlife, Department of Land and Natural Resources, State of Hawaii.

"MANAGEMENT PLAN" means a plan for the conservation management of the PRESERVE that meets the standards established by the DEPARTMENT for the Natural Area Reserves System, submitted by the CONTRACTOR to the DEPARTMENT and approved by the BOARD, as updated and/or amended from time to time pursuant to section 3.5 below and General Condition # 20, as amended.

"MANAGING PARTNER" means the party responsible for implementing the MANAGEMENT PLAN and is listed in this AGREEMENT as the CONTRACTOR. For purposes of this AGREEMENT, the MANAGING PARTNER is MAUI LAND & PINEAPPLE COMPANY, INC., a Hawaii corporation, whose business and post office address is P.O. Box 187 Kahului, HI 96733-6687.

"NATURAL AREA PARTNERSHIP PROGRAM" means the program established in the DEPARTMENT to provide State funds on a two-for-one matching basis with private funds for the management of private lands that are dedicated to conservation purposes pursuant to Chapter 195, Hawaii Revised Statutes.

"PRESERVE" means the Puu Kukui Watershed Preserve, consisting of 8,660 acres, more or less, identified as Tax Map Key Parcel 4-1-1-17, 4-2-1-1:por, 4-1-4-12:por, 4-1-5-10, 4-1-5-13, 4-1-5-16, 4-1-5-17, 4-3-1-1:por, 4-3-1-17:por, owned by Maui Land & Pineapple Company, Inc., and over which The Nature Conservancy owns a perpetual conservation easement.

SECTION 3 - OBJECTIVES

3.1 MANAGEMENT AREA – The area to be managed is the Puu Kukui Watershed Preserve, designated on the map attached as Exhibit A to this AGREEMENT.

3.2 THE PRIMARY OBJECTIVES – The STATE and the CONTRACTOR shall direct the efforts under this AGREEMENT to do the following: fund the management of, and manage, the natural resources of the Puu Kukui Watershed Preserve in accordance with the MANAGEMENT PLAN and all approved amendments thereto, with the

intention of protecting, maintaining or enhancing the native ecosystems and indigenous biological diversity.

3.3 SCOPE OF WORK – The CONTRACTOR shall perform the following technical and professional services:

(a) Management plan. The CONTRACTOR shall carry out the activities outlined in the MANAGEMENT PLAN (Exhibit C).

(b) Consultation. The CONTRACTOR shall be available for consultation regarding progress, upon request by the DEPARTMENT.

3.4 AUTHORITY TO CARRY OUT MANAGEMENT PLAN – The Contractor hereby represents that it has authority to carry out the MANAGEMENT PLAN.

3.5 MANAGEMENT PLAN EXTENSION – On April 1 of each year of this AGREEMENT if the MANAGING PARTNER has not submitted a notice of non-renewal as provided in HAR § 13-210-11, the MANAGEMENT PLAN shall automatically be extended for an additional year, with the result that there shall always be six (6) years remaining under the term of the MANAGEMENT PLAN as of July 1 of each year. The MANAGING PARTNER shall submit to the COMMISSION on or before April 1 of each such year an amended scope of work and budget for the new sixth year of the MANAGEMENT PLAN. If the MANAGING PARTNER does not submit the amended scope of work and budget by such date, the scope of work for the new sixth year shall be a continuation of the scope of work for the prior year, with the same budget as the prior year. The STATE will initiate documentation as appropriate to reflect the extension.

3.6 NO INCONSISTENT ACTIVITIES – The CONTRACTOR shall not take any actions on the PRESERVE which will undermine or conflict with the approved MANAGEMENT PLAN.

3.7 PERTINENT INFORMATION – By request of the CONTRACTOR, the STATE shall furnish to the CONTRACTOR any pertinent information reasonably available to the STATE. The STATE may charge the CONTRACTOR the cost of providing the information.

SECTION 4 – CONTROL AND PROGRESS OF THE WORK

4.1 REPORTS – The CONTRACTOR shall submit to the DIVISION for submittal to the BOARD reports showing work accomplished at the following times:

(a) Progress Reports. A 6-month progress report shall be due for the period of July 1 to December 31 of each year under this AGREEMENT for which funding has been approved. This report shall include a description of management accomplishments and activities, areas needing technical advice, a preliminary accounting of expenditures, and proposed modifications to the current year's management projects. This report shall be submitted to the DIVISION by February 28 of each year under this agreement.

(b) Annual Report. An annual report shall be due for the period of July 1 to June 30 of each year under this AGREEMENT for which funding has been approved. This report shall include a description of management accomplishments and activities; areas needing technical advice, status of public hunting opportunities and proposed modifications to the next year's approved management objectives, projects and budget. This report shall also include a detailed accounting of expenditures for the period of July 1 to June 30 to provide the basis for the annual reconciliation of the STATE's and CONTRACTOR's respective shares of the two-for-one matching funds as determined pursuant to Attachment 2, Section 1.2 (c). This report shall be submitted to the DIVISION by September 30 of each year under this agreement. The report shall not be considered as final until accepted by the DEPARTMENT in a written notice in accordance with §13-210-12, Hawaii Administrative Rules (HAR).

COMPENSATION AND PAYMENT SCHEDULE

SECTION 1 – PAYMENT1.1 SCOPE OF PAYMENT

(a) STATE's Payment. In full satisfaction of the STATE's 2/3 financial share of the two-for-one NATURAL AREA PARTNERSHIP PROGRAM match, and in consideration of the performance by the CONTRACTOR of the management activities outlined in the approved MANAGEMENT PLAN, the STATE agrees to pay the CONTRACTOR the total sum of 2/3 of the actual annual expenditures of the management work identified in the MANAGEMENT PLAN, up to, but not to exceed, 2/3 of the approved budget (outlined in section 1.1 (d) below), to be paid as provided herein. All funds to be paid by the STATE to the CONTRACTOR shall be encumbered on an annual basis for the forthcoming fiscal year provided that the STATE has approved the continuation of management activities outlined in the MANAGEMENT PLAN for the forthcoming fiscal year. Actual expenditures may include in-kind services such as heavy equipment operation and sources of labor. The value of in-kind services shall be consistent with federal and state guidelines for such services.

(b) CONTRACTOR's Share. In full satisfaction of the CONTRACTOR's 1/3 financial share of the two-for-one NATURAL AREA PARTNERSHIP PROGRAM match, the CONTRACTOR agrees to assume and be responsible for the total sum of 1/3 of the actual annual expenditures for the management work identified in the MANAGEMENT PLAN, up to but not to exceed, 1/3 of the approved budget (outlined in section 1.1 (d) below). Use of other State government financial program funds is not permitted for use as part of the CONTRACTOR's share for matching requirements.

(c) Additional Matching Funds. With prior written approval from the STATE and the CONTRACTOR, additional matching funds (on the same 2:1 ratio) may be expended to meet approved management goals as set forth in the MANAGEMENT PLAN and any amendments thereto, including any amendments to the budget established in the MANAGEMENT PLAN.

(d) Six Year Budget (\$).

Puu Kukui	2018	2019	2020	2021	2022	2023
Budget	289,500	301,080	313,123	325,648	338,674	352,221
Private Match (1/3 of total)	96,500	100,360	104,374	108,549	112,891	117,407
TOTAL NAPP REQUEST (2/3)	193,000	200,720	208,749	217,099	225,783	234,814

* NOTE: Year 01 (FY18) is subject to a 10% Budget & Finance restriction.
Contract is modified pursuant to Chapter 13-210-14 (c)(3), HAR for revised funding amount of \$173,700.00 applicable to FY 2018 only.

ATTACHMENT 2

COMPENSATION AND PAYMENT SCHEDULE

SECTION 1 – PAYMENT

1.1 SCOPE OF PAYMENT

(a) STATE's Payment. In full satisfaction of the STATE's 2/3 financial share of the two-for-one NATURAL AREA PARTNERSHIP PROGRAM match, and in consideration of the performance by the CONTRACTOR of the management activities outlined in the approved MANAGEMENT PLAN, the STATE agrees to pay the CONTRACTOR the total sum of 2/3 of the actual annual expenditures of the management work identified in the MANAGEMENT PLAN, up to, but not to exceed, 2/3 of the approved budget (outlined in section 1.1 (d) below), to be paid as provided herein. All funds to be paid by the STATE to the CONTRACTOR shall be encumbered on an annual basis for the forthcoming fiscal year provided that the STATE has approved the continuation of management activities outlined in the MANAGEMENT PLAN for the forthcoming fiscal year. Actual expenditures may include in-kind services such as heavy equipment operation and sources of labor. The value of in-kind services shall be consistent with federal and state guidelines for such services.

(b) CONTRACTOR's Share. In full satisfaction of the CONTRACTOR's 1/3 financial share of the two-for-one NATURAL AREA PARTNERSHIP PROGRAM match, the CONTRACTOR agrees to assume and be responsible for the total sum of 1/3 of the actual annual expenditures for the management work identified in the MANAGEMENT PLAN, up to but not to exceed, 1/3 of the approved budget (outlined in section 1.1 (d) below). Use of other State government financial program funds is not permitted for use as part of the CONTRACTOR's share for matching requirements.

(c) Additional Matching Funds. With prior written approval from the STATE and the CONTRACTOR, additional matching funds (on the same 2:1 ratio) may be expended to meet approved management goals as set forth in the MANAGEMENT PLAN and any amendments thereto, including any amendments to the budget established in the MANAGEMENT PLAN.

(d) Six Year Budget (\$).

Puu Kukui	2018	2019	2020	2021	2022	2023
Budget	289,500	301,080	313,123	325,648	338,674	352,221
Private Match (1/3 of total)	96,500	100,360	104,374	108,549	112,891	117,407
TOTAL NAPP REQUEST (2/3)	193,000	200,720	208,749	217,099	225,783	234,814

1.2 PAYMENT SCHEDULE

(a) Advanced Payment. Within thirty (30) days following receipt of an invoice at the beginning of each fiscal year, until this AGREEMENT is terminated as provided below, the STATE shall pay to the CONTRACTOR an amount equal to 1/3 of the STATE's annual matching share based on the approved budget.

(b) Progress Payment. Within 30 days following receipt of an invoice and the 6-month progress report as provided in Attachment 1, Section 4.1(a) for each year until this AGREEMENT is terminated as provided below, the STATE shall pay to the CONTRACTOR an additional amount up to, but not more than, 1/3 of the STATE's annual matching share based on the approved budget. The CONTRACTOR shall determine whether the full 1/3 amount is requested or whether a lesser amount is sufficient as a progress payment. This payment shall not be subject to the STATE's approval of such progress report.

(c) Annual/Final Payment. Within 30 days of receipt of an invoice and upon acceptance of the annual report by the DEPARTMENT, as provided in Attachment 1, Section 4.1(b), the STATE shall pay to the CONTRACTOR the balance of the approved matching funds for the year, calculated on the basis of actual expenditures. In no case, however, shall the STATE pay more than 2/3 of the approved budget and any approved amendments thereto. If the State's initial and additional payments as provided above total more than 2/3 of the actual final expenditures reported by the CONTRACTOR, the CONTRACTOR shall return the difference with interest owed to the STATE. Interest shall be calculated as provided for in §13-210-13(c), HAR. The final payment shall be subject to any withheld amounts as provided in General Condition #13, as amended.

1.3 UNAUTHORIZED WORK – The CONTRACTOR shall not receive matching STATE funds for any work not designated in the approved MANAGEMENT PLAN. All work performed by the CONTRACTOR prior to receipt of a fully-executed copy of this AGREEMENT, and prior to STATE and BOARD approval of funding for any subsequent years and prior to BOARD approval of any subsequent amendments to the MANAGEMENT PLAN, shall be at the CONTRACTOR's own volition and risk, including work performed during the period of any deliberations by the BOARD or DEPARTMENT in anticipation of approval; provided, however, that if funding and/or amendments applicable to such work are subsequently approved, the CONTRACTOR may be paid for such work even if performed prior to such approval.

SECTION 2 – FISCAL RECORDS, MAINTENANCE, RETENTION, AND ACCESS

2.1 The CONTRACTOR shall maintain, in accordance with generally accepted accounting practices, fiscal records and supporting documents and related files, papers and reports that adequately reflect all direct and indirect expenditures and management and fiscal practices materially related to the CONTRACTOR's performance of services paid for by STATE funds under the AGREEMENT.

- (a) The DEPARTMENT, the Comptroller of the State of Hawaii, and any of their authorized representatives, the committees (and their staffs) of the Legislature of the State of Hawaii, and the Legislative Auditor of the State of Hawaii shall have the right of access to any book, document, paper, file, or other records of the CONTRACTOR that is materially related to performance by the CONTRACTOR of services funded by the STATE under this AGREEMENT, in accordance with generally accepted audit procedures, for the purposes of monitoring and evaluating the CONTRACTOR's performance of services and the CONTRACTOR's management program and fiscal practices to assure the proper and effective expenditure of funds under this AGREEMENT; provided, however, that no party conducting any such audit or examination shall copy, distribute, or retain any of such information or records, with the understanding that it is not the intention that the CONTRACTOR's financial and other records and information be made public.
- (b) The right of access shall not be limited to the required retention period but shall last as long as the records are retained. The CONTRACTOR shall retain all records related to the CONTRACTOR's performance of services funded under this AGREEMENT for at least 3 years after the date of submission of the CONTRACTOR's annual report for any designated period and payment for such expenditures by the STATE in accordance with its matching share, except that if any litigation, claim, negotiation, investigation, audit, or other action involving the records has been started before the expiration of the 3-year period, the CONTRACTOR shall retain the records until completion of the action and resolution of all issues that arise from it or until the end of the regular 3-year retention period, whichever occurs later.

ATTACHMENT 3

TIME OF PERFORMANCE

SECTION 1 – EXECUTION OF AGREEMENT

1.1 EXECUTION OF AGREEMENT – This AGREEMENT shall be promptly executed by the STATE and the CONTRACTOR upon approval by each party.

1.2 CERTIFICATE AND APPROVAL OF AGREEMENT – This AGREEMENT shall not be considered binding upon the STATE unless the availability of the funds therefore has been duly certified as prescribed by Section 103-39, Hawaii Revised Statutes, as amended. Further, this AGREEMENT shall not be considered to be fully executed unless the Department of the Attorney General of the State of Hawaii has approved this AGREEMENT as to form.

SECTION 2 – TERM

2.1 INITIAL TERM – This AGREEMENT shall commence on the effective date referenced on page 1 of the partnership agreement and shall be in effect until June 30 of the fifth State fiscal year (July 1 to June 30) following the fiscal year in which the AGREEMENT commenced (i.e. 6 years, or 5 years and a portion if the AGREEMENT commenced in the middle of a fiscal year), subject to continued State funding as provided in Attachment 3, Section 2.2 below, General Conditions #12 and 13, as amended, and subject to the provisions of Attachment 2, Section 1.3 regarding payment of prior work.

2.2 STATE FUNDING CONDITION – This AGREEMENT is subject to continued State funding of the STATE's 2/3 share of the approved management budget as provided in Attachment 2, Section 1.1. If in any fiscal year the State does not appropriate, and/or the BOARD does not approve the expenditure of, funds sufficient to meet the STATE's full 2/3 share of the approved management budget, this AGREEMENT may be terminated pursuant to General Condition #12, as amended.

2.3 AUTOMATIC ONE-YEAR RENEWALS – Each July 1 of each year during which this AGREEMENT shall be in effect shall be deemed to be the annual renewal date of this AGREEMENT. On each such annual renewal date, a year shall be added automatically to the initial term of this AGREEMENT, subject to continued State funding as provided in Attachment 3, Section 2.2 above, General Conditions #12 and 13, as amended; the term of this AGREEMENT shall be thereby renewed and extended annually, with the result that there shall always be 6 years remaining under the term of this AGREEMENT as of July 1 of each year, unless either party notifies the other in writing of non-renewal of this AGREEMENT by April 1, as provided for in General Condition #12, as amended. Notice of non-renewal by either party shall operate to cancel any future automatic one-year renewals. Upon notice of non-renewal this AGREEMENT shall remain in effect for the balance of the existing six year term.

ATTACHMENT 4

SPECIAL CONDITIONS

The following special conditions shall apply to this agreement:

1. To adequately reflect the partnership nature of this agreement, General Condition #1 is deleted in its entirety and replaced by the following:
 1. Coordination of Services by the State. It shall be the responsibility of both the STATE and the CONTRACTOR to maintain close and frequent communications with each other at all stages of the management work and funding cycles contemplated by this AGREEMENT.
2. General Condition #2.a regarding Inspections is modified by adding the following language:

The DEPARTMENT shall have the right to make inspections of the PRESERVE with three days prior written notice to the CONTRACTOR. In addition, the DEPARTMENT shall be obligated to inspect the work on the PRESERVE not less frequently than once per year under this AGREEMENT. The CONTRACTOR hereby represents that it has authority to allow access to the PRESERVE by the DEPARTMENT in connection with this AGREEMENT.

3. The first paragraph of General Condition #6 is deleted in its entirety and replaced by the following language:

Except with respect to any subcontracting contemplated in the approved MANAGEMENT PLAN, the CONTRACTOR shall not subcontract any of the CONTRACTOR's duties, obligations, or interests under this AGREEMENT and no such subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE and (ii) the CONTRACTOR shows that any subcontracted portions of the work will provide a quality of work that is at least equal in quality to the work that would have resulted if the CONTRACTOR had performed such work itself. The CONTRACTOR shall submit to the State all subcontractors' tax clearance certificates from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR's subcontractors have been paid.

The CONTRACTOR may not assign any of the CONTRACTOR's duties, obligations, or interests under this AGREEMENT and the rights herein granted in whole or in part to any party and no such assignment shall be effective unless (i) the CONTRACTOR obtains prior written consent of the BOARD, and (ii) the CONTRACTOR's assignee submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR's assignee have been paid. Approval of assignment in no way relieves the original CONTRACTOR of any obligations under this AGREEMENT, including payback and penalty obligations as

outlined in General Condition #13, as amended, unless specifically agreed to by the Board in its consent to the assignment.

Additionally, no assignment by the CONTRACTOR of the CONTRACTOR's right to compensation under this AGREEMENT shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii as provided in section 40-58, HRS.

4. General Condition #7 is deleted in its entirety and replaced with the following:

7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii and its officers, employees, and agents from and against all liability, loss, damage, cost and expense, including all attorneys' fees and all claims, suits and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR's employees, officers, agents or subcontractors occurring during or in connection with the performance of the CONTRACTOR's services under this AGREEMENT. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this AGREEMENT.

5. To reflect the long-term nature of this partnership AGREEMENT and the need for long term commitment by both parties, General Conditions #12, 13 and 14 are deleted in their entirety and replaced with the following:

12. **Termination of the Agreement.** It is mutually agreed that this AGREEMENT may be terminated for any of the following reasons on the following terms:

(a) **No State Funding.** This AGREEMENT shall be terminated if the STATE does not approve any matching funds as outlined in the budget provided in the approved MANAGEMENT PLAN. In such event, this AGREEMENT shall automatically terminate without penalty at the end of the funding period in effect.

(b) **Partial State Funding.** This AGREEMENT may be terminated by the CONTRACTOR if the STATE approves only a portion of the STATE's share of matching funds as outlined in the budget provided in the approved MANAGEMENT PLAN. In such event, the CONTRACTOR shall elect, by written notice to the STATE, either:

- (1) to terminate this AGREEMENT without penalty at the end of the funding period then in effect; or
- (2) to revise the updated MANAGEMENT PLAN and budget, in the CONTRACTOR's reasonable discretion, to accomplish significant management goals which can reasonably be funded with the amount of STATE matching funds actually approved.

(c) Non-Renewal. This AGREEMENT may be terminated without penalty by non-renewal effective at the end of the 6th full fiscal year following the date of notice of non-renewal as provided in HAR § 13-210-11(a). Provided, however, that notwithstanding non-renewal, if any default of the CONTRACTOR has not been remedied by the date of termination for non-renewal, the CONTRACTOR's obligation to remedy such default and the remedies therefore, including the penalty payback provisions, shall survive termination.

(d) Transfer to Government Agency. This AGREEMENT may be terminated without penalty, upon approval of the BOARD, if the PRESERVE is transferred or sold to a government agency committed to the preservation of biological diversity and that possesses the technical and professional skills to manage the PRESERVE's natural resources and the Board agrees to the termination without penalty.

(e) CONTRACTOR Defaults. This AGREEMENT may be terminated by the STATE upon substantial evidence that progress being made by the CONTRACTOR in carrying out the MANAGEMENT PLAN is inadequate, incorrect, or insufficient to substantially complete on a timely basis the work called for in the MANAGEMENT PLAN, after complying with the lack of performance notification provisions set forth below.

(1) Penalties Apply. In the event of termination for default in accordance with these provisions, the penalty payback provisions set forth below shall apply.

(2) Lack of Performance Notification.

(A) The STATE shall first notify the CONTRACTOR in writing of any perceived inadequacy, incorrectness or insufficient progress. The CONTRACTOR shall arrange to meet with the STATE within two weeks of the written notice, and every three months thereafter until nine months following the date of the notice, to discuss in good faith the perceived failure and the reasons therefore and any subsequent progress or lack thereof. If the reason for the failure is a good faith inability of the CONTRACTOR to carry out the terms of the MANAGEMENT PLAN for reasons beyond the CONTRACTOR's reasonable control, including without limitation economic hardship as described in General Condition #20.f., as amended, the STATE and the CONTRACTOR shall specifically consider the need to amend the MANAGEMENT PLAN, including extending the time to carry out the work called for in the MANAGEMENT PLAN and/or revising the budget established in the MANAGEMENT PLAN, subject to the provisions of Attachment 1, Section 3.5 and General Condition #20, as amended, of this AGREEMENT regarding amendments to this AGREEMENT and the MANAGEMENT PLAN. The CONTRACTOR shall arrange to have the DEPARTMENT inspect the

PRESERVE once each quarter following the date of the notice to determine the updated status of the perceived defaults. It shall be within the STATE's sole discretion to determine whether to amend the MANAGEMENT PLAN or revise the budget established in the MANAGEMENT PLAN.

(B) Following the expiration of the nine month period following notice of default given by the STATE to the CONTRACTOR and failure of the CONTRACTOR to remedy the default, or to make significant progress to remedy the default if by its nature the default cannot reasonably be remedied within nine months, as determined by the STATE in its sole discretion, the STATE may immediately terminate the AGREEMENT for default by written notice thereof to the CONTRACTOR.

(C) The STATE shall be deemed to have complied with these provisions if it attempts in good faith to meet with the CONTRACTOR and to have the DEPARTMENT inspect the PRESERVE as provided above, whether or not the CONTRACTOR cooperates in such procedures.

(3) If the CONTRACTOR has not fully performed its work under this AGREEMENT, on termination of this AGREEMENT, the STATE may withhold the final payment to the CONTRACTOR pending full completion of the CONTRACTOR's work. This withheld payment shall be paid by the STATE to the CONTRACTOR upon final acceptance by the STATE of CONTRACTOR's performance and CONTRACTOR providing the STATE with tax clearances as provided in Attachment 2, Section 1.2 (d) and General Conditions # 2 and 17.

(f) Effect of Eminent Domain.

(1) Full Condemnation. If any action in eminent domain for the condemnation of the fee title of the entire PRESERVE described herein is filed, or if the PRESERVE is acquired in lieu of eminent domain for a public improvement by a public agency or person or whenever there is any such action or acquisition by the federal government or the state government or any person, instrumentality or agency acting under the authority or power of the federal government or the state government, this AGREEMENT shall be deemed null and void without penalty as to the land actually being condemned or so acquired as of the date the action is filed, and upon the termination of such a proceeding which results in condemnation, this AGREEMENT shall be null and void without penalty for all land actually taken or acquired.

(2) Partial Condemnation. When such an action to condemn or acquire less than the entire PRESERVE is commenced, this AGREEMENT shall be

deemed null and void without penalty as to the portion so condemned or acquired.

(3) Adjustment of MANAGEMENT PLAN. The land actually taken by the means set forth above in this Section shall be removed from this AGREEMENT and the MANAGEMENT PLAN and budget adjusted accordingly on a reasonable basis by the STATE and the CONTRACTOR.

13. Penalty Payback.

(a) Payback and Penalties. In the event that the CONTRACTOR defaults on this AGREEMENT as provided in General Condition #12, as amended, and the STATE has followed the Lack of Performance Notification procedures as outlined in General Condition #12, as amended, the CONTRACTOR shall promptly pay to the STATE the following payback and penalty monies:

(1) Refund of State Funds with Interest – 6 Years. All matching funds paid by the STATE to the CONTRACTOR in the previous 6 years, or such portion thereof as STATE shall have funded if this AGREEMENT shall have been in effect for less than 6 years, shall be returned to the STATE with interest. Interest shall be calculated at eight percent (8%) per year compounded annually. In the event that this AGREEMENT shall have been in effect for more than 6 years, the CONTRACTOR shall be liable only to pay back STATE funds for the immediately proceeding 6 years, with interest as stated above.

(2) Additional Penalty. An additional penalty of 10 percent (10%) of the total amount of the matching funds expended by the STATE in the previous 6 years shall be paid by the CONTRACTOR to the STATE.

(b) No Other Party Liable. Only the CONTRACTOR receiving matching STATE funding under the NATURAL AREA PARTNERSHIP PROGRAM shall be liable to the STATE under this AGREEMENT for the payback and penalty.

14. Inconsistent Activities. It is expressly understood and agreed that activities inconsistent with the MANAGEMENT PLAN by third parties over whom the CONTRACTOR has no reasonable control shall not constitute or give rise to a default by the CONTRACTOR under this AGREEMENT and no penalty provisions shall apply to the CONTRACTOR unless the CONTRACTOR has knowledge of the inconsistent activities and has made no effort to prevent or cease the inconsistent activities.

6. General Condition #16.b is deleted in its entirety and replaced by the following:

Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate sized vehicle except as approved in the MANAGEMENT PLAN.

7. To adequately reflect the partnership nature of this AGREEMENT and to respect the fact that both parties are contributing matching funds to the project, General Condition #20 is deleted in its entirety and replaced by the following:

20. Change Order.

(a) The CONTRACTOR may propose for approval by the DIVISION, and the DIVISION may approve, minor alterations to the approved MANAGEMENT PLAN which will not have a material adverse impact on the achievement of the overall management objectives of the MANAGEMENT PLAN.

(b) The CONTRACTOR may propose for approval by the BOARD, and the BOARD may approve, significant changes to the approved MANAGEMENT PLAN or budget to adapt to current conditions. Significant amendments to the MANAGEMENT PLAN shall include an amended budget. The BOARD shall make the proposed amendments available for public review prior to final approval.

(c) The proposed amendments may include, without limitation, re-establishment of management priorities, increase or reduction of the specific work, budget, or time for performance of specified tasks, all as determined considering the natural condition of the PRESERVE, existing management priorities, threats, potential for decline of the natural resource during any period under consideration, availability of specialized labor or technical expertise, permitting requirements and time needed to obtain permits, and other material factors.

(d) Expenditures. Expenditures for implementation of the approved MANAGEMENT PLAN which are less than the amounts allocated in the approved budget may be made by the CONTRACTOR in its discretion so long as the quality of materials and work as called for in the approved MANAGEMENT PLAN is not adversely affected. Any proposed expenditures which will increase the overall STATE's matching share above the amount set forth in the approved budget, which are proposed either as a result of additional costs required to implement the approved MANAGEMENT PLAN or as a result of amendments to the approved MANAGEMENT PLAN, must be mutually agreed upon in advance by and between the BOARD and the CONTRACTOR. If so agreed upon the approval of these expenditures shall be incorporated in written amendment to this AGREEMENT.

(e) Updated MANAGEMENT PLAN. Updating the MANAGEMENT PLAN shall follow the following process and time line:

(1) Timeline for Updating MANAGEMENT PLAN. The CONTRACTOR shall submit an updated 6-year MANAGEMENT PLAN, with a revised budget, to the DEPARTMENT by August 31 of the 6th State fiscal year for which management activities and funding were approved by the BOARD, and every 6 years thereafter so long as State funding is available, extending the term of the MANAGEMENT

PLAN by an additional 6 years. If funding for this agreement is approved for less than 6 years, then the updated MANAGEMENT PLAN and revised budget shall be submitted to the DEPARTMENT by August 31 of the last State fiscal year in which funding is approved. The cost of preparing the updated plan, including any accompanying environmental assessment or environmental impact statement, may be included in each 6-year MANAGEMENT PLAN budget approved by the BOARD. Additional plan preparation funds above approved amounts will not be available. The CONTRACTOR may submit an updated 6-year MANAGEMENT PLAN and revised budget to the DEPARTMENT more frequently than every 6 years, at its option and sole expense; in such event, the next updated MANAGEMENT PLAN and revised budget shall be submitted to the DEPARTMENT by August 31 of the 6th State fiscal year thereafter. The revised and updated budget and MANAGEMENT PLAN submitted by the CONTRACTOR shall be reasonable and made in good faith, taking into account the natural resources on the RESERVE, and the threats to the resources, and the ability of the CONTRACTOR to carry out the MANAGEMENT PLAN.

(2) Process for updating MANAGEMENT PLAN. Updating and obtaining approval for revised plans shall follow these three steps:

- (A) The CONTRACTOR shall submit an updated 6-year MANAGEMENT PLAN, with a revised budget, to the DEPARTMENT for its review.
- (B) The CONTRACTOR, with assistance from the DIVISION, shall prepare and complete an Environmental Assessment (EA) for the updated plan, if necessary according to Chapter 343, HRS and Title 11, Chapter 200, Department of Health Administrative rules. The EA shall be completed prior to BOARD submission for approval.
- (C) The DIVISION shall submit the updated MANAGEMENT PLAN to the BOARD for approval of requested funding amounts and of planned management activities.

(f) Economic Hardship. Notwithstanding other provisions of this AGREEMENT, in the event that the CONTRACTOR determines in good faith that it is financially unable without undue economic hardship to fulfill its 1/3 financial share as provided in Attachment 2, Section 1.1(b) or to carry out fully the work of the MANAGEMENT PLAN within the budget and time period established thereby, the CONTRACTOR may apply to the STATE to amend the terms thereof.

(1) Negotiation of Amendment. In such event, the STATE and the CONTRACTOR may meet and negotiate an amendment to the MANAGEMENT PLAN that seeks to accomplish the significant objectives of the MANAGEMENT PLAN reasonably within the CONTRACTOR's financial means. The amendment may include, without limitation, re-establishment of management priorities and

reduction or deferral of the specified work involving significant costs, or extensions of time for performance of specified tasks, all as determined considering the natural conditions of the PRESERVE, existing management priorities, threats, potential for decline of the natural resource during any period under consideration, other potential sources of funding, and other material factors.

(2) No Termination for Economic Hardship. This provision shall not be construed to allow the CONTRACTOR or the STATE to terminate this AGREEMENT for economic hardship; it is rather intended to provide a mechanism for reasonable revisions to the MANAGEMENT PLAN for economic hardship.

8. To adequately reflect the partnership nature of this AGREEMENT and to respect the fact that both parties are contributing matching funds to the project, General Condition #23 is deleted in its entirety.
9. It is expressly understood and agreed to by the STATE that General Condition #25 dealing with Publicity shall not be applicable to acknowledgement of the STATE's participation in and funding of the project in any of the CONTRACTOR's reports, brochures, advertisements or other information released to its members, the media or the public. Whenever the CONTRACTOR mentions this project as outlined above, credit shall be given to the STATE's Natural Area Partnership Program. The CONTRACTOR shall refer all inquiries about STATE policy or administration of the Program to the CHAIRPERSON or his designee.
10. It is expressly understood and agreed to by the STATE that General Condition #26 shall not be applicable to any research, studies, reports, management techniques, or any other product development by the CONTRACTOR during the course of the AGREEMENT. The CONTRACTOR's products are not subject to the custody by the STATE. They shall remain the property of the CONTRACTOR; however the STATE may use them at any time.
11. To more adequately reflect the partnership nature of this AGREEMENT, the first sentence of General Condition #39 is replaced by the following sentence:

The failure of either party to insist upon the strict compliance with any term, provision or condition of this AGREEMENT shall not constitute or be deemed to constitute a waiver or relinquishment of such party's right to enforce the same in accordance with this AGREEMENT.

The rest of General Condition #39 remains as originally written.

12. Unless specifically outlined otherwise, any notice called for in this AGREEMENT shall be sent by facsimile, overnight or hand delivery, or by certified mail, addressed as follows:

To the CONTRACTOR at:	To The STATE at:
-----------------------	------------------

Maui Land & Pineapple Company, Inc. P.O. Box 187 Kahului, HI 96733-6687	Division of Forestry & Wildlife Dept. of Land & Natural Resources 1151 Punchbowl Street Honolulu, Hawaii 96813 Attn: Natural Areas Program Manager Ph. (808) 587-4170 Fax (808) 587-0160
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Or to such other address as either party may inform the other of from time to time; and the notice shall be deemed to be received on the date evidenced by the facsimile verification, overnight or hand delivery receipt, or certified mail receipt.

EXHIBIT A

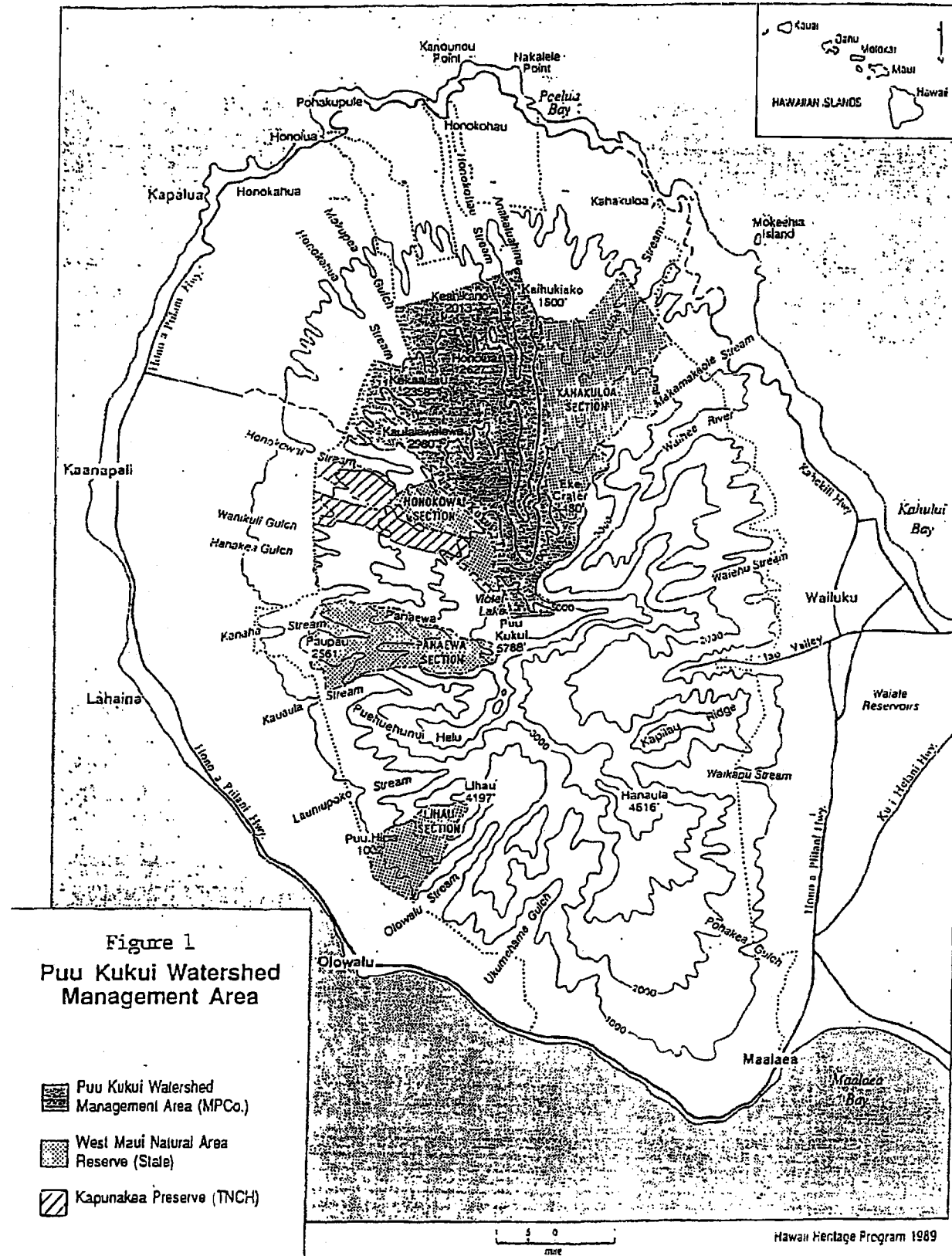
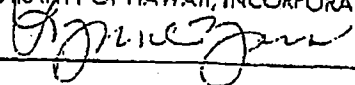


EXHIBIT B.

: We hereby certify that this is a true copy of the original
: filed as Land Court Document No. _____
: and / or recorded in the Bureau of Conveyances as
: Document No. 92-187901 on
: NOV 19 1992 at 801 o'clock PM
: TITLE GUARANTY OF HAWAII, INCORPORATED
: By 

LAND COURT SYSTEM : REGULAR SYSTEM
AFTER RECORDATION, RETURN BY Mail () Pickup ()

TITLE OF DOCUMENT:

MEMORANDUM OF CONSERVATION EASEMENT
(Pu'u Kukui, Maui -- Maui Land & Pineapple)

PARTIES TO DOCUMENT:

MAUI LAND & PINEAPPLE COMPANY, INC. a Hawaii corporation
("Grantor")

THE NATURE CONSERVANCY, a District of Columbia non-profit
corporation (the "Conservancy")

PROPERTY DESCRIPTION: : LIBER/PAGE:
: :
: DOCUMENT NO.:
: TRANSFER CERTIFICATE OF TITLE
: NO(S)..
:

MEMORANDUM OF CONSERVATION EASEMENT
(Pu'u Kukui, Maui -- Maui Land & Pineapple Company, Inc.)

THIS MEMORANDUM OF CONSERVATION EASEMENT (the "Memorandum"), made and entered into this 13th day of November, 1992, by and between MAUI LAND & PINEAPPLE COMPANY, INC., a Hawaii corporation ("Grantor"), and THE NATURE CONSERVANCY, a District of Columbia non-profit corporation (the "Conservancy"),

WITNESSETH:

1. Grantor is the owner of certain real property on the Island of Maui, in the County of Maui, State of Hawaii, commonly known as the Pu'u Kukui Preserve, consisting of 8,661 acres, more or less, identified as:

<u>Tax Map Key</u>	<u>Acreage</u>
4-1-1-17	5,780.00
4-2-1-1 (portion)	2,450.38
4-1-4-23 (portion)	0.40
4-1-5-10	1.75
4-1-5-13	2.48
4-1-5-16 less than	0.01
4-1-5-17 less than	0.01
4-3-1-1 (portion)	92.00
4-3-1-17 (portion)	334.00

and more particularly described in Exhibit A and shown generally on the maps attached as Exhibit B-1 and B-2 to this Memorandum of Conservation Easement (the "Property").

2. Grantor and the Conservancy have entered into that certain unrecorded Conservation Easement on or about even date herewith incorporated by this reference into this Memorandum (the "Conservation Easement"), pursuant to which Grantor conveyed to the Conservancy a conservation easement over the Property on all the terms, covenants and conditions and for the consideration set forth in the Conservation Easement.

3. Grantor has also conveyed to the Conservancy in the Conservation Easement a non-exclusive easement over:

(1) certain parcels owned by Grantor identified in the tax maps of the State of Hawaii as follows:

TMK 4-4-04:08
TMK 4-3-01:17
TMK 4-4-07:06
TMK 4-2-01:01
TMK 4-1-01:09

(collectively, the "ML&P Access Parcels"), and

(2) certain parcels now owned by the State of Hawaii identified in the tax maps of the State of Hawaii as follows:

TMK 4-4-02:20
TMK 4-4-02:18
TMK 4-4-02:15
TMK 4-4-02:14
TMK 4-4-04:09
TMK 4-4-04:10
TMK 4-4-07:04

(collectively, the "State Access Parcels"), as long as and when from time to time Grantor controls the State Access Parcels through lease or other right,

for the purpose of ingress to and egress from the Property from and to Honoapiilani Highway, over the existing roadways shown on Exhibit B-1 or other roadways in approximately the same location. The right for ingress and egress over and across the roadways provided hereunder may be relocated by Grantor from time to time as long as the Conservancy is provided with access of similar quality and convenience to the existing roads and trails to and from the Property from and to Honoapiilani Highway or other public roadway connecting to Honoapiilani Highway, and provided further the Grantor gives the Conservancy 30 days' notice prior to any significant relocation of any such access (i.e., other than minor relocation of roads the exact routes of which vary seasonally through pineapple fields and sugar cane fields), and in any such event the parties agree to execute and record any necessary amendments and other documentation necessary to evidence such significant relocations in the public records, in order to impart constructive public notice of the Conservancy's easement over the parcel or parcels through which the roadways as relocated run.

4. The Grant of Conservation Easement and right of ingress and egress shall be perpetual except as provided in the Conservation Easement and is subject to existing easements, restrictions, encumbrances and other similar granting of rights.

5. The Conservation Easement shall run with and burden title to the Property, and the access easement granted in the Conservation Easement shall run with and burden title to the ML&P Access Parcels described above, and any interest Grantor may have from time to time in the State Access Parcels, in perpetuity except as provided in the Conservation Easement, and shall be binding forever upon Grantor, its heirs, successors and assigns, for the benefit of the Conservancy, its successors and assigns, and the Property, except as provided in the Conservation Easement.

6. This Memorandum of Conservation Easement shall not be deemed to modify, alter or amend in any way the provisions of the Conservation Easement, but is intended to give notice of such Conservation Easement and access and the provisions thereof. In the event any conflict exists between the terms of the Conservation Easement and this instrument, the terms of the Conservation Easement shall govern and determine for all purposes the relationship between Grantor and the Conservancy and their respective rights and duties.

IN WITNESS WHEREOF, Grantor and the Conservancy have executed this Conservation Easement this 15th day of November, 1992.

GRANTOR:

MAUI LAND & PINEAPPLE COMPANY,
INC.
a Hawaii corporation

By Mary C. Sanford
Its Chairman

By Richard H. Cameron
Its Executive Vice President

THE CONSERVANCY:

THE NATURE CONSERVANCY,
a District of Columbia
non-profit corporation

By Ell. H. Pitt
Its Vice President

STATE OF HAWAII)
) ss.
COUNTY OF MAUI)

On NOVEMBER 6, 1992, before me, the undersigned, a Notary Public in and for said State, personally appeared MARY C. SANFORD and Richard H. Cameron, personally known to me or proved to me on the basis of satisfactory evidence to be the persons who executed the within instrument as the Chairman and Executive Vice President, respectively, of MAUI LAND & PINEAPPLE COMPANY, INC., a Hawaii corporation, the corporation that executed the within instrument and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Stephanie J. O'Neil

LS

MY COMMISSION EXPIRES 9/29/93

STATE OF Hawaii)
) ss.
CITY AND COUNTY OF Honolulu)

On November 13, 1992, before me, the undersigned, a Notary Public in and for said State, personally appeared Kelvin H. Takera, personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the Vice President of THE NATURE CONSERVANCY, a District of Columbia nonprofit corporation, the corporation that executed the within instrument and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Linda M. Anthony

LS

MY COMMISSION EXPIRES 8-5-94

EXHIBIT A
(Legal Description)

Exhibit B-1

Map -- Easement Access

(General Map of a Portion of West Maui Showing the Property and Access Roads to and from Honoapiilani Highway)

Exhibit B-2

Map -- Easement Area

(Map of Conservation Easement Property Showing General Location of roadways, jeep trails and main trails, and Ha'ela'au Cabin)

EXHIBIT A

-FIRST:-

All of that certain parcel of land (being a portion of the land(s) described in and covered by Land Patent Number 8130, Land Commission Award Number 7714-B to Moses Kekuaiwa and Land Patent Number 8129, Land Commission Award Number 8559-B to Wm. C. Lunaliilo) situate, lying and being at Honokohau and Honolulu, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-1-001-017 (2), and containing an area of 5780.00 acres, more or less.

-SECOND:-

All of that certain parcel of land (being a portion of the land(s) described in and covered by Land Patent Number 2236, Land Commission Award Number 8522-B to Kale Davis and Land Patent Number 8129, Land Commission Award Number 8559-B to Wm. C. Lunaliilo) situate, lying and being at Honokohau and Honolulu, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-2-001-portion 001 (2), and shown on the State of Hawaii Tax Map as containing an area of 2,450.38 acres, as cross-hatched on the map attached hereto and made a part hereof as Exhibit "1".

-THIRD:-

All of that certain parcel of land (being a portion of the land(s) described in and covered by Royal Patent Number 3706, Land Commission Award Number 6145-T, Apana 1 to Pakali) situate, lying and being at Honokohau, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-1-004-023 (2), and shown on the State of Hawaii Tax Map as containing an area of 0.40 acres, as cross-hatched on the map attached hereto and made a part hereof as Exhibit "2".

-FOURTH:-

All of that certain parcel of land (being all of the land(s) described in and covered by Royal Patent Number 4616, Land Commission Award Number 5777 to Kupali) situate, lying and being at Honokohau, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-1-005-010 (2), and containing an area of 1.750 acres, more or less.

-FIFTH:-

All of that certain parcel of land (being all of the land(s) described in and covered by Royal Patent Number _____, Land Commission Award Number 6145-U to Kenui) situate, lying and being

at Honokohau, District of Lahaina, Island and County of Maui, State of Hawaii, being Tax Key designation 4-1-005-013 (2), and containing an area of 2.480 acres, more or less.

-SIXTH:-

All of that certain parcel of land (being portion of the land(s) described in and covered by Royal Patent Number 4739, Land Commission Award Number 7474 to Kamokuikai) situate, lying and being at Honokohau, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-1-005-016 (2), and containing an area of 0.005 acres, more or less.

-SEVENTH:-

All of that certain parcel of land (being portion of the land(s) described in and covered by Royal Patent Number 4620, Land Commission Award Number 7472 to Kaumauma) situate, lying and being at Honokohau, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-1-005-017 (2), and containing an area of 0.005 acres, more or less.

-EIGHTH:-

All of that certain parcel of land (being a portion of the land(s) described in and covered by Royal Patent Number 1663, Land Commission Award Number 5524 to L. Konia) situate, lying and being at Mailepai, District of Lahaina, Island and County of Maui, State of Hawaii, being Tax Key designation 4-3-001-portion 001 (2), and shown on the State of Hawaii Tax Map as containing an area of 92.00 acres, as cross-hatched on map attached hereto and made a part hereof as Exhibit "3".

-NINTH:-

All of that certain parcel of land (being a portion of the land(s) described in and covered by Royal Patent Grant Number 1166 to D. Baldwin et al. and Royal Patent Number 415, Land Commission Award Number 75 to Charles Cockett) situate, lying and being at Kahana and Mahinahina 1-2-3-4, District of Lahaina, Island and County of Maui, State of Hawaii, bearing Tax Key designation 4-3-001-portion 017 (2), and shown on the State of Hawaii Tax Map as containing an area of 334.00 acres, as cross-hatched on the map attached hereto and made a part hereof as Exhibit "4".

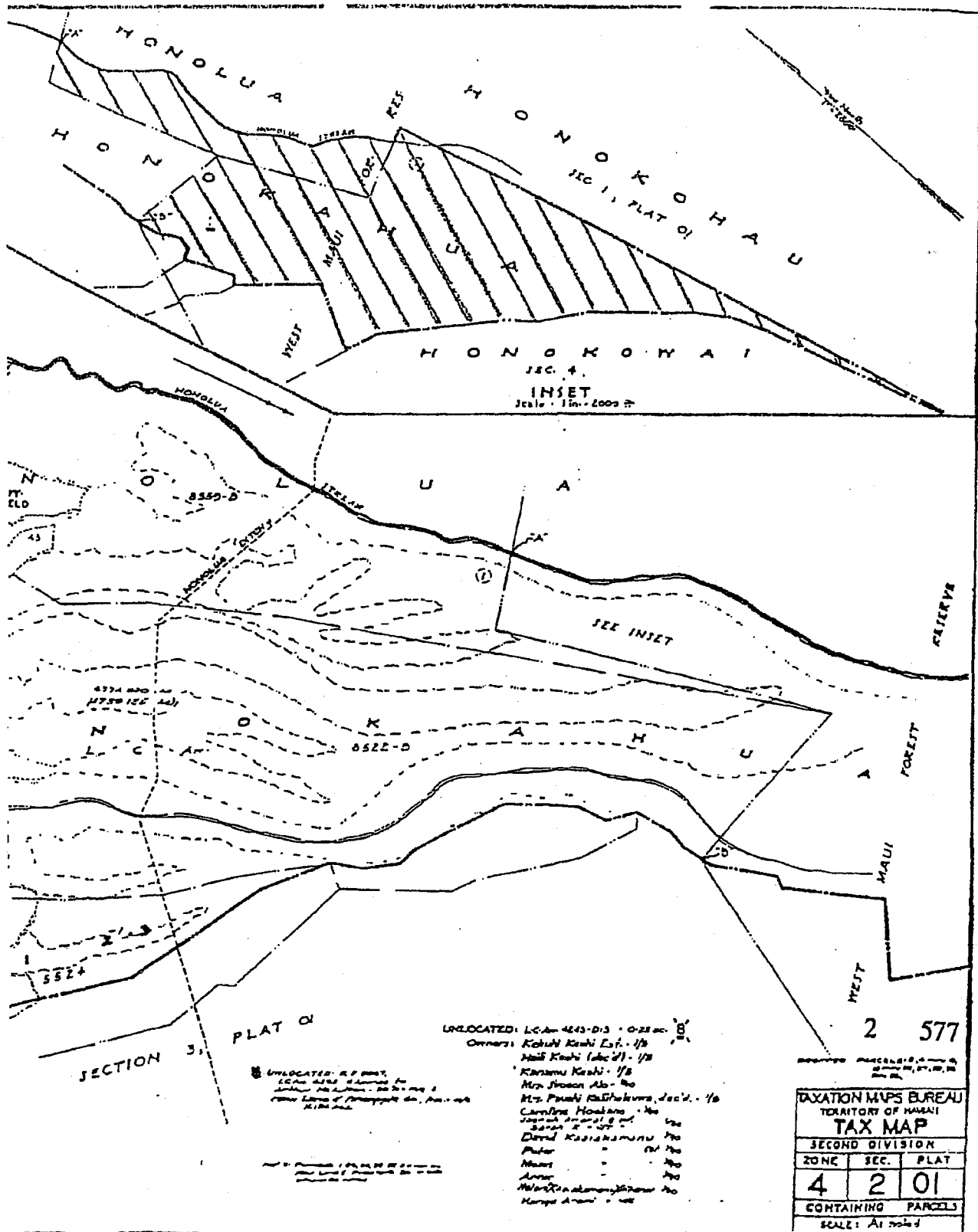
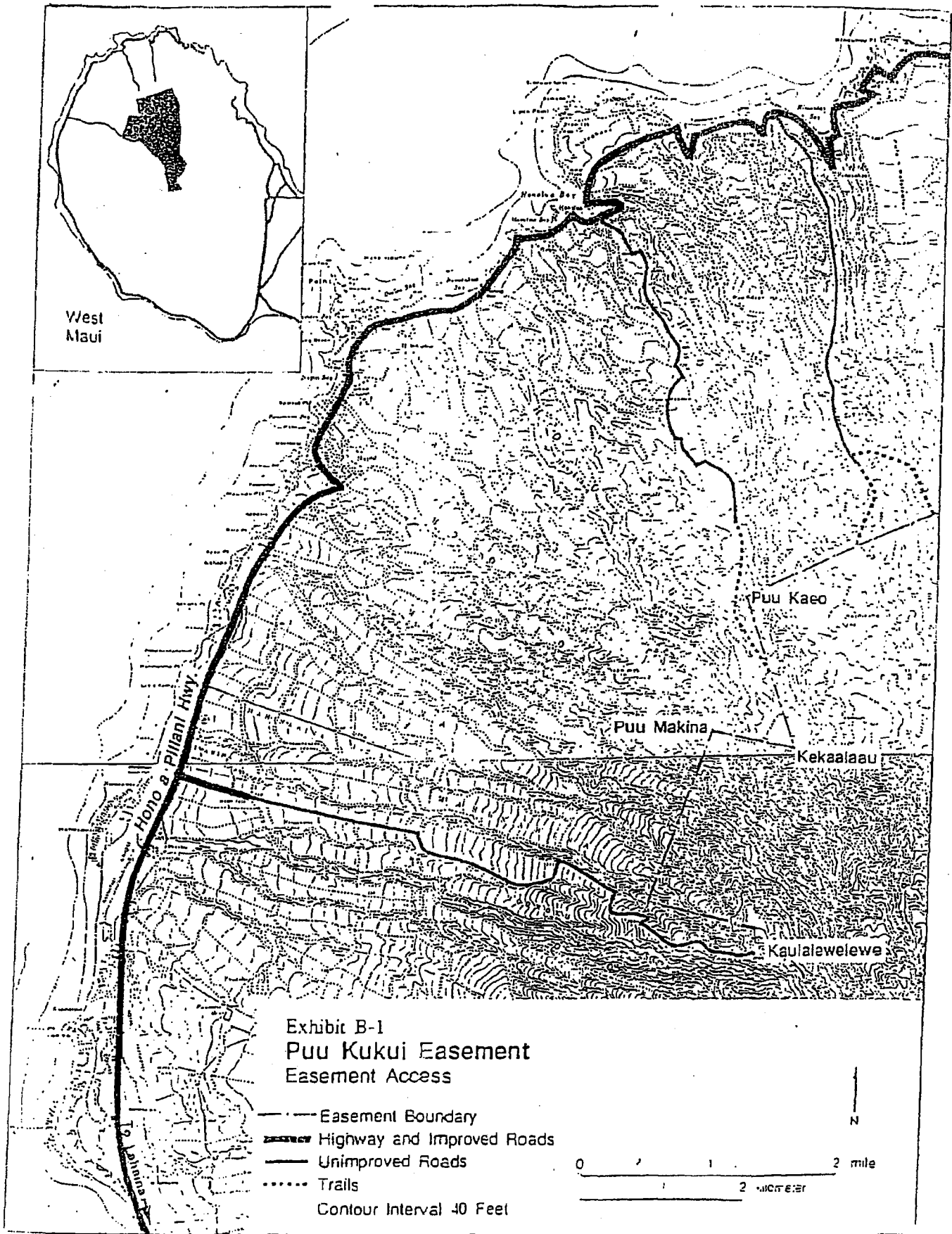
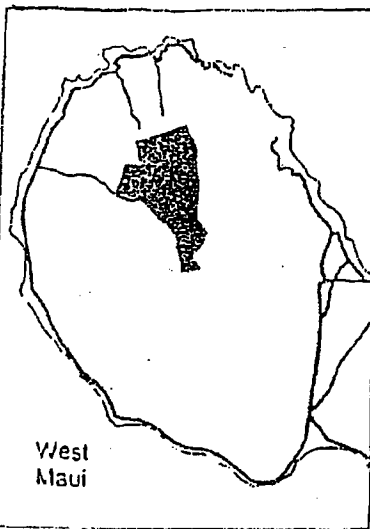
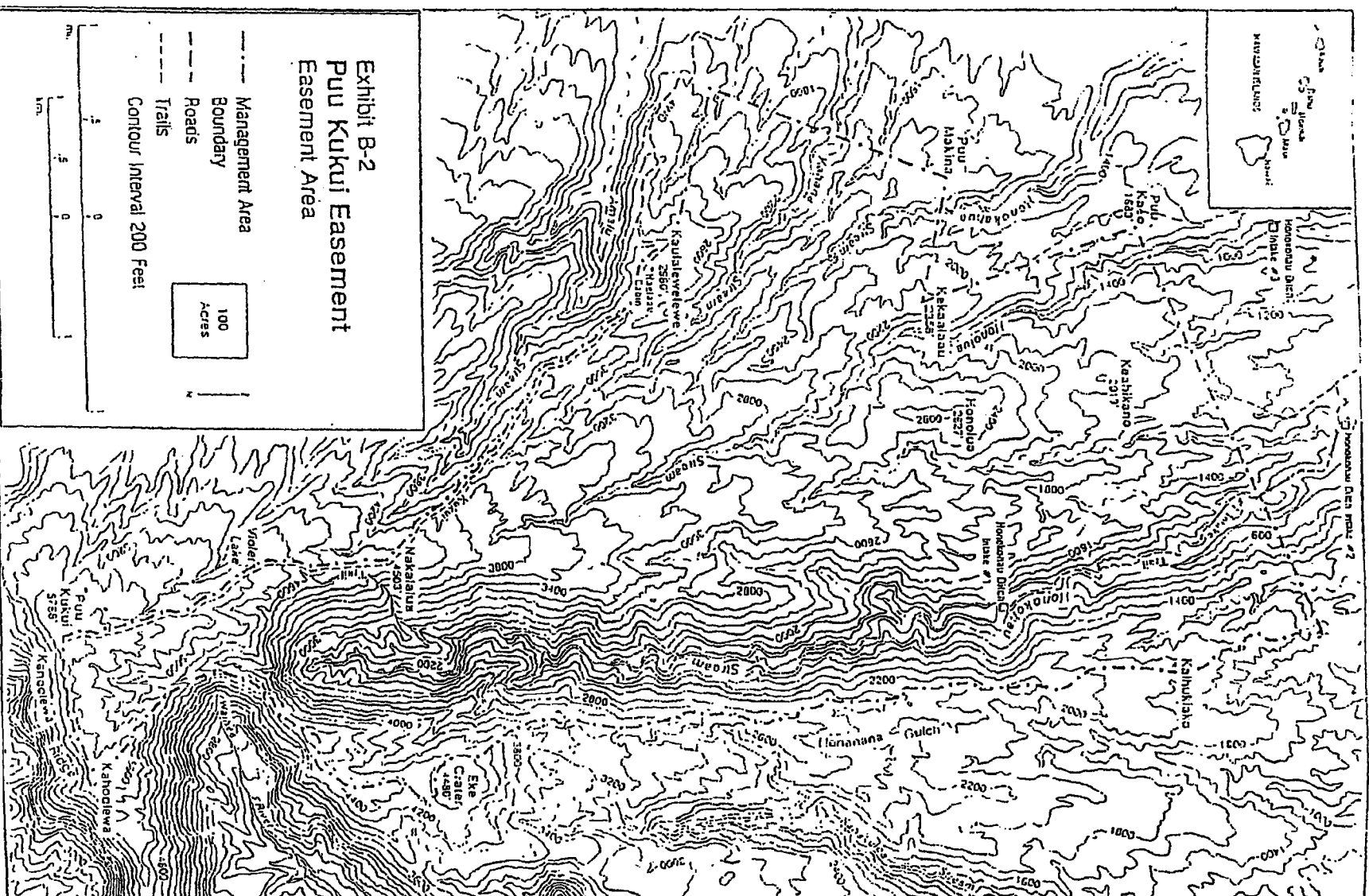


EXHIBIT "1"





GENERAL CONDITIONS

Table of Contents

	<u>Page(s)</u>
1. Coordination of Services by the STATE	2
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.....	2
3. Personnel Requirements	3
4. Nondiscrimination	3
5. Conflicts of Interest	3
6. Subcontracts and Assignments	3
7. Indemnification and Defense.....	4
8. Cost of Litigation.....	4
9. Liquidated Damages	4
10. STATE'S Right of Offset.....	4
11. Disputes	4
12. Suspension of Contract.....	4
13. Termination for Default.....	5
14. Termination for Convenience	6
15. Claims Based on the Agency Procurement Officer's Actions or Omissions.....	8
16. Costs and Expenses	8
17. Payment Procedures; Final Payment; Tax Clearance	9
18. Federal Funds	9
19. Modifications of Contract.....	9
20. Change Order.....	10
21. Price Adjustment	11
22. Variation in Quantity for Definite Quantity Contracts	11
23. Changes in Cost-Reimbursement Contract.....	11
24. Confidentiality of Material	12
25. Publicity.....	12
26. Ownership Rights and Copyright	12
27. Liens and Warranties.....	12
28. Audit of Books and Records of the CONTRACTOR.....	13
29. Cost or Pricing Data	13
30. Audit of Cost or Pricing Data	13
31. Records Retention.....	13
32. Antitrust Claims.....	13
33. Patented Articles.....	13
34. Governing Law.....	14
35. Compliance with Laws	14
36. Conflict between General Conditions and Procurement Rules	14
37. Entire Contract.....	14
38. Severability	14
39. Waiver	14
40. Pollution Control	14
41. Campaign Contributions.....	14
42. Confidentiality of Personal Information.....	14

GENERAL CONDITIONS

1. Coordination of Services by the STATE. The head of the purchasing agency ("HOPA") (which term includes the designee of the HOPA) shall coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Contract. The CONTRACTOR shall maintain communications with HOPA at all stages of the CONTRACTOR'S work, and submit to HOPA for resolution any questions which may arise as to the performance of this Contract. "Purchasing agency" as used in these General Conditions means and includes any governmental body which is authorized under chapter 103D, HRS, or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods or services or both.
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
 - a. In the performance of services required under this Contract, the CONTRACTOR is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE'S opinion, the services are being performed by the CONTRACTOR in compliance with this Contract. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
 - b. The CONTRACTOR and the CONTRACTOR'S employees and agents are not by reason of this Contract, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR'S employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
 - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR'S performance under this Contract. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR'S employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR'S employees or agents in the course of their employment.
 - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Contract, including but not limited to (i) income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
 - e. The CONTRACTOR shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of the Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Contract. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 17 of these General Conditions.
 - f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR'S employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

- g. The CONTRACTOR shall obtain a certificate of compliance issued by the Department of Labor and Industrial Relations, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
 - h. The CONTRACTOR shall obtain a certificate of good standing issued by the Department of Commerce and Consumer Affairs, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
 - i. In lieu of the above certificates from the Department of Taxation, Labor and Industrial Relations, and Commerce and Consumer Affairs, the CONTRACTOR may submit proof of compliance through the State Procurement Office's designated certification process.
3. Personnel Requirements.
- a. The CONTRACTOR shall secure, at the CONTRACTOR'S own expense, all personnel required to perform this Contract.
 - b. The CONTRACTOR shall ensure that the CONTRACTOR'S employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.
4. Nondiscrimination. No person performing work under this Contract, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.
5. Conflicts of Interest. The CONTRACTOR represents that neither the CONTRACTOR, nor any employee or agent of the CONTRACTOR, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with the CONTRACTOR'S performance under this Contract.
6. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR'S duties, obligations, or interests under this Contract and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE, and (ii) the CONTRACTOR'S assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR'S assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR'S right to compensation under this Contract shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.
- a. Recognition of a successor in interest. When in the best interest of the State, a successor in interest may be recognized in an assignment contract in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
 - (1) The Assignee assumes all of the CONTRACTOR'S obligations;
 - (2) The CONTRACTOR remains liable for all obligations under this Contract but waives all rights under this Contract as against the STATE; and
 - (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required bonds.
 - b. Change of name. When the CONTRACTOR asks to change the name in which it holds this Contract with the STATE, the procurement officer of the purchasing agency (hereinafter referred to as the "Agency procurement officer") shall, upon receipt of a document acceptable or satisfactory to the

Agency procurement officer indicating such change of name (for example, an amendment to the CONTRACTOR'S articles of incorporation), enter into an amendment to this Contract with the CONTRACTOR to effect such a change of name. The amendment to this Contract changing the CONTRACTOR'S name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.

- c. Reports. All assignment contracts and amendments to this Contract effecting changes of the CONTRACTOR'S name or novations hereunder shall be reported to the chief procurement officer (CPO) as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
 - d. Actions affecting more than one purchasing agency. Notwithstanding the provisions of subparagraphs 6a through 6c herein, when the CONTRACTOR holds contracts with more than one purchasing agency of the State, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the CPO's office.
- 7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR'S employees, officers, agents, or subcontractors under this Contract. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.
 - 8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
 - 9. Liquidated Damages. When the CONTRACTOR is given notice of delay or nonperformance as specified in paragraph 13 (Termination for Default) and fails to cure in the time specified, it is agreed the CONTRACTOR shall pay to the STATE the amount, if any, set forth in this Contract per calendar day from the date set for cure until either (i) the STATE reasonably obtains similar goods or services, or both, if the CONTRACTOR is terminated for default, or (ii) until the CONTRACTOR provides the goods or services, or both, if the CONTRACTOR is not terminated for default. To the extent that the CONTRACTOR'S delay or nonperformance is excused under paragraph 13d (Excuse for Nonperformance or Delay Performance), liquidated damages shall not be assessable against the CONTRACTOR. The CONTRACTOR remains liable for damages caused other than by delay.
 - 10. STATE'S Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Contract, any amounts owed to the State of Hawaii by the CONTRACTOR under this Contract or any other contracts, or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.
 - 11. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time.
 - 12. Suspension of Contract. The STATE reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the CONTRACTOR in accordance with the provisions herein.
 - a. Order to stop performance. The Agency procurement officer may, by written order to the CONTRACTOR, at any time, and without notice to any surety, require the CONTRACTOR to stop all or any part of the performance called for by this Contract. This order shall be for a specified

period not exceeding sixty (60) days after the order is delivered to the CONTRACTOR, unless the parties agree to any further period. Any such order shall be identified specifically as a stop performance order issued pursuant to this section. Stop performance orders shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the CONTRACTOR for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the CONTRACTOR for minimizing costs. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and suspend all performance under this Contract at the time stated, provided, however, the CONTRACTOR shall take all reasonable steps to minimize the occurrence of costs allocable to the performance covered by the order during the period of performance stoppage. Before the stop performance order expires, or within any further period to which the parties shall have agreed, the Agency procurement officer shall either:

- (1) Cancel the stop performance order; or
 - (2) Terminate the performance covered by such order as provided in the termination for default provision or the termination for convenience provision of this Contract.
- b. Cancellation or expiration of the order. If a stop performance order issued under this section is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the CONTRACTOR shall have the right to resume performance. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the Contract shall be modified in writing accordingly, if:
- (1) The stop performance order results in an increase in the time required for, or in the CONTRACTOR'S cost properly allocable to, the performance of any part of this Contract; and
 - (2) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of performance stoppage; provided that, if the Agency procurement officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this Contract.
- c. Termination of stopped performance. If a stop performance order is not cancelled and the performance covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop performance order shall be allowable by adjustment or otherwise.
- d. Adjustment of price. Any adjustment in contract price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

13. Termination for Default.

- a. Default. If the CONTRACTOR refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of this Contract, the Agency procurement officer may notify the CONTRACTOR in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency procurement officer, such officer may terminate the CONTRACTOR'S right to proceed with the Contract or such part of the Contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Agency procurement officer may procure similar goods or services in a manner and upon the terms deemed appropriate by the Agency procurement officer. The CONTRACTOR shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.
- b. CONTRACTOR'S duties. Notwithstanding termination of the Contract and subject to any directions from the Agency procurement officer, the CONTRACTOR shall take timely, reasonable, and

necessary action to protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest.

- c. Compensation. Payment for completed goods and services delivered and accepted by the STATE shall be at the price set forth in the Contract. Payment for the protection and preservation of property shall be in an amount agreed upon by the CONTRACTOR and the Agency procurement officer. If the parties fail to agree, the Agency procurement officer shall set an amount subject to the CONTRACTOR'S rights under chapter 3-126, HAR. The STATE may withhold from amounts due the CONTRACTOR such sums as the Agency procurement officer deems to be necessary to protect the STATE against loss because of outstanding liens or claims and to reimburse the STATE for the excess costs expected to be incurred by the STATE in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. The CONTRACTOR shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, including any failure by the CONTRACTOR to make progress in the prosecution of the performance hereunder which endangers such performance, if the CONTRACTOR has notified the Agency procurement officer within fifteen (15) days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of a public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the CONTRACTOR shall not be deemed to be in default, unless the goods and services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the CONTRACTOR to meet the requirements of the Contract. Upon request of the CONTRACTOR, the Agency procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the CONTRACTOR'S progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of the STATE under this Contract. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.
- e. Erroneous termination for default. If, after notice of termination of the CONTRACTOR'S right to proceed under this paragraph, it is determined for any reason that the CONTRACTOR was not in default under this paragraph, or that the delay was excusable under the provisions of subparagraph 13d, "Excuse for nonperformance or delayed performance," the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to paragraph 14.
- f. Additional rights and remedies. The rights and remedies provided in this paragraph are in addition to any other rights and remedies provided by law or under this Contract.

14. Termination for Convenience.

- a. Termination. The Agency procurement officer may, when the interests of the STATE so require, terminate this Contract in whole or in part, for the convenience of the STATE. The Agency procurement officer shall give written notice of the termination to the CONTRACTOR specifying the part of the Contract terminated and when termination becomes effective.
- b. CONTRACTOR'S obligations. The CONTRACTOR shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination the CONTRACTOR will stop performance to the extent specified. The CONTRACTOR shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The CONTRACTOR shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the STATE'S approval. The Agency procurement officer may direct the CONTRACTOR to assign the CONTRACTOR'S right, title, and interest under terminated orders or subcontracts to the STATE. The CONTRACTOR must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.

- c. Right to goods and work product. The Agency procurement officer may require the CONTRACTOR to transfer title and deliver to the STATE in the manner and to the extent directed by the Agency procurement officer:

- (1) Any completed goods or work product; and
- (2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the CONTRACTOR has specifically produced or specially acquired for the performance of the terminated part of this Contract.

The CONTRACTOR shall, upon direction of the Agency procurement officer, protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest. If the Agency procurement officer does not exercise this right, the CONTRACTOR shall use best efforts to sell such goods and manufacturing materials. Use of this paragraph in no way implies that the STATE has breached the Contract by exercise of the termination for convenience provision.

- d. Compensation.

- (1) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, submitted to the extent required by chapter 3-122, HAR, bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Agency procurement officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph 14d(3) below.
- (2) The Agency procurement officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the STATE, the proceeds of any sales of goods and manufacturing materials under subparagraph 14c, and the Contract price of the performance not terminated.
- (3) Absent complete agreement under subparagraph 14d(2) the Agency procurement officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under subparagraph 14d(2) shall not duplicate payments under this subparagraph for the following:
 - (A) Contract prices for goods or services accepted under the Contract;
 - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a fair and reasonable profit on such portion of the performance, such profit shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided, however, that if it appears that the CONTRACTOR would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 - (C) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to subparagraph 14b. These costs must not include costs paid in accordance with subparagraph 14d(3)(B);
 - (D) The reasonable settlement costs of the CONTRACTOR, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract. The total sum to be paid the CONTRACTOR under this subparagraph shall not exceed the

total Contract price plus the reasonable settlement costs of the CONTRACTOR reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 14d(2), and the contract price of performance not terminated.

- (4) Costs claimed, agreed to, or established under subparagraphs 14d(2) and 14d(3) shall be in accordance with Chapter 3-123 (Cost Principles) of the Procurement Rules.

15. Claims Based on the Agency Procurement Officer's Actions or Omissions.

- a. Changes in scope. If any action or omission on the part of the Agency procurement officer (which term includes the designee of such officer for purposes of this paragraph 15) requiring performance changes within the scope of the Contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:
- (1) Written notice required. The CONTRACTOR shall give written notice to the Agency procurement officer:
- (A) Prior to the commencement of the performance involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
- (B) Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did not have such knowledge prior to the commencement of the performance; or
- (C) Within such further time as may be allowed by the Agency procurement officer in writing.
- (2) Notice content. This notice shall state that the CONTRACTOR regards the act or omission as a reason which may entitle the CONTRACTOR to additional compensation, damages, or an extension of time. The Agency procurement officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Agency procurement officer;
- (3) Basis must be explained. The notice required by subparagraph 15a(1) describes as clearly as practicable at the time the reasons why the CONTRACTOR believes that additional compensation, damages, or an extension of time may be remedies to which the CONTRACTOR is entitled; and
- (4) Claim must be justified. The CONTRACTOR must maintain and, upon request, make available to the Agency procurement officer within a reasonable time, detailed records to the extent practicable, and other documentation and evidence satisfactory to the STATE, justifying the claimed additional costs or an extension of time in connection with such changes.
- b. CONTRACTOR not excused. Nothing herein contained, however, shall excuse the CONTRACTOR from compliance with any rules or laws precluding any state officers and CONTRACTOR from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.
- c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

16. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Contract shall be subject to chapter 3-123 (Cost Principles), HAR, and the following guidelines:

- a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
- b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-sized vehicle.
- c. Unless prior written approval of the HOPA is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for inter-island or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.

17. Payment Procedures: Final Payment; Tax Clearance.

- a. Original invoices required. All payments under this Contract shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Contract have been performed by the CONTRACTOR according to the Contract.
- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
- c. Prompt payment.
 - (1) Any money, other than retainage, paid to the CONTRACTOR shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
 - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
- d. Final payment. Final payment under this Contract shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid. Further, in accordance with section 3-122-112, HAR, CONTRACTOR shall provide a certificate affirming that the CONTRACTOR has remained in compliance with all applicable laws as required by this section.

18. Federal Funds. If this Contract is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Contract to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds. Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.

19. Modifications of Contract.

- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract permitted by this Contract shall be made by written amendment to this Contract, signed by the CONTRACTOR and the STATE, provided that change orders shall be made in accordance with paragraph 20 herein.
- b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract shall be permitted.

- c. Agency procurement officer. By written order, at any time, and without notice to any surety, the Agency procurement officer may unilaterally order of the CONTRACTOR:
 - (A) Changes in the work within the scope of the Contract; and
 - (B) Changes in the time of performance of the Contract that do not alter the scope of the Contract work.
 - d. Adjustments of price or time for performance. If any modification increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.
 - e. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if written modification of the Contract is not made prior to final payment under this Contract.
 - f. Claims not barred. In the absence of a written contract modification, nothing in this clause shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under this Contract or for a breach of contract.
 - g. Head of the purchasing agency approval. If this is a professional services contract awarded pursuant to section 103D-303 or 103D-304, HRS, any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract which increases the amount payable to the CONTRACTOR by at least \$25,000.00 and ten per cent (10%) or more of the initial contract price, must receive the prior approval of the head of the purchasing agency.
 - h. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE'S approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract, a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid.
 - i. Sole source contracts. Amendments to sole source contracts that would change the original scope of the Contract may only be made with the approval of the CPO. Annual renewal of a sole source contract for services should not be submitted as an amendment.
20. Change Order. The Agency procurement officer may, by a written order signed only by the STATE, at any time, and without notice to any surety, and subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:
- (1) Drawings, designs, or specifications, if the goods or services to be furnished are to be specially provided to the STATE in accordance therewith;
 - (2) Method of delivery; or
 - (3) Place of delivery.
- a. Adjustments of price or time for performance. If any change order increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in the Contract price made pursuant to this provision shall be determined in accordance with the price adjustment provision of this Contract. Failure of the parties to agree to an adjustment shall not excuse the CONTRACTOR from proceeding with the Contract as changed, provided that the Agency procurement officer promptly and duly makes the provisional adjustments in payment or time for performance as may be reasonable. By

proceeding with the work, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, or any extension of time for completion.

- b. Time period for claim. Within ten (10) days after receipt of a written change order under subparagraph 20a, unless the period is extended by the Agency procurement officer in writing, the CONTRACTOR shall respond with a claim for an adjustment. The requirement for a timely written response by CONTRACTOR cannot be waived and shall be a condition precedent to the assertion of a claim.
 - c. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if a written response is not given prior to final payment under this Contract.
 - d. Other claims not barred. In the absence of a change order, nothing in this paragraph 20 shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under the Contract or for breach of contract.
21. Price Adjustment.
- a. Price adjustment. Any adjustment in the contract price pursuant to a provision in this Contract shall be made in one or more of the following ways:
 - (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (2) By unit prices specified in the Contract or subsequently agreed upon;
 - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
 - (4) In such other manner as the parties may mutually agree; or
 - (5) In the absence of agreement between the parties, by a unilateral determination by the Agency procurement officer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Agency procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
 - b. Submission of cost or pricing data. The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, HAR.
22. Variation in Quantity for Definite Quantity Contracts. Upon the agreement of the STATE and the CONTRACTOR, the quantity of goods or services, or both, if a definite quantity is specified in this Contract, may be increased by a maximum of ten per cent (10%); provided the unit prices will remain the same except for any price adjustments otherwise applicable; and the Agency procurement officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.
23. Changes in Cost-Reimbursement Contract. If this Contract is a cost-reimbursement contract, the following provisions shall apply:
- a. The Agency procurement officer may at any time by written order, and without notice to the sureties, if any, make changes within the general scope of the Contract in any one or more of the following:
 - (1) Description of performance (Attachment 1);
 - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
 - (3) Place of performance of services;

- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the STATE in accordance with the drawings, designs, or specifications;
 - (5) Method of shipment or packing of supplies; or
 - (6) Place of delivery.
- b. If any change causes an increase or decrease in the estimated cost of, or the time required for performance of, any part of the performance under this Contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Contract, the Agency procurement officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the Contract accordingly.
 - c. The CONTRACTOR must assert the CONTRACTOR'S rights to an adjustment under this provision within thirty (30) days from the day of receipt of the written order. However, if the Agency procurement officer decides that the facts justify it, the Agency procurement officer may receive and act upon a proposal submitted before final payment under the Contract.
 - d. Failure to agree to any adjustment shall be a dispute under paragraph 11 of this Contract. However, nothing in this provision shall excuse the CONTRACTOR from proceeding with the Contract as changed.
 - e. Notwithstanding the terms and conditions of subparagraphs 23a and 23b, the estimated cost of this Contract and, if this Contract is incrementally funded, the funds allotted for the performance of this Contract, shall not be increased or considered to be increased except by specific written modification of the Contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract.
24. Confidentiality of Material.
- a. All material given to or made available to the CONTRACTOR by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
 - b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.
25. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any state employee, including the HOPA, the CPO, the Agency procurement officer, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR'S brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Contract shall be referred to the Agency procurement officer.
26. Ownership Rights and Copyright. The STATE shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the STATE upon expiration or termination of this Contract. The STATE, in its sole discretion, shall have the exclusive right to copyright any product, concept, or material developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract.
27. Liens and Warranties. Goods provided under this Contract shall be provided free of all liens and provided together with all applicable warranties, or with the warranties described in the Contract documents, whichever are greater.

28. Audit of Books and Records of the CONTRACTOR. The STATE may, at reasonable times and places, audit the books and records of the CONTRACTOR, prospective contractor, subcontractor, or prospective subcontractor which are related to:
- a. The cost or pricing data, and
 - b. A state contract, including subcontracts, other than a firm fixed-price contract.
29. Cost or Pricing Data. Cost or pricing data must be submitted to the Agency procurement officer and timely certified as accurate for contracts over \$100,000 unless the contract is for a multiple-term or as otherwise specified by the Agency procurement officer. Unless otherwise required by the Agency procurement officer, cost or pricing data submission is not required for contracts awarded pursuant to competitive sealed bid procedures.
- If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the STATE is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data was not used or relied upon, the price will be reduced in such amount.
30. Audit of Cost or Pricing Data. When cost or pricing principles are applicable, the STATE may require an audit of cost or pricing data.
31. Records Retention.
- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
 - (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.
32. Antitrust Claims. The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to STATE any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the STATE under an escalation clause.
33. Patented Articles. The CONTRACTOR shall defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.

34. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
35. Compliance with Laws. The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR'S performance of this Contract.
36. Conflict Between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the procurement rules, the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.
37. Entire Contract. This Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Contract. This Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
38. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.
39. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE'S right to enforce the same in accordance with this Contract. The fact that the STATE specifically refers to one provision of the procurement rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Contract shall not constitute a waiver or relinquishment of the STATE'S rights or the CONTRACTOR'S obligations under the procurement rules or statutes.
40. Pollution Control. If during the performance of this Contract, the CONTRACTOR encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in section 128D-1, HRS, the CONTRACTOR shall immediately notify the STATE and all other appropriate state, county, or federal agencies as required by law. The Contractor shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the STATE determines that this Contract requires an adjustment of the time for performance, the Contract shall be modified in writing accordingly.
41. Campaign Contributions. The CONTRACTOR is hereby notified of the applicability of 11-355, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
42. Confidentiality of Personal Information.
- a. Definitions.
- "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:
- (1) Social security number;
 - (2) Driver's license number or Hawaii identification card number; or

- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to the CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by the CONTRACTOR and shall not be disclosed without the prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.
- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
 - (A) The personal information collected, used, or maintained by the CONTRACTOR will be treated as confidential;
 - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
 - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

- d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for the CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, the CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.