

JAN 17 2014

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 SECTION 1. The legislature finds that contracts for public
2 works often include a duty to defend clause, unfairly requiring
3 the contractor to defend governmental entities before the
4 contractor's negligence or fault is determined.

5 Designing and constructing public works projects are unique
6 among services procured by the government. Public agencies have
7 a strong involvement in budgeting and scoping services and
8 working in collaboration with the contractor. Public works
9 often involve large risks due to site circumstances, public
10 environmental concerns, and high public usage. Highways and
11 public buildings have necessarily long service life relative to
12 other services procured, thereby increasing contractor risk
13 beyond that of other government contracts. Thus, the
14 legislature finds that design and construction service
15 contractors should not be burdened with the duty to defend a
16 governmental body before the contractor's negligence or fault is
17 determined. Upon determination of negligence or fault, the
18 contractor may still be required to indemnify and hold harmless



1 the governmental body from claims arising out of or resulting
2 from the negligent, reckless, or wrongful acts, errors, or
3 omissions of the contractor.

4 The legislature further finds that, while some state and
5 county agencies recognize the negative implications and have
6 removed the duty to defend clause, inconsistency among agencies
7 and departments still exists. The legislature further finds
8 that the clause is detrimental in the long term by negatively
9 affecting competition for contracts and innovation.

10 The purpose of this Act is to standardize differing
11 contract conditions regarding the duty to defend clause by
12 prohibiting defense clauses in contracts that are entered into
13 by persons licensed under chapters 444 and 464, Hawaii Revised
14 Statutes.

15 SECTION 2. Section 103D-713, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "~~{}~~§103D-713~~{}~~ **Defense of a governmental body.** (a)
18 ~~[No]~~ Beginning July 1, 2014, no contract ~~[of less than~~
19 ~~\$1,000,000]~~ that is entered into ~~[on or after July 1, 2007,]~~ by
20 any governmental body~~[, and is exclusively for services that may~~
21 ~~only lawfully be provided by]~~ with a person licensed under
22 ~~[chapter]~~ chapter 444 or 464, [may] shall require the contractor



1 to defend the governmental body, or its officers, employees, or
2 agents, from any liability, damage, loss, or claim, action, or
3 proceeding arising out of the [~~contractor's performance under~~
4 ~~the~~] contract[-] with the governmental body.

5 (b) Subsection (a) notwithstanding, the contract may
6 require the contractor providing the services to indemnify and
7 hold harmless the governmental body and its officers, employees,
8 and agents from and against any liability, damage, loss, cost,
9 and expense, including reasonable attorneys' fees, and all
10 claims, suits, and demands therefor arising out of or resulting
11 from the negligent, reckless, intentional, or wrongful acts,
12 errors, or omissions of the contractor, the contractor's
13 employees, officers, agents, or subcontractors in the
14 performance of the contract or the contractor's professional
15 services, and the provisions may remain in full force and effect
16 notwithstanding the expiration or early termination of the
17 contract.

18 (c) No person licensed under chapter 444 or 464 that has
19 agreed in any contract to defend a governmental body, including
20 those contracts entered into before or after July 1, 2007, shall
21 be required to defend the governmental body in a lawsuit filed
22 more than ten years beyond the substantial completion of the



1 project, except that this subsection shall not apply to any
2 lawsuit that has been filed prior to July 1, 2007.

3 (d) As used in this section, "person" means any person,
4 partnership, corporation, or other entity conducting business in
5 the State.

6 (e) As used in this section, "governmental body" means the
7 State and all agencies thereof, any public body corporate within
8 the State and all agencies thereof, and any non-incorporated
9 public body within the State of whatever nature and all agencies
10 thereof. "Governmental body" includes but is not limited to
11 cities, counties, school districts, authorities, universities
12 and community colleges, and their employees and agents,
13 including but not limited to other business entities retained by
14 or contracting with the public entity to manage or administer
15 the contract for the public entity."

16 SECTION 3. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 4. This Act shall take effect on July 1, 2014.

19

INTRODUCED BY:

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S.B. NO. 2463

Report Title:

Procurement Contracts; Liability; Duty to Defend

Description:

Prohibits governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault. Provides that the contractor may still be required to indemnify and hold harmless the governmental body from claims arising out of or resulting from the negligent, reckless, or wrongful acts, errors, or omissions of the contractor.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

