
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 SECTION 1. Approximately ninety per cent of Hawaii's food
2 is imported from the continental United States or foreign
3 countries. This equates to an exportation of over
4 \$3,000,000,000 annually to places outside of Hawaii.

5 But, this practice is not only on a public commercial
6 level. Even the State of Hawaii and its political subdivisions,
7 as large purchasers and consumers of agricultural products,
8 procure agricultural products outside the State of Hawaii.

9 However, this is contrary to the intent of the procurement laws.

10 In 1994, Act 186 created a "preference" for the purchase of
11 Hawaii products, which was codified into part X of chapter 103D,
12 Hawaii Revised Statutes. The purpose was to provide Hawaii
13 businesses a procurement preference similar to the federal
14 government's "Buy American Act" under Federal Acquisition
15 Regulation 52.225-1.

16 Yet, undermining and eviscerating the entire preference
17 program, are the administrative rules that exempt certain
18 products from the entire procurement code, as found at the end



1 of chapter 3-120, Hawaii Administrative Rules, "Exhibit A".
2 Specifically, exempt from any of the provisions of the entire
3 chapter 103D, HRS, including the preferences, are "fresh meats
4 and produce," "animals and plants," and "food and fodder for
5 animals."

6 In addition, the administrative rules create a cumbersome,
7 lengthy and complex process under sections 3-124-1 thru 3-124-8,
8 Hawaii Administrative Rules, that require offerors to be placed
9 on a pre-approved "list." This process does not allow for
10 Hawaii business to respond and submit proposals in a timely
11 fashion, nor does it reflect the need for flexibility in an
12 ever-changing marketplace. Instead, offerors should be required
13 to "self-certify" that their products meet the Hawaii products
14 preference criteria, or subject themselves to rigorous
15 penalties.

16 The legislature recognizes that direct intervention into
17 the administrative rules is an unusual procedure. However,
18 given the current uncertainties in these fiscal times, and the
19 length of time that amending administrative rules can take to
20 comply with chapter 91, Hawaii Revised Statutes, the legislature
21 finds that the exemptions and procedures in the administrative
22 rules are inconsistent with the purposes, letter, and spirit of



1 sections 103D-1001 thru 103D-1012, Hawaii Revised Statutes.
2 Therefore, the legislature takes it upon itself to revise and
3 simplify sections 103D-1001 thru 103D-1002, Hawaii Revised
4 Statutes, and to amend and automatically repeal certain sections
5 of the administrative rules.

6 SECTION 2. Chapter 103D, Hawaii Revised Statutes, is
7 amended by adding a new section to be appropriately designated
8 and to read as follows:

9 **"§103D-1002.5 Failure to adequately verify, deliver, or**
10 **supply Hawaii products.** If an administrator or procurement
11 officer has made any contract under section 103D-1002 and finds
12 that in the performance of the contract there has been a failure
13 to comply with the provisions of that section, the contract
14 shall be voidable and the offeror shall be referred for
15 debarment or suspension proceedings under section 103D-702."

16 SECTION 3. Section 103D-1001, Hawaii Revised Statutes, is
17 amended as follows:

18 1. By adding a new definition to be appropriately inserted
19 and to read:

20 "Hawaii input" means the part of the cost of a product
21 attributable to production, manufacturing, or other expenses
22 arising within the state. "Hawaii input" includes:



- 1 (1) The cost to mine, excavate, produce, manufacture,
- 2 raise, or grow the materials in Hawaii;
- 3 (2) The added value of that portion of the cost of
- 4 imported materials that is incurred after landing in
- 5 Hawaii, including other articles, materials and
- 6 supplies added to the imported materials;
- 7 (3) The cost of labor, variable overhead, utilities, and
- 8 services incurred in the production and manufacturing
- 9 of materials or products in the state; and
- 10 (4) Fixed overhead cost and amortization or depreciation
- 11 cost, if any, for buildings, tools, and equipment
- 12 situated and located in the state and used in the
- 13 production or manufacturing of a product.

14 2. By amending the definitions of "Hawaii products" and
 15 "products" to read:

16 "Hawaii products" means products that are mined, excavated,
 17 produced, manufactured, raised, or grown in the [State] state
 18 and where the [input constitutes no less than twenty five] cost
 19 of the Hawaii input into the product exceeds fifty per cent of
 20 the [manufactured] total cost[+] of the product; provided that:

21 [~~(1) Where the value of the input constitutes twenty five~~
 22 ~~per cent or more, but less than fifty per cent, of the~~



1 ~~manufactured cost, the product shall be classified as~~
2 ~~class I;~~

3 ~~(2)]~~ (1) Where the value of the input [~~constitutes~~
4 ~~exceeds~~ fifty per cent [~~or more, but less than~~
5 ~~seventy five per cent,~~] of the [~~manufactured~~] total
6 cost, the product shall be classified as class [~~II~~]
7 I; and

8 ~~[(3) Where the value of the input constitutes seventy five~~
9 ~~per cent or more of the manufactured cost, the product~~
10 ~~shall be classified as class III.]~~

11 (2) Where any agricultural, aquacultural, horticultural,
12 silvicultural, floricultural, or livestock product is
13 raised, grown, or harvested in the state, the product
14 shall be classified as class II.

15 "Products" include materials, manufactures, supplies,
16 merchandise, goods, wares, products, and foodstuffs[~~-~~] acquired
17 for public use under the contract."

18 SECTION 4. Section 103D-1002, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "**§103D-1002 Hawaii products.** (a) A purchasing agency
21 shall review all specifications in a bid or proposal for the



- 1 purchase [~~from the~~] of Hawaii products [~~list~~] where these
2 products are available[~~;~~ ~~provided that the products:~~
- 3 ~~(1) Meet the minimum specifications and the selling price~~
4 ~~f.o.b. jobsite;~~
- 5 ~~(2) Unloaded including applicable general excise tax and~~
6 ~~use tax does not exceed the lowest delivered price in~~
7 ~~Hawaii f.o.b. jobsite; and~~
- 8 ~~(3) Unloaded, including applicable general excise tax and~~
9 ~~use tax, does not exceed the lowest delivered price of~~
10 ~~a similar non-Hawaii product by more than:~~
- 11 ~~(A) Three per cent where class I Hawaii products are~~
12 ~~involved;~~
- 13 ~~(B) Five per cent where class II Hawaii products are~~
14 ~~involved; or~~
- 15 ~~(C) Ten per cent where class III Hawaii products are~~
16 ~~involved].~~
- 17 (b) All invitations for bids and requests for proposals
18 shall [~~include a description~~]:
- 19 (1) Include a description of the products that are listed
20 in the Hawaii products list established pursuant to
21 this section, [~~and their established classes,~~] which
22 may be used to complete the scope of work specified in



1 the invitation for bids or request for proposals[~~7~~
2 ~~where the products are~~]; or
3 (2) Allow as part of the offer, self-certification that
4 the Hawaii products qualify for preference;
5 provided that the offer can be evaluated along with any other
6 published criteria in the solicitation, including such
7 considerations as specific nutritional content or its
8 equivalent, timing of delivery, quality or freshness, and past
9 performance, if applicable.

10 All Hawaii products in any bid or request for proposal
11 shall be made available [~~and meet~~] for inspection, or additional
12 information may be requested to verify that the Hawaii product
13 meets the minimum specifications.

14 (c) All persons submitting bids or proposals to claim a
15 Hawaii products preference shall designate in their bids which
16 individual product and its price is to be supplied as a Hawaii
17 product.

18 (d) Where a bid or proposal contains both Hawaii and non-
19 Hawaii products, then for the purpose of selecting the lowest
20 bid or purchase price only, the price bid or offered for a
21 Hawaii product item shall be decreased by subtracting
22 [~~therefrom: three per cent, five per cent, or~~] ten per cent for



1 the class I, [~~class II, or class III~~] of the Hawaii product
2 items bid or offered[~~7~~] or fifteen per cent for the class II,
3 respectively. The lowest total bid or proposal, taking the
4 preference into consideration, shall be awarded the contract
5 unless the bid or offer provides for additional award criteria.
6 The contract amount of any contract awarded, however, shall be
7 the amount of the bid or price offered, exclusive of the
8 preferences.

9 (e) Upon receipt and approval of application for Hawaii
10 products preference, the administrator shall include within the
11 Hawaii products list, the names of producers and manufacturers
12 in the [~~State~~] state who are authorized to supply locally
13 manufactured soil enhancement products to state agencies under
14 subsection [~~(h)~~] (k). The administrator of the state
15 procurement office shall maintain and distribute copies of the
16 list to the purchasing agencies of the various governmental
17 agencies.

18 (f) Any person not on the Hawaii products list desiring a
19 preference pursuant to this section shall certify the Hawaii
20 product when submitting a response to a solicitation; provided
21 that the person certifies under penalty of sanctions that the



1 offered Hawaii product meets the requirements for the
2 preference.

3 The procurement officer may request additional information
4 deemed necessary to qualify a product and shall have sole
5 discretion to determine qualification for the preference.

6 Any offeror whose product is deemed not qualified for the
7 preference may appeal by filing a written request for
8 reexamination of facts with the procurement officer. Upon
9 determining that the offeror is qualified for the preference,
10 the procurement officer shall notify the administrator to place
11 the offeror on the Hawaii products list.

12 (g) Solicitations shall contain a provision notifying
13 offerors who request application of the preference that in the
14 the offeror shall immediately notify the chief procurement
15 officer in writing of any change that materially alters the
16 offeror's ability to supply a Hawaii product and the parties
17 shall enter into discussions to revise or terminate the contract
18 for convenience.

19 (h) Nothing in this section shall limit, restrict or
20 preclude a Hawaii product from any preferences, set-asides, or
21 criteria that may be applied under section 103D-906, and this



1 section shall be implemented to mutually enhance the purposes of
2 both this section and section 103D-906.

3 [~~f~~] (i) This section shall not apply whenever its
4 application will disqualify any governmental agency from
5 receiving federal funds or aid.

6 [~~g~~] (j) Any purchase made or any contract awarded or
7 executed in violation of this section shall be void and no
8 payment shall be made by any purchasing agency on account of the
9 purchase or contract.

10 [~~h~~] (k) For the purposes of this section, "soil
11 enhancement product" means any nonchemical soil preparation,
12 conditioner, or compost mixture designed to supplement aeration
13 or add organic, green waste, or decaying matter to the soil;
14 provided that the term does not include any plant fertilizer
15 intended to stimulate or induce plant growth through chemical
16 means. All state agencies shall include in their solicitations,
17 when required, the soil enhancement products identified on the
18 Hawaii products list pursuant to subsection (e)."

19 SECTION 5. Section 3-120-4, Hawaii Administrative Rules,
20 is amended to read as follows:

21 "**§3-120-4 Procurements exempt from chapter 103D, HRS.** (a)
22 Notwithstanding the intent of chapter 103D, HRS, to require



1 governmental bodies to procure their goods and services through
2 competitive bidding, it is acknowledged that there may be
3 situations where procurement by competitive means is either not
4 practicable or not advantageous to the State.

5 (b) An exhibit A titled "Procurements Exempt From Chapter
6 103D, HRS" dated [~~07/17/08,~~] 07/01/09, is located at the end of
7 this chapter. This exhibit provides a list of goods and
8 services which the procurement policy board has determined to be
9 exempt from chapter 103D, HRS, because although such goods and
10 services may be available from multiple sources, their
11 procurement by competitive means would be either not practicable
12 or not advantageous to the State.

13 (c) Chief procurement officers may request periodic
14 reports from the heads of purchasing agencies of procurements
15 made pursuant to section (b). The heads of purchasing agencies
16 may be required to include in their reports, descriptions of the
17 process or procedures the agency used to select the vendor
18 ensuring maximum fair and open competition whenever practicable.

19 (d) Chief procurement officers may request that additional
20 exemptions be added to the exhibit A.

21 (e) The procurement policy board shall review the exhibit
22 annually or more frequently as needed for amendments.



1 (f) Purchasing agencies making procurements which are
 2 exempt from chapter 103D, HRS, are nevertheless encouraged to
 3 adopt and use provisions of the chapter and its implementing
 4 rules as appropriate; provided that the use of one or more
 5 provisions shall not terminate the exemption and subject the
 6 procurement of the purchasing agency to any other provision of
 7 the chapter.

8 (g) Purchasing agencies shall cite on the purchase order
 9 or on the contract, the authority waiver as "Exempt From Chapter
 10 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number
 11 from exhibit), Hawaii Administrative Rules".

12 "EXHIBIT A"

13 PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS

14 07/01/09

15 The following list of exemptions pursuant to HAR §3-120-4, has
 16 been determined to be exempt from chapter 103D, by the
 17 procurement policy board:

18 Exemption 19 Number	20 Exemption
21 1.	22 Research, reference, and educational materials 23 including books, maps, periodicals, and pamphlets, 24 which are published or available in print, video, 25 audio, magnetic, or electronic form, including web- 26 based databases;



- 1 2. Services of printers, rating agencies, support
2 facility providers, fiscal and paying agents, and
3 registrars for the issuance and sale of the State's or
4 counties' bonds;
5
- 6 3. Services of lecturers, speakers, trainers,
7 facilitators and scriptwriters when the provider
8 possess specialized training methods, techniques or
9 expertise in the subject matter;
10
- 11 4. Services of legal counsel, guardian ad litem,
12 psychiatrists, and psychologists, receivers and
13 masters when required by court order;
14
- 15 ~~[5. Fresh meats and produce;~~
- 16
- 17 ~~6.]~~ 5. Insurance to include insurance broker services;
18
- 19 ~~[7. Animals and plants;]~~
- 20
- 21 ~~[8.]~~ 6. New or used items which are advantageous and available
22 on short notice through an auction, bankruptcy,
23 foreclosure, etc.;
24
- 25 ~~[9.]~~ 7. Food and fodder for animals;
26
- 27 ~~[10.]~~ 8. Facility costs for conferences, meetings, and training
28 sessions;
29
- 30 ~~[11.]~~ 9. Advertisements in specialized publications, such as in
31 ethnic or foreign language publications, trade
32 publications, professional publications;
33
- 34 ~~[12.]~~ 10. Arbitrator and mediator services;
35
- 36 ~~[13.]~~ 11. Interpreter services;
37
- 38 ~~[14.]~~ 12. Procurement of repair services when dismantling is
39 required to assess the extent of repairs;
40
- 41 ~~[15.]~~ 13. Burial services consisting of mortuary, crematory,
42 cemetery, and other essential services for deceased
43 indigent persons or unclaimed corpses;



- 1
- 2 [~~16.~~] 14. Radio and television airtime when selection of station
- 3 is based on the targeted audience (i.e. ethnic or age
- 4 group, gender, etc);
- 5
- 6 [~~17.~~] 15. Subscription costs and registration or workshop fees
- 7 for conferences or training; and
- 8
- 9 [~~18.~~] 16. Court reporter services.
- 10

11 SECTION 6. After the effective date of this Act, any

12 provision of the Hawaii Administrative Rules authorized by

13 section 103D-102(b)(4)(L), Hawaii Revised Statutes, may be

14 amended through rulemaking under chapter 91, Hawaii Revised

15 Statutes, including any provision modified by this Act.

16 SECTION 7. This Act does not affect rights and duties that

17 matured, penalties that were incurred, and proceedings that were

18 begun, before its effective date.

19 SECTION 8. Statutory and administrative rule material to

20 be repealed is bracketed and stricken. New statutory and

21 administrative rule material is underscored.

22 SECTION 9. This Act shall take effect on July 1, 2009.



Report Title:

Procurement; Hawaii Products; Preference

Description:

Allows for persons desiring a Hawaii product preference to self-certify their Hawaii products when submitting bids as an alternative to registration on the Hawaii products list. Amends the definition of a Hawaii product by revising the product classes. Revises administrative rules relating to exemptions from procurement. (HB988 HD1)

