

JAN 25 2010

A BILL FOR AN ACT

RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.

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

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

4 "§103D- Preference for recycled oil products. (a)

5 Notwithstanding any law to the contrary, any procurement officer
6 that purchases lubricating oil and industrial oil may purchase
7 the oil from the seller who certifies the oil product containing
8 the greatest percentage of recycled oil. The procurement
9 officer may purchase an oil product containing a lower
10 percentage of recycled oil if the specific oil product
11 containing recycled oil is:

12 (1) Not available within a reasonable period of time or in
13 quantities necessary to meet an agency's needs;

14 (2) Not able to meet the performance requirements or
15 standards recommended by the equipment or vehicle
16 manufacturer, including any warranty requirements;

17 (3) Available only at a cost greater than the cost of
18 comparable virgin oil products; or

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1 (4) Likely to breach an existing warranty that requires
2 the purchase of virgin oil products for exclusive use
3 in vehicles or equipment whose warranties expressly
4 prohibit the use of products containing recycled oil.

5 (b) Each chief procurement officer may establish and
6 maintain an affirmative program for procuring oils containing
7 the maximum content of recycled oil. An affirmative program
8 shall include:

9 (1) Placement of descriptions of the preference of
10 recycled oil products in publications used to solicit
11 bids from suppliers or vendors;

12 (2) Descriptions of the recycled oil procurement program
13 at the bidders' conferences;

14 (3) Discussion of the preference program in lubricating
15 oil and industrial oil procurement solicitations,
16 invitations for bids, requests for proposals, or other
17 solicitations for offers under this chapter; and

18 (4) Efforts to inform trade associations about the
19 preference program."

20 SECTION 2. Section 103D-102, Hawaii Revised Statutes, is
21 amended by amending subsection (b) to read as follows:

1 " (b) Notwithstanding subsection (a), this chapter shall
2 not apply to contracts by governmental bodies:

3 (1) Solicited or entered into before July 1, 1994, unless
4 the parties agree to its application to a contract
5 solicited or entered into prior to July 1, 1994;

6 (2) To disburse funds, irrespective of their source:

7 (A) For grants or subsidies as those terms are
8 defined in section 42F-101, made by the State in
9 accordance with standards provided by law as
10 required by article VII, section 4, of the State
11 Constitution; or by the counties pursuant to
12 their respective charters or ordinances;

13 (B) To make payments to or on behalf of public
14 officers and employees for salaries, fringe
15 benefits, professional fees, or reimbursements;

16 (C) To satisfy obligations that the State is required
17 to pay by law, including paying fees, permanent
18 settlements, subsidies, or other claims, making
19 refunds, and returning funds held by the State as
20 trustee, custodian, or bailee;

21 (D) For entitlement programs, including public
22 assistance, unemployment, and workers'

- 1 compensation programs, established by state or
2 federal law;
- 3 (E) For dues and fees of organizations of which the
4 State or its officers and employees are members,
5 including the National Association of Governors,
6 the National Association of State and County
7 Governments, and the Multi-State Tax Commission;
- 8 (F) For deposit, investment, or safekeeping,
9 including expenses related to their deposit,
10 investment, or safekeeping;
- 11 (G) To governmental bodies of the State;
- 12 (H) As loans, under loan programs administered by a
13 governmental body; and
- 14 (I) For contracts awarded in accordance with chapter
15 103F;
- 16 (3) To procure goods, services, or construction from a
17 governmental body other than the University of Hawaii
18 bookstores, from the federal government, or from
19 another state or its political subdivision;
- 20 (4) To procure the following goods or services which are
21 available from multiple sources but for which

1 procurement by competitive means is either not
2 practicable or not advantageous to the State:

- 3 (A) Services of expert witnesses for potential and
4 actual litigation of legal matters involving the
5 State, its agencies, and its officers and
6 employees, including administrative quasi-
7 judicial proceedings;
- 8 (B) Works of art for museum or public display;
- 9 (C) Research and reference materials including books,
10 maps, periodicals, and pamphlets, which are
11 published in print, video, audio, magnetic, or
12 electronic form;
- 13 (D) Meats and foodstuffs for the Kalaupapa
14 settlement;
- 15 (E) Opponents for athletic contests;
- 16 (F) Utility services whose rates or prices are fixed
17 by regulatory processes or agencies;
- 18 (G) Performances, including entertainment, speeches,
19 and cultural and artistic presentations;
- 20 (H) Goods and [~~services~~] for commercial resale by the
21 State;

- 1 (I) Services of printers, rating agencies, support
2 facilities, fiscal and paying agents, and
3 registrars for the issuance and sale of the
4 State's or counties' bonds;
- 5 (J) Services of attorneys employed or retained to
6 advise, represent, or provide any other legal
7 service to the State or any of its agencies, on
8 matters arising under laws of another state or
9 foreign country, or in an action brought in
10 another state, federal, or foreign jurisdiction,
11 when substantially all legal services are
12 expected to be performed outside this State;
- 13 (K) Financing agreements under chapter 37D; and
- 14 (L) Any other goods or services which the policy
15 board determines by rules or the chief
16 procurement officer determines in writing is
17 available from multiple sources but for which
18 procurement by competitive means is either not
19 practicable or not advantageous to the State;
- 20 (5) Which are specific procurements expressly exempt from
21 any or all of the requirements of this chapter by:

1 (A) References in state or federal law to provisions
2 of this chapter or a section of this chapter, or
3 references to a particular requirement of this
4 chapter; and

5 (B) Trade agreements, including the Uruguay Round
6 General Agreement on Tariffs and Trade (GATT)
7 which require certain non-construction and non-
8 software development procurements by the
9 comptroller to be conducted in accordance with
10 its terms; and

11 (6) With a bidder or offeror who is a United States
12 General Services Administration-approved sole source vendor, who
13 shall be exempt from complying with section 103D-302, 103D-303,
14 or 103D-304, as applicable, in any procurement funded by state
15 and federal matching funds, if the bidder or offeror was
16 responsible for obtaining and was the recipient of the federal
17 funds."

18 SECTION 3. Section 103D-103, Hawaii Revised Statutes, is
19 amended to read as follows:

20 " ~~§103D-103~~ **Retention of written determinations.**

21 Written determinations required by this chapter shall be
22 retained in the appropriate official files of the chief

1 procurement officer or in the case of delegated authority, in
2 the files of [~~that purchasing agency.~~] the procurement officer."

3 SECTION 4. Section 103D-104, Hawaii Revised Statutes, is
4 amended as follows:

5 (1) By adding a new definition to be appropriately
6 inserted and to read as follows:

7 "Subcontractor" means any person who enters into an
8 agreement with the contractor to perform a portion of the work
9 for the contractor."

10 (2) By amending the definitions of "contractor" and
11 "procurement officer" to read as follows:

12 "Contractor" means any [~~person~~] individual, partnership,
13 firm, corporation, joint venture, or other legal entity having a
14 contract with a governmental body[-] to undertake the execution
15 of the work under the terms of the contract with the State, and
16 acting directly or through its agents or employees.

17 "Procurement officer" means [~~any~~] a person [authorized]
18 delegated in writing the authority to enter into and administer
19 contracts and make written determinations with respect thereto.
20 The term also includes an authorized representative acting
21 within the limits of authority."

1 (3) By repealing the definition of "purchasing
2 agency".

3 ~~["Purchasing agency" means any governmental body which is
4 authorized by this chapter or its implementing rules and
5 procedures, or by way of delegation, to enter into contracts for
6 the procurement of goods, services, or construction."]~~

7 SECTION 5. Section 103D-110, Hawaii Revised Statutes, is
8 amended by amending subsections (c), (d), and (e) to read as
9 follows:

10 (c) Each [~~state~~] procurement officer of a department of
11 the executive branch shall attend a mandatory fundamental
12 training and development session within sixty days of being
13 appointed or named to the position of procurement officer.

14 (d) Each [~~state~~] procurement officer of a department of
15 the executive branch whom the state procurement office
16 determines is in need of further training and development based
17 upon:

18 (1) The history of procurement compliance to this chapter
19 by the agency to which the particular procurement
20 officer is attached; or

21 (2) Any other need for training and development, shall
22 attend follow-up training and development sessions.

1 (e) Attendance by ~~[state]~~ procurement officers at the
2 follow-up training and development sessions, other than as
3 required under subsection (d), and by county procurement
4 ~~[officials]~~ officers at the fundamental and follow-up training
5 and development sessions is optional, though encouraged."

6 SECTION 6. Section 103D-207, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "~~[+]§103D-207[+]~~ **Centralization of procurement authority.**

9 Except as otherwise provided in ~~[sections]~~ section 103D-208,
10 ~~[103D-209, and 103D-210,]~~ all rights, powers, duties, and
11 authority relating to the procurement of goods, services, and
12 construction, and the management, control, warehousing, sale,
13 and disposal of goods, services, and construction now vested in,
14 or exercised by, the governmental bodies of the State and
15 counties are hereby transferred to the respective chief
16 procurement officers."

17 SECTION 7. Section 103D-301, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "~~[+]§103D-301[+]~~ **Methods of source selection.** [~~Unless~~
20 ~~otherwise authorized by law, all contracts shall be awarded by~~
21 ~~competitive sealed bidding pursuant to section 103D-302, except]~~
22 Contracts shall be awarded as provided in:

- 1 (1) Section 103D-302 (Competitive sealed bidding);
- 2 [~~(1)~~] (2) Section 103D-303 (Competitive sealed proposals);
- 3 [~~(2)~~] (3) Section 103D-304 (Professional services
- 4 procurement);
- 5 [~~(3)~~] (4) Section 103D-305 (Small purchases);
- 6 [~~(4)~~] (5) Section 103D-306 (Sole source procurement); and
- 7 [~~(5)~~] (6) Section 103D-307 (Emergency procurements)."

8 SECTION 8. Section 103D-302, Hawaii Revised Statutes, is

9 amended as follows:

10 (1) By amending subsection (a) to read as follows:

11 "(a) [~~Contracts shall be awarded by competitive sealed~~

12 ~~bidding except as otherwise provided in section 103D-301.]~~

13 Awards [~~of contracts by competitive sealed bidding]~~ may be made

14 after single or multi-step bidding. Competitive sealed bidding

15 does not include negotiations with bidders after the receipt and

16 opening of bids. Award is based on the criteria set forth in

17 the invitation for bids."

18 (2) By amending subsections (c) and (d) to read as

19 follows:

20 "(c) Adequate public notice of the invitation for bids

21 shall be given a reasonable time before the due date set forth

1 in the invitation for [~~the opening of~~] bids. The policy board
2 shall adopt rules which specify:

3 (1) The form that the notice is to take;

4 (2) [~~What constitutes a reasonable interim~~] Minimum
5 period between [~~publication~~] notice and bid [~~opening~~]
6 due date; and

7 (3) How notice may be [~~published~~] provided, including
8 publication in a newspaper of general circulation,
9 notice by mail to all persons on any applicable
10 bidders mailing list, [~~publication~~] notice by any
11 public or private telecommunication information
12 network, or any other method of [~~publication~~] notice
13 it deems to be effective.

14 (d) [~~Bids~~] Except for invitation for bids conducted on an
15 electronic procurement system, bids shall be opened publicly in
16 the presence of one or more witnesses, at the time and place
17 designated in the invitation for bids. The amount of each bid
18 and other relevant information specified by rule, together with
19 the name of each bidder shall be recorded[~~— The record~~] and
20 [~~each bid~~] shall be open to public inspection. Bid results for
21 procurements conducted on an electronic procurement system shall
22 be available on the system."

1 (3) By amending subsections (f) and (g) to read as
2 follows:

3 "(f) Bids shall be evaluated based on the requirements set
4 forth in the invitation for bids. These requirements may
5 include criteria to determine acceptability such as inspection,
6 testing, quality, workmanship, delivery, and suitability for a
7 particular purpose. Those criteria that will affect the bid
8 price and be considered in evaluation for award shall be stated
9 in the invitation for bid and objectively measurable, such as
10 discounts, transportation costs, and total or life cycle costs.
11 [~~The invitation for bids shall set forth the evaluation criteria~~
12 ~~to be used.~~] No criteria may be used in bid evaluation that are
13 not set forth in the invitation for bids.

14 (g) Correction or withdrawal of inadvertently erroneous
15 bids before or after award, or cancellation of invitations for
16 bids, awards, or contracts based on such bid mistakes, shall be
17 permitted in accordance with rules adopted by the policy board.
18 After bid [~~opening~~] due date no changes in bid prices or other
19 provisions of bids prejudicial to the interest of the public or
20 to fair competition shall be permitted. Except as otherwise
21 provided by rule, all decisions to permit the correction or
22 withdrawal of bids, or to cancel awards or contracts based on

1 bid mistakes, shall be supported by a written determination made
2 by the chief procurement officer or head of a purchasing
3 agency."

4 SECTION 9. Section 103D-303, Hawaii Revised Statutes, is
5 amended as follows:

6 (1) By amending subsection (a) to read as follows:

7 "(a) Competitive sealed proposals may be utilized to
8 procure goods, services, or construction [~~designated in rules~~
9 ~~adopted by the procurement policy board as goods, services, or~~
10 ~~construction~~] which are either not practicable or not
11 advantageous to the State to procure by competitive sealed
12 bidding. [~~Competitive sealed proposals may also be utilized when~~
13 ~~the head of a purchasing agency determines in writing that the~~
14 ~~use of competitive sealed bidding is either not practicable or~~
15 ~~not advantageous to the State.~~]"

16 (2) By amending subsection (d) to read as follows:

17 "(d) Proposals shall be opened so as to avoid disclosure of
18 contents to competing offerors during the evaluation process [~~of~~
19 ~~negotiation~~]. A register of proposals shall be prepared [~~in~~
20 ~~accordance with rules adopted by the policy board~~] and shall be
21 open for public inspection after contract award."

22 (3) By amending subsection (h) to read as follows:

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

13 SECTION 10. Section 103D-303.5, Hawaii Revised Statutes,
14 is amended to read as follows:

15 "~~[+]~~**\$103D-303.5**~~[+]~~ **Pre-bid conference.** [~~(a)~~] At least
16 fifteen days prior to submission of bids pursuant to section
17 103D-302 for a construction or design-build project [~~with a~~
18 ~~total estimated contract value of \$500,000 or more,~~] and [~~at~~
19 ~~least fifteen days~~] prior to submission of proposals pursuant to
20 section 103D-303 for a construction or design-build project
21 [~~with a total estimated contract value of \$100,000 or more~~], the
22 [~~head of the purchasing agency shall hold~~] procurement officer.

1 may conduct a pre-bid conference [~~and shall invite~~] for all
2 potential interested bidders, offerors, subcontractors, and
3 union representatives to attend.

4 [~~(b) The procurement policy board shall adopt rules under~~
5 ~~chapter 91 to effectuate this section.~~]"

6 SECTION 11. Section 103D-305, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "**§103D-305 Small purchases; prohibition against**
9 **parceling.** (a) Procurements of less than \$100,000 for goods or
10 services, or \$250,000 for construction shall be made in
11 accordance with procedures set forth in rules adopted by the
12 policy board that are designed to ensure administrative
13 simplicity and as much competition as is practicable; provided
14 that multiple expenditures shall not be created at the inception
15 of a transaction or project so as to evade the requirements of
16 this chapter; and provided further that procurement requirements
17 shall not be artificially divided or parceled so as to
18 constitute a small purchase under this section.

19 (b) Procurements of greater than \$50,000 for construction
20 under subsection (a) shall require security by a performance
21 bond delivered to the purchasing agency that is:

22 (1) In a form prescribed by the rules of the policy board;

1 (2) Executed by a surety company authorized to do business
2 in this State; and

3 (3) In an amount equal to one hundred per cent of the
4 price specified in the contract,
5 or shall otherwise be secured by a performance bond in
6 a manner satisfactory to the purchasing agency.

7 (c) Procurements of \$25,000 to less than \$100,000 shall be
8 made in accordance with small purchase procedures; provided that
9 small purchase procurements through an electronic system shall
10 be required [~~after the policy board has adopted rules for~~
11 ~~electronic procurement and provided training to the affected~~
12 ~~agency]~~."

13 SECTION 12. Section 103D-312, Hawaii Revised Statutes, is
14 amended to read as follows:

15 "**§103D-312 Cost or pricing data.** (a) [~~A contractor,~~
16 ~~except as provided in subsection (c), shall submit cost or~~
17 ~~pricing data and shall certify that, to the best of the~~
18 ~~contractor's knowledge and belief, the cost or pricing data~~
19 ~~submitted is accurate, complete, and current as of a mutually~~
20 ~~determined specified date prior to the date of:~~

21 ~~(1) The pricing of any contract awarded by competitive~~
22 ~~sealed proposals or pursuant to the sole source~~

1 ~~procurement authority, where the total contract amount~~
2 ~~is expected to exceed an amount established by rules~~
3 ~~adopted by the policy board; or~~

4 ~~(2) The pricing of any change order or contract~~

5 ~~modification that is expected to exceed an amount~~

6 ~~established by rules adopted by the policy board.] The~~

7 procurement officer may request data or factual information

8 reasonably available to the offeror to substantiate that the

9 price offered is reasonable. Submission of data is limited to

10 that normally kept by the offeror and shall not require

11 extensive effort to gather data not reasonably available.

12 (b) Any contract, change order, or contract modification

13 [~~under which a certificate is required~~] shall contain a

14 provision that the price to the State, including profit or fee,

15 shall be adjusted to exclude any significant sums by which the

16 State finds that the price was increased because the contractor

17 furnished cost or pricing data that was inaccurate, incomplete,

18 or not current as of the date agreed upon between the parties.

19 (c) The requirements of this section shall not apply to

20 contracts:

21 (1) Where the contract price is based on adequate price

22 competition;

- 1 (2) Where the contract price is based on established
2 catalog prices or market prices;
- 3 (3) Where the contract prices are set by law or rule; or
- 4 (4) Where it is determined in writing in accordance with
5 rules adopted by the policy board that the
6 requirements of this section may be waived, and the
7 reasons for the waiver are stated in writing."

8 SECTION 13. Section 103D-313, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "**§103D-313 Types of contracts.** (a) Subject to the
11 limitations of this section, any type of contract that will
12 promote the State's best interests may be used.

13 (b) Cost-reimbursement and cost-plus-a-percentage-of-cost
14 contracts may be used only when the chief procurement officer
15 determines in writing that such a contract is likely to be less
16 costly than any other type of contract or that it is
17 impracticable to obtain the goods, services, or construction
18 required except by means of such a contract. Cost-reimbursement
19 and cost-plus-a-percentage-of-cost contracts shall not be used
20 if their use would jeopardize the receipt of federal assistance
21 moneys or reduce the amount of such assistance under any
22 applicable federal statute or regulation.

1 ~~[(c) In addition to the requirements of subsections (a)~~
2 ~~and (b), a cost plus a percentage of cost contract may not be~~
3 ~~awarded unless:~~

4 ~~(1) Notice is given to the head of the compliance audit~~
5 ~~unit, president of the senate, speaker of the house~~
6 ~~of representatives, and the chairpersons of the senate~~
7 ~~ways and means and house finance committees; and~~

8 ~~(2) Notice is conspicuously posted in an area accessible~~
9 ~~to the public in the office of the chief procurement~~
10 ~~officer and available for public inspection during~~
11 ~~normal business hours.~~

12 ~~(d) The policy board shall adopt rules to implement this~~
13 ~~section.] "~~

14 SECTION 14. Section 103D-316, Hawaii Revised Statutes, is
15 amended to read as follows:

16 "~~+~~**§103D-316**~~+~~ **Right to inspect plant.** The ~~[State,~~
17 procurement officer, at reasonable times, may inspect the part
18 of the plant or place of business of a contractor or any
19 subcontractor that is related to the performance of a contract
20 awarded or to be awarded by the State."

21 SECTION 15. Section 103D-317, Hawaii Revised Statutes, is
22 amended to read as follows:

1 " ~~[+]§103D-317[+]~~ **Right to audit records.** (a) The
2 ~~[purchasing agency]~~ procurement officer, at reasonable times
3 and places, may audit the books and records of any person who
4 has submitted cost or pricing data pursuant to section 103D-312
5 to the extent that such books and records relate to such cost or
6 pricing data. Any person who receives a contract, change order,
7 or contract modification for which cost or pricing data is
8 required, shall maintain such books and records that relate to
9 such cost or pricing data for three years from the date of final
10 payment under the contract, unless another period is otherwise
11 authorized in writing.

12 (b) The ~~[purchasing agency]~~ procurement officer shall be
13 entitled to audit the books and records of a contractor or any
14 subcontractor under any negotiated contract or subcontract other
15 than a fixed-price contract to the extent that such books and
16 records relate to the performance of such contract or
17 subcontract. The books and records shall be maintained by the
18 contractor for a period of three years from the date of final
19 payment under the prime contract and by the subcontractor for a
20 period of three years from the date of final payment under the
21 subcontract, unless another period is otherwise authorized in
22 writing."

1 SECTION 16. Section 103D-320, Hawaii Revised Statutes, is
2 amended to read as follows:

3 " ~~[+]§103D-320[+]~~ **Retention of procurement records.** All
4 procurement records shall be retained and disposed of in
5 accordance with chapter 94 and records retention guidelines and
6 schedules approved by the comptroller~~[-]~~ or similar authority of
7 procuring governmental bodies not subject to the record
8 retention jurisdiction of the comptroller."

9 SECTION 17. Section 103D-323, Hawaii Revised Statutes, is
10 amended by amending subsection (a) to read as follows:

11 "(a) Unless the policy board determines otherwise by
12 rules, bid security shall be required ~~[only]~~ for construction
13 contracts to be awarded pursuant to sections 103D-302 and 103D-
14 303 and when the price of the contract is estimated ~~[by the~~
15 ~~procurement officer]~~ to exceed ~~[\$25,000]~~ \$50,000 or, if the
16 contract is for goods or services, the ~~[purchasing agency~~
17 ~~secures the approval of the chief]~~ procurement officer~~[-]~~
18 includes a requirement for bid security in the solicitation.
19 Bid security shall be a bond provided by a surety company
20 authorized to do business in the State, or the equivalent in
21 cash, or ~~[otherwise supplied]~~ in a form ~~[specified in rules.]~~
22 pursuant to section 103D-325."

1 SECTION 18. Section 103D-324, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) Unless the policy board determines otherwise by
4 rules, the following bonds or security shall be delivered to the
5 ~~[purchasing agency]~~ procurement officer and shall become binding
6 on the parties upon the execution of the contract if the
7 contract which is awarded exceeds ~~[\$25,000]~~ \$50,000 and is for
8 construction, or the ~~[purchasing agency secures the approval of~~
9 ~~the chief]~~ procurement officer[+] includes a requirement for
10 such bonds in the solicitation:

11 (1) A performance bond in a form ~~[prescribed by the rules~~
12 ~~of the policy board,]~~ pursuant to section 103D-325,
13 executed by a surety company authorized to do business
14 in this State or otherwise secured in a manner
15 satisfactory to the ~~[purchasing agency,]~~ procurement
16 officer, in an amount equal to one hundred per cent of
17 the price specified in the contract;

18 (2) A payment bond in a form ~~[prescribed by the rules of~~
19 ~~the policy board,]~~ pursuant to section 103D-325,
20 executed by a surety company authorized to do business
21 in this State or otherwise secured in a manner
22 satisfactory to the ~~[purchasing agency,]~~ procurement

1 officer, for the protection of all persons supplying
2 labor and material to the contractor for the
3 performance of the work provided for in the contract.
4 The bond shall be in an amount equal to one hundred
5 per cent of the price specified in the contract; or

- 6 (3) A performance and payment bond which satisfies all of
7 the requirements of paragraphs (1) and (2)."

8 SECTION 19. Section 103D-406, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "~~§103D-406~~ **Specifications prepared by ~~[architects and~~**
11 **~~engineers.] persons other than governmental personnel.~~** The
12 requirements of this part regarding the purposes and
13 nonrestrictiveness of specifications shall apply to all
14 specifications, including, but not limited to, those prepared by
15 ~~[architects, engineers, designers, and drafting]~~ professionals,
16 consultants, and any other individual for public contracts."

17 SECTION 20. Section 103D-410, Hawaii Revised Statutes, is
18 amended by amending subsections (b) and (c) to read as follows:

19 "(b) In implementing life-cycle costing, the purchasing
20 agency shall be guided by energy efficiency standards and
21 policies for purchasing various items developed and promulgated
22 by the United States Department of Energy and other federal

1 agencies, and nationally recognized trade associations,
2 including but not limited to the National Association of State
3 Purchasing Officials, the National Institute of Governmental
4 Purchasing, Inc., the National Association of Purchasing
5 Management, and the Air Conditioning and Refrigeration
6 Institute. The [~~purchasing agency~~] procurement officer shall
7 notify bidders of information, procedures, and forms required in
8 implementing energy efficiency standards and policies. The
9 information required shall include purchasing standards and
10 policies developed by federal agencies and by nationally
11 recognized agencies and associations, as well as energy
12 consumption and life-cycle cost data.

13 (c) The [~~purchasing agency~~] procurement officer shall
14 consider purchasing via the life-cycle costing method those
15 classes of items for which nationally recognized energy
16 efficiency data have been developed. These items shall include
17 but not be limited to automobiles and air conditioning systems.
18 The watt-saving variety of common-sized fluorescent lamps shall
19 be purchased except where standard wattage of those lamps is
20 specifically required by the using agency."

21 SECTION 21. Section 103D-701, Hawaii Revised Statutes, is
22 amended by amending subsection (f) to read as follows:

1 "(f) In the event of a timely protest under subsection
2 (a), no further action shall be taken on the solicitation or the
3 award of the contract until the chief procurement officer makes
4 a written determination that the award of the contract without
5 delay is necessary to protect substantial interests of the
6 State. Notwithstanding section 103D-709 and any law to the
7 contrary, a decision under this subsection shall be final,
8 conclusive, and not subject to appeal."

9 SECTION 22. Section 103D-1001, Hawaii Revised Statutes, is
10 amended as follows:

11 (1) By adding seven new definitions to be appropriately
12 inserted and to read as follows:

13 "Biodiesel" means a vegetable oil-based fuel that meets
14 ASTM International standard D6751, "Standard Specification for
15 Biodiesel (B100) Fuel Blend Stock for Distillate Fuels", as
16 amended.

17 "Biofuel" means fuel from non-petroleum plant or animal
18 based sources that can be used for the generation of heat or
19 power.

20 "Industrial oil" means any compressor, turbine, or bearing
21 oil, hydraulic oil, metal working oil or refrigeration oil.

1 "Lubricating oil" means any oil intended for use in an
2 internal combustion crankcase, transmission, gearbox or
3 differential or an automobile, bus, truck, vessel, plane, train,
4 heavy equipment, or machinery powered by an internal combustion
5 engine.

6 "Recycled oil" means used oil that has been prepared for
7 reuse as a petroleum product by refining, reclaiming,
8 reprocessing or other means provided that the preparation or use
9 is operationally safe, environmentally sound and complies with
10 all laws, rules, and regulations.

11 "Soil enhancement product" means any nonchemical soil
12 preparation, conditioner, or compost mixture designed to
13 supplement aeration or add organic, green waste, or decaying
14 matter to the soil; provided that the term does not include any
15 plant fertilizer intended to stimulate or induce plant growth
16 through chemical means.

17 "Virgin oil" means oil that has been refined from crude oil
18 and that has not been used or contaminated with impurities."

19 (1) By repealing the definitions of "Hawaii software
20 development business", "printed material", and "software
21 development".

1 [~~"Hawaii software development business" means any person,~~
2 ~~agency, corporation, or other business entity with its principal~~
3 ~~place of business or ancillary headquarters located in the State~~
4 ~~and that proposes to obtain eighty per cent of the labor for~~
5 ~~software development from persons domiciled in Hawaii.~~

6 ~~"Printed material" includes business forms, stationery,~~
7 ~~business cards, brochures, reports, publications, advertising~~
8 ~~and promotional collateral, and other related materials,~~
9 ~~including reports, publications, and related materials~~
10 ~~commissioned as part of any professional services contract.~~

11 ~~"Software development" means any work related to~~
12 ~~feasibility studies, system requirements analysis, system design~~
13 ~~alternatives analysis, system external specifications, system~~
14 ~~internal specifications, programming, testing, debugging, or~~
15 ~~implementation for an electronic data processing system.]~~

16 SECTION 23. Section 103D-1005, Hawaii Revised Statutes, is
17 amended as follows:

18 (1) By amending subsections (a) and (b) to read as
19 follows:

20 " (a) To encourage the use of recycled products, contracts
21 [~~shall~~] may be awarded to the lowest responsible and responsive
22 bidders, with preference being given to the products containing

1 recycled material. The policy board [~~shall adopt rules in~~
2 ~~accordance with chapter 91 governing preference for recycled~~
3 ~~products. The~~] rules shall establish percentages of preference
4 and the method of determining the contents of recycled material
5 to qualify various products for preference.

6 (b) The state procurement office, with the assistance of
7 the office of solid waste management in the department of health
8 as provided in section 342G-42, shall develop a recycled product
9 procurement program that shall require state [~~purchasing~~
10 ~~agencies~~] procurement officers and urge county [~~purchasing~~
11 ~~agencies~~] procurement officers to:

- 12 (1) Apply preference to the purchase of products with
13 recycled content before purchasing products without
14 any recycled content;
- 15 (2) Be consistent with applicable federal specification
16 standards incorporated in Executive Order No. 12873,
17 signed by the President of the United States on
18 October 20, 1993, and any subsequent amendments to
19 that order; and
- 20 (3) Ensure, to the maximum extent economically feasible,
21 the purchase of materials that may be recycled or

1 reused when discarded, and to avoid the purchase of
2 products deemed environmentally harmful."

3 (2) By amending subsection (e) to read as follows:

4 "(e) When purchasing office paper and printed material,
5 state [~~purchasing agencies~~] procurement officers shall, and
6 county [~~purchasing agencies~~] procurement officers are urged to,
7 purchase only office paper and printed material with recycled
8 content, except when statutory, regulatory, or contractual
9 requirements preclude the purchase of office paper or printed
10 material with recycled contents of the same type and quantity as
11 the office paper or printed material without recycled content."

12 SECTION 24. Section 103D-1010, Hawaii Revised Statutes, is
13 amended by amending subsection (b) to read as follows:

14 "(b) The [~~purchasing agency~~] procurement officer shall:

15 (1) Receive and review proposals submitted by qualified
16 community rehabilitation programs to provide goods or
17 services and determine if they are suitable for
18 purchase by the agency;

19 (2) Negotiate the conditions and terms for the purchase,
20 including the price of the offer, between the agency
21 and the qualified community rehabilitation program;
22 provided that the price of the offer shall not exceed

1 the fair market price and there is assurance that the
2 qualified community rehabilitation program proposal is
3 in compliance with all administrative rules related to
4 purchasing; and

5 (3) Ensure that any goods or service purchased from a
6 qualified community rehabilitation program shall not
7 be placed on the Hawaii products list under section
8 103D-1002."

9 SECTION 25. Section 103D-1011, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "~~§103D-1011~~ **Qualified community rehabilitation**
12 **program; proposal to provide goods and services.** A qualified
13 community rehabilitation program shall be allowed to sell only
14 goods or services, also to include building custodial and
15 grounds maintenance services, to a governmental body. A
16 proposal shall be submitted to the ~~[purchasing agency]~~
17 procurement officer containing the following information:

- 18 (1) A description of the goods or service;
19 (2) The price of the goods or service; and
20 (3) Documents and information necessary to qualify as a
21 qualified community rehabilitation program
22 under section 103D-1001."

1 SECTION 26. Section 103D-1012, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "~~[§]~~103D-1012~~[§]~~ **Biofuel preference.** (a)

4 Notwithstanding any other law to the contrary, contracts for the
5 purchase of diesel fuel or boiler fuel ~~[shall]~~ may be awarded to
6 the lowest responsible and responsive bidders, with preference
7 given to bids for biofuels or blends of biofuel and petroleum
8 fuel.

9 (b) When purchasing fuel for use in diesel engines, the
10 preference shall be five cents per gallon of one hundred per
11 cent biodiesel. For blends containing both biodiesel and
12 petroleum-based diesel, the preference shall be applied only to
13 the biodiesel portion of the blend.

14 (c) When purchasing fuel for use in boilers, the
15 preference shall be five cents per gallon of one hundred per
16 cent biofuel. For blends containing both biofuel and petroleum-
17 based boiler fuel, the preference shall be applied only to the
18 biofuel portion of the blend.

19 ~~[(d) As used in this section, "biodiesel" means a~~
20 ~~vegetable oil based fuel that meets ASTM International standard~~
21 ~~D6751, "Standard Specification for Biodiesel (B100) Fuel Blend~~
22 ~~Stock for Distillate Fuels", as amended.~~

1 ~~(e) As used in this section, "biofuel" means fuel from~~
2 ~~non petroleum plant or animal based sources that can be used for~~
3 ~~the generation of heat or power.] "~~

4 SECTION 27. Section 103D-209, Hawaii Revised Statutes, is
5 repealed.

6 ~~["**§103D-209 Authority to contract for certain services.**~~
7 ~~Except as provided in section 28-8.3 with respect to agencies of~~
8 ~~the State of Hawaii, any governmental body of this State may act~~
9 ~~as a purchasing agency and contract on its own behalf for~~
10 ~~professional services subject to this chapter and rules adopted~~
11 ~~by the policy board. The purchasing agency may consult with the~~
12 ~~chief procurement officer or the officer's designee when~~
13 ~~procuring these services."]~~

14 SECTION 28. Section 103D-403, Hawaii Revised Statutes, is
15 repealed.

16 ~~["**§103D-403 Exempted items.** Specifications for goods,~~
17 ~~services, or construction items procured under section 103D-209,~~
18 ~~or those exempted pursuant to section 103D-210 may be prepared~~
19 ~~by a purchasing agency in accordance with this chapter and rules~~
20 ~~adopted hereunder."]~~

21 SECTION 29. Section 103D-1003, Hawaii Revised Statutes, is
22 repealed.

1 [~~"§103D-1003 Printing, binding, and stationery work. (a)~~

2 ~~All bids submitted for a printing, binding, or stationery~~
3 ~~section 103D-302 contract in which all work will be performed~~
4 ~~in state, including all preparatory work, presswork, bindery~~
5 ~~work, and any other production related work, to include storage~~
6 ~~and shipping costs, shall receive a fifteen per cent preference~~
7 ~~for purposes of bid evaluation.~~

8 ~~(b) Where bids are for work performed in state and out of~~
9 ~~state, then for the purpose of selecting the lowest bid~~
10 ~~submitted only, the amount bid for work performed out of state~~
11 ~~shall be increased by fifteen per cent. The lowest total bid,~~
12 ~~taking the preference into consideration, shall be awarded the~~
13 ~~contract unless the solicitation provides for additional award~~
14 ~~criteria. The contract amount awarded, however, shall be the~~
15 ~~amount of the price offered, exclusive of the preference."]~~

16 SECTION 30. Section 103D-1006, Hawaii Revised Statutes, is
17 repealed.

18 [~~"§103D-1006 Software development businesses. (a) In any~~
19 ~~expenditure of public funds for software development, the use of~~
20 ~~Hawaii software development businesses shall be preferred.~~
21 ~~Where a package bid or response to a request for proposal~~
22 ~~contains both Hawaii and non Hawaii software development~~

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1 ~~businesses, then for the purpose of selecting the lowest bid or~~
2 ~~purchase price only, the bid or offer by a non Hawaii software~~
3 ~~development business shall be increased by a preference~~
4 ~~percentage pursuant to rules adopted by the policy board.~~

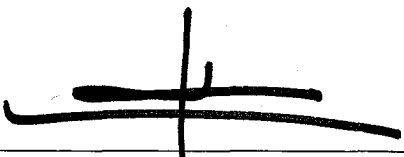
5 ~~(b) This section shall not apply when precluded by federal~~
6 ~~requirements for competitive bidding."]~~

7 SECTION 31. Chapter 103D, part XIII, Hawaii Revised
8 Statutes, is repealed.

9 SECTION 32. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 33. This Act shall take effect on January 1, 2011;
12 provided that amendments made to sections 103D-102(b) and 103D-
13 305, Hawaii Revised Statutes, by this Act shall not be repealed
14 when sections 103D-102 and 103D-305, Hawaii Revised Statutes,
15 are reenacted pursuant to section 14(1) of Act 175, Session Laws
16 of Hawaii 2009.

17
18 INTRODUCED BY:


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19 BY REQUEST

Report Title:

Procurement Code; Streamline

Description:

Amends various sections of the Hawaii Public Procurement Code, Chapter 103D, Hawaii Revised Statutes, to simplify and streamline procurement processes to enable agencies to expeditiously acquire the resources or services they need to perform their missions.

JUSTIFICATION SHEET

DEPARTMENT: Accounting and General Services

TITLE: A BILL FOR AN ACT RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.

PURPOSE: To amend various sections of the Hawaii Public Procurement Code, chapter 103D, Hawaii Revised Statutes (HRS), to simplify and streamline procurement processes to enable agencies to expeditiously acquire the resources or services they need to perform their missions.

MEANS: Add a new section to part X, chapter 103D, HRS; amend sections 103D-102(b), 103D-103, 103D-104, 103D-110(c), (d) and (e), 103D-207, 103D-301, 103D-302(a), (c), (d), (f), and (g), 103D-303(a), (d), and (h), 103D-303.5, 103D-305, 103D-312, 103D-313, 103D-316, 103D-317, 103D-320, 103D-323(a), 103D-324(a), 103D-406, 103D-410(b) and (c), 103D-701(f), 103D-1001, 103D-1005(a), (b), and (e), 103D-1010(b), 103D-1011, 103D-1012; and repeal part XIII of chapter 103D, HRS, and sections 103D-209, 103D-403, 103D-1003, and 103D-1006, HRS.

JUSTIFICATION: See attached Justification.

Impact on the public: Expediting the procurement processes to obtain contract awards.

Impact on the department and other agencies: This bill will simplify and expedite the procurement processes to execute contracts and obtain goods, services, and construction in a timely manner.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION:

AGS-240 State Procurement.

OTHER AFFECTED
AGENCIES:

All governmental agencies, including chief procurement officers and heads of governmental bodies.

EFFECTIVE DATE:

January 1, 2011; provided that amendments made to sections 103D-102(b) and 103D-305, Hawaii Revised Statutes, by this Act shall not be repealed when sections 103D-102 and 103D-305, Hawaii Revised Statutes, are reenacted pursuant to section 14(1) of Act 175, Session Laws of Hawaii 2009.

JUSTIFICATION

§103D-102 Application of this chapter.

Amend §103D-102(b) to delete "services" to clarify applicability for "commercial resale" should be limited to goods.

§103D-103 Retention of written determinations.

Amend §103D-103 to clarify delegated procurement authority resides with the "procurement officer" rather than a "purchasing agency".

§103D-104 Definitions.

Amend §103D-104 to clarify existing definitions for "Contractor", and "Procurement officer"; delete "Purchasing agency" as inconsistent due to clarification of "Procurement officer".

Add definition for "subcontractor" to clarify the intent of §103D-302(b) which requires bidders for construction projects to list the subcontractors they intend to use. The long standing interpretation has always been to require the bidder to list only those subcontractors who have a contract with a bidder, and not any subcontractor who is in turn hired by the bidders' subcontractors. The bidder remains responsible for the satisfactory performance of the project. Listing of subcontractors who do not have a contract with the bidder is unreasonable and only serves to jeopardize and delay the orderly review of bids and award of contracts.

§103D-110 Education and training.

Amend §103D-110 to clarify "procurement officer" for consistency.

§103D-207 Centralization of procurement authority.

Amend §103D-207 to delete section (-209) being repealed and section (-210) that was repealed in 1994.

§103D-209 Authority to contract for certain services.

Delete §103D-209. Reference to §28-8.3 on employment of attorneys limits the authority to retain or contract with attorneys, and does not impact this section on the procurement of professional services. Delete this section as procurement of professional services is one of the authorized procurement methods, and should be centralized to the chief procurement officer authority rather than any purchasing agency. This change should lessen confusion as to who has authority to

contract for these services. Centralized to the chief procurement officer adds accountability, who may delegate this authority to contract for professional services to an authorized procurement officer.

§103D-301 Methods of source selection.

Amend §103D-301 to detail the six procurement methods that may be used to procure goods, services, and construction.

§103D-302 Competitive sealed bidding.

Amend §103D-302 to allow use of the six procurement methods and to clarify the invitation to bid process to provide adequate notice rather than a 'publication'; allow for electronic procurement system submittal; and clarify evaluation criteria shall be included in the invitation for bid document.

§103D-303 Competitive sealed proposals.

Amend §103D-303 to amend by replacing the word "negotiation" with "evaluation"; delete unnecessary language for rulemaking as §103D-211 on procurement rules already provides for this requirement; clarify procurement officer responsibility.

§103D-303.5 Pre-bid conference.

Amend §103D-303.5 to make this process optional. The need for a pre-bid conference should be determined by the procurement officer. This process has been problematic and extends the procurement process. Subsection (b) not necessary, as §103D-211 on procurement rules already states this requirement.

§103D-305 Small purchases; prohibition against parceling.

Amend §103D-305 to delete unnecessary language. Electronic procurement (eProcurement) systems are in place, including applicable training.

§103D-312 Cost or pricing data.

Amend §103D-312 to require a less burdensome standard appropriate to the commercial goods and services that government agencies buy. The threshold for submission of such data would be provided in rules, and should be substantial. The data must also be limited to that normally kept by the contractor and not require extensive sweeps to gather data not reasonably available.

§103D-313 Types of contracts.

Amend §103D-313 to delete language that requires excessive approvals; CPO approval is currently required and adequate. The SPO is not aware of the use of subsection (c).

§103D-316 Right to inspect plant.

Amend §103D-316 for consistency to clarify "procurement officer".

§103D-317 Right to audit records.

Amend §103D-317 for consistency to replace "purchasing agency" with "procurement officer".

§103D-320 Retention of procurement records.

Amend §103D-320 to clarify records retention responsibility is applicable to all governmental bodies, including the counties. Comptroller responsible for Executive Departments, and does not have jurisdiction over county records.

§103D-323 Bid security.

Amend §103D-323 to clarify the estimated contract amount may be determined by other parties such as consultants, not necessarily only the procurement officer; amends the dollar limits to \$50,000; allows the procurement officer to require security for goods and services when stated in the solicitation; delete redundant or unnecessary language for rulemaking as §103D-325 on bond forms and copies already provides for policy board to specify the bond forms.

§103D-324 Contract performance and payment bonds.

Amend §103D-324 dollar limits to \$50,000; allows the procurement officer to require security for goods and services when stated in the solicitation; delete redundant or unnecessary language for rulemaking as §103D-325 on bond forms and copies already provides for policy board to specify the bond forms.

§103D-403 Exempted items.

Repeal §103D-403 as it is redundant. §103D-102(d) already provides language to meet the requirements of this section proposed to be repealed, which states in part, "...which are exempt from this chapter are nevertheless encouraged to adopt and use provisions of this chapter..."

§103D-406 Specifications prepared by architects and engineers.

Amend §103D-406 to clarify who may prepare specifications.

§103D-410 Energy efficiency through life-cycle costing.

Amend §103D-410 for consistency to replace "purchasing agency" with "procurement officer".

§103D-701 Authority to resolve protested solicitations and awards.

Amend §103D-701(f) to make final and nonappealable, the chief procurement officer's decision to lift the automatic stay imposed by a protest. Appeal of this decision to lift the stay is contrary to the purpose of the subsection and the intent of the procurement code. The chief procurement officer should be permitted to exercise discretion when necessary to lift the stay to permit a procurement to proceed so as not to jeopardize substantial interests of the state.

This action by the chief procurement officer does not impact the due process of the protestor; the protest process continues, including the administrative appeal and judicial processes of sections 103D-709 and 103D-710.

§103D-1001 Definitions.

Amend §103D-1001 to delete unnecessary definitions for "Hawaii software development business", "Printed material", and "Software development" due to sections proposed for repeal. Added definitions for "Biodiesel", "Biofuel", "Industrial oil", "Lubricating oil", "Recycled oil", "Soil enhancement product", and "Virgin oil" for consistency of definitions in one section.

§103D-1003 Printing, binding, and stationery work.

Delete §103D-1003. This preference is not appropriate to Chapter 103D. Other business incentives may be used to support printing businesses.

§103D-1005 Recycled products.

Application of preferences for agencies tend to be cumbersome, complex, and increases costs to the State, as the award may be given to the vendor with a preference at a higher dollar amount rather than to the lowest bid amount.

Amend §103D-1005 from "shall" to "may" to allow the procurement officer to determine when appropriate to use the provisions of this section, providing agencies the flexibility to apply the preference, when appropriate. Delete unnecessary language for rulemaking as §103D-211 already provides for policy board rulemaking authority; for consistency, replace "purchasing agencies" with "procurement officers".

§103D-1006 Software development businesses.

Delete §103D-1006. This preference is not appropriate to Chapter 103D. Other business incentives may be used to support software development businesses.

§103D-1010 Purchases from qualified community rehabilitation programs.

Amend §103D-1010 for consistency to replace "purchasing agency" with "procurement officer".

§103D-1011 Qualified community rehabilitation program; proposal to provide goods and services.

Amend §103D-1011 for consistency to replace "purchasing agency" with "procurement officer".

§103D-1012 Biofuel preference.

Application of preferences for agencies tend to be cumbersome, complex, and increases costs to the State, as the award may be given to the vendor with a preference at a higher dollar amount rather than to the lowest bid amount.

Amend §103D-1012 from "shall" to "may" to allow the procurement officer to determine when appropriate to use the provisions of this section, providing agencies the flexibility to apply preference. Moved definitions to section 103D-1001.

§103D- Preference for recycled oil products.

Add new section to part X, Preferences, on recycled oil products (moved from part XIII); optional preference for chief procurement officers to implement when practicable.

PART XIII. PREFERENCE FOR OIL PRODUCTS WITH GREATER RECYCLED CONTENT

Repeal and move this to part X; amend to make this an option for chief procurement officers to implement.