

## PROCUREMENT POLICY BOARD

1151 Punchbowl Street  
Conference Room 410  
Honolulu, Hawaii 96813

Regular Meeting  
October 18, 2007  
1:00 pm

### AGENDA

- I. Call to Order
- II. Approval of Minutes – Meeting of August 16, 2007
- III. Proposed draft amendments to sections of HAR Chapter 3-125, Modifications and Terminations of Contracts, for consideration as interim rules. Amendments are made for compliance with statutes due to changes in Act 291/06.
  - a. Proposal 1 – submitted by the Attorney General’s Office/State Procurement Office
  - b. Proposal 2 – submitted by Jessica Horiuchi/Terry Thomason
- IV. Proposal to adopt federal acquisition regulation guidelines for using Small Business Administration (SBA) size criteria for creating set asides and subcontracting requirements.
- V. Announcements
- VI. Adjournment

Individuals may present testimony on matters on the Procurement Policy Board’s agenda when the agenda item is being discussed by the Board. Individuals who intend to testify, should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting. Written testimonies will be accepted through e-mail at [procurement.policy.board@hawaii.gov](mailto:procurement.policy.board@hawaii.gov) or faxed to (808) 587-4703 until 1:00 pm, October 16, 2007. Testimonies received after the October 16, 2007 deadline will be forwarded to the board after the October 18, 2007 meeting. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., October 15, 2007 to discuss accommodation arrangements.



"Terry Thomason"  
<TThomason@ahfi.com>

10/08/2007 03:14 PM

To <aaron.fujioka@hawaii.gov>

cc "Francine Kawakami" <FKawakami@ahfi.com>,  
<hpinstitute@gmail.com>

Subject Re: proposed HAR 3-125 sections

Aaron:

Jessica did make some editorial changes. They are all incorporated into the attached. The document number our document control system attaches is the same. However, the document edit history reflects that this has all of Jeessica's changes.

Terry

>>> <aaron.fujioka@hawaii.gov> 10/8/2007 2:28 PM >>>

Terry,

I was under the impression that there was a more recent draft other than what's attached at the very bottom of this string of emails.

Aaron



656134\_1\_Prompt payment rule changes (Chap. 3-125).DOC

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to Chapter 3-125 (Interim)  
Hawaii Administrative Rules

August 16, 2007

1. Section 3-125-2, Hawaii Administrative Rules (Interim), is amended to read as follows:

"§3-125-2 Change orders to 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 paragraphs or similar statements expressing the intent of the paragraphs shall be included in all contracts for goods and services:

**"Changes Clause**

- (1) ~~"Change clause~~**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. 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.

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed provided that the procurement officer promptly and duly makes the provisional adjustments in payment or time for the direct costs of the work as the State **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 or these rules."

- (3) “Time period for claim. Within ten days after receipt of a written change order, unless the **such** period is extended by the procurement officer in writing, the contractor shall respond with a claim for an adjustment. The requirement for a timely written response **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 ~~written response~~ **the claim** is not given **received by the procurement officer** prior to final payment under this contract.”
- (5) “~~Claims~~ **Other claims not barred.** In the absence of 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 NOV 17, 1997; am ] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

**Justification: Minor changes made for clarification.**

2. Section 3-125-3, Hawaii Administrative Rules (Interim), is amended to read as follows:

§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 clauses or similar statements expressing the intent of the clauses shall be included in all contracts for goods and services:

**“Modifications**

- (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 included 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 ~~written agreement of modification~~ **the claim** is not made **received by the procurement officer** prior to the final payment under this contract.”
  - (4) “~~Claims~~ Other claims not barred. In the absence of 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 NOV 17, 1997] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

**Justification: Minor changes made for clarification.**

3. Section 3-125-4, Hawaii Administrative Rules (Interim), is amended to read as follows:

“§3-125-4 Changes for construction contracts. The following paragraphs or similar statements expressing the intent of these paragraphs 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 ~~maybe~~ **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. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract. Failure of the parties to agree to an adjustment shall not excuse a contractor from proceeding with the contract as changed, provided that the ~~State~~ **procurement officer** promptly and duly makes such provisional adjustments in payments or time for the direct costs of the work as changed as the ~~State~~ **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 notice requirements for disputes and claims established by the contract ~~or these rules.~~”

- (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 claim for an adjustment. The requirement for 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 ~~here under~~ **hereunder** shall be allowed if written notice is not given prior to final payment under this contractor.”
- (5) “~~Claims~~ **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 NOV 17 1997; am ] (Auth: HRS §§103d-202, 103D-501) (Imp: HRS §103D-501)

**Justification: Minor changes made for clarification.**

4. Section 3-125-12, Hawaii Administrative Rules (Interim), is amended to read as follows:

“§3-125-12 Price adjustment for goods and services contracts.

(a) The following paragraph or similar statement expressing the intent of the **this** paragraph, shall be included in all applicable **contracts for** goods and services 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 ~~or as soon thereafter as practicable;~~
  - (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 event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon; **before commencement of the pertinent performance;**
  - (D) In ~~such~~ **any** other manner as the **contracting** parties may mutually agree; ~~or~~ **upon before commencement of the pertinent performance; or**
  - (E) In the absence of agreement between the parties, ~~by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126.”:~~
    - i. **For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty percent of the actual costs for overhead and profit on work done directly by the contractor and ten percent on any subcontractor’s billing to the contractor for the contractor’s overhead and profit. There shall be no cap on the total cost of the work if this method**

is used. A Price Adjustment change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or

- ii. For change orders with value exceeding \$50,000 by a unilateral determination by the procurement officer of the costs attributable to the events or situations under 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. When a unilateral determination has been made, a unilateral Price Adjustment change order shall be issued within ten days. Costs included in the unilateral change order shall allow for twenty percent of the actual costs for overhead and profit on work done directly by the contractor and ten percent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral change order. Failure to file a claim under the Disputes clause of the contract within the time specified shall constitute agreement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral Price Adjustment change order.



- (b.) Submission of cost or pricing data. The contractor shall ~~provide~~ be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 103D-312. 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 paragraphs (A) through (E) shall be issued within ten days after agreement on the method of adjustment.” [Eff 12/15/95; comp NOV 17 1997 ] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-312, 103D-501, 103D-601, 103D-703)

**Justification: Change made in response to Act 291, 2006 Session Laws of Hawaii, which amended HRS §103D-501 by adding new requirements regarding price adjustments. Minor changes made for clarification.**

5. Section 3-125-13. Hawaii Administrative Rules (Interim), is amended to read as follows:

“§3-125-13 Price adjustment for construction contracts.

(a) The paragraphs in this subsection, or similar statements expressing the intent of these paragraphs, shall be included in all applicable 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 ~~or as soon thereafter as practicable;~~
- (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;**
- ~~(C)~~ (D) Whenever there is a variation in quantity for any work covered by any line item in breakdown costs provided by the contractor pursuant to contractual pre-work submittal requirements, by the procurement officer, at the procurement officer’s discretion, adjusting the lump sum price proportionately;

~~(D) In such other manner as the parties may mutually agree;~~

(E) At the sole option of the procurement officer, by the costs attributable to the event or situation covered by the change, plus appropriate profit or fee; or

**(F) In such other manner as the parties may mutually agree upon before commencement of the pertinent performance; or**

~~(G) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126.":~~

- i. **For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty percent of the actual costs for overhead and profit on work done directly by the contractor and ten percent on any subcontractor's billing to the contractor for the contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A Price Adjustment change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or**
- ii. **For change orders with value exceeding \$50,000 by a unilateral determination by the procurement officer of the costs attributable to the events or situations under 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. When a unilateral determination has been made, a unilateral Price Adjustment change order shall be issued**

within ten days. Costs included in the unilateral Price Adjustment change order shall allow for twenty percent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral Price Adjustment change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral change order. Failure to file a claim under the Disputes Clause of this contract within the time specified shall constitute greement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral Price Adjustment change order.

- (2) “Determining the cost or credit. In determining the cost or credit to the State **government** resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office and field overhead) and profit combined, shall not exceed the percentages set forth below:
- (A) For the contractor, for any work performed by its own labor forces, ~~fifteen~~ **twenty** per cent **percent** of the cost;
  - (B) For each subcontractor involved, for any work performed by its own forces, ~~fifteen~~ **twenty** per cent **percent** of the cost;
  - (C) For the contractor or any subcontractor, for work performed by their subcontractors, ~~seven~~ **ten** per cent **percent** of the amount due the performing subcontractor.”
- (3) “Percentages for fee and overhead. Not more than three line item percentages for fee and overhead, not to exceed the maximum percentages shown above, will be allowed regardless of the number of tier subcontractors.”

- (4) **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. 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 paragraphs (A) through(D) shall be issued within ten days after agreement on the method of adjustment.** [Eff 12-15-95; am and comp NOV 17 1997 ] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-501, 103D-601, 103D-703)

**Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended HRS §103D-501 by adding new requirements regarding price adjustments. Minor changes made for clarification.**

6. Section 3-125-23, Hawaii Administrative Rules (Interim), is amended to read as follows:

“§3-125-23 Prompt payment by contractors to subcontractors. The following ~~statements~~ **paragraphs**, or similar statements expressing the same intent, shall be included in all contracts:

**“Prompt payment Clause**

- (1) **“Prompt payment clause Generally.** Any money, ~~other than retainage,~~ paid to a contractor shall be dispersed **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.** ~~and, upon~~
- (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 agency or the contractor, as applicable, will be subject to a penalty of one and one-half (1 ½) percent per month upon outstanding amounts due that were not timely paid by the responsible party under the following. 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 subsection (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; 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; 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 to the contractor and subsequently, upon receipt, by the contractor to the subcontractor within the applicable time periods specified in subsection (2) and section 103-10. The penalty may be withheld from future payment due to the contractor, if the contractor was the responsible party. If a contractor has violated subsection (2) three or more times within two years of the first violation, the contractor shall be referred by the procurement officer to the contractor

license board for action under section 444-17(14).

- (4) A properly documented final payment request from a subcontractor, as required by subsection (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 subsection (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 subsection (3) of this section; provided that any such payments withheld shall be withheld by the procurement officer. [Eff 12/15/95; am and comp NOV 17 1997; AM ] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-501)

Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended law regarding prompt payments by adding new procedures. Minor changes made for clarification.

PCL XL error

Warning: IllegalMediaSource