

JAN 20 2010

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

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

4 "§103- Public works construction; preferences. (a) A
5 governmental body, as defined in section 103D-104, that, under
6 this chapter or chapter 103D, enters into a public works
7 contract having an estimated value of not less than \$250,000,
8 shall decrease the bid amount of a bidder by five per cent for
9 each preference under paragraphs (1) to (4) for which the bidder
10 meets the criteria specified:

11 (1) A documented history indicating zero incidences of
12 non-compliance by the contractor, subcontractor, or
13 the executive management of the contractor or
14 subcontractor, with applicable federal, state, and
15 local labor, wage, health, safety, and environmental
16 protection laws;



1 (2) A documented history indicating zero incidences of
2 non-compliance by the contractor, subcontractor, or
3 the executive management of the contractor or
4 subcontractor, with government agencies, unions, and
5 other agencies or bodies that perform regular
6 inspections of construction sites and relevant
7 records;

8 (3) A record of zero outstanding judgments or liens
9 against the contractor, subcontractor, or the
10 executive management of the contractor or
11 subcontractor; and

12 (4) An audited statement indicating that no project
13 revenues derived from government tax revenues will be
14 exported out-of-state through foreign ownership or
15 employees of the contractor or subcontractor.

16 (b) Should more than one preference allowed by statute
17 apply, the evaluated price shall be based on the application of
18 all applicable preferences. The sum of the preferences shall be
19 subtracted from the original contract price.

20 (c) The lowest total bid, taking into consideration all
21 applicable preferences in this section and the preference
22 awarded for participation in an apprenticeship program under



1 Act 17, Special Session Laws of Hawaii 2009, shall be awarded
2 the contract unless the invitation for bids provides for
3 additional award criteria. The contract amount awarded shall be
4 the amount of the original contract price offered, exclusive of
5 any applied preference.

6 (d) At the time of submission of a competitive sealed bid
7 or a competitive sealed proposal by a bidder, the bidder shall
8 furnish written proof of eligibility for each claimed preference
9 and, if awarded the contract, shall continue to certify monthly
10 in writing that the bidder or offeror remains eligible for each
11 claimed preference for the entire duration of the bidder's work
12 on the project. This subsection shall be deemed to be
13 incorporated into a public works contract.

14 (e) A bidder who is awarded a contract shall be subject to
15 the following sanctions if, after commencement of work, the
16 bidder at any time during the construction is no longer eligible
17 for any claimed preference:

18 (1) Temporary or permanent cessation of work on the
19 project, without recourse to breach of contract claims
20 by the bidder; provided that the governmental body
21 that entered into the contract shall be entitled to



1 restitution for nonperformance or liquidated damages,
2 as appropriate; or
3 (2) Proceedings to debar or suspend under section
4 103D-702.

5 (f) For purposes of this section, "bidder" means an entity
6 that submits a competitive sealed bid under section 103D-302 or
7 submits a competitive sealed proposal under section 103D-303."

8 SECTION 2. The Hawaii Revised Statutes is amended by
9 adding a new part to chapter 103D to be appropriately designated
10 and to read as follows:

11 **"PART . RESPONSIBLE CONSTRUCTION CONTRACTOR LAW**

12 **§103D-A Applicability.** (a) This part shall apply to
13 public works contracts under chapter 103 and to procurements for
14 construction under this chapter, if the general contract amount
15 is \$250,000 or more, and to any subcontract of \$50,000 or more
16 in connection with any general contract. The requirements of
17 this part shall be incorporated by reference into every
18 invitation for bids to which this part is applicable.

19 (b) This part shall not apply to employees covered by a
20 collective bargaining agreement under chapter 89 if the
21 applicability of this part is expressly waived in the collective
22 bargaining agreement in clear and unambiguous terms.



1 §103D-B Prerequisites for award of contract. (a) A
2 contractor who submits a bid for a contract for construction
3 shall show proof of compliance with subsection (c) to the
4 comptroller or county counterpart for contracts under chapter
5 103, or to the procurement officer for contracts under this
6 chapter, as applicable, as a prerequisite to being awarded a
7 construction contract; provided that the requirements of this
8 subsection shall be deemed incorporated by reference in any
9 contract between the contractor and subcontractor.

10 (b) A subcontractor who subcontracts with a contractor
11 under subsection (a), for a subcontract for construction shall
12 show proof of compliance with subsection (c) to the comptroller
13 or county counterpart for contracts under chapter 103 or to the
14 procurement officer for contracts under this chapter, as a
15 prerequisite to being awarded a subcontract; provided that the
16 contractor shall be primarily responsible for presentation of
17 the show of proof under this subsection; and provided further
18 that the requirements of this subsection shall be deemed
19 incorporated by reference in any contract between the contractor
20 and subcontractor.



1 (c) As a prerequisite to the award of any contract under
2 this chapter or chapter 103, a contractor or subcontractor, as
3 applicable, shall:

4 (1) Classify all workers of the contractor or
5 subcontractor as employees;

6 (2) Adhere to proper job classifications for all laborers
7 and mechanics employed as workers by the contractor or
8 subcontractor;

9 (3) Comply with the requirements of section 103-55.5 by
10 certifying compliance with the prevailing wage and
11 overtime requirements of section 104-2 and all other
12 applicable federal and state laws relating to workers'
13 compensation, unemployment compensation, payment of
14 wages, and safety;

15 (4) Provide prepaid health care benefits to all employees
16 in compliance with chapter 393;

17 (5) Provide reasonable paid sick leave to all employees;

18 (6) Provide records indicating the history of compliance
19 of the contractor or subcontractor and the contractor
20 or subcontractor's executive management with all
21 applicable federal, state, and local labor, wage,
22 health, safety, and environmental protection laws;



- 1 (7) Provide records indicating the contractor or
2 subcontractor's record of compliance with government
3 agencies, unions, and other agencies or bodies that
4 perform regular inspections of construction sites and
5 relevant records;
- 6 (8) Provide employees with a fair and neutral process for
7 resolving work-related issues that does not force the
8 employee to waive statutory remedies and rights;
- 9 (9) Secure and maintain appropriate licensure for the
10 contractor and all subcontractors;
- 11 (10) Provide documentation of any past or outstanding
12 judgments or liens against the contractor or
13 subcontractor and the contractor or subcontractor's
14 executive management, along with documentation of
15 steps taken to satisfy those judgments or liens;
- 16 (11) Provide documentation of financial stability necessary
17 for a determination under section 103D-310(b) that the
18 contractor or subcontractor has the financial ability,
19 resources, skills, capability, and business integrity
20 necessary to perform the contracted work;



- 1 (12) Provide documentation of the contractor or
- 2 subcontractor's ability to provide security as
- 3 required under sections 103D-323 and 103D-324;
- 4 (13) Provide an audited statement of the percentage of
- 5 total project revenues derived from government tax
- 6 revenues that will be exported out-of-state through
- 7 foreign ownership or employees of the contractor or
- 8 subcontractor; and
- 9 (14) Provide references from all government agencies for
- 10 which the contractor or subcontractor has previously
- 11 performed work.

12 **§103D-C Compliance duration; compliance officer.** Each

13 contractor and subcontractor shall:

- 14 (1) Comply with section 103D-B for the entire duration of
- 15 the contract of construction;
- 16 (2) Certify compliance with section 103D-B, under oath, by
- 17 an officer of the contractor or subcontractor,
- 18 respectively, to the comptroller, county counterpart,
- 19 or procurement officer, as applicable, on a monthly
- 20 basis;



- 1 (3) Maintain compliance with all applicable local, state,
2 and federal laws relating to labor, wages, health,
3 safety, and environmental protection; and
- 4 (4) Take reasonable steps toward satisfying any
5 outstanding judgments or liens against the contractor,
6 subcontractor, and the contractor or subcontractor's
7 executive management.

8 **§103D-D Failure to comply; sanctions.** A contractor or
9 subcontractor under this part who fails to comply with section
10 103D-B, shall be subject to sanctions, which shall include any
11 or all of the following, at the discretion of the comptroller,
12 county counterpart, or procurement officer, as applicable:

- 13 (1) Temporary suspension of work on the project until the
14 contractor or subcontractor complies with section
15 103D-B;
- 16 (2) Withholding of payment on the contract or subcontract,
17 as applicable, until the contractor or subcontractor
18 complies with section 103D-B;
- 19 (3) Permanent disqualification of the contractor or
20 subcontractor from any further work on the project;



1 (4) Recovery by the State or county, as applicable, of any
2 moneys expended on the contract or subcontract, as
3 applicable; and

4 (5) Proceedings for debarment or suspension of the
5 contractor or subcontractor under section 103D-702."

6 SECTION 3. Section 103D-104, Hawaii Revised Statutes, is
7 amended as follows:

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

10 "Executive management" means any person who is an owner,
11 general partner, limited partner, or officer of a contractor or
12 subcontractor."

13 2. By amending the definition of "contractor" to read:

14 "Contractor" means any person [having] who is or seeks to
15 be party to a contract with a governmental body."

16 SECTION 4. Section 103D-302, Hawaii Revised Statutes, is
17 amended to read as follows:

18 **"§103D-302 Competitive sealed bidding.** (a) Contracts
19 shall be awarded by competitive sealed bidding except as
20 otherwise provided in section 103D-301. Awards of contracts by
21 competitive sealed bidding may be made after single or
22 multi-step bidding. Competitive sealed bidding does not include



1 negotiations with bidders after the receipt and opening of bids.
2 Award is based on the criteria set forth in the invitation for
3 bids.

4 (b) An invitation for bids shall be issued, and shall
5 include a purchase description and all contractual terms and
6 conditions applicable to the procurement. If the invitation for
7 bids is for construction, it shall specify that all bids include
8 the name of each person or firm to be engaged by the bidder as a
9 joint contractor or subcontractor in the performance of the
10 contract and the nature and scope of the work to be performed by
11 each. Construction bids that do not comply with this
12 requirement may be accepted if acceptance is in the best
13 interest of the State and the value of the work to be performed
14 by the joint contractor or subcontractor is equal to or less
15 than one per cent of the total bid amount.

16 (c) Adequate public notice of the invitation for bids
17 shall be given a reasonable time before the date set forth in
18 the invitation for the opening of bids. The policy board shall
19 adopt rules which specify:

- 20 (1) The form that the notice is to take;
21 (2) What constitutes a reasonable interim between
22 publication and bid opening; and



1 (3) How notice may be published, including publication in
2 a newspaper of general circulation, notice by mail to
3 all persons on any applicable bidders mailing list,
4 publication by any public or private telecommunication
5 information network, or any other method of
6 publication it deems to be effective.

7 (d) Bids shall be opened publicly in the presence of one
8 or more witnesses, at the time and place designated in the
9 invitation for bids. The amount of each bid and other relevant
10 information specified by rule, together with the name of each
11 bidder shall be recorded. The record and each bid shall be open
12 to public inspection[-] and shall be subject to written public
13 comment submitted to the chief procurement officer.

14 (e) When a written public comment presents a credible
15 allegation of a fact that, if true, would render the bid
16 nonresponsive or ineligible under sections 103D-A through
17 103D-C, the chief procurement officer shall audit the books and
18 records of the bidder that submitted the bid for the purpose of
19 determining the truth or falsity of that allegation. If, after
20 reasonable notice to the bidder and reasonable opportunity to be
21 heard, the chief procurement officer, after consultation with
22 the using agency and the attorney general or corporation



1 counsel, as applicable, finds that the bid is nonresponsive or
2 ineligible under sections 103D-A through 103D-C, the bidder
3 shall be subject to penalties under section 103D-106 and section
4 103D-D.

5 [~~e~~] (f) Bids shall be unconditionally accepted without
6 alteration or correction, except as authorized in this chapter
7 or by rules adopted by the policy board.

8 [~~f~~] (g) Bids shall be evaluated based on the
9 requirements set forth in the invitation for bids. These
10 requirements may include criteria to determine acceptability
11 such as inspection, testing, quality, workmanship, delivery, and
12 suitability for a particular purpose. Those criteria that will
13 affect the bid price and be considered in evaluation for award
14 shall be objectively measurable~~[7]~~ such as discounts,
15 transportation costs, and total or life cycle costs. The
16 invitation for bids shall set forth the evaluation criteria to
17 be used~~[7]~~ and shall incorporate by reference the requirements
18 of sections 103D-A through 103D-C. No criteria that are not set
19 forth in the invitation for bids shall [may] be used in bid
20 evaluation [~~that are not set forth in the invitation for bids~~].

21 [~~g~~] (h) Correction or withdrawal of inadvertently
22 erroneous bids before or after award, or cancellation of



1 invitations for bids, awards, or contracts based on [~~such~~] bid
2 mistakes[7] shall be permitted in accordance with rules adopted
3 by the policy board. After bid opening, no changes in bid
4 prices or other provisions of bids prejudicial to the interest
5 of the public or to fair competition shall be permitted. Except
6 as otherwise provided by rule, all decisions to permit the
7 correction or withdrawal of bids[7] or to cancel awards or
8 contracts based on bid mistakes[7] shall be supported by a
9 written determination made by the chief procurement officer or
10 head of a purchasing agency.

11 [~~(h)~~] (i) The contract shall be awarded with reasonable
12 promptness by written notice to the lowest responsible and
13 responsive bidder whose bid meets the requirements and criteria
14 set forth in the invitation for bids. In the event that all
15 bids exceed available funds as certified by the appropriate
16 fiscal officer, the head of the purchasing agency responsible
17 for the procurement in question is authorized, in situations
18 where time or economic considerations preclude resolicitation of
19 work of a reduced scope, to negotiate an adjustment of the bid
20 price, including changes in the bid requirements, with the low
21 responsible and responsive bidder[7] in order to bring the bid
22 within the amount of available funds.



1 [~~(i)~~] (j) When it is not practicable to initially prepare
2 a purchase description to support an award based on price, an
3 invitation for bids [~~which~~] that requests the submission of
4 unpriced offers to be followed by an invitation for bids limited
5 to those bidders whose offers have been qualified under the
6 criteria set forth in the first solicitation[~~7~~] may be used. If
7 a multi-step sealed bidding process is used, the notice and the
8 invitation for bids shall describe each step to be used in
9 soliciting, evaluating, and selecting unpriced offers."

10 SECTION 5. Section 103D-303, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**§103D-303 Competitive sealed proposals.** (a) Competitive
13 sealed proposals may be utilized to procure goods, services, or
14 construction designated in rules adopted by the procurement
15 policy board as goods, services, or construction [~~which~~] that
16 are [~~either~~] not practicable or not advantageous to the State to
17 procure by competitive sealed bidding. Competitive sealed
18 proposals may also be utilized when the head of a purchasing
19 agency determines in writing that the use of competitive sealed
20 bidding is either not practicable or not advantageous to the
21 State.



1 (b) Proposals shall be solicited through a request for
2 proposals.

3 (c) Notice of the request for proposals shall be given in
4 the same manner as provided in section 103D-302(c).

5 (d) Proposals shall be opened so as to avoid disclosure of
6 contents to competing offerors during the process of
7 negotiation. A register of proposals shall be prepared in
8 accordance with rules adopted by the policy board, and shall be
9 open for public inspection after contract award[-] and subject
10 to written public comment submitted to the chief procurement
11 officer.

12 (e) When a written public comment presents a credible
13 allegation of a fact that, if true, would render the proposal
14 nonresponsive or ineligible under sections 103D-A through
15 103D-C, the chief procurement officer shall audit the books and
16 records of the offeror that submitted the proposal for the
17 purpose of determining the truth or falsity of that allegation.
18 If, after reasonable notice to the offeror and reasonable
19 opportunity to be heard, the chief procurement officer, after
20 consultation with the using agency and the attorney general or
21 corporation counsel, as applicable, finds that the proposal is
22 nonresponsive or ineligible under sections 103D-A through



1 103D-C, the offeror shall be subject to penalties under section
2 103D-106 and section 103D-D.

3 ~~(e)~~ (f) The request for proposals shall state the
4 relative importance of price and other evaluation factors~~(-)~~ and
5 shall incorporate by reference the requirements of sections
6 103D-A through 103D-C.

7 ~~(f)~~ (g) Discussions may be conducted with responsible
8 offerors who submit proposals determined to be reasonably
9 susceptible of being selected for award for the purpose of
10 clarification to assure full understanding of~~(-)~~ and
11 responsiveness to~~(-)~~ the solicitation requirements. Offerors
12 shall be accorded fair and equal treatment with respect to any
13 opportunity for discussion and revision of proposals, and
14 revisions may be permitted after submissions and prior to award
15 for the purpose of obtaining best and final offers. In
16 conducting discussions, there shall be no disclosure of any
17 information derived from proposals submitted by competing
18 offerors.

19 ~~(g)~~ (h) Award shall be made to the responsible offeror
20 whose proposal is determined in writing to be the most
21 advantageous taking into consideration price and the evaluation
22 factors set forth in the request for proposals. No other



1 factors or criteria shall be used in the evaluation. The
2 contract file shall contain the basis on which the award is
3 made.

4 ~~[(h)]~~ (i) In cases of awards made under this section,
5 nonselected offerors may submit a written request for debriefing
6 to the chief procurement officer or designee within three
7 working days after the posting of the award of the contract.
8 Thereafter, the head of the purchasing agency shall provide the
9 requester a prompt debriefing in accordance with rules adopted
10 by the policy board. Any protest by the requester pursuant to
11 section 103D-701 following debriefing shall be filed in writing
12 with the chief procurement officer or designee within five
13 working days after the date that the debriefing is completed."

14 SECTION 6. The comptroller shall submit a report to the
15 legislature no later than sixty days before the commencement of
16 the 2011 regular session on the implementation of this Act. The
17 report shall include a listing of all contracts awarded under
18 this Act by the State from the effective date of the Act and
19 progress reports for those contracts, data on total state
20 revenues spent on contracts awarded subject to this Act, data on
21 employment and wages under contracts subject to this Act, data
22 on preferences awarded under section 1 of this Act, the number



S.B. NO. 2062

1 of challenges to bids or offers made under sections 4 and 5 of
 2 this Act and the disposition of each challenge, information on
 3 the implementation of this Act, and recommendations for further
 4 legislation to better effectuate the purpose of this Act.

5 SECTION 7. In codifying the new sections added by section
 6 2 of this Act, the revisor of statutes shall substitute
 7 appropriate section numbers for the letters used in designating
 8 the new sections in this Act.

9 SECTION 8. Statutory material to be repealed is bracketed
 10 and stricken. New statutory material is underscored.

11 SECTION 9. This Act shall take effect on July 1, 2010.

12

INTRODUCED BY:

[Handwritten signatures]
 Bruce Kohub
 Dennis DeBake
 Suzanne Chun Adland
 J. Lali Goh

[Handwritten signatures]
 Clarence A. Washburn
 Carol Johnson

[Handwritten signatures]
 Jim Arnold
 [Signature]



Report Title:

Government Procurement; Responsible Contractors

Description:

Establishes procurement preferences for public works contracts. Establishes a responsible construction contractor law which specifies prerequisites for government construction contractors and subcontractors. Allows public comments on the public procurement process. Requires the comptroller to report to the legislature on the implementation of the Act.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

