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April 9, 2002

To: G. Riki Hokama, Chair
Budget and Finance Committee

From: Traci Fujita Villarosa 
Deputy Corporation Counsel

Re: Follow-up question from the April 1, 2002 meeting
(CC-02) (BF-9)

You have asked this office to advise you on an issue which arose during the April 1, 2002 meeting. Your memo dated April 2, 2002 poses the following question:

"Provide an explanation of the liability issues that the County would need to consider if volunteers are used to reduce the construction costs of a capital improvement project."

Short Answer

The County may be liable to the volunteer for injuries sustained while performing services for the County under the state workers' compensation law. The County has a variety of responsibilities to volunteers under Hawaii Revised Statute (HRS) Chapter 90, the State Policy Concerning The Utilization of Volunteer Services. The County may be liable to the volunteer for damage done to the volunteer's personal property. The County may be liable to third parties for damages caused by the negligent acts of volunteers. Finally, the County must not allow volunteers to perform services under a contract for the procurement of services.

Statutory Definition and Status of Volunteer

The term "volunteer" means any person who of the person's own free will provides goods or services to an agency with no monetary or material gain and includes material donors, occasional-service, regular-service, and stipended volunteers. "Material donor" means any person who of the person's own free will provides funds or materials to an agency. "Occasional-service volunteer" means any person who offers to provide a one-time, on-call or single task service to an agency without receipt of any compensation, except as provided in this

chapter. "Regular-service volunteer" means any person engaged in specific voluntary service activities on an on-going or continuous basis to an agency without receipt of any compensation, except as provided in this chapter. "Stipended volunteer" means any person who by receiving a support allowance is then able to provide voluntary service to an agency. The allowance may be for food, lodging, or other personal living expenses and does not reflect compensation for work performed. HRS §90-1.

Volunteers recruited, trained, or accepted by an agency shall be excluded from any provision of law relating to state or county employment, from any collective bargaining agreement between the State and counties, with any employees' association or union, from any law relating to hours of work, rates of compensation, leaves, and employee benefits, and from any other provisions of title 7, except those consistent with this chapter. HRS § 90-2(c).

County's responsibility to Volunteer

Any person who is injured in performing service for the State or any county in any voluntary or unpaid capacity under the authorized direction of a public officer or employee, and who has not secured payment of the person's hospital and medical expenses from the State or the county under any other provision of law and has not secured payment thereof from any third person, shall be paid the person's reasonable hospital and medical expenses under this chapter. HRS § 386-171.

Thus under state worker's compensation law, the County may be liable to a volunteer if the volunteer is injured while performing services for the County and the volunteer's hospital and medical expenses are not covered by some other source, such as personal health care insurance.

HRS § 90-3(e), the State Policy Concerning The Utilization of Volunteer Services, sets forth additional responsibilities of the County to volunteers:

"The agency utilizing the services of volunteers has the responsibility to:

- 1) Use volunteers to extend services without displacing paid employees.
- 2) Provide each volunteer with a designated supervisor.
- 3) Provide staff orientation and training in the use and supervision of volunteers.
- 4) Define volunteer jobs that are meaningful to the volunteer and commensurate with his abilities.
- 5) Be alert to assignments for handicapped or disable volunteers.
- 6) Make it possible for a volunteer to serve on a trial or probationary basis for a specified period.
- 7) Provide orientation and training to improve the volunteer's skills.
- 8) Provide volunteers with clear instructions and an adequate work space.
- 9) Accept the volunteer as part of the team, including him in training and staff meetings that pertain to his work.
- 10) Establish and communicate clearly defined lines of supervision so that the volunteer knows to whom he is responsible.
- 11) Provide appropriate recognition and appreciation to the volunteer.
- 12) Provide written guidelines governing the recruitment, screening, utilization, and supervision of volunteers.
- 13) Recognize an applicant's prior volunteer service in evaluating fulfillment of training and experience requirements for state employment pursuant to rules adopted by the department of human resources development, the judiciary, and the board of regents of the University of Hawaii.

- 14) Provide funds for volunteer benefits as specified in § 90-4.
- 15) Provide recognition of paid staff for support and supervision of volunteers."

"Volunteer benefits shall be provided within the limits of an agency's budget as follows:

- 1) Meals may be furnished without charge or the cost thereof may be reimbursed to volunteers serving the agency.
- 2) Lodging may be furnished temporarily without charge or the cost thereof may be reimbursed to volunteers.
- 3) Transportation reimbursement including parking fees, bus and taxi fares may be furnished to volunteers. Mileage reimbursement when provided for shall be furnished as a rate comparable to that of permanent employees performing similar duties. Volunteers may be authorized to use state vehicles in the performance of official state duties.
- 4) Solely for the purposes of chapter 662, volunteers are hereby deemed "employees of the State," when acting for an agency in their capacity as volunteers.
- 5) Out-service training and conference reimbursement may be furnished for volunteers.
- 6) Personal liability insurance coverage may be furnished for volunteers.
- 7) Reasonable expenses incurred by volunteers in connection with their assignments may be reimbursed.
- 8) Recognition of volunteer service may include a recognition ceremony, certificates, and awards to be determined by the agency." HRS § 90-4.

While the volunteer benefits listed in HRS § 90-4 are dependent upon the County's budget, the responsibilities listed in HRS § 90-3(e) are not and must be fulfilled.

Finally, the County may be liable to a volunteer for damage done to the volunteer's personal property if such property becomes damaged while the volunteer performs services for the County. However, the County may limit this liability. The County could have volunteers sign waiver of liability forms to relieve the County of liability should the volunteer's personal property become damaged while performing services for the County.

Liability of County to Third Parties

The County may be held liable for damages caused by the negligent acts of authorized volunteers who are acting within the scope of their duties.

"In any suit against a nonprofit corporation, a hospital, or a governmental entity for civil damages based upon the negligent act or omission of a volunteer, proof of the act or omission shall be sufficient to establish the responsibility of the entity therefor under the doctrine of respondeat superior, notwithstanding the immunity granted to the volunteer with respect to any act or omission included under subsection (a)." HRS § 662D-2.

Under the doctrine of respondeat superior, an employer is held accountable and liable for negligent acts of its employees. However, recovery under doctrine requires that the employee's act complained of must have been within the scope of employment. The conduct of an employee is said to be within the course and scope of employment, for purposes of doctrine of respondeat superior, if it is of kind he is employed to perform, it occurs substantially within authorized time and space limits, and it is actuated, at least in part, by purpose to serve the

employer. Henderson v. Professional Coatings Corp., 72 Haw. 387 (1991). HRS § 662D-2 has statutorily extended the doctrine of respondeat superior to volunteers.

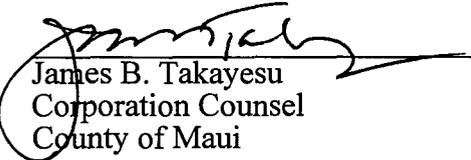
However, the County could limit this liability. The County could require that volunteers execute an indemnity agreement in which the volunteer would defend, indemnify, and hold harmless the County against any liability from a third party for negligent acts of the volunteer. It should be kept in mind, however, that an indemnification agreement is only as good as the party executing it and the agreement may not protect the County in the end. Thus the County should carefully weigh the value of an indemnity agreement against the possibility that such an agreement would be ineffectual or could discourage people from volunteering for the County. Another way to limit exposure would be to provide personal liability insurance for volunteers as set forth in HRS § 90-4(6).

Procurement Contracts

Volunteers may not be utilized to perform services within the scope of work of a County construction contract in excess of \$2,000.¹ State procurement law requires that the County pay prevailing wages for laborers and mechanics when procuring such services. Prevailing wages shall not be less than the wages payable under federal law. HRS § 104-2. Thus, a County contract which includes volunteer services would violate procurement law because these workers would not be paid the prevailing wages. Along the same lines, a contractor could not utilize volunteers to perform services within the scope of a County contract because such volunteers would be considered subcontractors and subject to the same prevailing wage requirement.

These are the main issues of liability the County should consider if volunteers are used to reduce the construction costs of a capital improvement project. If you should have any further questions, I can be reached at extension 7740.

Approved For Transmittal:


James B. Takayesu
Corporation Counsel
County of Maui

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¹ Procurement law specifically excludes grants from the requirements of procurement law so volunteers may be utilized under a grant agreement. HRS § 103D-102(b)(2)(A).