
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 conducted on a public
6 commercial level. Even the State of Hawaii and its political
7 subdivisions, as large purchasers and consumers of agricultural
8 products, procure agricultural products from outside the State
9 of Hawaii. However, this is contrary to the intent of the
10 procurement laws.

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

17 However, Exhibit A of chapter 3-120, Hawaii Administrative
18 Rules, undermines the foregoing preference program by exempting

1 "fresh meats and produce" and "animals and plants" from
2 application of the procurement code.

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

13 The legislature recognizes that direct intervention into
14 the administrative rules is an unusual procedure. However,
15 given the current uncertainties in these fiscal times, and the
16 length of time that amending administrative rules can take to
17 comply with chapter 91, Hawaii Revised Statutes, the legislature
18 finds that the exemptions and procedures in the administrative
19 rules are inconsistent with the purpose, letter, and spirit of
20 sections 103D-1001 through 103D-1012, Hawaii Revised Statutes.
21 Therefore, the legislature takes it upon itself to revise and
22 simplify sections 103D-1001 through 103D-1002, Hawaii Revised

1 Statutes, and to amend and automatically repeal certain sections
2 of the administrative rules.

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

6 "§103D- Failure to adequately verify, deliver, or supply
7 Hawaii products. Any contract for Hawaii products performed in
8 violation of the provisions of section 103D-1002 shall be
9 voidable and the offeror shall be referred for debarment or
10 suspension proceedings under section 103D-702."

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

13 "(b) The causes for debarment or suspension include the
14 following:

15 (1) Conviction for commission of a criminal offense as an
16 incident to obtaining or attempting to obtain a public
17 or private contract or subcontract, or in the
18 performance of the contract or subcontract;

19 (2) Conviction under state or federal statutes relating to
20 embezzlement, theft, forgery, bribery, falsification
21 or destruction of records, receiving stolen property,
22 or any other offense indicating a lack of business

1 integrity or business honesty which currently,
2 seriously, and directly affects responsibility as a
3 contractor;

4 (3) Failure to adequately verify, deliver, or supply
5 Hawaii products, as required by section 103D- ;

6 [~~3~~] (4) Conviction under state or federal antitrust
7 statutes arising out of the submission of bids or
8 proposals;

9 [~~4~~] (5) Violation of contract provisions, as set forth
10 below, of a character that is regarded by the chief
11 procurement officer to be so serious as to justify
12 debarment action:

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

16 (B) A recent record of failure to perform or of
17 unsatisfactory performance in accordance with the
18 terms of one or more contracts; provided that
19 failure to perform or unsatisfactory performance
20 caused by acts beyond the control of the
21 contractor shall not be considered to be a basis
22 for debarment;

1 [~~(5)~~] (6) Any other cause the chief procurement officer
2 determines to be so serious and compelling as to
3 affect responsibility as a contractor, including
4 debarment by another governmental entity for any cause
5 listed in the rules of the policy board; and

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

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

12 1. By adding a new definition to be appropriately inserted
13 and to read:

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

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

19 (2) The added value of that portion of the cost of
20 imported materials that is incurred after landing in
21 Hawaii, including other articles, materials, and
22 supplies added to the imported materials;

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

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

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

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

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

19 ~~(2)]~~ (1) Where the value of the Hawaii input [~~constitutes~~]
20 exceeds fifty per cent [~~or more, but less than~~
21 ~~seventy-five per cent,~~] of the [~~manufactured~~] total

1 cost, the product shall be classified as class [~~II~~]

2 I; and

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

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

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

12 "**§103D-1002 Hawaii products.** (a) A purchasing agency
13 shall review all specifications in a bid or proposal for the
14 purchase [~~from the~~] of Hawaii products [~~list~~] where these
15 products are available[~~; provided that the products:~~

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

18 ~~(2) Unloaded including applicable general excise tax and~~
19 ~~use tax does not exceed the lowest delivered price in~~
20 ~~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~~] Hawaii product items bid
18 or offered [~~7~~] or fifteen per cent for class II Hawaii product
19 items bid or offered, respectively. The lowest total bid or
20 proposal, taking the preference into consideration, shall be
21 awarded the contract unless the bid or offer provides for
22 additional award criteria. The contract amount of any contract

1 awarded, however, shall be the amount of the bid or price
2 offered, exclusive of the 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,
19 [~~has~~] have been determined to be exempt from chapter 103D by the
20 procurement policy board:

21	Exemption	
22	<u>Number</u>	<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
28 available on short notice through an auction,
29 bankruptcy, foreclosure, etc.;
30
- 31 ~~[9.]~~ 7. Food and fodder for animals;
32
- 33 ~~[10.]~~ 8. Facility costs for conferences, meetings, and
34 training sessions;
35
- 36 ~~[11.]~~ 9. Advertisements in specialized publications, such
37 as in 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
- 2 is required to assess the extent of repairs;
- 3
- 4 [~~15.~~] 13. Burial services consisting of mortuary,
- 5 crematory, cemetery, and other essential services for
- 6 deceased indigent persons or unclaimed corpses;
- 7
- 8 [~~16.~~] 14. Radio and television airtime when selection of
- 9 station is based on the targeted audience (i.e. ethnic
- 10 or age group, gender, etc);
- 11
- 12 [~~17.~~] 15. Subscription costs and registration or workshop
- 13 fees 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 by amending subsection (b) to read:

19 "(b) An exhibit A titled "Procurements Exempt From Chapter
 20 103D, HRS" dated [~~07/17/08,~~] 07/01/09, is located at the end of
 21 this chapter. This exhibit provides a list of goods and
 22 services which the procurement policy board has determined to be
 23 exempt from chapter 103D, HRS, because although such goods and
 24 services may be available from multiple sources, their
 25 procurement by competitive means would be either not practicable
 26 or not advantageous to the State."

27 SECTION 8. After the effective date of this Act, any
 28 provision of the Hawaii Administrative Rules authorized by
 29 section 103D-102(b)(4)(L), Hawaii Revised Statutes, may be

1 amended through rulemaking under chapter 91, Hawaii Revised
2 Statutes, including any provision modified by this Act.

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

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

9 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. (SD1)