
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 from 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 chapter 103D,
3 Hawaii Revised Statutes, including the preferences, are "fresh
4 meats and produce" and "animals and plants."

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

15 The legislature recognizes that direct intervention into
16 the administrative rules is an unusual procedure. However,
17 given the current uncertainties in these fiscal times, and the
18 length of time that amending administrative rules can take to
19 comply with chapter 91, Hawaii Revised Statutes, the legislature
20 finds that the exemptions and procedures in the administrative
21 rules are inconsistent with the purpose, letter, and spirit of
22 sections 103D-1001 through 103D-1012, Hawaii Revised Statutes.



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

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

8 **"§103D-1002.5 Failure to adequately verify, deliver, or**
9 **supply Hawaii products. Any contract for Hawaii products**
10 **performed in violation of the provisions of section 103D-1002**
11 **shall be voidable and the offeror shall be referred for**
12 **debarment or suspension proceedings under section 103D-702."**

13 SECTION 3. Section 103D-702, Hawaii Revised Statutes, is
14 amended by amending subsection (b) to read as follows:

15 "(b) The causes for debarment or suspension include the
16 following:

- 17 (1) Conviction for commission of a criminal offense as an
18 incident to obtaining or attempting to obtain a public
19 or private contract or subcontract, or in the
20 performance of the contract or subcontract;
- 21 (2) Conviction under state or federal statutes relating to
22 embezzlement, theft, forgery, bribery, falsification



1 or destruction of records, receiving stolen property,
2 or any other offense indicating a lack of business
3 integrity or business honesty which currently,
4 seriously, and directly affects responsibility as a
5 contractor;

6 (3) Failure to adequately verify, deliver, or supply
7 Hawaii products, as required by section _____ ;

8 [~~3~~] (4) Conviction under state or federal antitrust
9 statutes arising out of the submission of bids or
10 proposals;

11 [~~4~~] (5) Violation of contract provisions, as set forth
12 below, of a character that is regarded by the chief
13 procurement officer to be so serious as to justify
14 debarment action:

15 (A) Deliberate failure without good cause to perform
16 in accordance with the specifications or within
17 the time limit provided in the contract; or

18 (B) A recent record of failure to perform or of
19 unsatisfactory performance in accordance with the
20 terms of one or more contracts; provided that
21 failure to perform or unsatisfactory performance
22 caused by acts beyond the control of the



1 contractor shall not be considered to be a basis
2 for debarment;

3 [~~5~~] (6) Any other cause the chief procurement officer
4 determines to be so serious and compelling as to
5 affect responsibility as a contractor, including
6 debarment by another governmental entity for any cause
7 listed in the rules of the policy board; and

8 [~~6~~] (7) Violation of the ethical standards set forth in
9 chapter 84 and its implementing rules, or the charters
10 and ordinances of the several counties and their
11 implementing rules."

12 SECTION 4. Section 103D-1001, Hawaii Revised Statutes, is
13 amended as follows:

14 1. By adding a new definition to be appropriately inserted
15 and to read:

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

19 (1) The cost to mine, excavate, produce, manufacture,
20 raise, or grow the materials in Hawaii;

21 (2) The added value of that portion of the cost of
22 imported materials that is incurred after landing in



1 Hawaii, including other articles, materials, and
2 supplies added to the imported materials;

3 (3) The cost of labor, variable overhead, utilities, and
4 services incurred in the production and manufacturing
5 of materials or products in the state; and

6 (4) Fixed overhead cost and amortization or depreciation
7 cost, if any, for buildings, tools, and equipment
8 situated and located in the state and used in the
9 production or manufacturing of a product."

10 2. By amending the definition of "Hawaii products" to read:

11 ""Hawaii products" means products that are mined,
12 excavated, produced, manufactured, raised, or grown in the
13 [State] state and where the [input constitutes no less than
14 ~~twenty-five]~~ cost of the Hawaii input into the product exceeds
15 fifty per cent of the [manufactured] total cost[+] of the
16 product; provided that:

17 ~~[-(1) Where the value of the input constitutes twenty-five~~
18 ~~per cent or more, but less than fifty per cent, of the~~
19 ~~manufactured cost, the product shall be classified as~~
20 ~~class I;~~

21 ~~-(2)]~~ (1) Where the value of the Hawaii input [~~constitutes]~~
22 exceeds fifty per cent [or more, but less than



1 ~~seventy-five per cent,~~] of the [manufactured] total
2 cost, the product shall be classified as class [~~II;~~]
3 I; and

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

7 (2) Where any agricultural, aquacultural, horticultural,
8 silvicultural, floricultural, or livestock product is
9 raised, grown, or harvested in the state, the product
10 shall be classified as class II."

11 SECTION 5. Section 103D-1002, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "**§103D-1002 Hawaii products.** (a) A purchasing agency
14 shall review all specifications in a bid or proposal for the
15 purchase [~~from the~~] of Hawaii products [~~list~~] where these
16 products are available [~~;~~ ~~provided that the products:~~

17 ~~(1) Meet the minimum specifications and the selling price~~
18 ~~f.o.b. jobsite;~~

19 ~~(2) Unloaded including applicable general excise tax and~~
20 ~~use tax does not exceed the lowest delivered price in~~
21 ~~Hawaii f.o.b. jobsite; and~~



1 ~~(3) Unloaded, including applicable general excise tax and~~
2 ~~use tax, does not exceed the lowest delivered price of~~
3 ~~a similar non-Hawaii product by more than:~~

4 ~~(A) Three per cent where class I Hawaii products are~~
5 ~~involved;~~

6 ~~(B) Five per cent where class II Hawaii products are~~
7 ~~involved; or~~

8 ~~(C) Ten per cent where class III Hawaii products are~~
9 ~~involved].~~

10 (b) All invitations for bids and requests for proposals
11 shall ~~[include a description]:~~

12 (1) Include a description of the products that are listed
13 in the Hawaii products list established pursuant to
14 this section, ~~[and their established classes,]~~ which
15 may be used to complete the scope of work specified in
16 the invitation for bids or request for proposals~~[~~
17 ~~where the products are available and meet the minimum~~
18 ~~specifications.];~~ or

19 (2) Allow as part of the offer, self-certification that
20 the Hawaii products qualify for preference;
21 provided that the offer may be evaluated along with any other
22 published criteria in the solicitation, including such



1 considerations as specific nutritional content or its
2 equivalent, timing of delivery, quality, freshness, and past
3 performance, if applicable.

4 All Hawaii products in any bid or request for proposal
5 shall be made available for inspection, or additional
6 information may be requested to verify that the Hawaii product
7 meets the minimum specifications.

8 (c) All persons submitting bids or proposals to claim a
9 Hawaii products preference shall designate in their bids which
10 individual product and its price is to be supplied as a Hawaii
11 product.

12 (d) Where a bid or proposal contains both Hawaii and non-
13 Hawaii products, then for the purpose of selecting the lowest
14 bid or purchase price only, the price bid or offered for a
15 Hawaii product item shall be decreased by subtracting
16 [~~therefrom: three per cent, five per cent, or~~] ten per cent for
17 the class I [~~, class II, or class III~~] of the Hawaii product
18 items bid or offered [~~]~~ or fifteen per cent for the class II,
19 respectively. The lowest total bid or proposal, taking the
20 preference into consideration, shall be awarded the contract
21 unless the bid or offer provides for additional award criteria.
22 The contract amount of any contract awarded, however, shall be



1 the amount of the bid or price offered, exclusive of the
2 preferences.

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

12 (f) Any person not on the Hawaii products list desiring a
13 preference pursuant to this section shall certify the Hawaii
14 product when submitting a response to a solicitation; provided
15 that the person certifies under penalty of sanctions that the
16 offered Hawaii product meets the requirements for the
17 preference.

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

21 Any offeror whose product is deemed not qualified for the
22 preference may appeal by filing a written request for



1 reexamination of facts with the procurement officer. Upon
2 determining that the offeror is qualified for the preference,
3 the procurement officer shall notify the administrator to place
4 the offeror on the Hawaii products list.

5 (g) Solicitations shall contain a provision notifying
6 offerors who request application of the preference that the
7 offeror shall immediately notify the chief procurement officer
8 in writing of any change that materially alters the offeror's
9 ability to supply a Hawaii product and the parties shall enter
10 into discussions to revise or terminate the contract for
11 convenience.

12 (h) Nothing in this section shall limit, restrict, or
13 preclude a Hawaii product from any preferences, set-asides, or
14 criteria that may be applied under section 103D-906, and this
15 section shall be implemented to mutually enhance the purposes of
16 both this section and section 103D-906.

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

20 [~~g~~] (j) Any purchase made or any contract awarded or
21 executed in violation of this section shall be void and no



1 payment shall be made by any purchasing agency on account of the
2 purchase or contract.

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

12 SECTION 6. Chapter 3-120, Hawaii Administrative Rules, is
13 amended by amending Exhibit "A" to read:

14 ""EXHIBIT A"

15 HAR Chapter 3-120

16 PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS

17 [~~07/17/08~~] 07/01/09

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

21	Exemption	
22	Number	<u>Exemption</u>
23		



- 1 1. Research, reference, and educational materials
2 including books, maps, periodicals, and pamphlets,
3 which are published or available in print, video,
4 audio, magnetic, or electronic form, including web-
5 based databases;
6
- 7 2. Services of printers, rating agencies, support
8 facility providers, fiscal and paying agents, and
9 registrars for the issuance and sale of the State's or
10 counties' bonds;
11
- 12 3. Services of lecturers, speakers, trainers,
13 facilitators and scriptwriters when the provider
14 possess specialized training methods, techniques or
15 expertise in the subject matter;
16
- 17 4. Services of legal counsel, guardian ad litem,
18 psychiatrists, and psychologists, receivers and
19 masters when required by court order;
20
- 21 ~~[5.] Fresh meats and produce;~~
22
- 23 ~~6.]~~ 5. Insurance to include insurance broker services;
24
- 25 ~~[7.] Animals and plants;~~
26
- 27 ~~8.]~~ 6. New or used items which are advantageous and available
28 on short notice through an auction, bankruptcy,
29 foreclosure, etc.;
30
- 31 ~~[9.]~~ 7. Food and fodder for animals;
32
- 33 ~~[10.]~~ 8. Facility costs for conferences, meetings, and training
34 sessions;
35
- 36 ~~[11.]~~ 9. Advertisements in specialized publications, such as in
37 ethnic or foreign language publications, trade
38 publications, or professional publications;
39
- 40 ~~[12.]~~ 10. Arbitrator and mediator services;
41
- 42 ~~[13.]~~ 11. Interpreter services;
43



- 1 [14.] 12. Procurement of repair services when dismantling is
2 required to assess the extent of repairs;
3
4 [15.] 13. Burial services consisting of mortuary, crematory,
5 cemetery, and other essential services for deceased
6 indigent persons or unclaimed corpses;
7
8 [16.] 14. Radio and television airtime when selection of station
9 is based on the targeted audience (i.e. ethnic or age
10 group, gender, etc);
11
12 [17.] 15. Subscription costs and registration or workshop fees
13 for conferences or training; and
14
15 [18.] 16. Court reporter services."
16

17 SECTION 7. Section 3-120-4, Hawaii Administrative Rules,
18 is amended to read as follows:

19 "**§3-120-4 Procurements exempt from chapter 103D, HRS.** (a)

20 Notwithstanding the intent of chapter 103D, HRS, to require
21 governmental bodies to procure their goods and services through
22 competitive bidding, it is acknowledged that there may be
23 situations where procurement by competitive means is either not
24 practicable or not advantageous to the State.

25 (b) An exhibit A titled "Procurements Exempt From Chapter
26 103D, HRS" dated [~~07/17/08,~~] 07/01/09, is located at the end of
27 this chapter. This exhibit provides a list of goods and
28 services which the procurement policy board has determined to be
29 exempt from chapter 103D, HRS, because although such goods and



1 services may be available from multiple sources, their
2 procurement by competitive means would be either not practicable
3 or not advantageous to the State.

4 (c) Chief procurement officers may request periodic
5 reports from the heads of purchasing agencies of procurements
6 made pursuant to subsection (b). The heads of purchasing
7 agencies may be required to include in their reports,
8 descriptions of the process or procedures the agency used to
9 select the vendor ensuring maximum fair and open competition
10 whenever practicable.

11 (d) Chief procurement officers may request that additional
12 exemptions be added to [~~the~~] Exhibit A.

13 (e) The procurement policy board shall review [~~the~~]
14 Exhibit A annually or more frequently as needed for amendments.

15 (f) Purchasing agencies making procurements which are
16 exempt from chapter 103D, HRS, are nevertheless encouraged to
17 adopt and use provisions of the chapter and its implementing
18 rules as appropriate; provided that the use of one or more
19 provisions shall not terminate the exemption and subject the
20 procurement of the purchasing agency to any other provision of
21 the chapter.



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

5 SECTION 8. After the effective date of this Act, any
6 provision of the Hawaii Administrative Rules authorized by
7 section 103D-102(b)(4)(L), Hawaii Revised Statutes, may be
8 amended through rulemaking under chapter 91, Hawaii Revised
9 Statutes, including any provision modified by this Act.

10 SECTION 9. This Act does not affect rights and duties that
11 matured, penalties that were incurred, and proceedings that were
12 begun, before its effective date.

13 SECTION 10. Statutory and administrative rule material to
14 be repealed is bracketed and stricken. New statutory and
15 administrative rule material is underscored.

16 SECTION 11. This Act shall take effect on July 1, 2020.



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. Effective 07/01/2020. (HB988 HD2)

