
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 This practice is not confined to, or the result of, private
6 sector practices alone. The State of Hawaii and its political
7 subdivisions procure large quantities of agricultural products
8 from outside the State of Hawaii, contrary to the intent of
9 state procurement laws.

10 In 1994, Act 186 created a preference for the purchase of
11 Hawaii products in the Hawaii state procurement code
12 (procurement code), which was codified as part X of chapter
13 103D, Hawaii Revised Statutes, and was intended to provide
14 Hawaii businesses with a preference similar to the federal
15 government's "Buy American Act" under Federal Acquisition
16 Regulation 52.225-1.

17 However, undermining and eviscerating the preference
18 program are administrative rules that exempt certain products



1 from the procurement code. Chapter 3-120, Hawaii Administrative
2 Rules, "Exhibit A," specifically exempts from the procurement
3 code, and from the Hawaii products preference, certain products
4 such as "fresh meats and produce" and "animals and plants."

5 The legislature recognizes that direct intervention into
6 the administrative rules is an unusual procedure. However,
7 given current fiscal uncertainties, and the lengthy time
8 required to amend administrative rules in compliance with
9 chapter 91, Hawaii Revised Statutes, the legislature in this
10 Act, repeals certain sections of the administrative rules that
11 are contrary to the purpose, letter, and spirit of the Hawaii
12 preference in the procurement code.

13 In addition, sections 3-124-1 through 3-124-8, Hawaii
14 Administrative Rules, establish a cumbersome, lengthy, and
15 complex procedure requiring Hawaii product offerors to be placed
16 on a pre-approved list. The procedure does not allow Hawaii
17 businesses to respond and submit proposals in a timely fashion,
18 and does not reflect the need for flexibility in an ever-
19 changing marketplace. The legislature finds that offerors
20 should be allowed to "self-certify" that their products meet the
21 criteria for the Hawaii products preference, and should also be



1 subject to rigorous penalties if they do not meet those
2 criteria.

3 The purpose of this Act is to strengthen the Hawaii
4 products preference in the procurement code by:

- 5 (1) Allowing offerors to self-certify that their products
6 meet the criteria for the Hawaii preference, and
7 making offerors who self-certify subject to suspension
8 and debarment if they fail to deliver Hawaii products;
- 9 (2) Increasing from twenty-five per cent to fifty per
10 cent, the amount of Hawaii input that qualifies a
11 product as a Hawaii product, and establishing two,
12 instead of three Hawaii product classes;
- 13 (3) Increasing the preference for Hawaii products by
14 applying a ten per cent decrease in a bid or proposal
15 for class I Hawaii products, and a fifteen per cent
16 decrease for class II Hawaii products; and
- 17 (4) Removing from the Hawaii Administrative Rules, certain
18 agricultural product procurement code exemptions.

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



1 "§103D-1002.5 Failure to adequately verify, deliver, or
2 supply Hawaii products. Any contract for Hawaii products
3 performed in violation of section 103D-1002 shall be voidable
4 and the offeror shall be referred for debarment or suspension
5 proceedings under section 103D-702."

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

8 "(b) The causes for debarment or suspension include the
9 following:

10 (1) Conviction for commission of a criminal offense as an
11 incident to obtaining or attempting to obtain a public
12 or private contract or subcontract, or in the
13 performance of the contract or subcontract;

14 (2) Conviction under state or federal statutes relating to
15 embezzlement, theft, forgery, bribery, falsification
16 or destruction of records, receiving stolen property,
17 or any other offense indicating a lack of business
18 integrity or business honesty which currently,
19 seriously, and directly affects responsibility as a
20 contractor;

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



- 1 [~~3~~] (4) Conviction under state or federal antitrust
2 statutes arising out of the submission of bids or
3 proposals;
- 4 [~~4~~] (5) Violation of contract provisions, as set forth
5 below, of a character that is regarded by the chief
6 procurement officer to be so serious as to justify
7 debarment action:
- 8 (A) Deliberate failure without good cause to perform
9 in accordance with the specifications or within
10 the time limit provided in the contract; or
- 11 (B) A recent record of failure to perform or of
12 unsatisfactory performance in accordance with the
13 terms of one or more contracts; provided that
14 failure to perform or unsatisfactory performance
15 caused by acts beyond the control of the
16 contractor shall not be considered to be a basis
17 for debarment;
- 18 [~~5~~] (6) Any other cause the chief procurement officer
19 determines to be so serious and compelling as to
20 affect responsibility as a contractor, including
21 debarment by another governmental entity for any cause
22 listed in the rules of the policy board; and



1 [~~6~~] (7) Violation of the ethical standards set forth in
2 chapter 84 and its implementing rules, or the charters
3 and ordinances of the several counties and their
4 implementing rules."

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

7 1. By adding a new definition to be appropriately inserted
8 and to read:

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

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

14 (2) The value added to the cost of imported materials that
15 is incurred after the materials land in Hawaii,
16 including the cost of adding other articles,
17 materials, and supplies to the imported materials;

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

21 (4) Fixed overhead cost and amortization or depreciation
22 cost, if any, for buildings, tools, and equipment



1 situated and located in the state and used in the
2 production or manufacturing of a product."

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

4 "Hawaii products" means products that are mined,
5 excavated, produced, manufactured, raised, or grown in the
6 [State] state and where the [~~input constitutes no less than~~
7 ~~twenty five~~] cost of the Hawaii input into the product exceeds
8 fifty per cent of the [manufactured] total cost[+] of the
9 product; provided that:

10 [~~(1) Where the value of the input constitutes twenty five~~
11 ~~per cent or more, but less than fifty per cent, of the~~
12 ~~manufactured cost, the product shall be classified as~~
13 ~~class I;~~

14 ~~(2)]~~ (1) Where the value of the Hawaii input [~~constitutes]~~
15 exceeds fifty per cent [~~or more, but less than~~
16 ~~seventy five per cent,~~] of the [~~manufactured]~~ total
17 cost, the product shall be classified as class [~~II~~]
18 I; and

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



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

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

7 "**§103D-1002 Hawaii products.** (a) A purchasing agency
8 shall review all specifications in a bid or proposal for the
9 purchase [~~from the~~] of Hawaii products [~~list~~], where these
10 products are available[~~;~~ ~~provided that the products:~~

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

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

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

19 ~~(A) Three per cent where class I Hawaii products are~~
20 ~~involved;~~

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



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

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

5 (1) Include a description of the products that are listed
6 in the Hawaii products list established pursuant to
7 this section, ~~[and their established classes,]~~ which
8 may be used to complete the scope of work specified in
9 the invitation for bids or request for proposals~~[~~
10 ~~where the products are available and meet the minimum~~
11 ~~specifications.];~~ or

12 (2) Allow as part of the offer, self-certification that
13 the Hawaii products qualify for preference;
14 provided that the offer may be evaluated along with any other
15 published criteria in the solicitation, including such
16 considerations as specific nutritional content or its
17 equivalent, timing of delivery, quality, freshness, and past
18 performance, if applicable.

19 All Hawaii products in any bid or request for proposal
20 shall be made available for inspection, or additional
21 information may be requested to verify that the Hawaii product
22 meets the minimum specifications.



1 (c) All persons submitting bids or proposals to claim a
2 Hawaii products preference shall designate in their bids which
3 individual product and its price is to be supplied as a Hawaii
4 product.

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

18 (e) Upon receipt and approval of the application for
19 Hawaii products preference, the administrator shall include
20 within the Hawaii products list, the names of producers and
21 manufacturers in the [~~State~~] state who are authorized to supply
22 locally manufactured soil enhancement products to state agencies



1 under subsection [~~(h)~~] (k). The administrator of the state
2 procurement office shall maintain and distribute copies of the
3 list to the purchasing agencies of the various governmental
4 agencies.

5 (f) Any person not on the Hawaii products list desiring a
6 preference pursuant to this section shall certify the Hawaii
7 product when submitting a response to a solicitation; provided
8 that the person certifies under penalty of sanctions that the
9 offered Hawaii product meets the requirements for the
10 preference.

11 The procurement officer may request any additional
12 information deemed necessary to qualify a product and shall have
13 sole discretion to determine qualification for the preference.

14 Any offeror whose product is deemed not qualified for the
15 preference may appeal by filing a written request for
16 reexamination of facts with the procurement officer. Upon
17 determining that the offeror is qualified for the preference,
18 the procurement officer shall notify the administrator and the
19 offeror shall be placed on the Hawaii products list.

20 (g) Solicitations shall contain a provision notifying
21 offerors who request application of the preference that in the
22 event of any change that materially alters the offeror's ability



1 to supply a Hawaii product, the offeror shall immediately notify
2 the chief procurement officer in writing, and the parties shall
3 enter into discussions to revise or terminate the contract for
4 convenience.

5 (h) Nothing in this section shall limit, restrict, or
6 preclude a Hawaii product from any preferences, set-asides, or
7 criteria that may be applied under section 103D-906, and this
8 section shall be implemented to mutually enhance achievement of
9 the purposes of both this section and section 103D-906.

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

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

17 [~~h~~] (k) For the purposes of this section, "soil
18 enhancement product" means any nonchemical soil preparation,
19 conditioner, or compost mixture designed to supplement aeration
20 or add organic, green waste, or decaying matter to the soil;
21 provided that the term does not include any plant fertilizer
22 intended to stimulate or induce plant growth through chemical



1 means. All state agencies shall include in their solicitations,
2 when required, the soil enhancement products identified on the
3 Hawaii products list pursuant to subsection (e)."

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

6 "EXHIBIT A"

7 HAR Chapter 3-120

8 PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS

9 [~~07/17/08~~] 07/01/09

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

13 Exemption 14 <u>Number</u>	15 <u>Exemption</u>
16 1.	17 Research, reference, and educational materials 18 including books, maps, periodicals, and pamphlets, 19 which are published or available in print, video, 20 audio, magnetic, or electronic form, including web- 21 based databases;
22 2.	23 Services of printers, rating agencies, support 24 facility providers, fiscal and paying agents, and 25 registrars for the issuance and sale of the State's or 26 counties' bonds;
27 3.	28 Services of lecturers, speakers, trainers, 29 facilitators and scriptwriters when the provider 30 possess specialized training methods, techniques or 31 expertise in the subject matter;



- 1 4. Services of legal counsel, guardian ad litem,
2 psychiatrists, and psychologists, receivers and
3 masters when required by court order;
4
- 5 ~~[5.]~~ ~~Fresh meats and produce;~~
6
- 7 ~~6.]~~ 5. Insurance to include insurance broker services;
8
- 9 ~~[7.]~~ ~~Animals and plants;~~
10
- 11 ~~8.]~~ 6. New or used items which are advantageous and available
12 on short notice through an auction, bankruptcy,
13 foreclosure, etc.;
14
- 15 ~~[9.]~~ 7. Food and fodder for animals;
16
- 17 ~~[10.]~~ 8. Facility costs for conferences, meetings, and training
18 sessions;
19
- 20 ~~[11.]~~ 9. Advertisements in specialized publications, such as in
21 ethnic or foreign language publications, trade
22 publications, or professional publications;
23
- 24 ~~[12.]~~ 10. Arbitrator and mediator services;
25
- 26 ~~[13.]~~ 11. Interpreter services;
27
- 28 ~~[14.]~~ 12. Procurement of repair services when dismantling is
29 required to assess the extent of repairs;
30
- 31 ~~[15.]~~ 13. Burial services consisting of mortuary, crematory,
32 cemetery, and other essential services for deceased
33 indigent persons or unclaimed corpses;
34
- 35 ~~[16.]~~ 14. Radio and television airtime when selection of station
36 is based on the targeted audience (i.e. ethnic or age
37 group, gender, etc);
38
- 39 ~~[17.]~~ 15. Subscription costs and registration or workshop fees
40 for conferences or training; and
41
- 42 ~~[18.]~~ 16. Court reporter services."
43



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

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

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

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

17 (c) Chief procurement officers may request periodic
18 reports from the heads of purchasing agencies of procurements
19 made pursuant to subsection (b). The heads of purchasing
20 agencies may be required to include in their reports,
21 descriptions of the process or procedures the agency used to



1 select the vendor ensuring maximum fair and open competition
2 whenever practicable.

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

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

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

14 (g) Purchasing agencies shall cite on the purchase order
15 or on the contract, the authority waiver as "Exempt From Chapter
16 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number
17 from exhibit), Hawaii Administrative Rules".

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



1 SECTION 9. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun, before its effective date.

4 SECTION 10. Statutory and administrative rule material to
5 be repealed is bracketed and stricken. New statutory and
6 administrative rule material is underscored.

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



Report Title:

Procurement; Hawaii Products; Preference

Description:

Allows offerors to self-certify their Hawaii products as an alternative to registration on the Hawaii products list. Creates two Hawaii product classes and increases the preference given Hawaii products. Removes procurement code exemptions for certain agricultural products from the administrative rules.
(SB506 HD1)

