

JAN 19 2023

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 103D-501, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§103D-501 Contract clauses and their administration.**

4 (a) The policy board shall adopt rules requiring the inclusion
5 of contract clauses providing for adjustments in prices, time of
6 performance, or other contract provisions, as appropriate, and
7 covering the following subjects:

8 (1) The unilateral right of the governmental body to order
9 in writing:

10 (A) Changes in the work within the scope of the
11 contract; and

12 (B) Changes in the time of performance of the
13 contract that do not alter the scope of the
14 contract work;

15 (2) Variations occurring between estimated quantities of
16 work in a contract and actual quantities;



1 (3) Suspension of work ordered by the governmental body;
2 and

3 (4) Site conditions differing from those indicated in the
4 contract, or ordinarily encountered, except that
5 differing site conditions clauses established by these
6 rules need not be included in a contract:

7 (A) When the contract is negotiated;

8 (B) When the contractor provides the site or design;
9 or

10 (C) When the parties have otherwise agreed with
11 respect to the risk of differing site conditions.

12 (b) Adjustments in price permitted by rules adopted under
13 subsection (a) shall be computed in one or more of the following
14 ways:

15 (1) By agreement on a fixed price adjustment before
16 commencement of the pertinent performance;

17 (2) By unit prices specified in the contract or
18 subsequently agreed upon before commencement of the
19 pertinent performance;

20 (3) By the costs attributable to the events or situations
21 under such clauses with adjustment of profit or fee,



1 all as specified in the contract or subsequently
2 agreed upon before commencement of the pertinent
3 performance;

4 (4) In any other manner as the contracting parties may
5 mutually agree upon before commencement of the
6 pertinent performance; or

7 (5) In the absence of agreement by the parties:

8 (A) For change orders with value not exceeding fifty
9 per cent of the total contract price and not
10 exceeding \$50,000 by documented actual costs of
11 the work, allowing for twenty per cent of the
12 actual costs for overhead and profit on work done
13 directly by the contractor and ten per cent on
14 any subcontractor's billing to the contractor for
15 the contractor's overhead and profit. There
16 shall be no cap on the total cost of the work if
17 this method is used. A change order shall be
18 issued within fifteen days of submission by the
19 contractor of proper documentation of completed
20 force account work, whether periodic (conforming
21 to the applicable billing cycle) or final. The



1 procurement officer shall return any
2 documentation that is defective to the contractor
3 within fifteen days after receipt, with a
4 statement identifying the defect; or
5 (B) For change orders not exceeding fifty per cent of
6 the total contract price, but with value
7 exceeding \$50,000 by a unilateral determination
8 by the governmental body of the costs
9 attributable to the events or situations under
10 clauses with adjustment of profit or fee, all as
11 computed by the governmental body in accordance
12 with applicable sections of the rules adopted
13 under section 103D-601 and subject to the
14 provisions of part VII. When a unilateral
15 determination has been made, a unilateral change
16 order shall be issued within ten days. Costs
17 included in the unilateral change order shall
18 allow for twenty per cent of the actual costs for
19 overhead and profit on work done directly by the
20 contractor and ten per cent on any
21 subcontractor's billing to the contractor for the



1 contractor's overhead and profit. Upon receipt
2 of the unilateral change order, if the contractor
3 does not agree with any of the terms or
4 conditions, or the adjustment or nonadjustment of
5 the contract time or contract price, the
6 contractor shall file a notice of intent to claim
7 within thirty days after the receipt of the
8 written unilateral change order. Failure to file
9 a protest within the time specified shall
10 constitute agreement on the part of the
11 contractor with the terms, conditions, amounts,
12 and adjustment or nonadjustment of the contract
13 time or the contract price set forth in the
14 unilateral change order.

15 A contractor shall be required to submit cost or pricing
16 data if any adjustment in contract price is subject to the
17 provisions of section 103D-312. A fully executed change order
18 or other document permitting billing for the adjustment in price
19 under any method listed in paragraphs (1) through (4) shall be
20 issued within ten days after agreement on the method of
21 adjustment.



1 (c) Any change order:

2 (1) That increases the cost of a contract by more than
3 fifty per cent of the original contract cost;

4 (2) Having a cost increase that, when added to the cost
5 changes of all prior change orders for that contract,
6 increases the cost of a contract by more than fifty
7 per cent of the original contract cost; or

8 (3) That substantially changes the scope of work for a
9 contract,

10 shall be prohibited by rules adopted under subsection (a) and
11 shall be considered a new procurement; provided that the head of
12 a purchasing agency may approve a change order that is otherwise
13 prohibited by this subsection if in a written justification of
14 the approval the head of the purchasing agency determines that
15 the approval is in the best interest of the State, taking into
16 consideration the purpose and intent of this subsection.

17 [~~e~~] (d) The policy board shall adopt rules requiring the
18 inclusion in contracts of clauses providing for appropriate
19 remedies and covering the following subjects:

20 (1) Liquidated damages as appropriate;

21 (2) Specified excuses for delay or nonperformance;



1 (3) Termination of the contract for default; and

2 (4) Termination of the contract in whole or in part for
3 the convenience of the governmental body.

4 [~~(d)~~] (e) The chief procurement officer or the head of a
5 purchasing agency may vary the clauses that may be required to
6 be included in contracts under the rules adopted under
7 subsections (a) and [~~(e)~~] (d); provided that:

8 (1) Any variations are supported by a written
9 determination that states the circumstances justifying
10 such variations; and

11 (2) Notice of any such material variation be stated in the
12 invitation for bids or request for proposals when the
13 contract is awarded under section 103D-302 or
14 103D-303."

15 SECTION 2. This Act does not affect rights and duties that
16 matured, penalties that were incurred, and proceedings that were
17 begun before its effective date.

18 SECTION 3. Statutory material to be repealed is bracketed
19 and stricken. New statutory material is underscored.



1 SECTION 4. This Act shall take effect on July 1, 2023.

2

INTRODUCED BY:

Kurt Ferrel



S.B. NO. 247

Report Title:

Procurement; Change Order; Cost Increases; Scope of Work

Description:

Requires that any procurement change order that increases the contract cost by more than fifty per cent or substantially increases the scope of work be considered a new contract for procurement purpose.

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