

CONTRACT NO. CT-DTS-1100431

**UTILITY FACILITIES RELOCATION AND
COST REIMBURSEMENT AGREEMENT
BETWEEN THE CITY AND COUNTY OF HONOLULU AND
THE GAS COMPANY, LLC**

THIS UTILITY FACILITIES RELOCATION AND COST REIMBURSEMENT AGREEMENT is entered into this 30th day of June, 2011 (the "Agreement"), by and between the CITY AND COUNTY OF HONOLULU, a municipal corporation of the State of Hawaii, whose principal place of business and mailing address is Honolulu Hale, 530 South King Street, Honolulu, Hawaii 96813 (the "CITY"), and THE GAS COMPANY, LLC, a Hawaii limited liability company, whose principal mailing address is 745 Fort Street, Suite 1800, Honolulu, Hawaii 96813 (the "UTILITY"). (The CITY and the UTILITY collectively, are the "Parties," and individually a "Party," all as governed by the context in which such words are used.)

RECITALS

WHEREAS, pursuant to Hawaii Revised Statutes ("HRS") Section 51-1 (1993), the CITY is authorized to construct, extend, own, maintain, and operate mass transit systems on the island of Oahu;

WHEREAS, pursuant to Ordinance No. 07-001, the CITY is authorized to implement the Locally Preferred Alternative (the "LPA"), which is a fixed guideway transit system between Kapolei and the University of Hawaii ("UH") at Manoa, provided that a Minimum Operable Segment (the "MOS") of the LPA is constructed within financial constraints;

WHEREAS, Resolution No. 08-261 approved the MOS beginning at UH-West Oahu (near the future Kroc Center), via Farrington Highway and Kamehameha Highway (adjacent to Pearl Harbor), to Aolele Street serving the Honolulu International Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center;

WHEREAS, the MOS includes the limits of the West Oahu/Farrington Highway Section of the Honolulu High-Capacity Transit Corridor Project (the "WOFH Project") in general accordance with the alignment depicted in Exhibit "A," attached hereto and incorporated herein by reference;

WHEREAS, the UTILITY owns and operates its utility facilities together with any related improvements within the limits of the WOFH Project (collectively, the “Facilities”);

WHEREAS, the Facilities are located in public rights-of-way within the limits of the WOFH Project which are under the jurisdiction, authority, and control of the CITY or the State of Hawaii (the “STATE”);

WHEREAS, the preliminary design for the WOFH Project has identified potential conflicts between the WOFH Project and the Facilities, which conflicts will require the Facilities to be relocated, replaced and/or protected in place (the “Rearrangement”). The Facilities identified for Rearrangement are listed in Exhibit “B,” attached hereto and incorporated herein by reference;

WHEREAS, the UTILITY has the expertise and ability to perform such construction, inspection and other work reasonably required to effect the Rearrangement of the facilities set forth in Exhibit “B” as contemplated in this Agreement (collectively, the “Work”) and can do so in a cost effective manner, as set forth in Exhibit “C”;

WHEREAS, the Parties desire to establish procedures for the Rearrangement of Facilities which will be affected by the WOFH Project;

WHEREAS, the Parties desire to allocate cost responsibility for the Work; and

WHEREAS, the Parties desire to establish procedures to reimburse the UTILITY, as the actual owner of the subject utility facilities, for engineering and design work costs relating to Utility Relocation due to a Federal Transit Administration-funded project; and

WHEREAS, the cost reimbursement for the Work to be done under this Agreement is a sole source procurement pursuant to HRS Section 103D-306 (Supp. 2010) and related Hawaii Administrative Rules, and has been approved for Sole Source Procurement pursuant to Section 3-122-81, Sole Source No. 2, Hawaii Administrative Rules.

AGREEMENT

NOW, THEREFORE, in accordance with the foregoing Recitals, which are incorporated into this Agreement by reference, and for and in consideration of the mutual covenants and agreements hereafter set forth, the mutual benefits to the Parties to be derived herefrom, and for other good and valuable consideration, the receipt and adequacy of which the Parties acknowledge, the CITY and the UTILITY agree as follows:

SECTION 1. COOPERATION AND COORDINATION

- 1.1 **Statement of Cooperation.** The Parties hereby acknowledge that the timely completion of the WOFH Project will be influenced by the ability of the CITY and the UTILITY to coordinate their activities, communicate with each other, and respond promptly to reasonable requests of the other. The Parties desire to cooperate so that the Rearrangement is effected with the greatest expedition and least interference with the operations of either of the Parties. As a guiding principle, the Parties agree to strive to minimize Rearrangement of Facilities wherever possible, so as to avoid disruption to customers, maintain the schedule of the WOFH Project, and minimize cost impact to all Parties.
- 1.2 **Construction Coordination Meetings.** The CITY and its design-build contractor (the “DB Contractor”) (sometimes collectively referred to herein as “CITY” as governed by the context in which such words are used) will hold construction coordination meetings on a regular basis as early as the WOFH Project design progress allows. The CITY will send notice of such meetings to the UTILITY in its reasonable discretion, who will participate in the meetings to review matters including, but not limited to, design development, construction estimates, proposed cost allocations and scheduling for the Work.
- 1.3 **The CITY and the UTILITY Coordination.** The CITY and the UTILITY shall consult in good faith in order to decide whether the CITY, through minor changes to the WOFH Project design acceptable to the CITY, can avoid conflicts with the Facilities. The CITY and the UTILITY shall determine an appropriate and mutually acceptable WOFH Project strategy for each potentially impacted Facility.
- 1.4 **UTILITY Liaison.** The UTILITY shall designate a project manager, who will be the UTILITY’s liaison with respect to the matters covered by this Agreement. The UTILITY’s project manager shall interface with the CITY’s utilities coordinator for the WOFH Project regarding the matters described in this Agreement.

SECTION 2. DESIGN AND CONSTRUCTION

- 2.1 **WOFH Project Schedule.** The Parties hereby acknowledge the importance of completing the Work in a manner consistent with the overall schedule for the WOFH Project. Accordingly, the Parties shall coordinate and agree upon a schedule for the construction and final completion of the Work, including, but not limited to, any Betterment (as

defined below) work to be performed by the UTILITY in conjunction with the Work. The schedule shall be agreed upon during the construction coordination meetings referenced in Section 1.2. The Parties shall execute a written acknowledgement of the approved schedule for the Work which shall, upon execution, be incorporated into and made a part of this Agreement by reference. The UTILITY agrees to commit using commercially reasonable efforts to complete all of the Work in accordance with the agreed upon schedule subject to Section 7.18.

2.2 Design Reviews. As design drawings are prepared, updated and available for review, the CITY and the UTILITY shall review and reach mutual agreement regarding the final design for the Work. The Parties agree to review each other's design drawings in a timely manner, with a target review period not to exceed thirty (30) calendar days for each design review. The CITY must approve final design plans related to the Work prior to the commencement of construction. For Rearrangement of Facilities to be performed by the UTILITY, upon CITY approval of final design plans related to the Work, the CITY shall issue to the UTILITY a work order (a "Work Order") to proceed with construction. By accepting such Work Order, the UTILITY agrees to the terms, conditions and schedule set forth in the Work Order, and the UTILITY shall commence and diligently prosecute the construction of the Work to completion as authorized by the Work Order, in conformance with the final design plans approved by the CITY and the time schedule set forth in the Work Order.

2.3 Construction of Work. For Rearrangement of Facilities set forth in Exhibit "B" for which the CITY has issued a Work Order, the UTILITY shall perform the necessary field and office engineering, furnish all materials, and perform the construction (including inspection, testing and acceptance) included as part of the Work, in a cost-effective manner as set forth in Exhibit "C." The UTILITY may perform the Work with either (a) its regular construction forces, (b) under an existing continuing contract under which the Work is regularly performed for the UTILITY and under which the lowest available costs are developed, or (c) through qualified licensed contractors procured pursuant to a competitive process. If the UTILITY opts to select contractors pursuant to a competitive process under clause (c) above, the CITY shall review and approve the UTILITY's bid solicitation process prior to the job being advertised and concur in the award of the contract. The personnel performing services for the UTILITY shall at all times be employees, agents, contractors, or subcontractors of the UTILITY and not employees,

agents, contractors, or subcontractors of the CITY or under any direction or control of the CITY. In the alternative, upon mutual agreement of the Parties, the CITY may issue a Work Order to the DB Contractor to perform the Work in conformance with the final design plans approved by the CITY and the time schedule set forth in the Work Order.

- 2.4 **Notification Prior to Construction.** The UTILITY shall notify the CITY in writing at least forty-eight (48) hours in advance of initiating construction of the Work under this Agreement. In addition to the initial construction notice, the UTILITY shall provide to the CITY, as needed, subsequent notifications of when and where the UTILITY will be performing portions of the Work. Subsequent notifications by the UTILITY can be made on an oral basis to the CITY's Assistant Project Officer for Utility Coordination, or designee. The CITY shall be permitted to observe the performance of any and all Work, and notice provided pursuant to this Section 2.4 shall be sufficiently timely to allow such observation.
- 2.5 **Permits.** The DB Contractor shall obtain, in advance, all necessary licenses, permits, authorizations and approvals as may be required for performance of the Work, including, without limitation, any certifications or other authorizations required by the CITY or the STATE. The UTILITY represents and warrants that the UTILITY and all personnel who may provide Work under this Agreement on behalf of the UTILITY shall have the requisite licenses, permits, level of experience, and expertise required for the services to be performed.
- 2.6 **Right of Entry.** Each Party shall permit the other immediate entry upon, and use of, all of such Party's right(s)-of-way located within or near the route of the WOFH Project, whenever necessary for a purpose related to construction of the WOFH Project or related to the maintenance, operation or inspection of the Facilities during WOFH Project construction and where not inconsistent in time or manner of exercise either with the UTILITY's discharge of its duties as a public utility or with the CITY's discharge of its duties including those with respect to the WOFH Project.
- 2.7 **Standard of Care.** The UTILITY shall be solely responsible for the performance of all its Work. The UTILITY (including its contractors, subcontractors, consultants and other agents) shall perform all Work in a good and workmanlike manner and in conformance with all applicable federal, STATE and local laws and regulations.
- 2.8 **UTILITY Standards.** All Work shall be performed in accordance with the most current standards, guidelines, policies and procedures of the UTILITY (the "UTILITY

Standards”). The UTILITY will interpret and apply UTILITY Standards in such a manner as to effect a condition equal to existing Facilities, consistent with federal, STATE and local requirements and the UTILITY’s normal business practices. The UTILITY agrees that it will not adopt any new UTILITY Standards, or otherwise amend or supplement any existing UTILITY Standards, for the sole or primary purpose of affecting the WOFH Project.

- 2.9 UTILITY Facility Locates. The Parties agree to follow the spirit and intent of the Hawaii One Call Law, HRS Chapter 269E, particularly with respect to HRS Section 269E-9, entitled Identification of subsurface installations by operator. To minimize risk of impact and disruption, the UTILITY agrees to locate and field mark in conformance with the American Public Works Association Uniform Color Code the approximate location and the number of subsurface installations that may be affected by a proposed CITY excavation to the extent and degree of accuracy that the information is available as determined through the use of standard locating techniques or based on the records of the operator. Said field locates shall be made within five working days as per HRS Section 269E-9 as required, but the UTILITY agrees to use commercially reasonable efforts to complete said field locates within two (2) working days where practicable.
- 2.10 Rearrangement Facilities. To the extent design, construction and operation of the WOFH Project will permit, the relocated, replaced and/or protected in place Facilities (the “Rearrangement Facilities”) shall be located in existing public rights-of-ways and shall otherwise be of the same character and scope as the original Facilities. The UTILITY shall not obtain greater rights (e.g., an easement in lieu of an existing license) unless the CITY determines that such rights are appropriate in the interest of WOFH Project economy or to meet the requirements of the WOFH Project.
- 2.11 Abandoned Utilities. No Facilities shall be left in place after the Facilities are no longer active unless specifically permitted by the CITY, as WOFH Project sponsor or property owner, and the STATE, as property owner. The UTILITY will not proceed to abandon Facilities prior to receipt of written evidence that both the CITY and the STATE find such abandonment to be acceptable. In the event the CITY and/or STATE require the Facilities to be removed by the UTILITY in accordance with this Section 2.11, the CITY shall reimburse the UTILITY for all commercially reasonable costs incurred by the UTILITY for said removal.

- 2.12 Inspection during Construction. The CITY may inspect the construction of the Rearrangement to ensure that the Work has been performed in conformance with the final design plans approved by the Parties. The UTILITY shall provide inspectors to observe and inspect the Work during its progress to ensure timely completion of the same. Upon completion of the Work, the UTILITY shall furnish a notice of completion to the CITY and acceptance of the Work in writing. Upon such acceptance, the UTILITY shall assume full responsibility for such Rearrangement Facilities.
- 2.13 Routine Maintenance. The UTILITY shall schedule, with the concurrence of the CITY, any routine maintenance of Facilities within the WOFH Project so as not to interfere with the WOFH Project construction.
- 2.14 Unforeseen Work. Conflicts with Facilities not previously identified in Exhibit "B" may be discovered after the execution of this Agreement. Upon discovery of unforeseen conflicts, the CITY and the UTILITY field supervisors shall define and agree upon such additional Work scope as may be necessary to resolve the unforeseen conflicts. The Parties agree to execute an amendment to this Agreement to include the additional Facilities in an amended Exhibit "B" and increase the maximum reimbursable amount in an amended Exhibit "C", to reflect the additional Work scope within the scope of this Agreement prior to any additional expenses being incurred and as a condition to such expenses being eligible for reimbursement by the CITY.
- 2.15 Reproducible Contract Documents. The CITY and the UTILITY shall each maintain a set of "as-built" drawings of the Rearrangement as performed by the CITY and the UTILITY, respectively, during the progress of construction. Within sixty (60) days following the completion and acceptance of each Rearrangement, the Party that performed the Work shall furnish the other Party with suitable reproducible copies of those "as-built" drawings showing such Rearrangement as installed by the performing Party and all contract records pertaining to such Rearrangement so that each Party may compile a complete set of contract documents.

SECTION 3. COSTS AND REIMBURSEMENT

- 3.1 Allocation of Responsibility for Rearrangement Costs. The Parties shall allocate responsibility for the costs of performing the Work as follows:
- 3.1.1 Except as otherwise provided in Sections 3.1.2, 3.1.3 and 3.1.4, the CITY shall reimburse the UTILITY for all actual, allocable and reasonable costs incurred in

the performance of the Work, provided that the UTILITY uses commercially reasonable efforts to meet the requirements of the agreed-upon schedule as provided for in Section 2.1 of this Agreement. Should the UTILITY or CITY not meet the requirements of the agreed-upon schedule, the Parties agree to meet to discuss adjustments to the reimbursement for the Work due to delay costs incurred by the UTILITY or CITY, as the case may be, related to not meeting the requirements of the agreed-upon schedule. The costs payable by the CITY under this Agreement shall not include any profit on the Work performed by the UTILITY's own forces. Overhead that does not include any profit shall be reimbursed by CITY to UTILITY. The CITY and the UTILITY have met in good faith and established a cost estimate setting forth the maximum amount of reimbursement-eligible costs which may be incurred by the UTILITY (the "Maximum Reimbursable Amount"). A cost estimate which constitutes the Maximum Reimbursable Amount is contained in Exhibit "C," attached hereto and incorporated herein by reference and shall be valid for a period of one year from the date of execution of this Agreement. Any costs incurred by the UTILITY in excess of the Maximum Reimbursable Amount shall not be reimbursable under this Agreement unless otherwise approved in writing by the CITY. In the event the cost estimate expires, or the Parties agree to revisions to the Maximum Reimbursable Amount, the CITY and the UTILITY shall execute an appropriate written amendment to this Agreement, if needed.

- 3.1.2 The Parties intend that the scope of the CITY's reimbursement obligations under this Agreement shall be limited to only that portion of the Work necessary: (i) to permit the continued safe use, operation and maintenance of the Facilities in compliance with applicable laws, regulations, industry standards and commercially reasonable practices; (ii) to preserve the current condition, functionality and utility of the Facilities; and (iii) to construct the WOFH Project improvements in accordance with the clearance standards and other design requirements set forth in the CITY's design criteria manual. Accordingly, any incremental costs attributable to Facility improvements which increase the capacity, capability, durability, appearance, efficiency, access or function of a Facility (collectively, the "Betterments") will be borne by the UTILITY except to the extent that such Betterments are required by changes in manufacturing

standards, prevailing industry standards, or regulatory requirements, or required due to the unavailability of replacement materials.

- 3.1.3 Except for Betterments required by changes in manufacturing standards, prevailing industry standards, or regulatory requirements, or required due to the unavailability of replacement materials, the UTILITY's request for Betterments may be accepted or rejected at the sole discretion of the CITY. If accepted, the CITY and the UTILITY shall enter into a separate written agreement regarding Betterments that will specify, among other things, the funding and payment mechanisms for Betterment costs including, but not limited to, costs resulting from increased construction management expenses and all construction costs. Construction of Betterments will not begin unless and until the CITY and the UTILITY have executed a separate written agreement regarding Betterments.
- 3.1.4 The CITY shall receive a credit for the fair market value of any salvage which shall accrue to the UTILITY as a result of the Work. The UTILITY is responsible to ensure recovery of salvageable materials and to report the fair market value of any salvageable materials to the CITY. Material shall be itemized where it represents major components.
- 3.1.5 Subject to the audit provisions of Section 3.5, and provided the CITY is not in material breach of the terms and conditions of this Agreement, upon completion of the Work covered by this Agreement and payment by the CITY of its share of the cost of the Work, as determined by Section 3, the UTILITY shall hold the CITY harmless from and waive any and all further claims for expenses incurred by the UTILITY in performing the Work.
- 3.2 Cost Overruns. The UTILITY agrees to notify the CITY if at any time the UTILITY has reason to believe that the construction costs which it expects to incur under any Work Order in the following sixty (60) days, when added to all construction costs previously incurred under such Work Order, will exceed seventy-five percent (75%) of the Maximum Reimbursable Amount authorized in the applicable Work Order, or if at any time the UTILITY has reason to believe that the total construction costs under said Work Order will be in excess of ten percent (10%) of the amounts set forth in the Work Order (collectively, a "Cost Overrun"). In such event, the UTILITY may request a revision of a Work Order to increase the Maximum Reimbursable Amount authorized in the applicable Work Order in the event of anticipated Cost Overruns. The CITY will consider, and may

not unreasonably withhold its approval of, an increase in the Maximum Reimbursable Amount authorized in the applicable Work Order that is caused by a necessary change in the scope of construction or a delay that is not caused by the UTILITY, provided that the UTILITY notifies the CITY of such Cost Overrun as provided above. For increases in construction costs resulting from reasons other than those identified in this Section 3.2, the CITY may withhold its approval of a request for an increase in the Maximum Reimbursable Amount authorized in the applicable Work Order in its reasonable discretion. Without the CITY's prior approval, the UTILITY will not be reimbursed for construction costs expended in excess of the Maximum Reimbursable Amount authorized in the applicable Work Order.

- 3.3 Invoices for Reimbursable Work. For each Work Order the UTILITY shall submit to the CITY invoices for the actual costs of the Work subject to CITY reimbursement under this Agreement. The invoice: (a) shall include only actual and allocable reasonable costs; (b) shall be itemized with detailed descriptions of the scope of the Work completed; (c) shall be prepared in the form and manner as reasonably requested by the CITY; and (d) shall include supporting documentation as reasonably requested by the CITY. The UTILITY shall submit one (1) original and three (3) copies of each invoice and supporting documentation to the CITY pursuant to Section 7.6.
- 3.4 Defects. Final acceptance and payment for the Work performed under this Agreement shall not excuse the UTILITY from any liability for defects in performance which may subsequently appear, and such defects shall be promptly corrected by the UTILITY at no additional expense to the CITY.
- 3.5 Audit. The UTILITY shall keep detailed and complete records verifying all costs for which the UTILITY seeks reimbursement pursuant to this Agreement and which support the UTILITY's billings. Upon completion of the Work, the CITY and the UTILITY shall reconcile the payments made to the UTILITY under this Agreement to confirm that such payments were made in compliance with the cost allocation formula set forth in Section 3.1. For a period of three (3) years following completion of the Work, each Party agrees to make any payment adjustment required as the result of the reconciliation performed. The CITY shall have the right, upon reasonable notice, to audit all records and accounts of the UTILITY pertaining to the Work for purposes of verifying the costs for which the UTILITY seeks reimbursement. Should such audit disclose that the UTILITY has been underpaid, the UTILITY will be reimbursed by the CITY after submission of an

additional billing to cover the underpayment. Should such audit disclose that the UTILITY has been overpaid, the UTILITY will promptly reimburse the CITY in the amount of the overpayment, upon demand by the CITY. For purposes of this section, the UTILITY is required to maintain cost records regarding the Work for which the UTILITY seeks reimbursement under this Agreement for a minimum of three (3) years after final payment is received from the CITY. Should a dispute arise as a result of this Section 3.5, the Parties agree to avail themselves of the Dispute Resolution provisions under Section 6.1 of this Agreement.

3.6 Prompt Payment to Subcontractors.

3.6.1. Subject to any bonafide right to withhold payment under its contracts with its contractors, the UTILITY shall pay its contractors within ten (10) days after receipt of payment from the CITY.

3.6.2. A payment request made by the UTILITY to the CITY that includes a request for sums that were withheld or retained from a contractor and are due to the contractor may not be approved, unless the payment request includes:

1. Substantiation of the amounts requested; and
2. Certification by the UTILITY, to the UTILITY's actual knowledge and belief; that:
 - a. The amounts requested are only for performance in accordance with the specifications, terms, and conditions of this Agreement;
 - b. The contractor has made payments due to its subcontractors and suppliers from previous payments received under its contracts with subcontractors and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontracts and the requirements of this section; and
3. The payment request does not include any amounts that the UTILITY intends to withhold or retain from a contractor or supplier in accordance with the terms and conditions of their subcontracts.

3.6.3. Prompt Payment of Retainage to Contractors upon Satisfactory Completion of Contractor Work. Upon satisfactory completion of accepted work by a

contractor, the UTILITY may request sums that were withheld or retained from a contractor and are due to the contractor pursuant to Section 3.6.2. The UTILITY shall pay all retainage owed to the contractor within ten (10) days after payment to the UTILITY.

- 3.7. No Precedential Value. Due to the special nature of the Honolulu High-Capacity Transit Corridor Project, and pursuant to the terms of this Agreement, the CITY has agreed to reimburse the UTILITY for all actual, allocable and reasonable costs incurred in the performance of the Work for the limited purpose of effecting the Rearrangement for the WOFH Project with the greatest expedition and least interference with the operations of either of the Parties as stated in Section 1.1. The terms of this Agreement shall carry no precedential value with respect to other matters in which the UTILITY performs services.

SECTION 4. INSURANCE AND INDEMNIFICATION

4.1 Insurance.

- 4.1.1 **Required coverages.** The UTILITY shall procure or cause to be procured and maintained as provided herein during the term of this Agreement and any extensions thereof, or until such time as action against the UTILITY or contractor for death, injuries, losses and damages is barred by the provisions of HRS Chapter 657, the insurance specified below, to cover the operations under this Agreement, and all other insurance that may be required under the laws, ordinances or regulations of any governmental authority. The UTILITY may self-insure any of the required coverages, subject to approval of the CITY, which shall not be unreasonably withheld. Any additional costs or expenses reasonably incurred by the UTILITY as a result of the requirements of this Section 4 shall be fully reimbursed by the CITY.
- 4.1.2 **Workers Compensation and Employers Liability Insurance.** The UTILITY shall maintain workers compensation and employers liability insurance. Workers compensation coverage shall be in accordance with STATE statutes. Employers liability and/or commercial umbrella limits shall be not less than \$1,000,000 each accident for bodily injury by accident, or \$1,000,000 each employee and aggregate for bodily injury by disease. The policy shall include a waiver of subrogation in favor of the CITY.
- 4.1.3 **Commercial General Liability Insurance.**

(a) The UTILITY shall maintain commercial general liability (“CGL”), and if deemed appropriate by the UTILITY, commercial umbrella liability insurance with limits of not less than \$5,000,000 per occurrence and aggregate, \$5,000,000 Products & Completed Operations. If such CGL insurance contains a general aggregate limit, it shall apply separately to each location or project. CGL insurance shall be written on ISO occurrence form, CG 00 01 (or a substitute form providing equivalent coverage), and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, and contractual liability insurance to include the tort liability of another assumed in a business contract. The policy(ies) shall include the expanded or amended definition of “occurrence” for Hawaii. There shall be no endorsement or modification of the CGL insurance limiting the scope of coverage for liability arising from explosion, collapse, underground property damage. The CITY, the STATE, DB Contractor and effective July 1, 2011, HART, shall be included as additional insureds, using ISO additional insured endorsement CG 20 32 (or equivalent), and under the commercial umbrella liability insurance policy, if any.

(b) Continuing Completed Operations Liability Insurance. If it can be obtained, the UTILITY shall maintain CGL insurance and, if requested by the CITY, commercial umbrella liability insurance with limits of not less than \$5,000,000 each occurrence for at least five (5) years following final acceptance of the Work. Continuing CGL insurance shall be written on ISO occurrence form CG 00 01 10 93 (or equivalent form) and shall, at a minimum, cover liability arising from the Work, including products-completed operations and contractual liability for liability assumed under a business contract. Continuing CGL insurance shall have a products-completed operations aggregate of at least two times its occurrence limit. Continuing commercial umbrella coverage, if any, shall include liability coverage for damage to the insured’s completed work, equivalent to that provided under ISO form CG 00 01.

4.1.4 Business Auto Liability Insurance. The UTILITY shall maintain business auto liability (including no-fault coverage) insurance with limits of not less than \$1,000,000 per accident. Such insurance shall cover liability arising out of any auto (including owned, hired, and non-owned autos) used in the performance of

this Agreement. Business auto liability insurance coverage shall be written on ISO form CA 00 01 with appropriate Hawaii endorsements, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01.

4.1.5 Property Insurance.

(a) If it can be obtained, the UTILITY shall purchase and maintain in force property insurance on the entire Work at each site, in an amount equal to the full replacement cost of the Work, or the initial contract sum (including any subsequent modifications thereto), whichever is greater. Such property insurance shall be maintained in effect as required in this Agreement or otherwise as mutually agreed in writing by all Parties. This insurance shall name as insured the CITY, the UTILITY, and all contractors in the Work. The UTILITY shall also add HART as an insured, as of July 1, 2011.

(b) Partial occupancy or use of the Work shall not commence until the insurance company or companies providing insurance as required have consented to such partial occupancy or use. The UTILITY shall take reasonable steps to obtain consent of the insurer(s) and the UTILITY and the CITY agree to take no action, other than upon mutual written consent, with respect to occupancy for use of the Work that could lead to cancellation, lapse, or reduction of insurance.

(c) The UTILITY shall be responsible for any and all loss or damage to the UTILITY's equipment, tools and other personal property, and may at its option purchase insurance to cover such property and equipment.

4.1.6 General Conditions. The following provisions are applicable to all insurance herein required, unless otherwise specified above:

(a) As used in this Section 4, "CITY" shall mean the City and County of Honolulu, its elected and appointed officials, employees, agents and servants, and "HART" shall mean the Honolulu Authority for Rapid Transportation, its appointed officials, employees, agents and servants.

(b) The UTILITY waives all rights against the CITY for recovery of damages to the extent such damages are covered by the insurance required herein.

(c) All insurance required herein shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to the CITY.

(d) All policies required herein shall be written to provide 60 days advance written notice of cancellation (except 10 days for non-payment of premium) to the UTILITY and the UTILITY shall notify the CITY within 10 days of receipt of such notice. The UTILITY will provide proof of replacement insurance and confirmation of payment of premium prior to the expiration or cancellation of any insurance required.

(e) **Contractors Insurance.** The UTILITY shall either:

- (1) Include all contractors as insureds under all insurance set forth in Sections 4.1.2, 4.1.3, 4.1.4, and 4.1.5; OR
- (2) Cause each contractor employed by the UTILITY to purchase and maintain insurance of the types specified above. The UTILITY shall obtain and maintain evidence of contractors' insurance, and if requested by the CITY, the UTILITY shall furnish copies of certificates of insurance evidencing coverage for each contractor.

(f) **Cross-Liability coverage.** If the UTILITY's liability policies do not contain the standard ISO separation of insureds provision, or a substantially similar clause, they shall be endorsed to provide cross-liability coverage.

(g) The UTILITY is responsible for paying any portion of any loss not covered because of the operation of any deductible applicable to the insurance required herein. If the CITY is damaged by the failure of the UTILITY to maintain insurance as required in this paragraph, then the UTILITY shall bear all reasonable costs properly attributable to that failure and shall indemnify the CITY for the same.

(h) **Evidence of Insurance.**

(1) Upon execution of this Agreement by the UTILITY, the UTILITY shall furnish the CITY, and effective July 1, 2011, HART, with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with insurance requirements set forth in Sections 4.1.2, 4.1.3, and 4.1.4.

(2) Prior to commencing the Work, the UTILITY shall furnish the CITY, and effective July 1, 2011, HART, with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance required under Section 4.1.5.

- (3) With respect to continuing insurance as required under Section 4.1.3(b), the UTILITY shall provide certificate(s) of insurance evidencing such coverage at the time of final payment, and thereafter whenever requested by the CITY or HART.
- (4) The UTILITY shall provide certified copies of all insurance policies required above within ten (10) days of the CITY's or HART's written request for said copies.
- (5) Failure of the CITY or HART to demand such certificate or other evidence of full compliance with these insurance requirements or failure of the CITY or HART to identify a deficiency from evidence that is provided shall not be construed as a waiver of the UTILITY's obligations to maintain such insurance.
- (6) Endorsements; other requirements.
 - (i) Show the certificate holder as the "City and County of Honolulu", and be delivered to Director of the Department of Budget and Fiscal Services, 530 South King Street, Honolulu, Hawaii, 96813; and add as a certificate holder, effective July 1, 2011, the "Honolulu Authority for Rapid Transportation" and be delivered to the Executive Director of HART, 1099 Alakea Street, Suite 1700, Honolulu, Hawaii 96813; AND
 - (ii) Include the contract number, and name of the project ("Utility Construction and Cost Reimbursement Agreement between the City and County of Honolulu and The Gas Company, LLC for the WOFH Project").
- (7) If the UTILITY elects to self insure any or all of the insurance required herein, subject to the CITY's and HART's approval, then, upon execution of this Agreement, and annually thereafter, the UTILITY shall provide written confirmation of such self-insurance that conforms to the requirements herein.
 - (i) Failure to Maintain Required Insurance.
 - (1) Failure to maintain the required insurance may result in suspension or termination of this Agreement at the CITY's option.

(2) The CITY shall have the right, but not the obligation, of prohibiting the UTILITY or any of its contractors from entering the WOFH Project site until the UTILITY has provided certificates or other evidence that insurance has been procured in complete compliance with these requirements and such certificates have been approved by the CITY.

(3) If the UTILITY fails to maintain the insurance as set forth herein, the CITY shall have the right, but not the obligation, to purchase said insurance at the UTILITY's expense.

(j) No representation of coverage adequacy. By requiring insurance herein, the CITY does not represent that coverage and limits will necessarily be adequate to protect the UTILITY, and such coverage and limits shall not be deemed as a limitation on the UTILITY's liability under the indemnities granted to the CITY under this Agreement.

(k) The CITY reserves the right to require additional kinds or amounts of insurance, as may be mutually agreed upon from time to time.

4.2 **Indemnification.** The UTILITY shall hold harmless, defend and indemnify the STATE, the CITY, HART, the DB Contractor and their respective governing bodies, officers, directors, employees, authorized agents, engineers, contractors, subcontractors, successors and assigns (collectively, the "Indemnified Parties") from and against all claims, demands, liabilities, suits, actions, judgments, costs, and expenses for loss, injury, death, or damage under tort, contract or otherwise, including, but not limited to, claims of property damage, personal injury, or death of persons, and economic loss (including reasonable attorneys' and expert witness fees and costs) (collectively, the "Claims") whenever such Claims arise out of, are connected with, or are related to the UTILITY's and/or its contractors', subcontractors', consultants' and other agents' acts, omissions, rights and responsibilities under this Agreement, or the subsequent occupation and use of the right-of-way by the UTILITY; provided, however, that the Indemnified Parties will not be indemnified for Claims resulting from their own negligence or intentional misconduct, or the negligence or intentional misconduct of their contractors, subcontractors, consultants and other agents arising out of, connected with, or in any way related to this Agreement.

SECTION 5. HAZARDOUS MATERIALS

- 5.1 **Hazardous Materials.** For the purposes of this Agreement, the term “Hazardous Materials” means any hazardous or toxic substances, materials or waste which is or becomes regulated by the United States government, the STATE and/or the CITY, including any department, agency or political subdivision thereof. Without limitation to the generality of the foregoing sentence, the term “Hazardous Materials” includes any material or substance that is (a) petroleum, (b) asbestos, (c) a flammable explosive, (d) radioactive material, (e) an organic substance known as polychlorinated biphenyls, (f) any material known to cause cancer or reproductive toxicity, (g) any material or substance which is or may become regulated by applicable federal and/or STATE environmental laws including, without limitation, the Water Pollution Control Act (33 U.S.C. §§ 1321 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.), the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. §§ 9601 et seq.), Subchapter IX of the Solid Waste Disposal Act (Regulation of Underground Storage Tanks) (42 U.S.C. §§ 6991 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), the Clean Water Act (33 U.S.C. §§ 1251 et seq.), the Clean Air Act (42 U.S.C. §§ 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), the Safe Drinking Water Act (42 U.S.C. §§ 300f et seq.), HRS § 321-21 (Management and Disposal of Infectious Waste), HRS Chapter 340A (Solid Waste), HRS Chapter 340E (Safe Drinking Water), HRS Chapter 342B (Air Pollution), HRS Chapter 342D (Water Pollution), HRS Chapter 342H (Solid Waste Pollution), HRS Chapter 342I (Lead Battery Recycling), HRS Chapter 342J (Hazardous Waste), HRS Chapter 342L (Underground Storage Tanks), HRS Chapter 342N (Used Oil Transport, Recycling and Disposal), HRS Chapter 342P (Asbestos), HRS Chapter 128D (Hawaii Environmental Response Law), or any similar federal, STATE or CITY laws, ordinances, rules, regulations or guidelines now existing or hereafter adopted, published and/or promulgated pursuant thereto (collectively, the “Hazardous Materials Laws”).
- 5.2 **Compliance with Hazardous Materials Laws.** The UTILITY shall, at UTILITY’s sole cost and expense, comply with all applicable Hazardous Materials Laws affecting the Work or any portion thereof. The UTILITY shall not cause or permit any Hazardous Materials to be brought upon, kept, generated, stored, handled, manufactured, treated,

- used or disposed of in, about or around the Work site, except in accordance with all applicable Hazardous Materials Laws.
- 5.3 Environmental Representations and Warranties. The UTILITY represents and warrants to the CITY that to the best of the UTILITY's actual knowledge there has not been a material release of Hazardous Materials at, on, or under the existing Facilities.
- 5.4 Environmental Controls. In all applicable Work Orders, the CITY shall include detailed environmental controls tailored to the specific work site, including, by way of example, construction noise and vibration control, pollution controls, archeological and paleontological coordination and requirements with respect to biological resources, historic properties, and parklands. The UTILITY's Work shall comply with Work Order requirements, all permit requirements, and all applicable federal, STATE, and local laws and regulations as required under Sections 2.5, 2.7, and 7.1 of this Agreement.
- 5.5 Discovery of Hazardous Material. If, after it commences the Work, the UTILITY discovers the existence of a Hazardous Material in, on, or under the site of such Work, the UTILITY shall immediately suspend the Work and notify the CITY of its discovery. The CITY shall promptly determine if any remedial work is reasonably necessary or required by any environmental law, regulation, order or agreement. If the CITY determines that any remedial work is reasonably necessary or required, the CITY may commence, or cause to be commenced, and thereafter prosecute to completion, all such remedial work, and, at the option of the CITY any Work to be performed by the UTILITY with respect to such site shall be suspended during the period of such remediation. The UTILITY shall not continue the Work until the required remedial work has been completed by the CITY. Notwithstanding the foregoing, nothing herein shall obligate the CITY to undertake any remedial work and nothing herein shall limit the CITY's rights to pursue any claims or actions against any person with respect to any Hazardous Materials.
- 5.6 Costs and Expenses of Remedial Work. The CITY shall perform the remedial work required pursuant to Section 5.5 at its sole cost and expense, except that the UTILITY shall be responsible for such costs and expenses to the extent that (a) the negligence or intentional acts of the UTILITY, its employees, contractors or agents contributed to or caused the Hazardous Materials giving rise to a remediation requirement, or (b) the UTILITY breached of any representations and warranties given pursuant to Section 5.3.

5.7 **Environmental Indemnification.** The UTILITY shall be responsible for and shall hold harmless, defend and indemnify the Indemnified Parties and their respective successors and assigns, from and against any Claims (including, but not limited to, remedial work costs) in any way arising out of, connected with or related to (a) the negligence or intentional acts of the UTILITY, its employees, contractors or agents which contributed to or caused the Hazardous Materials giving rise to a remediation requirement, or (b) the UTILITY's breach of any representations and warranties given pursuant to Section 5.3. These covenants shall survive the expiration or earlier termination of this Agreement, provided, however, the Indemnified Parties will not be indemnified for Claims resulting from their own negligence or intentional misconduct.

SECTION 6. DISPUTE RESOLUTION

- 6.1 **Dispute Resolution.** In the event of a claim or dispute between the Parties arising out of or relating to this Agreement, the Parties shall make good faith efforts to resolve the claim or dispute through negotiation at the lowest staff level possible. Disputes subject to this provision include, but are not limited to, the following: physical impacts, safety and operational impacts, long-term WOFH Project impacts, regulatory impacts, design review and approval, personnel, additional rights-of-way, and billing and payment matters. Where applicable, the Construction Coordination Meetings required pursuant to Section 1.2 shall satisfy this requirement. In the event the Parties are unable to resolve disputes at the Construction Coordination Meeting level, the Chief of the Rapid Transit Division, Department of Transportation Services, City and County of Honolulu (or HART's designated representative as of July 1, 2011), and the UTILITY's Project Manager shall resolve disputes. In the event the Parties cannot resolve disputes at this level, the matter shall be referred to the Director, Department of Transportation Services, City and County of Honolulu, (or HART's Executive Director as of July 1, 2011), and the UTILITY's Chief Operating Officer, or his designee, for resolution. The Parties shall meet in good faith to resolve the dispute in a time frame that does not result in delay to the overall WOFH Project Schedule.
- 6.2 **Condition to Court Proceeding.** The dispute resolution processes required by Section 6.1 and by HRS Section 103D-703 (Supp. 2009) must be exhausted before either Party may seek relief of the disputed matter in a court of law.

SECTION 7. MISCELLANEOUS

- 7.1 Compliance with Laws, Regulations and Other Requirements. The UTILITY shall comply with all federal, STATE, and local laws, rules, regulations and written policies governing the Work, as the foregoing may be amended from time to time, as well as with all requirements that are imposed on Rearrangement activities as a condition to or requirement of funding obtained by the CITY from the United States Department of Transportation (Federal Transit Administration) and/or other governmental agencies, including, without limitation, requirements and policies for contract procurement, plans, specifications, cost calculations (including credits), estimates, billings, record keeping, reporting, and audit.
- 7.2 Binding Effect. All provisions contained in this Agreement shall be binding upon and inure to the benefit of the respective Parties, their successors and permitted assigns, and officers, agents, and employees or any person acting for and on their behalf.
- 7.3 Singular, Plural, Gender. All words used herein in the singular number shall extend to and include the plural. All words used in one gender shall extend to and include all genders.
- 7.4 Headings. The headings and captions herein are for convenience or reference only and are not intended to fully describe, define, or limit the provisions of this Agreement to which they may pertain.
- 7.5 Breach. If the CITY claims that the UTILITY has breached any of its obligations under this Agreement, the CITY shall notify the UTILITY in writing of the alleged breach, and the UTILITY shall have thirty (30) days following receipt of such notice in which to cure the breach before the CITY may invoke any of its remedies for same. Notwithstanding any contrary provision in this Agreement, upon expiration of the 30-day period the CITY may exercise any of its remedies at law or in equity and may perform the Work with the CITY's forces or through its contractors and seek repayment from the UTILITY as appropriate for the reasonable cost thereof.
- 7.6 Notice. All notices required pursuant to the terms hereof may be sent by first class United States Mail, facsimile transmission, hand delivery, or express mail and shall be deemed to have been received after five (5) working days from the proper sending thereof unless proof of prior actual receipt indicating otherwise is provided. The UTILITY shall have a continuing obligation to notify the CITY of the persons authorized by the UTILITY to accept service of notices issued pursuant to this Agreement. Prior to July 1,

2011, notices to the CITY shall be mailed or otherwise delivered (via facsimile transmission, hand-delivery or express mail) by the UTILITY to the City's Director of Transportation Services as follows:

Director
Department of Transportation Services
City and County of Honolulu
Frank F. Fasi Municipal Building
650 South King Street, Third Floor
Honolulu, Hawaii 96813
Fax No.: 808-768-4954

As of July 1, 2011, and pursuant to Section 7.16, notices to HART shall be mailed or otherwise delivered (via facsimile transmission, hand-delivery or express mail) by the Utility to HART's Executive Director as follows:

Executive Director
Honolulu Authority for Rapid Transportation
1099 Alii Place, Suite 1700
Honolulu, Hawaii 96813
Fax No.: 808-768-5110

Notices issued by the CITY to the UTILITY shall be mailed or otherwise delivered (via facsimile transmission, hand-delivery or express mail) to the UTILITY as follows:

THE GAS COMPANY, LLC
515 Kamakee Street
Honolulu, HI 96814
Attention: Charles Calvet
Fax No.: 808-535-5943

- 7.7 **Waiver.** The failure of any Party at any time to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by any Party of any condition, or of any breach of any term, covenant, representation, or warranty contained herein shall be deemed to be a continuing waiver of any such condition, term, covenant, representation or warranty.
- 7.8 **Time.** In accomplishing all Work and performing all other acts required under this Agreement, time is of the essence.
- 7.9 **Delay.** The CITY and the UTILITY acknowledge and agree that delays in Rearrangement of the Facilities will impact the public convenience, safety and welfare, and that monetary damages would be inadequate to compensate for delays in the construction of the WOFH Project. Consequently, the Parties shall be entitled to specific

performance or other equitable relief in the event of any breach of this Agreement which threatens to delay construction of the WOFH Project; provided, however, that the fact that specific performance or other equitable relief may be granted shall not prejudice any claims for payment or otherwise related to performance of the Work.

- 7.10 Term of Agreement. This Agreement shall become effective on the date of its full execution by both Parties. Subject to the audit provisions of Section 3.5, this Agreement shall continue in full force and effect until the completion of all Work and final payment of the amounts due hereunder. This Agreement and all obligations hereunder shall terminate without further action required on the part of either Party in the event the CITY does not proceed with the WOFH Project for any reason and provides written notice of this fact to the UTILITY. Notwithstanding the termination of this Agreement, the CITY shall be responsible for the payment of all reimbursable costs properly accrued by the UTILITY prior to the date of the above-referenced notice of termination.
- 7.11 Entire Agreement; Amendment. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter described herein and supersedes any and all other prior negotiations, understandings and agreements, whether oral or in writing. This Agreement may not be amended, modified or superseded except by a written instrument executed by both Parties.
- 7.12 Incorporation of Exhibits. Every Exhibit to which reference is made in this Agreement is hereby incorporated in this Agreement by this reference.
- 7.13 Counterpart Originals. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be the original, and all of which together shall constitute one and the same instrument.
- 7.14 Survival. The representations, warranties, indemnities, waivers and dispute resolution provisions set forth in this Agreement, all payment obligations hereunder incurred prior to termination of this Agreement, and all other provisions which by their inherent nature should survive termination of this Agreement, shall survive the termination of this Agreement for any reason whatsoever, and shall remain in effect unless and until terminated or modified in writing by mutual agreement.
- 7.15 Third-Party Beneficiaries. The DB Contractor is an express intended third-party beneficiary of this Agreement. Except for the foregoing and except to the extent that specific provisions identify third parties and state that they are entitled to benefits hereunder, nothing in the provisions of this Agreement is intended to create duties or

obligations to or rights in third parties not Parties to this Agreement. Nothing in the provisions of this Agreement is intended to affect the legal liability of either Party to the Agreement to third parties by imposing any standard of care with respect to the development, design, construction, operation or maintenance of highways, the WOFH Project and other public facilities which is different from the standard of care imposed by law.

- 7.16 **Assignment**. The Parties acknowledge that this Agreement will be assigned from the CITY to the Honolulu Authority for Rapid Transportation (“HART”) as of July 1, 2011, when HART comes into existence. UTILITY hereby consents to the assignment by CITY to HART of all of the right, title, and interest of CITY in and under the Agreement, effective as of July 1, 2011. Except as provided in this section, this Agreement is non-transferable and non-assignable in whole or in part, except by an instrument, in writing, signed by each of the Parties. Notwithstanding anything herein to the contrary, a change of ownership or control of the UTILITY shall not be deemed to constitute an assignment requiring the written consent of the CITY or HART.
- 7.17 **Savings Clause**. If any part of this Agreement is found to be invalid or unenforceable, such finding shall not invalidate the remaining portions hereof, but such provisions shall remain in full force and effect to the fullest extent permitted by law.
- 7.18 **Force Majeure**. Neither the UTILITY nor the CITY shall be liable to the other for any failure to perform under this Agreement to the extent such performance is prevented by an act of God, war, riots, natural catastrophe, strikes, labor disputes, accidents, embargoes or other causes beyond the control of the non-performing Party; provided that the Party claiming the excuse from performance has (a) promptly notified the other Party of the occurrence and its estimated duration, (b) promptly remedied or mitigated the effect of the occurrence to the extent commercially reasonable, and (c) resumed performance as soon as commercially reasonable. The sole remedy for any Party claiming a force majeure event shall be a reasonable enlargement of time to perform its duties and obligations under this Agreement, as mutually agreed by the Parties.

[remainder of page intentionally left blank]

From BFS - 74
(Mar. 1996)

Certificate

The attached contract for Utility Facilities Relocations and Cost Reimbursement
Agreement

(\$289,000.00)

is hereby approved as to availability and designation of funds, and certification is hereby made that there is a valid appropriation from which expenditures to be made under said contract may be made and that sufficient unencumbered funds are available in the Treasury of the City and County of Honolulu to the credit of such appropriation to pay the amounts of such expenditures when the same become due and payable.

CONTRACT NO. CT - DTS- 1100431

FUND Transit Fund (690)

ACCOUNT NO.

690/7801-11-D (4064) \$ 10,000.00

690/7801-11-C (4072) 279,000.00

\$ 289,000.00

HONOLULU, HAWAII

DATE: JUL 7 2011



Director of Budget & Fiscal Services



IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized officers or agents as of the date first written above.

CITY AND COUNTY OF HONOLULU

THE GAS COMPANY, LLC



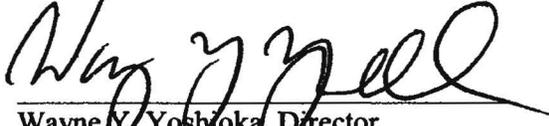
By: Michael R. Hansen, Director
Department of Budget and Fiscal Services

MR



By: Thomas K.L.M. Young
Its Chief Operating Officer

APPROVAL RECOMMENDED:



Wayne Y. Yoshitaka, Director
Department of Transportation Services

APPROVED AS TO FORM AND LEGALITY:



Deputy Corporation Counsel