
A BILL FOR AN ACT

RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.

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

1 SECTION 1. The legislature finds that contractors may
2 encounter subsurface conditions that differ from the information
3 contained in a geotechnical report, or other conditions in the
4 field that differ from what was expected or shown on the plans
5 or in solicitation documents, in ways that are sometimes minor
6 or significant. In most instances, when the conditions do
7 materially differ and cause an increase or decrease in the
8 contractor's cost of, or the time required for, performing any
9 part of the work under the contract, an equitable adjustment is
10 made and the contract is modified in writing accordingly.
11 However, the legislature finds that certain agencies are
12 requiring that the contractor bear the entire risk and costs of
13 these differing site conditions even if there is no way the
14 contractor could have planned or budgeted for such an
15 occurrence. Consequently, for projects that place the entire
16 risk on the contractor, a prospective bidder must inflate risk
17 contingencies in its bid to perform the work and the public is



1 obligated to pay for the inflated risk contingencies costs
2 regardless of whether the differing site conditions arise.

3 The purpose of this Act is to align state law to the
4 Federal Acquisition Regulation and more appropriately apportion
5 costs arising from differing site conditions and ensure that
6 bids are not unjustly inflated.

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

9 **"§103D-501 Contract clauses and their administration. (a)**

10 The policy board shall adopt rules requiring the inclusion of
11 contract clauses providing for adjustments in prices, time of
12 performance, or other contract provisions, as appropriate, and
13 covering the following subjects:

14 (1) The unilateral right of the governmental body to order
15 in writing:

16 (A) Changes in the work within the scope of the
17 contract; and

18 (B) Changes in the time of performance of the
19 contract that do not alter the scope of the
20 contract work;



- 1 (2) Variations occurring between estimated quantities of
2 work in a contract and actual quantities; and
3 (3) Suspension of work ordered by the governmental body[~~+~~
4 and
5 ~~(4) Site conditions differing from those indicated in the~~
6 ~~contract, or ordinarily encountered, except that~~
7 ~~differing site conditions clauses established by these~~
8 ~~rules need not be included in a contract:~~
9 ~~(A) When the contract is negotiated;~~
10 ~~(B) When the contractor provides the site or design;~~
11 ~~or~~
12 ~~(C) When the parties have otherwise agreed with~~
13 ~~respect to the risk of differing site~~
14 ~~conditions].~~
15 (b) Adjustments in price permitted by rules adopted under
16 subsection (a) shall be computed in one or more of the following
17 ways:
18 (1) By agreement on a fixed price adjustment before
19 commencement of the pertinent performance;



- 1 (2) By unit prices specified in the contract or
2 subsequently agreed upon before commencement of the
3 pertinent performance;
- 4 (3) By the costs attributable to the events or situations
5 under such clauses with adjustment of profit or fee,
6 all as specified in the contract or subsequently
7 agreed upon before commencement of the pertinent
8 performance;
- 9 (4) In any other manner as the contracting parties may
10 mutually agree upon before commencement of the
11 pertinent performance; or
- 12 (5) In the absence of agreement by the parties:
- 13 (A) For change orders with value not exceeding
14 \$50,000 by documented actual costs of the work,
15 allowing for twenty per cent of the actual costs
16 for overhead and profit on work done directly by
17 the contractor and ten per cent on any
18 subcontractor's billing to the contractor for the
19 contractor's overhead and profit. There shall be
20 no cap on the total cost of the work if this
21 method is used. A change order shall be issued



1 within fifteen days of submission by the
2 contractor of proper documentation of completed
3 force account work, whether periodic (conforming
4 to the applicable billing cycle) or final. The
5 procurement officer shall return any
6 documentation that is defective to the contractor
7 within fifteen days after receipt, with a
8 statement identifying the defect; or

9 (B) For change orders with value exceeding \$50,000 by
10 a unilateral determination by the governmental
11 body of the costs attributable to the events or
12 situations under clauses with adjustment of
13 profit or fee, all as computed by the
14 governmental body in accordance with applicable
15 sections of the rules adopted under section 103D-
16 601 and subject to the provisions of part VII.
17 When a unilateral determination has been made, a
18 unilateral change order shall be issued within
19 ten days. Costs included in the unilateral
20 change order shall allow for twenty per cent of
21 the actual costs for overhead and profit on work



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

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



1 issued within ten days after agreement on the method of
2 adjustment.

3 (c) The policy board shall adopt rules requiring the
4 inclusion in contracts of clauses providing for appropriate
5 remedies and covering the following subjects:

- 6 (1) Liquidated damages as appropriate;
7 (2) Specified excuses for delay or nonperformance;
8 (3) Termination of the contract for default; and
9 (4) Termination of the contract in whole or in part for
10 the convenience of the governmental body.

11 (d) The chief procurement officer or the head of a
12 purchasing agency may vary the clauses that may be required to
13 be included in contracts under the rules adopted under
14 subsections (a) and (c); provided that:

- 15 (1) Any variations are supported by a written
16 determination that states the circumstances justifying
17 [~~such~~] the variations; and
18 (2) Notice of any [~~such~~] material variation [~~be~~] is stated
19 in the invitation for bids or request for proposals
20 when the contract is awarded under section 103D-302 or
21 103D-303.



1 (e) Every construction contract shall include the
2 following clause regarding differing site conditions:

3 "The procurement officer shall investigate the site
4 conditions promptly after receiving notice of differing
5 site conditions. If the conditions do materially differ
6 and cause an increase or decrease in the contractor's cost
7 of, or the time required for, performing any part of the
8 work under this contract, whether or not changed as a
9 result of the conditions, an equitable adjustment shall be
10 made under this clause and the contract modified in writing
11 accordingly."

12 SECTION 3. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 4. This Act shall take effect upon its approval.

15

INTRODUCED BY: 

JAN 23 2024



H.B. NO. 2567

Report Title:

Hawaii Public Procurement Code; Differing Site Conditions

Description:

Repeals language requiring the Procurement Policy Board to adopt rules regarding differing site conditions. Requires every construction contract to include a clause that requires the procurement officer to investigate the site conditions and modify the contract in writing if differing site conditions exist.

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

