
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, requiring the
3 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 lives relative to
12 other services procured, thereby increasing contractor risk
13 beyond that of other government contracts.

14 For higher limits, however, the insurance industry does not
15 provide reasonable coverage for another party's defense costs if
16 the design professional is not negligent. Thus, the legislature
17 finds that design professional contractors would not be burdened
18 with the duty to defend a governmental body before the



1 contractor's negligence or fault is determined. However, the
2 legislature finds that upon determination of negligence or
3 fault, contractors may still be required to indemnify and hold
4 harmless the governmental body from claims arising out of or
5 resulting from the negligent, reckless, or wrongful acts,
6 errors, or omissions of the contractor.

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

13 The purpose of this Act is to provide certain limits on the
14 duty to defend for persons licensed under chapter 444, Hawaii
15 Revised Statutes.

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

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



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

5 (b) Beginning July 1, 2014, the requirement for a person
6 licensed under chapter 444 to defend the governmental body, or
7 its officers, employees, or agents, from any liability, damage,
8 loss, or claim, action, or proceeding arising out of the
9 contractor's performance under the contract shall not extend
10 beyond the time limitation set forth in section 657-8.

11 ~~[(b)]~~ (c) ~~[Subsection]~~ Subsections (a) and (b)
12 notwithstanding, the contract may require the contractor
13 providing the services to indemnify and hold harmless the
14 governmental body and its officers, employees, and agents from
15 and against any liability, damage, loss, cost, and expense,
16 including reasonable attorneys' fees, and all claims, suits, and
17 demands therefor arising out of or resulting from the negligent,
18 reckless, intentional, or wrongful acts, errors, or omissions of
19 the contractor, the contractor's employees, officers, agents, or
20 subcontractors in the performance of the contract or the
21 contractor's professional services, and the provisions may



1 remain in full force and effect notwithstanding the expiration
2 or early termination of the contract.

3 ~~[(e)]~~ (d) No person licensed under chapter 464 that has
4 agreed in any contract to defend a governmental body, including
5 those contracts entered into before or after July 1, 2007, shall
6 be required to defend the governmental body in a lawsuit filed
7 more than ten years beyond the ~~[substantial completion]~~ owner's
8 final acceptance of the project, except that this subsection
9 shall not apply to any lawsuit that has been filed prior to
10 July 1, 2007.

11 ~~[(d)]~~ (e) As used in this section, "person" means any
12 person, partnership, corporation, or other entity conducting
13 business in the State."

14 SECTION 3. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 4. This Act shall take effect on July 1, 2050.

17



Report Title:

Procurement Contracts; Liability; Duty to Defend

Description:

Provides that the requirement for persons licensed under chapter 444, Hawaii Revised Statutes, to defend a governmental body, or its officers, employees, or agents from claims arising out of the contractor's performance under the contract shall not extend beyond the expiration of the time limitation in section 657-8, Hawaii Revised Statutes. Takes effect 7/1/2050. (SD1)

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