
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 of less than \$10,000,000 often include a duty to defend
3 clause, requiring the contractor to defend governmental entities
4 against liability regardless of the contractor's negligence or
5 fault. The current law prohibits this requirement only for
6 contracts of \$1,000,000 or less.

7 Design for public works projects is unique among services
8 procured by the government. Public agencies have a strong
9 involvement in budgeting and scoping services and working in
10 collaboration with the design contractor. Public works often
11 involve large risks due to site circumstances, public
12 environmental concerns, and high public usage. Highways and
13 public buildings have necessarily long service lives relative to
14 other procurement items, thereby increasing contractor risk
15 beyond that for other government contracts.

16 Design professionals licensed under chapter 464, Hawaii
17 Revised Statutes, are able to obtain professional liability
18 insurance that covers the contractor for indemnifying the



1 government. However, the insurance industry does not provide
2 reasonable coverage for the government's defense costs if the
3 design professional is not liable. Further, the legislature
4 finds that the current law's limitation on duty to defend
5 clauses only for contracts of \$1,000,000 or more disadvantages
6 teams of local small design professional firms that may band
7 together to pursue larger projects, or small local design
8 professional firms that may serve as subcontractors on larger
9 projects against larger multi-state or multinational firms that
10 can self-insure. Thus, the legislature finds that design
11 professional contractors should not be burdened with the duty to
12 defend a governmental body against liability without regard to
13 the contractor's negligence or fault for contracts of less than
14 \$10,000,000. Upon determination of negligence or fault, the
15 contractor may still be required to indemnify and hold harmless
16 the governmental body from claims arising out of or resulting
17 from the negligent, reckless, or wrongful acts, errors, or
18 omissions of the contractor.

19 The legislature further finds that, while some state and
20 county agencies recognize the negative implications and have
21 removed the duty to defend clause from contracts for public
22 works, inconsistencies between agencies and departments still



1 exist. A duty to defend clause is detrimental in the long term
2 because such clauses negatively affect competition for contracts
3 and innovation.

4 The purpose of this Act is to raise the threshold amount
5 from \$1,000,000 to \$10,000,000 for contracts between any
6 governmental body and a licensed design professional in which
7 the governmental body may require the design professional to
8 defend the governmental body or its officers, employees, or
9 agents from any liability, damage, loss, claim, action, or
10 proceeding arising out of the contractor's performance under the
11 contract.

12 SECTION 2. Section 103D-713, Hawaii Revised Statutes, is
13 amended by amending subsection (a) to read as follows:

14 "(a) No contract of less than [~~\$1,000,000~~] \$10,000,000
15 that is entered into on or after July 1, [~~2007,~~] 2014, by any
16 governmental body, and is exclusively for services that may only
17 lawfully be provided by a person licensed under chapter 464, may
18 require the contractor to defend the governmental body, or its
19 officers, employees, or agents, from any liability, damage,
20 loss, or claim, action, or proceeding arising out of the
21 contractor's performance under the contract."



1 SECTION 3. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 4. This Act shall take effect on December 21,
4 2112.



Report Title:

Procurement Contracts; Liability; Duty to Defend; Public Works;
Design Professionals;

Description:

Prohibits the inclusion in any public works contract less than \$10,000,000 between any governmental body and a licensed design professional of a requirement that the contractor defend the governmental body from claims arising out of the contractor's performance under the contract unless the contractor is at fault. Effective December 21, 2112. (SB2463 HD1)

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

