

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
Amendment of Chapter 3-125
Hawaii Administrative Rules

July 16, 2009

SUMMARY

1. §§3-125-2 to 3-125-4 are amended.
2. §§3-125-12 to 3-125-13 are amended.
3. §3-125-23 is amended.

Historical Note. These sections:

Replaces interim rules effective 10/03/08 (file no. 2827) that amended sections 3-125-2, 3-125-3, 3-125-4, 3-125-12, 3-125-13, and 3-125-23.

§3-125-2 Change orders in goods and services contracts. (a) A change order is a written order signed by the procurement officer, directing the contractor to make changes which the "changes clause" of the contract authorizes the procurement officer to order without the consent of the contractor.

(b) The following paragraph, or similar statement expressing the same intent of this paragraph, shall be included in all contracts for goods and services:

"Changes Clause

- (1) Generally. By written order, at any time, and without notice to any surety, the procurement officer may, unilaterally, order of the contractor:
 - (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) Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly.
 - (A) Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause included pursuant to section 3-125-12. Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause included pursuant to section 3-125-12(1)(E).
 - (B) Failure of the parties to agree to an adjustment in time shall not excuse the contractor from proceeding with the contract as changed, provided that the

procurement officer, within fourteen days after the changed work commences, makes the provisional adjustments in time as the procurement officer deems reasonable.

The right of the contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work, provided however, that it follows the written notice requirements for disputes and claims established by the contract.

- (3) Time period for claim. Except as may be provided otherwise by section 103D-501(b), HRS, the contractor must file a written claim disputing the contract price or time provided in a change order within ten days after receipt of a written change order, unless such period for filing is extended by the procurement officer in writing. The requirement for filing a timely written claim cannot be waived and shall be a condition precedent to the assertion of a claim.
- (4) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if the claim is not received by the procurement officer prior to final payment under this contract.
- (5) Other claims not barred. In the absence of such a change order, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim under the contract or for breach of contract." [Eff 12/15/95; am and comp 11/17/97; am **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-3 Modifications to goods and services contracts. (a) A contract modification is a written alteration within the scope of the contract to specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

(b) The following paragraph, or similar statement expressing the same intent of this paragraph, shall be included in all contracts for goods and services:

"Modifications Clause

- (1) Contract modification. By a written order, at any time, and without notice to any surety, the procurement officer, subject to mutual agreement of the parties to the contract and all appropriate adjustments, may make modifications within the general scope of this contract to include any one or more of the following:
 - (A) Drawings, designs, or specifications, for the goods to be furnished;
 - (B) Method of shipment or packing;
 - (C) Place of delivery;
 - (D) Description of services to be performed;
 - (E) Time of performance (i.e., hours of the day, days of the week, etc.);
 - (F) Place of performance of the services; or
 - (G) Other provisions of the contract accomplished by mutual action of the parties to the contract.
- (2) Adjustments of price or time for performance. If any modification increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this contract or as negotiated.
- (3) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if the claim is not received by the procurement officer prior to final payment under this contract.

- (4) Other claims not barred. In the absence of such a contract modification, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim under the contract or for a breach of contract." [Eff 12/15/95; am and comp 11/17/97; am **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-4 Change orders in construction contracts.

The following paragraph, or similar statement expressing the intent of this paragraph, shall be included in all construction contracts:

"Changes Clause

- (1) Change order. The procurement officer, at any time, and without notice to any surety, in a signed writing designated or indicated to be a change order, may make changes in the work within the scope of the contract as may be found to be necessary or desirable. Such changes shall not invalidate the contract or release the sureties, and the contractor will perform the work as changed, as though it had been part of the original contract. Minor changes in the work may be directed by the procurement officer with no change in contract price or time of performance.

(2) Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment may be made and the contract modified in writing accordingly.

- (A) Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause included pursuant to section 3-125-13. Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause included pursuant to section 3-125-13(1)(E);
- (B) Failure of the parties to agree to an adjustment in time shall not excuse a contractor from proceeding with the contract as changed, provided that the procurement officer, within fourteen days after the changed work commences, makes such provisional adjustments in time as the procurement officer deems reasonable.

The right of the contractor to dispute the contract price or time required for performance or both shall not be waived by its performing

the work, provided however, that it follows the written notice requirements for disputes and claims established by the contract.

- (3) Time period for claim. Within thirty days after receipt of a written change order under paragraph (1) of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file a notice of intent to assert a claim for an adjustment. The requirement for filing a timely written notice cannot be waived and shall be a condition precedent to the assertion of a claim.
- (4) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if written notice is not given prior to final payment under this contract.
- (5) Other claims not barred. In the absence of such a change order, nothing in this clause shall restrict the contractor's right to pursue a claim arising under the contract or for breach of contract." [Eff 12/15/95; am and comp 11/17/97; am **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-12 Price adjustment in goods and services contracts. The following paragraph or similar statement expressing the intent of this paragraph, shall be included in all contracts for goods and services for which price adjustments will be allowed:

"Price Adjustment Clause

- (1) Price adjustment methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
 - (A) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - (B) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (C) 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 before commencement of the pertinent performance;
 - (D) In any other manner as the contracting parties may mutually agree upon before commencement of the pertinent performance; or
 - (E) In the absence of agreement between the parties, the provisions of section 103D-501(b)(5), HRS, shall apply.
- (2) Submission of cost or pricing data. The 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, HRS. The submission of any cost or pricing data shall be made for any price adjustment subject to the provisions of subchapter 15, chapter 3-122. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraph (1)(A) through (1)(D) shall be issued within ten days after agreement on the method of adjustment." [Eff 12/15/95; comp 11/17/97; am **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-312, 103D-501, 103D-601, 103D-703)

§3-125-13 Price adjustment in construction contracts.
 The following paragraph or similar statement expressing the intent of this paragraph, shall be included in all construction contracts for which price adjustments will be allowed:

"Price Adjustment Clause

- (1) Price adjustment methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
 - (A) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - (B) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (C) 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 before commencement of the pertinent performance;
 - (D) In any other manner as the parties may mutually agree upon before commencement of the pertinent performance; or
 - (E) In the absence of agreement between the parties the provisions of section 103D-501(b)(5), HRS, shall apply.
- (2) Submission of cost or pricing data. The 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, HRS. The submission of any cost or pricing data shall be made subject to the provisions of subchapter 15, chapter 3-122. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraph (1)(A) through (1)(D) shall be issued within ten days after agreement on the method of adjustment." [Eff 12/15/95; am and comp 11/17/97; am **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-501, 103D-601, 103D-703)

\$3-125-23 Prompt payment by contractors to subcontractors. The following paragraph, or similar statement expressing the same intent, shall be included in all contracts:

"Prompt Payment Clause

- (1) Generally. Any money paid to a contractor shall be disbursed 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.
- (2) Final payment. 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.
- (3) Penalty. The procurement officer or the contractor, as applicable, will be subject to a penalty of one and one-half per cent per month upon outstanding amounts due that were not timely paid by the responsible party under the following conditions. Where a subcontractor has provided evidence to the contractor of satisfactorily completing all work under their subcontract and has provided a properly documented final payment request as described in paragraph (4), and:
 - (A) Has provided to the contractor an acceptable performance and payment bond for the project executed by a surety company authorized to do business in the State, as provided in section 103-32.1, HRS; or
 - (B) The following has occurred:
 - (i) A period of ninety days after the day on which the last of the labor was done or performed and the last of the material was furnished or supplied has elapsed without written notice of a claim given to contractor and the surety, as

provided for in section 103D-324, HRS; and

- (ii) The subcontractor has provided to the contractor, an acceptable release of retainage bond, executed by a surety company authorized to do business in the State, in an amount of not more than two times the amount being retained or withheld by the contractor; any other bond acceptable to the contractor; or any other form of mutually acceptable collateral, then, all sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by the procurement officer to the contractor and subsequently, upon receipt from the procurement officer, by the contractor to the subcontractor within the applicable time periods specified in paragraph (2) and section 103-10, HRS. The penalty may be withheld from future payment due to the contractor, if the contractor was the responsible party. If a contractor has violated paragraph (2) three or more times within two years of the first violation, the contractor shall be referred by the procurement officer to the contractors license board for action under section 444-17(14), HRS.

- (4) A properly documented final payment request from a subcontractor, as required by paragraph (3), shall include:
 - (A) Substantiation of the amounts requested;
 - (B) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief, that:
 - (i) The amounts requested are only for performance in accordance with the

- specifications, terms, and conditions of the subcontract;
 - (ii) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
 - (iii) The payment request does not include any amounts that the subcontractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract; and
 - (C) The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied.

The procurement officer shall return any final payment request that is defective to the contractor within seven days after receipt, with a statement identifying the defect.

- (5) In the case of a construction contract, a payment request made by a contractor to the procurement officer that includes a request for sums that were withheld or retained from a subcontractor and are due to a subcontractor may not be approved under paragraph (3) unless the payment request includes:
 - (A) Substantiation of the amounts requested; and
 - (B) A certification by the contractor, to the best of the contractor's knowledge and belief, that:
 - (i) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
 - (ii) The subcontractor has made payments due to its subcontractors and suppliers from previous payments

received under the contract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and

- (iii) The payment request does not include any amounts that the contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.


The procurement officer shall return any final payment request that is defective to the contractor within seven days after receipt, with a statement identifying the defect.

- (6) This section shall not be construed to impair the right of a contractor or a subcontractor at any tier to negotiate and to include in their respective subcontracts provisions that provide for additional terms and conditions that are requested to be met before the subcontractor shall be entitled to receive final payment under paragraph (3); provided that any such payments withheld shall be withheld by the procurement officer." [Eff 12/15/95; am and comp 11/17/97; am **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)


DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to chapter 3-125, Hawaii Administrative Rules, on the Summary Page dated July 16, 2009 were adopted at the Procurement Policy Board meeting on July 16, 2009, following a public hearing held on July 13, 2009, after public notice was given in the Honolulu Star-Bulletin, The Maui News, The Garden Island, Hawaii Tribune-Herald, and West Hawaii Today newspapers on June 10, 2009.

The rules replace interim rules previously adopted and effective on 10/03/08. The rules shall take effect ten days after filing with the Office of the Lieutenant Governor.


PAMELA A. TORRES
Chairperson
Procurement Policy Board


RUSS K. SAITO
State Comptroller


LINDA LINGLE
Governor
State of Hawaii

JAMES H. AIGNA JR.
ACTING GOVERNOR

Dated: _____

Filed

APPROVED AS TO FORM:


Deputy Attorney General

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DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
OFFICE OF THE LIEUTENANT GOVERNOR

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