

COUNCIL OF THE COUNTY OF MAUI
**ECONOMIC DEVELOPMENT, ENERGY,
AGRICULTURE, AND RECREATION
COMMITTEE**

October 6, 2015

**Committee
Report No. _____**

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Economic Development, Energy, Agriculture, and Recreation Committee, having met on September 15, 2015, makes reference to County Communication 14-309, from Council Vice-Chair Robert Carroll, on the matter of the proposed Nahiku Community Center.

Your Committee notes on March 27, 2008, by Executive Order 4220, the State of Hawaii conveyed to the County, for community center purposes, the former Nahiku School lot at Makapipi, Nahiku, Maui. The former schoolhouse, dating from the late 1800s, was closed in the late 1950s and damaged by fire in 2005. The property consists of 1.9 acres at 0 Nahiku Road, Nahiku, Maui.

Since Fiscal Year ("FY") 2011, the Council has appropriated funds in various amounts to build a community center on the property, including, most recently, an appropriation of \$600,000 in FY 2014.

Your Committee further notes on September 28, 2012, the County executed a contract with Maui Kupono Builders LLC ("Contractor") to construct the community center building for \$641,206, with deductions, to be completed within 180 days after issuance of a Notice to Proceed, with a provision for time extension upon approval of the officer-in-charge. Subsequently, the contract was amended to provide for completion of the project by April 1, 2014, among other things.

At its meeting, your Committee received a status report from representatives of the Nahiku Community Association, observing that nothing has been done at the construction site and expressing frustration about the long delay in construction of the community center.

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A Deputy Corporation Counsel confirmed the Contractor has not done any work at the site and stated that, in order to move the project forward, the Department of Parks and Recreation must initiate another request for proposal for a new construction contract.

The Mayor advised your Committee he will request funding for the project in the FY 2017 Budget. He further informed your Committee he is seeking State funding to replace a \$250,000 State grant that lapsed because of the delay in commencement of construction. The Mayor estimated project costs would likely approach \$2 million.

A representative from the State Department of Land and Natural Resources expressed support for the project.

Your Committee is in receipt of a Complaint filed in County of Maui v. Maui Kupon Builders LLC, et al., Civil 15-1-0421(1).

Your Committee notes the Complaint alleges, among other things, the Contractor breached Contract 5149, as amended, by failing to submit a construction schedule or commence work on the Nahiku Community Center site; the Contractor failed to provide a performance bond as required by the Contract; and the Contractor's bonding agent breached its obligations pursuant to the Performance and Payment Bond and Contract.

Because the case involves ongoing litigation, your Committee noted the Complaint is more appropriately reviewed by your Committee of the Whole.

Your Committee voted 5-0 to recommend referral of the Complaint filed in County of Maui v. Maui Kupon Builders LLC, et al., Civil 15-1-0421(1), to your Committee of the Whole. Committee Chair Guzman, Vice-Chair Cochran, and members Crivello, Victorino, and White voted "aye." Committee members Couch and Hokama were excused.

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ECONOMIC DEVELOPMENT, ENERGY, AGRICULTURE, AND RECREATION COMMITTEE

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Your Economic Development, Energy, Agriculture, and Recreation Committee RECOMMENDS that the Complaint filed in County of Maui v. Maui Kuponu Builders LLC, et al., Civil 15-1-0421(1), attached hereto, be REFERRED to your Committee of the Whole.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



DON S. GUZMAN, Chair

ear:cr:15026aa:scb

DEPARTMENT OF THE CORPORATION COUNSEL 205

FILED

PATRICK K. WONG 5878
Corporation Counsel
BRIAN A. BILBERRY 7260
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone No.: (808) 270-7741
Facsimile No.: (808) 270-7152

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D. PELLAZAR, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

Attorneys for Plaintiff
COUNTY OF MAUI

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

COUNTY OF MAUI,

Plaintiff,

vs.

MAUI KUPONO BUILDERS LLC;
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA; JOHN DOES 1-
10; JANE DOES 1-10; DOE PARTNERSHIPS
1-10; DOE CORPORATIONS 1-10;
GOVERNMENTAL ENTITIES 1-10; AND
DOE ENTITIES 1-10

Defendants.


CIVIL NO. 15-1-0421 (1)

COMPLAINT; DEMAND FOR JURY
TRIAL; SUMMONS

COMPLAINT

The COUNTY OF MAUI, by and through its attorney Patrick K. Wong, Corporation Counsel, and Deputy Corporation Counsel Brian A. Bilberry, file this Complaint for contract damages against Defendant MAUI KUPONO BUILDERS LLC and its surety

I hereby certify that this is a full, true and
correct copy of the Original


Clerk, Second Circuit Court

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, alleging and averring as follows:

1. Plaintiff COUNTY OF MAUI is and was a municipal corporation chartered in, and a political subdivision of, the State of Hawai'i at all times relevant in this Complain.

2. Defendant MAUI KUPONO BUILDERS LLC is a domestic limited liability company engaged in the general contracting business in the State of Hawai'i at all relevant times alleged in this Complaint.

3. Defendant TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA is a foreign company organized under the laws of Connecticut and engaged in business in the State of Hawai'i at all relevant times alleged in this Complaint.

4. The NAHIKU COMMUNITY CENTER (the "Project") was proposed for construction in Nahiku, Maui, Hawai'i by the Notice to Contractors – Advertisement to Bid, dated May 31, 2012, contained in the 2012-05-18 Project Manual and Specifications for Furnishing Labor & Materials for Nahiku Community Center, Job No. P11/025, issued on behalf of the Department of Parks & Recreation of the County of Maui.

COUNT I – BREACH OF CONTRACT

5. Plaintiff COUNTY OF MAUI hereby incorporates paragraphs 1 through 4, above.

6. On June 22, 2012, MAUI KUPONO BUILDERS LLC submitted its Proposal for the Project, with a base bid at \$1,192,570. The bid included six (6) Deductive Alternatives. The COUNTY OF MAUI, elected Deductive Alternative Nos. 1, 2, and 3, for

\$265,449, \$154,186, and \$58,332, respectively, totaling \$477,967.¹

7. On September 28, 2012, MAUI KUPONO BUILDERS, LLC (aka the "Contractor") executed Contract No. C5149 with the COUNTY OF MAUI, which provided for the following Scope of Work:

Scope of Work. The Contractor shall supply, furnish, and pay for all labor, transportation, materials tools, and equipment necessary to construct, in place complete, all work as shown and called for in the Specifications for Job No. P11/025, Addendum No. 1, construction plans, and in accordance with the Proposal of the Contractor ("Contract Specifications"), which documents are on file in the office of the Procurement Officer, and are incorporated herein by reference in this Contract.

8. The Contract amount was for \$641,206. The agreed upon time of completion was "180 calendar days after a written Notice to Proceed has been issued." Contract No. 5149 also provided that:

6.1 Time. (a) Time is of the essence herein. Performance of the service the contract shall commence on the commencement date designated in the Notice to Proceed and the services described herein shall be completed within the time specified.

9. On September 28, 2012, the same date as Contract No. 5149, Performance and Payment Bond No. 105807510 was issued by TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA on behalf of its named principal MAUI KUPONO BUILDERS LLC.

10. By the Performance and Payment Bond both TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA and MAUI KUPONO BUILDERS LLCC expressly agreed to be "held and firmly bound unto the COUNTY OF MAUI, . . . its successors and assigns . . . in the total sum of SIX HUNDRED FORTY ONE THOUSAND TWO HUNDRED SIX AND

¹ The deductions eliminated a paved parking lot and driveway, a grease interceptor and septic system, and gutters and downspouts along with interior and exterior painting.

No/100 DOLLARS (\$641,206.00),” representing the amount of Contract No. 5149.

11. On August 7, 2013, the Building Permit for the Project was issued.

12. On August 21, 2013, the County of Maui, Department of Parks and Recreation issued an official Notice to Proceed. The commencement date for the Project was set for September 3, 2013 and the completion date was March 3, 2014.

13. As of November 5, 2013, MAUI KUPONO BUILDERS, LLC had not provided a construction schedule for the Project, as required by Section 6.3 of Contract No. C5149.

14. On November 12, 2013, an authorized amendment to Contract No. 5149 was agreed to and entered. The Scope of Work was revised to include Deductive Alternate Nos. 1, 2, and 3 in accordance with the Proposal of the Contractor. The time of performance was increased to Two-Hundred Ten (210) calendar days after issuance of the Notice to Proceed, and the Contract amount was increased to \$1,119,173. All other provisions of Contract No. 5149 remained unchanged, and in full force and effect. The new completion date per the First Amendment to Contract No. C5149 was April 1, 2014.

15. On December 16, 2013, MAUI KUPONO BUILDERS, LLC submitted for the first time a vague request for a contract extension, seeking to extend the completion date for the Project until February 2015.

16. As of December 26, 2013, MAUI KUPONO BUILDERS, LLC still had not provided a construction schedule for the Project, as required by Section 6.3 of Contract No. C5149.

17. On June 6, 2014, MAUI KUPONO BUILDERS, LLC made a submittal for cost escalations totaling approximately 23% of the original contract price. The escalation

amount was \$275,625.00, proposing a new contract total price of \$1,468,195.00.

18. To date, MAUI KUPONO BUILDERS, LLC has not submitted a construction schedule, has not commenced any work on the Project, and has not even mobilized to the Project site.

19. No claims of *force majeure* or other circumstances that have adversely impacted the Contractor's ability to perform, or even commence performance, were raised at any time relevant to the Contract.

20. MAUI KUPONO BUILDERS LLC was and remains in default of Contract No. 5149 and the First Amendment to Contract No. 5149.

21. The unreasonable and inexcusable delay by MAUI KUPONO BUILDERS, LLC has cost the County valuable time and significant resources, not to mention denying Nahiku community members the use of a community center.

22. MAUI KUPONO BUILDERS LLC's malfeasance has also limited the County's ability to hire an alternate contractor to complete the job, without again having to put the entire Project out to bid.

23. The liquidated damages clause contained in Contract No. 5149 provides:

4. Liquidated Damages. The Contractor recognizes and agrees that time is of the essence under this Contract and, . . . the Parties hereto, for the purpose of putting the question of damages beyond controversy and dispute, hereby agree that the Contractor shall pay to the County the sum set forth in the Contract Specifications, as liquidated damages, and not as a penalty, for each and every work day that work or any portion of work contemplated under this Contract remains uncompleted beyond the time set herein for completion[.]

24. MAUI KUPONO BUILDERS, LLC is in breach of its obligations pursuant to Contract No. C5149, and has caused damages to the COUNTY OF MAUI.

25. In addition to liquidated damages, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA and its principal MAUI KUPONO BUILDERS, LLC are liable to the COUNTY OF MAUI for any and all additional amounts above the Contract price incurred by the County to complete the Project, as well as incidental damages which can be calculated with reasonable certainty.

COUNT II – BREACH OF PERFORMANCE AND PAYMENT BOND OBLIGATION

26. Plaintiff COUNTY OF MAUI hereby incorporates paragraphs 1 through 25, above.

27. Section 3.3 of Contract No. C5149 required MAUI KUPONO BUILDERS, LLC to submit a sufficient performance and payment bond(s) for the full and faithful performance in an amount equal to 100% of the price of Contract No. C5149.

28. MAUI KUPONO BUILDERS, LLC obtained and submitted Performance and Payment Bond No. 105807510, which expressly identifies the COUNTY OF MAUI as a third-party beneficiary to whom both MAUI KUPONO BUILDERS, LLC and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA are bound, in the amount of the original contract price of SIX HUNDRED FORTY ONE THOUSAND TWO HUNDRED SIX AND NO/100 DOLLARS (\$641,206.00).

29. MAUI KUPONO BUILDERS, LLC never provided a performance and payment bond for the full price of Contract No. C5149 as amended on November 12, 2013.

30. On August 29, 2014, the COUNTY OF MAUI tendered this matter to TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, offering it the opportunity to dispose of the liability and damages caused by its Principal MAUI KUPONO BUILDERS, LLC's unreasonable delay and inexcusable failure to even commence the Project.

TRAVELERS CAUSUALTY AND SURETY COMPANY OF AMERICA did not resolve its principal MAUI KUPONO BUILDERS, LLC's delay and default.

31. Both MAUI KUPONO BUILDERS, LLC and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA are in breach of their obligations pursuant to Performance and Payment Bond No. 105807510, in addition to Contract No. C5149, and have caused damages to the COUNTY OF MAUI.

COUNT III – FRAUDULENT INDUCEMENT

32. Plaintiff COUNTY OF MAUI hereby incorporates paragraphs 1 through 31, above.

33. MAUI KUPONO BUILDERS, LLC submitted its proposal and bid for Contract No. 5149, specifically but not exclusively representing that it inspected the Project site, made itself familiar with the local conditions affecting the performance of the Project, reviewed the bid documents and specifications, and would complete the Project within the time specified in the contract documents and within the Budget Allowance for the Project.

34. MAUI KUPONO BUILDERS, LLC bid the Project with knowledge that it would not start and complete the Project as required by the specified schedule, and/or without knowledge as to whether it would be able to complete the Project within the contract schedule.

35. MAUI KUPONO BUILDERS, LLC underbid Contract No. 5149. The original bid was made with knowledge as to its insufficiency, and/or without knowledge as to whether the bid amount was sufficient to complete the Project.

36. MAUI KUPONO BUILDERS, LLC intended that the COUNTY OF MAUI rely on its representations made to the County, including but limited to those contained in its bid proposal that MAUI KUPONO BUILDERS, LLC would complete the Project in

accordance with the contract documents and specifications.

37. The COUNTY OF MAUI did rely on the representations and the bid proposal submitted by MAUI KUPONO BUILDERS, LLC, and in reliance awarded Contract No. 5149 to MAUI KUPONO BUILDERS, LLC based on those representations.

38. The COUNTY OF MAUI'S reliance on MAUI KUPONO BUILDERS, LLC's representations and its bid proposal was reasonable.

39. The COUNTY OF MAUI has been caused contract damages, consequential damages, and incidental damages, not exclusively by virtue of its reliance on MAUI KUPONO BUILDERS, LLC's representations and the bid proposal submitted by MAUI KUPONO BUILDERS, LLC.

WHEREFORE, Plaintiff COUNTY OF MAUI prays for the requested relief as follows:

- A. For an award of contract, compensatory, incidental, and liquidated damages, not exclusively, against Defendants and in favor of the COUNTY OF MAUI;
- B. For an award of punitive damages;
- C. For specific performance pursuant to the Performance and Payment Bond obligation;
- D. For an award in assumpsit of attorneys' fees and costs incurred in this litigation; and
- E. Such other and further relief as this Court may deem just and appropriate.

DATED: Wailuku, Maui, Hawaii, August 5, 2015.

PATRICK K. WONG
Corporation Counsel
Attorney for Defendant
COUNTY OF MAUI

By 

BRIANA A. BILBERRY
Deputy Corporation Counsel

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

COUNTY OF MAUI,

Plaintiff,

vs.

MAUI KUPONO BUILDERS LLC;
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA; JOHN DOES 1-
10; JANE DOES 1-10; DOE
PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; DOE
GOVERNMENTAL ENTITIES 1-10; AND
DOE ENTITIES 1-10,

Defendants.

CIVIL NO.

DEMAND FOR JURY TRIAL

DEMAND FOR JURY TRIAL

Defendants COUNTY OF MAUI, by and through its attorneys, Patrick K. Wong,
Corporation Counsel, and Brian A. Bilberry, Deputy Corporation Counsel, hereby demands a
trial by jury on all issues herein.

DATED: Wailuku, Maui, Hawaii, August 5, 2015.

PATRICK K. WONG
Corporation Counsel
Attorney for Defendants
COUNTY OF MAUI and MAUI PLANNING
COMMISSION

By 
BRIAN A. BILBERRY
Deputy Corporation Counsel

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

COUNTY OF MAUI,

Plaintiff,

vs.

MAUI KUPONO BUILDERS LLC;
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA; JOHN DOES 1-
10; JANE DOES 1-10; DOE PARTNERSHIPS
1-10; DOE CORPORATIONS 1-10;
GOVERNMENTAL ENTITIES 1-10; AND
DOE ENTITIES 1-10

Defendants.

CIVIL NO. _____

SUMMONS

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to file with the court and serve upon The Department of the Corporation Counsel of the County of Maui whose address is 200 South High Street, Wailuku, Maui, Hawaii 96793, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this SUMMONS upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Pursuant to Rule 4(b) of the Hawaii Rules of Civil Procedure, this summons shall not be delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the public, unless a judge or the District or Circuit courts permits, in writing on the summons, personal delivery during those hours.

If you fail to obey this summons, this may result in an entry of default and default judgment against the disobeying person or party.

AUG - 5 2015

DATED: Wailuku, Maui, Hawaii, _____.

/sgd/ D. PELLAZAR (seal)

CLERK OF THE ABOVE-ENTITLED COURT