

ACT 164

S.B NO. 2988

A Bill for an Act Relating to Public Contracts and Procurement.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that after receiving payment for construction projects, prime contractors sometimes do not make timely payments to subcontractors. One of the principal reasons for this is the prime contractors' liability for subcontractors union trust fund payments. Often, the long delay in receiving full clearance from union trust funds results in corresponding delays in payments to subcontractors.

The legislature also finds that earlier legislative action on the issue resulted in divisive conflict between construction industry groups. To avoid further rancor, representatives from various construction industry organizations established an informal task force to reconcile differences. After many months of open and sometimes heated debate, the members of the task force acquired a new respect for the unique problems facing their counterparts and crafted a partial solution to the thorny issue of prompt payment. The proposal provides that prime contractors make timely payments to subcontractors who possess a trust fund contribution bond or a performance/payment bond. This proposal makes significant progress toward addressing the subcontractors' concern for prompt payment, and the prime contractors' concern regarding liability for union trust fund benefit payments.

The purpose of this Act is to ensure prompt payment on state projects by contractors to subcontractors by:

- (1) Specifying that subcontractors provide evidence to contractors of a valid union trust fund benefit payment bond, performance/payment bond, other bond, or another mutually agreeable form of collateral; and
- (2) Imposing penalties on contractors for failing to properly pay amounts owed to subcontractors.

SECTION 2. Section 103-10.5, Hawaii Revised Statutes, is amended to read as follows:

“**[§103-10.5] Prompt payment.** (a) Any money, other than retainage, paid to a contractor shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract[,] ; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes[.] on which the procurement agency has withheld payment.

(b) Upon final payment to the contractor, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money[,] ; provided there are no bona fide disputes over the subcontractor's performance under the subcontract.

(c) Where a subcontractor has provided evidence to the contractor of:

- (1) A valid union trust fund contribution bond acceptable to the contractor in an amount not less than three months of the subcontractor's trust fund contribution;
- (2) A performance and payment bond for the project executed by a surety company authorized to do business in the State;
- (3) Any other bond acceptable to the contractor; or
- (4) Any other form of mutually-acceptable collateral;

and the contractor fails to pay in accordance with this section, a penalty of one and one-half per cent per month shall be imposed on the outstanding amounts due to the subcontractor. The penalty may be withheld from future payment due to the contractor. Where a contractor has violated subsection (b) three or more times within two years of the first violation, the contractor shall be referred to the contractor license board by the procurement agency for action under section 444-17(14)."

SECTION 3. Section 103D-501, Hawaii Revised Statutes, is amended to read as follows:

"§103D-501 Contract clauses and their administration. (a) The policy board shall adopt rules requiring the inclusion of contract clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

- (1) The unilateral right of the governmental body to order in writing:
 - (A) Changes in the work within the scope of the contract; and
 - (B) Changes in the time of performance of the contract that do not alter the scope of the contract work;
- (2) Variations occurring between estimated quantities of work in a contract and actual quantities;
- (3) Suspension of work ordered by the governmental body; and
- (4) Site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses established by these rules need not be included in a contract:
 - (A) When the contract is negotiated;
 - (B) When the contractor provides the site or design; or
 - (C) When the parties have otherwise agreed with respect to the risk of differing site conditions.

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

- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- (2) By unit prices specified in the contract or subsequently agreed upon;
- (3) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
- (4) In such other manner as the contracting parties may mutually agree; or
- (5) In the absence of agreement by the parties, by a unilateral determination by the governmental body of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the rules adopted under section 103D-601 and subject to the provisions of part VII.

A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 103D-312.

[(c) The policy board shall adopt rules requiring the inclusion in contracts of clauses providing for prompt payment by contractors to subcontractors. The rules shall provide that:

- (1) Any money, other than retainage, paid to a contractor shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
- (2) Upon final payment to the contractor, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.

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

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

[(e) (d) The chief procurement officer or the head of a purchasing agency may vary the clauses [which] that may be required to be included in contracts under the rules adopted under subsections (a)[, (c), and (d);] and (c); provided that [any];

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

SECTION 4. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2000, and shall apply to all public contracts entered into after June 30, 2000.

(Approved June 5, 2000.)