

**UTILITY FACILITIES RELOCATION AND
COST REIMBURSEMENT AGREEMENT
BETWEEN THE HONOLULU AUTHORITY FOR RAPID TRANSPORTATION AND
THE GAS COMPANY, LLC D/B/A HAWAII GAS
FOR THE KAMEHAMEHA HIGHWAY GUIDEWAY SECTION OF THE
HONOLULU RAIL TRANSIT PROJECT**

THIS UTILITY FACILITIES RELOCATION AND COST REIMBURSEMENT AGREEMENT is entered into and effective this 14th day of April, 2014 (the "Agreement"), by and between the **HONOLULU AUTHORITY FOR RAPID TRANSPORTATION**, a semi-autonomous agency of the City and County of Honolulu, whose principal place of business and mailing address is 1099 Alakea Street, Suite 1700, Honolulu, Hawaii 96813 ("HART"), and **THE GAS COMPANY, LLC**, a Hawai'i limited liability company, d/b/a HAWAII GAS, whose principal mailing address is 745 Fort Street, Suite 1800, Honolulu, Hawaii 96813 (the "UTILITY"). HART 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 and County of Honolulu (the "CITY") is authorized to construct, extend, own, maintain, and operate mass transit systems on the island of Oahu;

WHEREAS, pursuant to Article XVII of the Revised Charter of the City and County of Honolulu 1973 (2000 Ed.), as amended ("RCH"), HART is a semi-autonomous public transportation authority of the CITY with the authority to develop, operate, maintain, and expand the CITY's fixed guideway system;

WHEREAS, Ordinance No. 07-001 authorized the implementation of 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 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 Kamehameha Highway Guideway Section of the Honolulu Rail Transit Project (the “KHG 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 KHG Project (collectively, the “Facilities”);

WHEREAS, the Facilities are located in public rights-of-way within the limits of the KHG 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 KHG Project has identified potential conflicts between the KHG Project and the Facilities, which conflicts will require the Facilities to be relocated (vertically and/or horizontally), adjusted, removed, installed, 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 KHG Project;

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

WHEREAS, the Parties desire to establish procedures to reimburse the UTILITY, as the actual owner of the Facilities, for the 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. 2012) 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, HART 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 KHG Project will be influenced by the ability of HART 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 KHG Project, and minimize cost impact to all Parties.
- 1.2 **Construction Coordination Meetings.** HART and its design-build contractor (the “DB Contractor”) (sometimes collectively referred to herein as “HART” as governed by the context in which such words are used) will hold construction coordination meetings on a regular basis as early as the KHG Project design progress allows. HART in its reasonable discretion, will send notice of such meetings to the UTILITY, 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 **HART and the UTILITY Coordination.** HART and the UTILITY shall consult in good faith in order to decide whether HART, through minor changes to the KHG Project design acceptable to HART, can avoid conflicts with the Facilities. HART and the

UTILITY shall determine an appropriate and mutually acceptable KHG 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 HART's utilities coordinator for the KHG Project regarding the matters described in this Agreement.

SECTION 2. DESIGN AND CONSTRUCTION

- 2.1 KHG Project Schedule. The Parties hereby acknowledge the importance of completing the Work in a manner consistent with the overall schedule for the KHG 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 use commercially reasonable efforts to complete all of the Work in accordance with the agreed upon schedule.
- 2.2 Design Reviews. The design process is subject to the terms and conditions of an independent Utility Engineering Services Reimbursement Agreement for the KHG Project. Prior to the commencement of construction, HART must approve final design plans related to the Work. For Rearrangement of Facilities to be performed by the UTILITY, upon HART approval of final design plans related to the Work, HART 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 HART 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 HART 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, HART shall have the opportunity to verify that the UTILITY awards the contract to the lowest qualified responsible bidder based on appropriate solicitation. 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 HART or under any direction or control of HART. In the alternative, upon mutual agreement of the Parties, HART may issue a Work Order to the DB Contractor to perform the Work in conformance with the final design plans approved by HART and the time schedule set forth in the Work Order.
- 2.4 Notification Prior to Construction. The UTILITY shall notify HART's KHG Project Construction Resident Engineer (CRE) 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 HART's KHG Project CRE, as needed, subsequent notifications of when and where the UTILITY will be performing additional portions of the Work. Subsequent notifications by the UTILITY can be made on an oral basis to HART's KHG Project CRE, or designee. HART 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. HART shall obtain or caused to be obtained 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 HART, 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 Work 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 KHG Project, whenever necessary for a purpose related to construction of the KHG Project or related to the maintenance, operation or inspection of the Facilities during KHG Project construction and where not inconsistent in time or manner of exercise either with the UTILITY's discharge of its duties hereunder or with HART's discharge of its duties or including those with respect to the KHG Project.
- 2.7 Standard of Care. Each Party shall be solely responsible for the performance of all its Work. Each Party (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 standards, guidelines, policies and procedures of the UTILITY (the "UTILITY Standards") in effect at the time of execution of this Agreement. 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. If during the term of the Agreement the UTILITY Standards are modified, the Parties agree to discuss revisions to the maximum reimbursable amount, if necessary, provided that should such modifications to the UTILITY Standards impose additional requirements, that the additional requirements apply to all UTILITY projects and not specifically and/or exclusively to the utility relocation work related to the KHG 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 of subsurface installations that may be affected by a proposed HART 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 (5) working days or before the start of the excavation work, whichever is later, as set forth in HRS Section 269E-9. Notwithstanding the foregoing, the UTILITY agrees to use commercially reasonable efforts to complete said field locates within two (2) working days where practicable.

- 2.10 Rearranged Facilities. To the extent design, construction and operation of the KHG Project will permit, the relocated, replaced and/or protected in place Facilities (the “Rearranged Facilities”) shall be located in existing public rights-of-ways and shall otherwise be of the same character and scope as the original Facilities, with the exception of any Betterments as defined in Section 3.1.2 of this Agreement. The UTILITY shall not obtain greater rights (e.g., an easement in lieu of an existing license) unless HART determines that such rights are appropriate in the interest of KHG Project economy or to meet the requirements of the KHG Project. Similarly, the UTILITY shall not be subject to greater obligations by the STATE, CITY or other third parties for the Rearranged Facilities within public rights-of-ways or private land, unless the UTILITY in its sole and absolute discretion determines that such obligations are appropriate in the interest of the UTILITY. In the event an easement, license or other interest in private land is necessary for the Rearranged Facilities, HART shall negotiate and acquire such interest on behalf of the UTILITY at its sole cost and expense.
- 2.11 Abandoned Utilities. No Facilities shall be left in place after the Facilities are no longer active unless specifically permitted by HART, as KHG Project sponsor, the CITY, as property owner, and the STATE, as property owner. The UTILITY will not proceed to abandon Facilities prior to receipt of written documentation that HART, the CITY and the STATE find such abandonment to be acceptable. In the event HART, the CITY and/or STATE require the Facilities to be removed by the UTILITY in accordance with this Section 2.11, HART shall reimburse the UTILITY for all commercially reasonable costs incurred by the UTILITY for said removal.
- 2.12 Inspection During Construction. HART may inspect the construction of the Rearranged Facilities 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 HART and acceptance of the Work in writing. Upon such acceptance, the UTILITY shall assume full responsibility for such Rearranged Facilities as such responsibilities are defined herein.

- 2.13 Routine Maintenance. The UTILITY shall schedule, with the concurrence of HART's KHG Project CRE, any routine maintenance of Facilities within the KHG Project so as not to interfere with the KHG 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, HART's KHG Project CRE 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 HART.
- 2.15 Reproducible Contract Documents. HART and the UTILITY shall each maintain a set of "as-built" drawings of the Rearranged Facilities as performed by HART and the UTILITY, respectively, during the progress of construction. Within sixty (60) days following the completion and acceptance of each set of Rearranged Facilities, the Party that performed the Work shall furnish the other Party with suitable reproducible copies of those "as-built" drawings showing such Rearranged Facilities as installed by the performing Party and all contract records pertaining to such Rearranged Facilities so that each Party may compile a complete set of contract documents.

SECTION 3. COSTS AND REIMBURSEMENT

- 3.1 Allocation of Responsibility for the Cost of Rearrangement of the Facilities. 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 and 3.1.3, HART shall reimburse the UTILITY for all actual, allocable, allowable and reasonable costs incurred in the performance of the Work (including but not limited to, tax consequences to UTILITY for receiving reimbursements as provided herein) 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 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 HART related to the UTILITY not meeting the requirements of the agreed-upon schedule. The costs payable by HART under this Agreement shall not include any profit on the Work performed by the UTILITY's own forces. HART and the UTILITY have met in good faith and established a cost estimate SIX MILLION ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$6,100,000.00), 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. 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 HART. In the event the Parties agree to revisions to the Maximum Reimbursable Amount, HART and the UTILITY shall execute an appropriate written amendment to this Agreement. The UTILITY shall fill in the Certificate of Current Cost or Pricing Data, attached hereto as Exhibit "D," and provide it to HART at time of execution of this Agreement and thereafter for each revision to the Maximum Reimbursable Amount agreed upon by the Parties in an amendment to this Agreement.
- 3.1.2 The Parties intend that the scope of HART's reimbursement obligations under this Agreement shall be limited to only that portion of the Work necessary (a) to permit the continued use, operation and maintenance of the Facilities in compliance with applicable laws, regulations, industry standards and

commercially reasonable practices; (b) to preserve the current condition, functionality and utility of the Facilities; and (c) to construct the KHG Project improvements in accordance with the clearance standards and other design requirements set forth in HART'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. Notwithstanding the foregoing, to the extent that such improvements are required by changes in manufacturing standards, prevailing industry standards, or regulatory requirements, or required due to the unavailability of replacement materials, the cost of such improvements will be borne by HART, in which event Buy America requirements shall apply with respect to such improvements.

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 HART. If accepted, HART 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 and shall identify applicable Buy America requirements. Construction of Betterments will not begin unless and until HART and the UTILITY have executed a separate written agreement regarding Betterments.

3.1.4 [Reserved].

3.1.5 Subject to the audit provisions of Section 3.5, after the three year payment adjustment period has expired, each Party shall hold the other Party harmless and waive any and all further claims for payment adjustments for the UTILITY's performance of the Work.

3.2 Cost Overruns. The UTILITY agrees to notify HART if at any time the UTILITY reasonably believes 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, will exceed seventy-five percent (75%) of the Maximum Reimbursable Amount, 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 or an amendment to this Agreement to increase the amount authorized in the Work Order or the Maximum Reimbursable Amount, respectively, in the event of anticipated Cost Overrun. HART will consider, and may not unreasonably withhold its approval of, an increase in the amount authorized in the applicable Work Order, or an increase to the Maximum Reimbursable Amount, 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 HART of such Cost Overrun as provided above. For increases in construction costs resulting from reasons other than those identified in this Section 3.2, HART may withhold its approval of a request for an increase in the amount authorized in the applicable Work Order, or an increase to the Maximum Reimbursable Amount, in its reasonable discretion. Without HART’s prior approval, the UTILITY will not be reimbursed for construction costs expended in excess of the amount authorized in the applicable Work Order, or the Maximum Reimbursable Amount.

- 3.3 Invoices for Reimbursable Work. The UTILITY shall begin invoicing HART beginning the calendar month that the UTILITY receives the Work Order pursuant to Section 2.2. The UTILITY shall submit to HART invoices for the actual costs of the Work subject to HART reimbursement under this Agreement. The invoice: (a) shall include only actual, allocable, allowable and 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 HART; and (d) shall include supporting documentation as reasonably requested by HART. The UTILITY shall submit one (1) original and three (3) copies of each invoice and supporting documentation to HART pursuant to Section 7.7.
- 3.4 Defects. Final acceptance of the work contracted for under this Agreement shall not excuse the UTILITY from any liability for defects in performance which may

subsequently become apparent, and such defects shall be promptly corrected by the UTILITY at no additional expense to HART. Defects in performance shall not include circumstances and/or conditions beyond the UTILITY's control.

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, HART 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. HART 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 HART 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 HART in the amount of the overpayment, without demand by HART. 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 HART. 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 of this Agreement.

3.6 Prompt Payment to Subcontractors.

3.6.1. Generally. Any money paid to the UTILITY 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 on which HART has withheld payment.

3.6.2. Final Payment. Upon final payment to the UTILITY, 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.

3.6.3. Penalty. HART or the UTILITY, as applicable, will be subject to a penalty of one and one-half percent (1-1/2%) per month upon outstanding amounts due that were not timely paid by the responsible party under the following conditions. Where a subcontractor has provided evidence of satisfactorily completing all work under their subcontract and has provided a properly documented final payment request as described in paragraph (3.6.4), and:

- (a) Has provided to a Party an acceptable performance and payment bond for the project executed by a surety company authorized to do business in the State, as provided in Section 103-32.1, HRS; or
- (b) The following has occurred:
 - (i) A period of ninety (90) days after the day on which the last of the labor was done or performed and the last of the material was furnished or supplied has elapsed without written notice of a claim given to a Party and the surety, as provided for in Section 103D-324, HRS; and
 - (ii) The subcontractor has provided the UTILITY, an acceptable release of retainage bond, executed by a surety company authorized to do business in the State, in an amount of not more than two (2) times the amount being retained or withheld by the UTILITY; any other bond acceptable to the UTILITY; or any other form of mutually acceptable collateral,

then, all sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by HART to the UTILITY and subsequently, upon receipt from HART, by the UTILITY to the subcontractor within the applicable time periods specified in paragraph 3.6.2 and Section 103-10, HRS. The penalty may be withheld from future payment due to the UTILITY, if the UTILITY was the responsible party.

If the UTILITY has violated paragraph 3.6.2 three (3) or more times within two (2) years of the first violation, the UTILITY shall be referred by HART to the contractors license board for action under Section 444-17(14), HRS.

3.6.4. A properly documented final payment request from a subcontractor, as required by paragraph (3.6.3), shall include:

- (a) Substantiation of the amounts requested;
- (b) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief; that:
 - (i) The amounts requested are only for performance of the Work in accordance with the specifications, terms, and conditions of the subcontract;
 - (ii) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
 - (iii) The payment request does not include any amounts that the subcontractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and
- (c) The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied. HART shall return any final payment request that is defective to the UTILITY within seven (7) days after receipt, with a statement identifying the defect.

3.6.5. In the case of a construction contract, a payment request made by the UTILITY to HART that includes a request for sums that were withheld or retained from a subcontractor and are due to a subcontractor may not be approved under paragraph (3.6.3) unless the payment request includes:

- (a) Substantiation of the amounts requested; and
- (b) A certification by the UTILITY, to the best of the UTILITY's knowledge and belief; that:
 - (i) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
 - (ii) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the contract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
 - (iii) The payment request does not include any amounts that the UTILITY intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

HART shall return any final payment request that is defective to the UTILITY within seven (7) days after receipt, with a statement identifying the defect.

3.6.6. This section shall not be construed to impair the right of the UTILITY or a subcontractor at any tier to negotiate and to include in their respective subcontract provisions that provide for additional terms and conditions that are requested to be met before the subcontractor shall be entitled to receive final payment under paragraph 3.6.3; provided that any such payments withheld shall be withheld by HART.

3.6.7. HART shall not undertake any obligation to pay or be responsible for the payment of any sums to any subconsultant or subcontractor.

3.7. No Precedential Value. Due to the special nature of the Honolulu Rail Transit Project, and pursuant to the terms of this Agreement, HART has agreed to reimburse the UTILITY for all actual, allocable, allowable and reasonable costs incurred in the performance of the Work for the limited purpose of effecting the Rearrangement of Facilities for the KHG 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.

- 3.8. Buy America. The UTILITY shall comply with 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661 (collectively, “Buy America Requirements”), which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 C.F.R. § 661.7. The UTILITY must complete the “Certificate of Compliance with Buy America Requirements” (Exhibit “E”), and submit the certificate to HART upon execution of this Agreement.
- 3.9. Notwithstanding the description of HART’s reimbursement obligations in Section 3.1.1, there will be a reimbursable allowance not to exceed SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS (\$700,000.00) to be available to the UTILITY for costs to be reimbursed by HART incurred by the UTILITY for work relating to Utility Relocation performed prior to the execution of the Agreement. Any funds remaining in this reimbursable allowance at the end of this Agreement shall revert back to HART. The Parties agree that upon execution of the Agreement, the UTILITY’s reasonable costs for such work, not to exceed SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS (\$700,000.00), shall be reimbursed from this allowance. Invoices shall be submitted as required by Section 3.3.

SECTION 4. INSURANCE AND INDEMNIFICATION

4.1 Insurance.

4.1.1 Required Coverages. The UTILITY shall procure and maintain or cause to be procured and maintained (as provided herein), by insurers authorized to do business in the State of Hawaii, and with a current Best’s rating of not less than A-VII, or otherwise as approved by HART, at the UTILITY’s sole cost during the term of this Agreement and any extensions thereof, the following kinds and amounts of insurance, to cover the operations under this Agreement, and any 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 HART, which shall not be unreasonably withheld, conditioned or delayed.

4.1.2 **Worker's Compensation and Employer's Liability Insurance.** The UTILITY shall procure and maintain or cause to be procured and maintained worker's compensation and employer's liability insurance. Worker's 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 HART, the City and County of Honolulu, and the State of Hawaii.

4.1.3 **Commercial General and Excess Liability Insurance.**

- (a) The UTILITY shall procure and maintain or cause to be procured and maintained commercial general liability (CGL) insurance, and if necessary, commercial umbrella liability insurance with limits of not less than \$5,000,000 per occurrence and \$10,000,000 general aggregate, and not less than \$10,000,000 products-completed operations aggregate. 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 operation, independent contractors, products-completed operations, contractual liability, personal injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). There shall be no endorsement or modification of the CGL insurance limiting the scope of coverage for liability arising from explosion, collapse, or underground property damage perils. HART, the City and County of Honolulu, and the State of Hawaii shall be included as additional insureds under the CGL policy, 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.** The UTILITY shall maintain CGL insurance and, if necessary, 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 (2) 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 **Pollution Liability Insurance.** The UTILITY shall procure and maintain or cause to be procured and maintained Pollution Liability Insurance covering the UTILITY's liability for loss or damage arising from the release of hazardous materials arising from its performance of services. Such policy shall have a limit of not less than \$5,000,000 per occurrence/annual aggregate and shall name HART, the City and County of Honolulu and State of Hawaii as additional insureds.
- 4.1.5 **Business Auto Liability Insurance.** The UTILITY shall procure and maintain or cause to be procured and maintained 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, CA 00 05, CA 00 12, CA 00 20 (or equivalent), with appropriate State of 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. Such policy shall name HART, the City and County of Honolulu, and the State of Hawaii as additional insureds.

4.1.6 Employment Practices Liability Insurance (EPLI). The Utility shall procure and maintain EPL insurance covering against liability claims of discrimination, sexual harassment and wrongful termination brought against the Utility by its employees. Such EPLI policy shall have a limit of no less than \$5,000,000 per claim/annual aggregate and shall have an extended claims reporting period of not less than twenty-four months.

4.1.7 Property Insurance.

- (a) The UTILITY shall procure and maintain or cause to be procured and maintained 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 HART, the City and County of Honolulu, the State of Hawaii, the UTILITY, and all contractors in the Work.
- (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 HART 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 procure insurance to cover such property and equipment.

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

- (a) As used in this Section 4, "HART" shall mean the Honolulu Authority for Rapid Transportation, its appointed officials, employees, agents and

servants; "CITY" shall mean the City and County of Honolulu, its elected and appointed officials, employees, agents and servants; and "STATE" shall mean the State of Hawaii, its elected and appointed officials, employees, agents and servants.

- (b) The UTILITY waives all rights against HART for recovery of damages to the extent such damages are covered by the insurance required herein and to the extent allowed by law.
- (c) All insurance required herein shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to HART.
- (d) All policies required herein shall not be terminated, cancelled, or not renewed without sixty (60) days prior written notice to the UTILITY; and the UTILITY shall notify HART within seven (7) days of such cancellation, except for non-payment of premium. 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, 4.1.5, 4.1.6, and 4.1.7; or
 - (2) Cause each contractor employed by the UTILITY to procure and maintain insurance of the types specified above. The UTILITY shall obtain and maintain evidence of contractors' insurance, and if requested by HART, 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 HART 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 HART for the same.

(h) Evidence of Insurance.

- (1) Upon execution of this Agreement by the UTILITY and upon the renewal of any policy required herein, the UTILITY shall furnish 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, 4.1.4, 4.1.5, 4.1.6, and 4.1.7.
- (2) Prior to commencing the Work, the UTILITY shall furnish 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 HART.
- (4) The UTILITY shall provide copies of all insurance policies required above within ten (10) days of HART's request for said copies.
- (5) Failure of HART to demand such certificate or other evidence of full compliance with these insurance requirements or failure of HART to identify a deficiency from documentation that is provided to HART shall not be construed as a waiver of the UTILITY's obligations to maintain such insurance.
- (6) Endorsements; other requirements.
 - (i) Show the certificate holders as the "Honolulu Authority for Rapid Transportation" and the "City and County of Honolulu," and be delivered to the Executive Director and

CEO of HART, 1099 Alakea Street, Suite 1700, Honolulu, Hawaii 96813; and

- (ii) Include the contract number, and name of the project (“Utility Facilities Relocation and Cost Reimbursement Agreement between HART and THE GAS COMPANY, LLC. d/b/a HAWAIIIGAS for the KHG Project”).
- (7) If the UTILITY elects to self-insure any or all of the insurance required herein, subject to 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 reasonable discretion of HART.
 - (2) HART shall have the right, but not the obligation, of prohibiting the UTILITY or any of its contractors from entering the KHG 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 HART.
 - (3) If the UTILITY fails to maintain the insurance as set forth herein, HART shall have the right, but not the obligation, to procure said insurance at the UTILITY's expense.
 - (j) No representation of coverage adequacy. By requiring insurance herein, HART 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 HART, the CITY, and the STATE under this Agreement.

- (k) HART 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 agrees, to the fullest extent permitted by law, to hold harmless, defend and indemnify HART, the CITY and the STATE from and against all claims, demands, liabilities, suits, actions, judgments, costs, and expenses (including reasonable attorneys' fees and costs) for any loss, injury, death, or damage, including, without limitation, claims for breach of contract, property damage, personal injury, or death of persons, but only to the extent such loss, injury, death, or damage arises out of, is connected with, or related to a breach of this Agreement by the UTILITY, its officers, employees, agents or consultants under this Agreement, or any negligence or willful misconduct of the UTILITY, its officers, employees, agents or consultants, in performance of its obligations under this Agreement, or the subsequent occupation and use of the right-of-way by the UTILITY, subject to the limitations of liability contained in this Agreement. The UTILITY's obligation to indemnify HART, the CITY and the STATE shall be inapplicable if such claims, demands, liabilities, suits, actions, judgments, costs, and expenses arise out of or in connection with the gross negligence or willful misconduct by HART, the CITY, or the STATE and their respective employees, agents, contractors and representatives. This paragraph shall survive the expiration, termination, or early termination of this Agreement.
- 4.3 HART agrees, to the fullest extent permitted by law, to hold harmless, defend and indemnify the UTILITY from and against all claims, demands, liabilities, suits, actions, judgments, costs, and expenses (including reasonable attorneys' fees and costs) for any loss, injury, death, or damage, including, without limitation, claims for breach of contract, property damage, personal injury, or death of persons, but only to the extent such loss, injury, death, or damage arises out of, is connected with, or related to a breach of this Agreement by HART, the CITY and the STATE, and their respective officers, employees, agents or consultants under this Agreement, or any gross negligence or willful misconduct of HART, the CITY and the STATE, and their respective officers, employees, agents or consultants, in performance of its obligations under this Agreement, or the subsequent occupation and use of the right-of-way by HART, the CITY and the

STATE, subject to the limitations of liability contained in this Agreement. HART's obligation to indemnify the UTILITY shall be inapplicable if such claims, demands, liabilities, suits, actions, judgments, costs, and expenses arise out of or in connection with the gross negligence or willful misconduct by the UTILITY and its respective employees, agents, contractors and representatives. This paragraph shall survive the expiration, termination, or early termination of 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. §§ 5101 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 (Special Wastes Recycling), HRS Chapter 342J (Hazardous Waste), HRS Chapter 342L (Underground Storage Tanks), HRS Chapter

342P (Asbestos and Lead), HRS Chapter 128D (Environmental Response Law), or any similar federal, state or local 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 its 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 HART that to the best of the UTILITY's 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, HART 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 Hazardous Material in, on, or under the site of such Work, the UTILITY shall immediately suspend the Work and notify HART of its discovery. HART shall promptly determine if any remedial work is reasonably necessary or required by any environmental law, regulation, order or agreement. If HART determines that any remedial work is reasonably necessary or required, HART may commence, or cause to be commenced, and thereafter prosecute to completion, all such remedial work, and, at the discretion of HART, 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 HART.

Notwithstanding the foregoing, HART shall not be obligated to undertake any remedial work nor shall HART's rights be limited to pursue any claims or actions against any person with respect to any Hazardous Material.

5.6 Costs and Expenses of Remedial Work. HART 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 its pro rata share of such costs and expenses attributable to (a) the actions or omissions 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 breached 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) arising out of, connected with or related to (a) the actions or omissions 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's breach of any representations and warranties given pursuant to Section 5.3. These covenants shall survive the expiration, termination, or early termination of this Agreement.

Notwithstanding anything herein to the contrary, the UTILITY's obligation to indemnify the Indemnified Parties under this Section 5.7 shall be capped at TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$2,500,000.00).

SECTION 6. DISPUTE RESOLUTION

6. 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. 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 Meetings level, HART's Deputy Director of Utilities and Permits, and the UTILITY's Executive Vice-President or other designee shall make reasonable efforts to resolve disputes. In the event the Parties cannot resolve disputes by mutual agreement

within a period of ten (10) working days, the Parties shall begin a mediation process to be conducted as follows:

- (a) Selection of Mediator. Either Party may give the other Party a notice requesting mediation. Within ten (10) working days after such notice is delivered, HART and the UTILITY shall select one person to act as mediator. If HART and the UTILITY are unable within such time to select such one person, each Party shall appoint a mediator within ten (10) working days after the expiration of the period in which the one mediator was to have been selected, and each of those two appointed mediators shall appoint a third mediator within ten (10) working days thereafter. The third mediator shall serve to mediate the dispute.
- (b) Successor Mediator. In the event of the death, disability, or resignation of either the mediator or alternate mediator selected, a successor shall be selected by use of the same process as expeditiously as possible.
- (c) Matter Referred to Mediator. The matter will be immediately referred to the mediator after selection of the mediator. HART and the UTILITY will begin mediation as soon as reasonably practicable. HART and the UTILITY agree that mediation on a particular issue will not necessarily result in stoppage of the Work by the UTILITY. Unless prevented by the nature of the dispute, the Work will continue to be performed, and HART will continue to reimburse the UTILITY for costs incurred by the UTILITY in completing the Work performed in accordance with the terms and conditions of the Agreement.
- (d) Timing. Mediation will conclude no later than sixty (60) calendar days after referral to the mediator unless additional time is agreed to in writing by HART and the UTILITY.
- (e) Costs. The fees payable to the mediator or mediators shall be borne equally by HART and the UTILITY unless otherwise agreed to in writing by HART and the UTILITY.

The UTILITY shall continue with its duties and responsibilities under the Agreement pending the outcome of any dispute, dispute resolution process, or litigation, except as provided in Section 6.c. The informal dispute resolution and mediation processes

described above must be exhausted before relief is sought through other processes, e.g., judicial process.

SECTION 7. MISCELLANEOUS

- 7.1 PUC Approval. HART acknowledges that the UTILITY plans to file an application with the Hawaii Public Utilities Commission (“PUC”) for approval to commit funds in excess of \$500,000 for the Work in accordance with Section 2.3.f.2 of General Order No. 9, issued in Order No. 1627 by the PUC. If the UTILITY does not obtain a “Non-Appealable PUC Approval Order” from the PUC by June 1, 2014, then the UTILITY may terminate the Agreement *ab initio* in its sole and absolute discretion. For purposes of this Agreement, a “Non-Appealable PUC Approval Order” is a decision and order issued by the PUC that (1) grants or issues each of the approvals, findings, determinations, and authorizations set forth in the above-referenced application, in form and substance acceptable to the UTILITY and without the imposition of any conditions unacceptable to the UTILITY; and (2) is not subject to appeal to any circuit or appellate court of the State of Hawaii and/or the Supreme Court of the State of Hawaii, or, if appealed, is subsequently affirmed on appeal to any circuit or appellate court of the State of Hawaii or the Supreme Court of the State of Hawaii and is not subject to further appeal. HART shall cooperate reasonably with the UTILITY’s efforts to obtain a Non-Appealable PUC Approval Order.
- 7.2 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 to be performed pursuant to this Agreement, as such laws and written policies, 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 federal funding for the Honolulu Rail Transit Project obtained by HART and/or 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 audits.

- 7.3 **Binding Effect.** All provisions contained in this Agreement shall be binding upon and inure to the benefit of HART and the UTILITY, their successors and permitted assigns, and officers, agents, and employees or any person acting for and on their behalf.
- 7.4 **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.
- 7.5 **Headings.** The headings used herein are for convenience only. The headings do not purport to define, limit, or extend the scope or intent of the language of the paragraphs to which they pertain.
- 7.6 **Breach.** If HART claims that the UTILITY has breached any of its obligations under this Agreement, HART 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 HART may invoke any of its remedies for same. Notwithstanding any contrary provision in this Agreement, upon expiration of the thirty-day period HART may exercise any of its remedies at law or in equity and may perform the Work with HART's forces or through its contractors and seek repayment from the UTILITY as appropriate for the cost thereof.
- 7.7 **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 HART of the persons authorized by the UTILITY to accept service of notices issued pursuant to this Agreement.

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 and CEO as follows:

Executive Director and CEO
Honolulu Authority for Rapid Transportation
1099 Alakea Street, Suite 1700
Honolulu, Hawaii 96813
Fax No.: 808-768-5110

Notices issued by HART 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. d/b/a HAWAIIIGAS
P.O. Box 2200 MC: A-10
Honolulu, Hawaii 96841
Attention: Charles Calvet
Fax No.: 808-594-5630

- 7.8 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.
- 7.9 Time is of the Essence. Time is of the essence in the performance of all obligations under this Agreement.
- 7.10 Delay. HART 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 KHG 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 KHG Project and/or the Work hereunder; 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.
- 7.11 Term of Agreement. The term of this Agreement shall commence on the Effective Date and shall terminate on the earlier of (a) the UTILITY's completion of the Work and final payments of the amounts due as provided under this Agreement, or (b) termination of this Agreement by HART or the UTILITY for any reason or no reason upon thirty (30) days written notice to the other. Should the KHG Project be cancelled for any reason, HART shall terminate the Agreement for convenience subject to Section 7.11(b).
Notwithstanding the termination of the Agreement, except in the case of termination for breach by the UTILITY, HART shall be responsible for the payment of all reimbursable

costs properly accrued by the UTILITY prior to the date of the above-referenced written notice of termination.

- 7.12 Entire Agreement; Amendment. Except for Work Orders issued by HART to the UTILITY to proceed with construction pursuant to Section 2.2 of this Agreement, this writing embodies the whole agreement and understanding of HART and the UTILITY with respect to the subject matter hereof. There are no promises, terms, conditions, or obligations other than those contained herein, and this Agreement shall supersede all previous communications, representations, or agreements, either verbal or written, between HART and the UTILITY for the “Utility Facilities Relocation and Cost Reimbursement Agreement for the KHG Project.” This Agreement cannot be modified except by an instrument, in writing, signed by authorized representatives of HART and the UTILITY.
- 7.13 Authority. Each Party represents that it is authorized to enter into this Agreement, and that the Agreement constitutes a legal, valid and binding obligation of each Party and it shall be enforceable against each Party in accordance with the terms of the Agreement. Furthermore, each Party represents and warrants that it is not aware of any federal or state laws, municipal regulations, State of Hawaii Public Utility Commission tariffs, decisions and orders, administrative rules and/or regulations, or any other applicable rules, regulations, or policies which would prohibit such Party from entering into this Agreement.
- 7.14 Incorporation of Exhibits. Every Exhibit to which reference is made in this Agreement is hereby incorporated in this Agreement by this reference.
- 7.15 Severability. The portions of this Agreement shall be severable, and any invalidity, unenforceability, or illegality of any provision or provisions of this Agreement shall not affect any other provision or provisions of this Agreement, and each term or provision of this Agreement shall be construed to be valid and enforceable to the full extent permitted by law.
- 7.16 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of such counterparts together shall constitute one and the same instrument.

- 7.17 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.
- 7.18 Assignment. 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 provided however, the UTILITY may assign this Agreement to a parent, subsidiary, affiliate, subsequent owners or otherwise without the consent of HART, provided the assignee agrees in writing to be bound by the terms of this Agreement. The UTILITY agrees to promptly notify HART in the case of such assignment by UTILITY.
- 7.19 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.
- 7.20 Force Majeure. Neither the UTILITY nor HART 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 reasonable control of the non-performing Party, including, but not limited to, HART's suspension or delay of the Work, and which could not have been avoided or overcome by the exercise of due diligence; 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.
- 7.21 No Consequential Damages. Notwithstanding any other provision of this Agreement, in no event shall either Party be liable for any consequential, special, incidental, punitive, indirect or similar damages.

HART-12 (11/11)

Certificate

The attached contract for Utility Facilities Relocation and Cost Reimbursement Agreement (UFR CRA)
between the Honolulu Authority for Rapid Transportation and The Gas Company, LLC dba HAWAII GAS for the
Kamehameha Highway Guideway Section of the Honolulu Rail Transit Project

(\$6,100,000.00)

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 will be 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. SC-HRT-1400238

FUND Transit Funds (690 & 695)

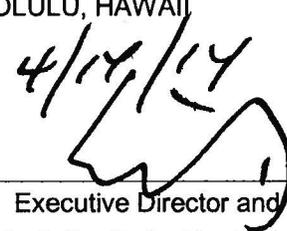
ACCOUNT NO. _____

690/7790-14 = \$3,350,000.00 (4263)

695/7790-14 = \$3,350,000.00 (pending
issuance of G.O. Bonds)

HONOLULU, HAWAII

Date: 4/14/14



Executive Director and CEO

Honolulu Authority for Rapid Transportation

7.22 Ownership of Facilities. Upon completion of all of the Work, or portion(s) thereof, for the KHG Project, and subject to the approval and written acceptance by the UTILITY, the accepted relocated Facilities shall become the property of the UTILITY. A warranty period on all labor, materials and equipment of one year from the date of the UTILITY's acceptance is applicable to all Facilities accepted by the UTILITY.

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.

HONOLULU AUTHORITY FOR RAPID
TRANSIT TRANSPORTATION



By: Daniel A. Grabauskas
Its Executive Director and CEO

THE GAS COMPANY, LLC, D/B/A
HAWAII GAS



NN

By: Tom Young
Its Executive Vice President, Supply &
Strategic Initiatives

APPROVED AS TO FORM AND LEGALITY:



Deputy Corporation Counsel
LISA S. HIRAHARA

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 14th day of March, 2014, before me appeared Tom Young, personally known to me, who, being by me duly sworn, did say that he/she is the Executive Vice-President, Supply & Strategic Initiatives of The Gas Company, LLC, a Hawaii limited liability company doing business as Hawaii Gas; that said instrument was signed and sealed on behalf of said company; and said officer severally acknowledged said instrument to be the free act and deed of said company.



Nathan C. Nelson

Notary Public, State of Hawaii

My commission expires: 11/4/2016

NOTARY CERTIFICATE (Hawaii Administrative Rules §5-11-8)

Document Identification or Description: UTILITY FACILITIES RELOCATION AND COST REIMBURSEMENT AGREEMENT BETWEEN THE HONOLULU AUTHORITY FOR RAPID TRANSPORTATION AND THE GAS COMPANY, LLC D/B/A HAWAII GAS FOR THE KAMEHAMEHA HIGHWAY GUIDEWAY SECTION OF THE HONOLULU RAIL TRANSIT PROJECT

Doc. Date: Undated No. of Pages: 71 Jurisdiction: First Circuit

Nathan C. Nelson

Signature of Notary

March 14, 2014

Date of Certificate

Nathan C. Nelson
Printed Name of Notary

