

JAN 23 2009

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 SECTION 1. Approximately ninety per cent of Hawaii's food
2 is imported from the continental United States or foreign
3 countries. This equates to an exportation of over
4 \$3,000,000,000 annually to places outside of Hawaii.

5 But, this practice is not only on a public commercial
6 level. Even the State of Hawaii and its political subdivisions,
7 as large purchasers and consumers of agricultural products,
8 procure agricultural products outside the State of Hawaii.
9 However, this is contrary to the intent of the procurement laws.

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

16 Yet, undermining and eviscerating the entire preference
17 program, are the administrative rules that exempt certain
18 products from the entire procurement code, as found in section



1 3-120-4, Hawaii Administrative Rules, "Exhibit A".
2 Specifically, exempt from any of the provisions of the entire
3 chapter 103D, including the preferences are "fresh meats and
4 produce", "animals and plants", and "food and fodder for
5 animals".

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

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



1 and spirit of sections 103D-1001 thru 103D-1012, Hawaii Revised
2 Statutes. Therefore, the legislature takes it upon itself to
3 revise and simplify sections 103D-1001 thru 103D-1002, Hawaii
4 Revised Statutes, and to amend and automatically repeal certain
5 sections of the administrative rules.

6 SECTION 2. Section 103D-1001, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "§103D-1001 Definitions. As used in this part, unless the
9 context clearly requires otherwise:

10 "Direct labor" means all work required for preparation,
11 processing, or packing of goods or performance of services, but
12 not work relating to supervision, administration, inspection, or
13 shipping.

14 "Fair market price" means the price of a product or service
15 paid by a willing buyer to a willing seller, that is reasonably
16 comparable to prices on the open market.

17 "Hawaii input" means the part of the cost of a product
18 attributable to production, manufacturing, or other expenses
19 arising within the State. "Hawaii input" includes but is not
20 limited to:

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



1 (2) The added value of that portion of the cost of
 2 imported materials that is incurred after landing in
 3 Hawaii, including but not limited to other articles,
 4 materials and supplies added to the imported
 5 materials;

6 (3) The cost of labor, variable overhead, utilities, and
 7 services incurred in the production and manufacturing
 8 of materials or products in the State; and

9 (4) Fixed overhead cost and amortization or depreciation
 10 cost, if any, for buildings, tools and equipment
 11 situated and located in the State and utilized in the
 12 production or manufacturing of a product.

13 "Hawaii component means those articles, materials, supplies
 14 and labor incorporated directly into the products acquired for
 15 public use under the contract.

16 "Hawaii products" means products that are mined, excavated,
 17 produced, manufactured, raised, or grown in the State and where
 18 the [~~input constitutes no less than twenty five~~] cost of the
 19 Hawaii input towards the product must exceed fifty per cent of
 20 the [manufactured] total cost[+] of the product; provided that:

21 [~~(1) Where the value of the input constitutes twenty five~~
 22 ~~per cent or more, but less than fifty per cent, of the~~

1 ~~manufactured cost, the product shall be classified as~~
2 ~~class I;~~

3 ~~(2)]~~ (1) Where the value of the input [~~constitutes~~
4 ~~exceeds fifty per cent [or more, but less than~~
5 ~~seventy five per cent,~~] of the [~~manufactured~~] total
6 cost, the product shall be classified as class [~~II~~]
7 I; and

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

11 (2) Where any agricultural, aquacultural, horticultural,
12 silvicultural, floricultural, or livestock product is
13 raised, grown, or harvested in the State, the product
14 shall be classified as class II.

15 "Hawaii software development business" means any person,
16 agency, corporation, or other business entity with its principal
17 place of business or ancillary headquarters located in the State
18 and that proposes to obtain eighty per cent of the labor for
19 software development from persons domiciled in Hawaii.

20 "Office paper" includes computer paper, bond paper, ledger
21 paper, xerographic copier paper, envelopes, and other related



1 types of paper on which printing, writing, or drawing is
2 intended.

3 "Person" means every individual, partnership, firm,
4 society, unincorporated association, joint venture, group, hui,
5 joint stock, company, corporation, trustee, personal
6 representative, trust estate, decedent's estate, trust, or other
7 entities, whether the persons are doing business for themselves
8 or in any agency or fiduciary capacity.

9 "Person with disabilities" means any person who is so
10 severely incapacitated by any physical or mental disability that
11 the person cannot engage in normal competitive employment
12 because of the disability.

13 "Post-consumer material" means a material or finished
14 product that has served its intended use and has been discarded
15 for disposal or recovery, having completed its life as a
16 consumer item, and is a part of the broader category of
17 recovered material.

18 "Printed material" includes business forms, stationery,
19 business cards, brochures, reports, publications, advertising
20 and promotional collateral, and other related materials,
21 including reports, publications, and related materials
22 commissioned as part of any professional services contract.



1 "Produced or manufactured" includes the processing,
2 developing, and making of a thing into a new article with a
3 distinct character and use through the application of input
4 within the State including Hawaii products, labor, skill, or
5 other services. "Produced or manufactured" does not include the
6 mere assembling or putting together of non-Hawaii products or
7 material.

8 "Products" include materials, manufactures, supplies,
9 merchandise, goods, wares, products, and foodstuffs[-] acquired
10 for public use under the contract.

11 "Public agency" means any agency of the State or county.

12 "Qualified community rehabilitation program" means a
13 nonprofit community rehabilitation program for persons with
14 disabilities that:

- 15 (1) Is organized and incorporated under the laws of the
16 United States or this State, and located in this
17 State;
- 18 (2) Is operated in the interest of and [+] employs[+]
19 persons with disabilities;
- 20 (3) Does not inure any part of its net income to any
21 shareholder or other individual;



1 (4) Complies with all applicable occupational health and
2 safety standards required by the federal, state, and
3 county governments; and

4 (5) Holds a current certificate from the United States
5 Department of Labor pursuant to the Fair Labor
6 Standards Act, Title 29 United States Code section
7 214(c), and is certified by the state department of
8 labor and industrial relations under section 387-9 and
9 applicable administrative rules relating to the
10 employment of persons with disabilities.

11 "Recovered material" means waste material and by-products
12 that have been recovered or diverted from solid waste.

13 "Recovered material" does not include those materials and by-
14 products generated from, and commonly reused within, an original
15 manufacturing process.

16 "Software development" means any work related to
17 feasibility studies, system requirements analysis, system design
18 alternatives analysis, system external specifications, system
19 internal specifications, programming, testing, debugging, or
20 implementation for an electronic data processing system."

21 SECTION 3. Section 103D-1002, Hawaii Revised Statutes, is
22 amended to read as follows:



1 "§103D-1002 Hawaii products. (a) A purchasing agency
2 shall review all specifications in a bid or proposal for
3 purchase from [the] Hawaii products [list] where these products
4 are available [~~;~~ ~~provided that the products:~~

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

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

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

13 ~~(A) Three per cent where class I Hawaii products are
14 involved;~~

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

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

19 (b) All invitations for bids and requests for proposals
20 shall include a [description]:

21 (1) Description of the products that are listed in the
22 Hawaii products list established pursuant to this

1 section, [~~and their established classes,~~] which may be
2 used to complete the scope of work specified in the
3 invitation for bids or request for proposals [~~, where~~
4 ~~the products are~~]; or

5 (2) Allow self-certification as part of the offer that the
6 Hawaii products qualify for preference;
7 provided that the offer can be evaluated along with any other
8 published criteria in the solicitation, including but not
9 limited to such considerations as specific nutritional content
10 or equivalent, timing of delivery, quality or freshness, and
11 past performance, if applicable.

12 All Hawaii products in any bid or request for proposal
13 shall be made available [~~and meet~~] for inspection or additional
14 information may be requested to verify that the Hawaii product
15 meets the minimum specifications.

16 (c) All persons submitting bids or proposals to claim a
17 Hawaii products preference shall designate in their bids which
18 individual product and its price is to be supplied as a Hawaii
19 product.

20 (d) Where a bid or proposal contains both Hawaii and non-
21 Hawaii products, then for the purpose of selecting the lowest
22 bid or purchase price only, the price bid or offered for a



1 Hawaii product item shall be decreased by subtracting
 2 [~~therefrom: three per cent, five per cent, or~~] ten per cent for
 3 the class I, [~~class II, or class III~~] of the Hawaii product
 4 items bid or offered[~~7~~] or fifteen per cent for the class II,
 5 respectively. The lowest total bid or proposal, taking the
 6 preference into consideration, shall be awarded the contract
 7 unless the bid or offer provides for additional award criteria.
 8 The contract amount of any contract awarded, however, shall be
 9 the amount of the bid or price offered, exclusive of the
 10 preferences.

11 (e) Upon receipt and approval of application for Hawaii
 12 products preference, the administrator shall include within the
 13 Hawaii products list, the names of producers and manufacturers
 14 in the State who are authorized to supply locally manufactured
 15 soil enhancement products to state agencies under subsection
 16 [~~(h)~~] (k). The administrator of the state procurement office
 17 shall maintain and distribute copies of the list to the
 18 purchasing agencies of the various governmental agencies.

19 (f) Any person, not on the Hawaii products list, desiring
 20 a preference pursuant to this section shall certify the Hawaii
 21 product when submitting a response to a solicitation, provided
 22 that the person certifies under penalty of sanctions that the



1 offered Hawaii products meet the requirements for the
2 preference.

3 The procurement officer may request additional information
4 deemed necessary in order to qualify a product and shall have
5 sole discretion in determining qualification for the preference.

6 Any offeror whose product is deemed not qualified for the
7 preference may appeal by filing a written request for
8 reexamination of facts to the procurement officer. Upon
9 determining that the offeror is qualified for the preference,
10 the procurement officer shall notify the administrator to place
11 the offeror on the Hawaii products list.

12 (g) Solicitations shall contain a provision notifying
13 offerors who request application of the preference that in the
14 event of any change that materially alters the offeror's ability
15 to supply Hawaii products, the offeror shall immediately notify
16 the chief procurement officer in writing and that the parties
17 shall enter into discussions for the purposes of revising the
18 contract or termination for convenience.

19 (h) Nothing in this section shall limit, restrict nor
20 preclude a Hawaii product from any preferences, set-asides, or
21 criteria that may be applied under section 103D-906, and
22 instead, shall operate to mutually enhance the purposes of both.



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

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

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

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

20 "§103D-1002.5 Failure to adequately verify, deliver, or
21 supply Hawaii product(s). If the administrator or procurement
22 officer calling for the offer has made any contract under



1 section 103D-1002, finds that in the performance of that
2 contract there has been a failure to comply with those
3 provisions, the contract shall be voidable and the findings
4 shall be referred for debarment or suspension proceedings under
5 section 103D-702."

6 SECTION 5. Section 3-120-4, Hawaii Administrative Rules,
7 is amended to read as follows:

8 "§3-120-4 Procurements exempt from chapter 103D, HRS. (a)
9 Notwithstanding the intent of chapter 103D, HRS, to require
10 governmental bodies to procure their goods and services through
11 competitive bidding, it is acknowledged that there may be
12 situations where procurement by competitive means is either not
13 practicable or not advantageous to the State.

14 (b) An exhibit A titled "Procurements Exempt From Chapter
15 103D, HRS" dated [~~05/09/01,~~] 07/01/09, is located at the end of
16 this chapter. This exhibit provides a list of goods and services
17 which the procurement policy board has determined to be exempt
18 from chapter 103D, HRS, because although such goods and services
19 may be available from multiple sources, their procurement by
20 competitive means would be either not practicable or not
21 advantageous to the State.



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

7 (d) Chief procurement officers may on an annual basis
8 request that additional exemptions be added to the exhibit.

9 (e) The procurement policy board shall review the exhibit
10 annually for amendments.

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

18 (g) Purchasing agencies shall cite on the purchase order
19 or on the contract, the authority waiver as "Exempt From Chapter
20 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number
21 from exhibit), Hawaii Administrative Rules".

22 "EXHIBIT A"



PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS

[05/09/01] 07/01/09

Exemptions are in section 103D-102(b)(4), HRS. The following is a list of additional exemptions which the procurement policy board has also determined to be exempt from chapter 103D, HRS:

Exemption

Number Exemption

- 1. Research, reference, and educational materials including books, maps, periodicals, and pamphlets, which are published or available in print, video, audio, magnetic, or electronic form, including web-based databases;
- 2. Services of printers, rating agencies, support facility providers, fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
- 3. Services of lecturers, speakers, trainers, and scriptwriters;
- 4. Services of legal counsel, guardian ad litem, psychiatrists, and psychologists, when required by court order, or by the Rules of Court in the case of interpreters, in criminal and civil proceedings;
- ~~5.~~ ~~Fresh meats and produce;~~
- ~~6.]~~ 5. Insurance to include insurance broker services;
- ~~7.~~ ~~Animals and plants;~~
- ~~8.]~~ 6. New or used items which are advantageous and available on short notice through an auction, bankruptcy, foreclosure, etc.;
- ~~9.~~ ~~Food and fodder for animals;~~



- 1
- 2 [~~10~~] 7. Facility costs for conferences, meetings, and training
- 3 sessions;
- 4
- 5 [~~11~~] 8. Advertisements in specialized publications, such as in
- 6 ethnic or foreign language publications, trade
- 7 publications, professional publications;
- 8
- 9 [~~12~~] 9. Professional consultant services as required under
- 10 Chapter 658, HRS;
- 11
- 12 [~~13~~] 10. Interpreter services;
- 13
- 14 [~~14~~] 11. Procurement of repair services when dismantling is
- 15 required to assess the extent of repairs;
- 16
- 17 [~~15~~] 12. Burial services consisting of mortuary, crematory,
- 18 cemetery, and other essential services for deceased
- 19 indigent persons or unclaimed corpses; and
- 20
- 21 [~~16~~] 13. Radio and television airtime when selection of station
- 22 is to be made by current audience demographics."
- 23

24 SECTION 6. After the effective date of this Act, any

25 provision of section 103D-102, Hawaii Revised Statutes, may be

26 amended through rulemaking under chapter 91, Hawaii Revised

27 Statutes, including any provision modified by this Act.

28 SECTION 7. This Act does not affect rights and duties that

29 matured, penalties that were incurred, and proceedings that were

30 begun, before its effective date.

31 SECTION 8. Statutory and administrative rule material to

32 be repealed is bracketed and stricken. New statutory and

33 administrative rule material is underscored.



1 SECTION 9. This Act shall take effect on July 1, 2009.

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Report Title:

Procurement; Hawaii Products; Preference

Description:

Allows for persons desiring a Hawaii product preference when submitting bids to self-certify 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.

