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# A BILL FOR AN ACT

RELATING TO THE PROCUREMENT CODE.

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

1           SECTION 1. Chapter 103D, Hawaii Revised Statutes, is  
2 amended by adding a new part to be appropriately designated and  
3 to read as follows:

4           "PART     .   CONSULTANTS' COMPETITIVE NEGOTIATION

5           §103D-A Definitions. As used in this part, unless the  
6 context clearly indicates otherwise:

7           "Agency" means the State, a state agency, or a county.

8           "Design-build entity" means an entity that:

- 9           (1) Is licensed under chapter 444 to engage in  
10           contracting; or  
11           (2) Is licensed under chapter 464 to practice or to offer  
12           to practice engineering, architecture, or landscape  
13           architecture.

14           "Design-build contract" means a single contract with a  
15 design-build entity for the design and construction of a public  
16 construction project.

17           "Design criteria package" means concise, performance-  
18 oriented drawings or specifications of the public construction



1 project that is sufficient to furnish information to permit  
2 design-build entities to prepare a bid or a response to an  
3 agency's request for proposal, or to permit an agency to enter  
4 into a negotiated design-build contract, and that includes, at a  
5 minimum, the following performance-based criteria: the legal  
6 description of the site, survey information concerning the site,  
7 interior space requirements, material quality standards,  
8 schematic layouts and conceptual design criteria of the project,  
9 cost or budget estimates, design and construction schedules,  
10 site development requirements, provisions for utilities,  
11 stormwater retention and disposal, and parking requirements  
12 applicable to the project.

13 "Design criteria professional" means an entity who is  
14 licensed under chapter 464 to practice architecture, landscape  
15 architecture, or engineering, and who is employed by or under  
16 contract to the agency for the providing of professional  
17 architect services, landscape architect services, or engineering  
18 services in connection with the preparation of the design  
19 criteria package.

20 "Entity" means any individual, firm, partnership,  
21 corporation, association, or other legal entity permitted by law  
22 to engage in business as a licensed contractor or to practice



1 architecture, engineering, or surveying and mapping in the  
2 state.

3 "Negotiate" or any form of that word means to conduct  
4 legitimate, arms length discussions and conferences to reach an  
5 agreement on a term or price. For purposes of this definition,  
6 the term does not include presentation of flat-fee schedules  
7 with no alternatives or discussion.

8 "Professional services" means those services within the  
9 scope of the practice of architecture, professional engineering,  
10 landscape architecture, or registered surveying and mapping, as  
11 defined by the laws of the State, or those performed by any  
12 architect, professional engineer, landscape architect, or  
13 registered surveyor and mapper in connection with the person's  
14 professional employment or practice.

15 "Project" means that fixed capital outlay study or planning  
16 activity described in the public notice of the State or a state  
17 or county agency under section 103D-B. A project may include:

- 18 (1) A grouping of minor construction, rehabilitation, or  
19 renovation activities; or  
20 (2) A grouping of substantially similar construction,  
21 rehabilitation, or renovation activities.



1           **§103D-B Public announcement and qualification procedures.**

2   (a) Each agency shall publicly announce, in a uniform and  
3 consistent manner, each occasion when professional services are  
4 to be purchased for a project, the basic construction cost of  
5 which is estimated by the agency to exceed the threshold amount  
6 of \$250,000, or for a planning or study activity when the fee  
7 for professional services exceeds the threshold amount of  
8 \$25,000, except in cases of valid public emergencies certified  
9 by the agency head. The public notice shall include a general  
10 description of the project and shall indicate how interested  
11 consultants may apply for consideration.

12           Each agency shall provide a good faith estimate in  
13 determining whether the proposed activity meets the threshold  
14 amounts referred to in this subsection.

15           (b) Each agency shall encourage design-build entities  
16 engaged in the lawful practice of their professions that desire  
17 to provide professional services to the agency to submit  
18 annually statements of qualifications and performance data.

19           (c) Any entity or individual desiring to provide  
20 professional services to the agency shall first be certified by  
21 the agency as qualified.



1 (d) Each agency shall evaluate professional services,  
2 including capabilities, adequacy of personnel, past record,  
3 experience, and other factors determined by the agency to be  
4 applicable to its particular requirements. The agency shall  
5 make a determination whether the entity or individual to be  
6 employed is fully qualified to render the required service.

7 (e) The agency's determination shall be a public record.

8 **§103D-C Competitive selection.** (a) For each proposed  
9 project, the agency shall evaluate current statements of  
10 qualifications and performance data if design-build entities on  
11 file with the agency, together with those that may be submitted  
12 by other entities regarding the proposed project, and shall  
13 conduct discussions with, and may require public presentations  
14 by, no fewer than three entities regarding their qualifications,  
15 approach to the project, and ability to furnish the required  
16 services.

17 (b) The agency shall select, in order of preference, no  
18 fewer than three design-build entities deemed to be the most  
19 highly qualified to perform the required services. In  
20 determining whether an entity is qualified, the agency shall  
21 consider such factors as the ability of professional personnel,  
22 past performance, willingness to meet time and budget



1 requirements, location, workloads of the entities, and the  
2 volume of work previously awarded to each entity by the agency,  
3 with the object of effecting an equitable distribution of  
4 contracts among qualified entities; provided such distribution  
5 does not violate the principle of selection of the most highly  
6 qualified entities. The agency may request, accept, and  
7 consider proposals for the compensation to be paid under the  
8 contract only during competitive negotiations under section  
9 103D-D.

10 (c) This section shall apply to a professional service  
11 contract for a project the basic construction cost of which is  
12 estimated by the agency to be \$250,000 or more, or for a  
13 planning or study activity when the fee for professional  
14 services is estimated to be \$25,000 or more.

15 **§103D-D Competitive negotiation.** (a) The agency shall  
16 negotiate a contract with the most qualified design-build entity  
17 for professional services at a compensation level that the  
18 agency determines is fair, competitive, and reasonable. In  
19 making such determination, the agency shall conduct a detailed  
20 analysis of the cost of the professional services required in  
21 addition to considering their scope and complexity.



1 (b) For any lump-sum or cost-plus-a-fixed-fee professional  
2 service contract in the amount of \$150,000 or more, the agency  
3 shall require the entity receiving the award to execute a truth-  
4 in-negotiation certificate stating that wage rates and other  
5 factual unit costs supporting the compensation are accurate,  
6 complete, and current at the time of contracting. Any  
7 professional service contract under which such a certificate is  
8 required shall contain a provision that the original contract  
9 price and any additions thereto will be adjusted to exclude any  
10 significant sums by which the agency determines the contract  
11 price was increased due to inaccurate, incomplete, or noncurrent  
12 wage rates and other factual unit costs. All contract  
13 adjustments shall be made within one year following the end of  
14 the contract.

15 (c) If the agency is unable to negotiate a satisfactory  
16 contract with the entity considered to be the most qualified at  
17 a price the agency determines to be fair, competitive, and  
18 reasonable, negotiations with that entity shall be formally  
19 terminated. The agency shall then undertake negotiations with  
20 the second most qualified entity. Failing accord with the  
21 second most qualified entity, the agency shall terminate



1 negotiations. The agency shall then undertake negotiations with  
2 the third most qualified entity.

3 (d) If the agency is unable to negotiate a satisfactory  
4 contract with any of the selected entities, the agency shall  
5 select additional entities in the order of their competence and  
6 qualification and continue negotiations in accordance with this  
7 section until an agreement is reached.

8 **§103D-E Prohibition against contingent fees.** (a) Each  
9 contract entered into by the agency for professional services  
10 shall contain a prohibition against contingent fees as follows:  
11 "The architect (surveyor, or professional engineer, as  
12 applicable) warrants that no company or person has been employed  
13 or retained, other than a bona fide employee working solely for  
14 the architect (surveyor, or professional engineer, as  
15 applicable) to solicit or secure this agreement and that no  
16 person, company, corporation, individual, or firm, other than a  
17 bona fide employee working solely for the architect (surveyor,  
18 professional engineer, as applicable) has been paid or has  
19 agreed to be paid any fee, commission, percentage, gift, or  
20 other consideration contingent upon or resulting from the award  
21 or making of this agreement.





1 For the breach or violation of this prohibition, the agency  
2 shall have the right to terminate the agreement without  
3 liability and, at its discretion, to deduct from the contract  
4 price, or otherwise recover, the full amount of any fee,  
5 commission, percentage, gift, or consideration.

6 (b) Any person who confers, or offers or agrees to confer,  
7 directly or indirectly, any pecuniary benefit upon a public  
8 servant with the intent to influence the public servant's vote,  
9 opinion, judgment, exercise of discretion, or other action as a  
10 public servant under this part shall be guilty of a misdemeanor.

11 (c) Any public servant who solicits, accepts, or agrees to  
12 accept, directly or indirectly, any pecuniary benefit with the  
13 intent that the person's vote, opinion, judgment, exercise of  
14 discretion, or other action as a public servant under this part  
15 will thereby be influenced, shall be guilty of a misdemeanor.

16 **§103D-F Authority of department of accounting and general**  
17 **services.** Notwithstanding any other provision of this part, the  
18 department of accounting and general services shall be the  
19 agency of state government that is solely and exclusively  
20 authorized and empowered to administer and perform the functions  
21 described in sections 103D-B, 103D-C, and 103D-D with respect to  
22 projects for which state funds are expended; provided that the



1 department may delegate authority to administer and perform the  
2 functions described in sections 103D-B, 103D-C, and 103D-D to  
3 other agencies. Under the terms of the delegation, the agency  
4 may reserve its right to accept or reject a proposed contract.

5 **§103D-G State assistance to counties.** On any professional  
6 service contract for which the fee is over \$25,000, the  
7 department of accounting and general services shall provide,  
8 upon request by a county, and upon reimbursement of the costs  
9 involved, assistance in selecting consultants and in negotiating  
10 consultant contracts.

11 **§103D-H Applicability to design-build contracts.** (a)  
12 Except as provided in this section, this part shall not be  
13 applicable to the procurement of design-build contracts by any  
14 agency, and the agency shall award design-build contracts in  
15 accordance with the procurement laws, rules, and ordinances  
16 applicable to the agency.

17 (b) The design criteria package shall be prepared and  
18 sealed by a design criteria professional employed by or retained  
19 by the agency. If the agency elects to enter into a  
20 professional services contract for the preparation of the design  
21 criteria package, then the design criteria professional shall be  
22 selected and contracted with under the requirements of sections



1 103D-C and 103D-D. A design criteria professional who has been  
2 selected to prepare the design criteria package shall not be  
3 eligible to render services under a design-build contract  
4 executed pursuant to the design criteria package.

5 (c) The department of accounting and general services  
6 shall adopt rules under chapter 91 for the award of design-build  
7 contracts to be followed by state agencies.

8 (d) If the procuring agency elects the option of  
9 qualifications-based selection, during the selection of the  
10 design-build entity the procuring agency shall employ or retain  
11 a licensed design professional appropriate to the project to  
12 serve as the agency's representative. Procedures for the use of  
13 a competitive proposal selection process shall include, as a  
14 minimum, the following:

15 (1) The preparation of a design criteria package for the  
16 design and construction of the public construction  
17 project;

18 (2) The qualification and selection of no fewer than three  
19 design-build entities as the most qualified, based on  
20 the qualifications, availability, and past work of the  
21 entities, including the partners or members thereof;



- 1           (3) The criteria, procedures, and standards for the  
2           evaluation of design-build contract proposals or bids,  
3           based on price, technical, and design aspects of the  
4           public construction project, weighted for the project;
- 5           (4) The solicitation of competitive proposals, pursuant to  
6           a design criteria package, from those qualified  
7           design-build entities and the evaluation of the  
8           responses or bids submitted by those entities based on  
9           the evaluation criteria and procedures established  
10          prior to the solicitation of competitive proposals;
- 11          (5) For consultation with the employed or retained design  
12          criteria professional concerning the evaluation of the  
13          responses or bids submitted by the design-build  
14          entities, the supervision or approval by the agency of  
15          the detailed working drawings of the project; and for  
16          evaluation of the compliance of the project  
17          construction with the design criteria package by the  
18          design criteria professional; and
- 19          (6) In the case of public emergencies, for the agency head  
20          to declare an emergency and authorize negotiations  
21          with the best qualified design-build entity available  
22          at that time.



1           **§103D-I Reuse of existing plans.** Notwithstanding any  
2 other provision of this part, there shall be no public notice  
3 requirement or utilization of the selection process as provided  
4 in this part for projects in which the agency is able to reuse  
5 existing plans from a prior project of the agency. Public  
6 notice for any plans that are intended to be reused at some  
7 future time shall contain a statement that provides that the  
8 plans are subject to reuse in accordance with this section.

9           **§103D-J Construction of part.** If any provision of this  
10 part is in conflict with any other provision of this chapter,  
11 the provision in this part shall apply."

12           SECTION 2. Section 103D-304, Hawaii Revised Statutes, is  
13 amended by amending subsection (a) to read as follows:

14           "(a) Professional services shall be procured in accordance  
15 with sections 103D-302, 103D-303, 103D-305, 103D-306, or 103D-  
16 307, or this section; provided that design professional services  
17 furnished by licensees under chapter 464 shall be procured  
18 pursuant to this section or section 103D-307[-] or part .  
19 Contracts for professional services shall be awarded on the  
20 basis of demonstrated competence and qualification for the type  
21 of services required, and at fair and reasonable prices."



1           SECTION 3. In codifying the new sections added by section  
2 1 of this Act, the revisor of statutes shall substitute  
3 appropriate section numbers for the letters used in designating  
4 the new sections in this Act.

5           SECTION 4. Statutory material to be repealed is bracketed  
6 and stricken. New statutory material is underscored.

7           SECTION 5. This Act shall take effect on July 1, 2034.



**Report Title:**

Procurement Code

**Description:**

Authorizes best value procurement by permitting governmental agencies to award design-build contracts. (HB1767 HD1)

