

JAN 22 2016

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# A BILL FOR AN ACT

RELATING TO CONSTRUCTION CONTRACTS.

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

- 1           SECTION 1. Section 103-53, Hawaii Revised Statutes, is  
2 amended by amending subsection (e) to read as follows:
- 3           "(e) This section shall not apply to:
- 4           (1) Any procurement of less than \$25,000 or that is  
5           considered a small purchase under section 103D-305 and  
6           any state or county department contract of less than  
7           \$25,000;
- 8           (2) Emergency purchases for the procurement of goods[~~7~~] or  
9           services[~~7~~, ~~or~~, ~~construction~~] under section 103D-307 or  
10           an emergency or disaster under chapter 127A;
- 11           (3) Grants disbursed by a state agency pursuant to chapter  
12           42F or in accordance with standards provided by law as  
13           required by article VII, section 4, of the state  
14           constitution, or made by the counties pursuant to  
15           their respective charters or ordinances;
- 16           (4) Contracts or agreements between government agencies;
- 17           (5) Contracts or agreements to disburse funds:



- 1           (A) To make payments to or on behalf of public
- 2                   officials, officers, and employees for salaries,
- 3                   fringe benefits, professional fees, and
- 4                   reimbursements;
- 5           (B) To satisfy obligations required to be paid by
- 6                   law, including fees, judgments, settlements, and
- 7                   other payments for resolving claims;
- 8           (C) To make refunds or return funds held by the State
- 9                   or county as trustee, custodian, or bailee;
- 10           (D) For entitlement programs, including public
- 11                   assistance, unemployment, and workers'
- 12                   compensation programs, established by state or
- 13                   federal law;
- 14           (E) For deposit, investment, or safekeeping,
- 15                   including sums to pay expenses related to their
- 16                   deposit investment, or safekeeping;
- 17           (F) For loans under government-administered loan
- 18                   programs; or
- 19           (G) To make periodic, recurring payments for utility
- 20                   services;



1           (6) Rent for the use or occupation of the premises and  
2                    facilities at Aloha Stadium, the convention center, or  
3                    any other state or county large spectator events  
4                    facility; and

5           (7) Contracts or agreements of the Hawaii health systems  
6                    corporation and its regional system boards."

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

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

11           (1) Solicited or entered into before July 1, 1994, unless  
12                    the parties agree to its application to a contract  
13                    solicited or entered into prior to July 1, 1994;

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

15                    (A) For grants as defined in section 42F-101, made by  
16                            the State in accordance with standards provided  
17                            by law as required by article VII, section 4, of  
18                            the state constitution; or by the counties  
19                            pursuant to their respective charters or  
20                            ordinances;



- 1           (B) To make payments to or on behalf of public
- 2                   officers and employees for salaries, fringe
- 3                   benefits, professional fees, or reimbursements;
- 4           (C) To satisfy obligations that the State is required
- 5                   to pay by law, including paying fees, permanent
- 6                   settlements, subsidies, or other claims, making
- 7                   refunds, and returning funds held by the State as
- 8                   trustee, custodian, or bailee;
- 9           (D) For entitlement programs, including public
- 10                   assistance, unemployment, and workers'
- 11                   compensation programs, established by state or
- 12                   federal law;
- 13           (E) For dues and fees of organizations of which the
- 14                   State or its officers and employees are members,
- 15                   including the National Association of Governors,
- 16                   the National Association of State and County
- 17                   Governments, and the Multi-State Tax Commission;
- 18           (F) For deposit, investment, or safekeeping,
- 19                   including expenses related to their deposit,
- 20                   investment, or safekeeping;
- 21           (G) To governmental bodies of the State;



- 1 (H) As loans, under loan programs administered by a
- 2 governmental body; and
- 3 (I) For contracts awarded in accordance with chapter
- 4 103F;
- 5 (3) To procure goods [~~7~~] or services [~~7, or construction~~]
- 6 from a governmental body other than the University of
- 7 Hawaii bookstores, from the federal government, or
- 8 from another state or its political subdivision;
- 9 (4) To procure the following goods or services [~~which~~]
- 10 that are available from multiple sources but for which
- 11 procurement by competitive means is either not
- 12 practicable or not advantageous to the State:
- 13 (A) Services of expert witnesses for potential and
- 14 actual litigation of legal matters involving the
- 15 State, its agencies, and its officers and
- 16 employees, including administrative quasi-
- 17 judicial proceedings;
- 18 (B) Works of art for museum or public display;
- 19 (C) Research and reference materials including books,
- 20 maps, periodicals, and pamphlets, which are



- 1 published in print, video, audio, magnetic, or  
2 electronic form;
- 3 (D) Meats and foodstuffs for the Kalaupapa  
4 settlement;
- 5 (E) Opponents for athletic contests;
- 6 (F) Utility services whose rates or prices are fixed  
7 by regulatory processes or agencies;
- 8 (G) Performances, including entertainment, speeches,  
9 and cultural and artistic presentations;
- 10 (H) Goods and services for commercial resale by the  
11 State;
- 12 (I) Services of printers, rating agencies, support  
13 facilities, fiscal and paying agents, and  
14 registrars for the issuance and sale of the  
15 State's or counties' bonds;
- 16 (J) Services of attorneys employed or retained to  
17 advise, represent, or provide any other legal  
18 service to the State or any of its agencies, on  
19 matters arising under laws of another state or  
20 foreign country, or in an action brought in  
21 another state, federal, or foreign jurisdiction,



1                   when substantially all legal services are  
2                   expected to be performed outside this State;

3                   (K) Financing agreements under chapter 37D; and

4                   (L) Any other goods or services which the policy  
5                   board determines by rules or the chief  
6                   procurement officer determines in writing is  
7                   available from multiple sources but for which  
8                   procurement by competitive means is either not  
9                   practicable or not advantageous to the State;

10                   [and]

11                   (5) Which are specific procurements expressly exempt from  
12                   any or all of the requirements of this chapter by:

13                   (A) References in state or federal law to provisions  
14                   of this chapter or a section of this chapter, or  
15                   references to a particular requirement of this  
16                   chapter; and

17                   (B) Trade agreements, including the Uruguay Round  
18                   General Agreement on Tariffs and Trade (GATT)  
19                   which require certain non-construction and non-  
20                   software development procurements by the



1                   comptroller to be conducted in accordance with  
2                   its terms[-]; and  
3       (6) To procure construction; provided that, with the  
4       exception of construction procured pursuant to  
5       paragraph (3), all other procurement contracts for  
6       construction shall comply with the federal statutory  
7       procurement requirements set forth under title 42  
8       United States Code section 6962, as amended, and the  
9       federal administrative procurement requirements set  
10       forth under title 48 Code of Federal Regulations parts  
11       1 to 9999, as amended; provided further that the  
12       procurement officer shall comply with the rules of the  
13       federal agency that is the closest counterpart to the  
14       agency of the procurement officer, and if there is  
15       none, then to the rules of the General Services  
16       Administration under parts 500-599."

17       SECTION 3. Section 103D-104, Hawaii Revised Statutes, is  
18 amended by deleting the definition of "design-build".

19       [~~"Design build" means a project delivery method in which~~  
20 ~~the procurement officer enters into a single contract for design~~  
21 ~~and construction."~~]





1 SECTION 4. Section 103D-302, Hawaii Revised Statutes, is  
2 amended by amending subsection (b) to read as follows:

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

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

17 "§103D-303 Competitive sealed proposals. (a) Competitive  
18 sealed proposals may be used to procure goods, services, or  
19 construction that are either not practicable or not advantageous  
20 to the State to procure by competitive sealed bidding.



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 evaluation.  
7 A register of proposals shall be prepared and shall be open for  
8 public inspection after contract award.

9 (e) The request for proposals shall state the relative  
10 importance of price and other evaluation factors.

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



1 (g) Award shall be made to the responsible offeror whose  
2 proposal is determined in writing to be the most advantageous,  
3 taking into consideration price and the evaluation factors set  
4 forth in the request for proposals. No other factors or  
5 criteria shall be used in the evaluation. The contract file  
6 shall contain the basis on which the award is made.

7 (h) In cases of awards made under this section, non-  
8 selected offerors may submit a written request for debriefing to  
9 the procurement officer within three working days after the  
10 posting of the award of the contract. Thereafter, the  
11 procurement officer shall provide the non-selected offeror a  
12 prompt debriefing. Any protest by the non-selected offeror  
13 pursuant to section 103D-701 following debriefing shall be filed  
14 in writing with the procurement officer within five working days  
15 after the date upon which the debriefing is completed.

16 ~~[(i) In addition to any other provisions of this section,~~  
17 ~~construction projects may be solicited through a request for~~  
18 ~~proposals to use the design build method, provided that:~~

19 ~~(1) A request for proposals is issued to prequalify~~  
20 ~~offerors to select a short list of no more than three~~  
21 ~~responsible offerors, prior to the submittal of~~



1 ~~proposals; provided that the number of offerors to be~~  
2 ~~selected for the short list shall be stated in the~~  
3 ~~request for proposals and prompt notice is given to~~  
4 ~~all offerors as to which offerors have been short-~~  
5 ~~listed;~~

6 ~~(2) A conceptual design fee may be paid to non-selected~~  
7 ~~offerors that submit a technically responsive~~  
8 ~~proposal; provided that the cost of the entire project~~  
9 ~~is greater than \$1,000,000; and~~

10 ~~(3) The criteria for pre-qualification of offerors, design~~  
11 ~~requirements, development documents, proposal~~  
12 ~~evaluation criteria, terms of the payment of a~~  
13 ~~conceptual design fee, or any other pertinent~~  
14 ~~information shall be stated in the request for~~  
15 ~~proposals.] "~~

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

18 "§103D-305 Small purchases; prohibition against parceling.

19 (a) Procurements of less than \$100,000 for goods or services [~~7~~  
20 ~~or \$250,000 for construction]~~ shall be made in accordance with  
21 procedures set forth in rules adopted by the policy board that



1 are designed to ensure administrative simplicity and as much  
2 competition as is practicable; provided that multiple  
3 expenditures shall not be created at the inception of a  
4 transaction or project so as to evade the requirements of this  
5 chapter; and provided further that procurement requirements  
6 shall not be artificially divided or parceled so as to  
7 constitute a small purchase under this section.

8 ~~[(b) Procurements greater than \$50,000 for construction~~  
9 ~~under subsection (a) shall require security by performance and~~  
10 ~~payment bonds, pursuant to section 103D-324, delivered to the~~  
11 ~~procurement officer, that are:~~

12 ~~(1) In a form prescribed by the rules of the policy board,~~  
13 ~~(2) Executed by a surety company authorized to do business~~  
14 ~~in this State; and~~  
15 ~~(3) In an amount equal to one hundred per cent of the~~  
16 ~~price specified in the contract,~~  
17 ~~or shall otherwise be secured by a performance bond in a manner~~  
18 ~~satisfactory to the procurement officer.~~

19 ~~(e)]~~ (b) Procurements of \$25,000 to less than \$250,000  
20 shall be made in accordance with small purchase procedures;



1 provided that [~~such~~] the small purchase procurements through an  
2 electronic system shall be required."

3 SECTION 7. Section 103D-306, Hawaii Revised Statutes, is  
4 amended by amending subsection (a) to read as follows:

5 "(a) A contract may be awarded for goods[~~7~~] or services[~~7~~  
6 ~~or construction~~] without competition when the head of a  
7 purchasing agency determines in writing that there is only one  
8 source for the required good[~~7~~] or service[~~7, or construction~~],  
9 the determination is reviewed and approved by the chief  
10 procurement officer, the written determination is posted in the  
11 manner described in rules adopted by the policy board, and no  
12 objection is outstanding. The written determination, any  
13 objection, and a written summary of the disposition of any  
14 objection shall be included in the contract file."

15 SECTION 8. Section 103D-307, Hawaii Revised Statutes, is  
16 amended by amending subsection (a) to read as follows:

17 "(a) The head of a purchasing agency may obtain a good[~~7~~  
18 or service[~~7, or construction~~] essential to meet an emergency by  
19 means other than specified in this chapter when the following  
20 conditions exist:



- 1           (1) A situation of an unusual or compelling urgency  
2                   creates a threat to life, public health, welfare, or  
3                   safety by reason of major natural disaster, epidemic,  
4                   riot, fire, or such other reason as may be determined  
5                   by the head of that purchasing agency;
- 6           (2) The emergency condition generates an immediate and  
7                   serious need for goods[~~7~~] or services[~~7~~~~er~~  
8                   ~~construction~~] that cannot be met through normal  
9                   procurement methods and the government would be  
10                  seriously injured if the purchasing agency is not  
11                  permitted to employ the means it proposes to use to  
12                  obtain the goods[~~7~~] or services[~~7~~~~er~~~~construction~~];  
13                  and
- 14           (3) Without the needed good[~~7~~] or service, [~~er~~  
15                  ~~construction~~7] the continued functioning of  
16                  government, the preservation or protection of  
17                  irreplaceable property, or the health and safety of  
18                  any person will be seriously threatened."

19           SECTION 9. Section 103D-311, Hawaii Revised Statutes, is  
20           amended by amending subsection (a) to read as follows:



1           "(a) The policy board may adopt rules to prequalify  
2 prospective suppliers for particular types of goods[~~7~~] and  
3 services[~~7~~,~~and~~~~construction~~] or to limit a solicitation to  
4 prequalified vendors to meet statutory or licensing requirements  
5 applying to the solicitation or when the time necessary to  
6 verify vendor qualifications would jeopardize timely award of  
7 contracts."

8           SECTION 10. Section 103D-313, Hawaii Revised Statutes, is  
9 amended by amending subsection (b) to read as follows:

10           "(b) Cost-reimbursement and cost-plus-a-percentage-of-cost  
11 contracts may be used only when the chief procurement officer  
12 determines in writing that such a contract is likely to be less  
13 costly than any other type of contract or that it is  
14 impracticable to obtain the goods[~~7~~] or services[~~7~~,~~or~~  
15 ~~construction~~] required except by means of such a contract.  
16 Cost-reimbursement and cost-plus-a-percentage-of-cost contracts  
17 shall not be used if their use would jeopardize the receipt of  
18 federal assistance moneys or reduce the amount of [~~such~~] the  
19 assistance under any applicable federal statute or regulation."  
20           SECTION 11. Section 103D-324, Hawaii Revised Statutes, is  
21 amended by amending subsection (a) to read as follows:





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

7           (1) A performance bond in a form prescribed by the rules  
8 of the policy board, executed by a surety company  
9 authorized to do business in this State or otherwise  
10 secured in a manner satisfactory to the purchasing  
11 agency, in an amount equal to one hundred per cent of  
12 the price specified in the contract;

13           (2) A payment bond in a form prescribed by the rules of  
14 the policy board, executed by a surety company  
15 authorized to do business in this State or otherwise  
16 secured in a manner satisfactory to the purchasing  
17 agency, for the protection of all persons supplying  
18 labor and material to the contractor for the  
19 performance of the work provided for in the contract.  
20 The bond shall be in an amount equal to one hundred  
21 per cent of the price specified in the contract; or



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

3 SECTION 12. Section 103D-802, Hawaii Revised Statutes, is  
4 amended to read as follows:

5 "§103D-802 Cooperative purchasing authorized. A public  
6 procurement unit may either participate in, sponsor, conduct, or  
7 administer a cooperative purchasing agreement for the  
8 procurement of goods [~~7~~] or services [~~7, or construction~~] with one  
9 or more public procurement units, external procurement units, or  
10 nonprofit private procurement units pursuant to rules adopted by  
11 the policy board and an agreement entered into between the  
12 participants. The cooperative purchasing may include [~~7~~] but  
13 shall not be limited to [~~7~~] joint or multi-party contracts  
14 between public procurement units, and state public procurement  
15 unit requirements contracts [~~which~~] that are made available to  
16 local public procurement units. Cooperative purchasing  
17 agreements may be exempt from preferences pursuant to part X."

18 SECTION 13. Section 103D-904, Hawaii Revised Statutes, is  
19 amended to read as follows:

20 "[~~+~~] §103D-904 [~~+~~] Geographic bidding. The chief  
21 procurement officer may utilize geographic bidding in providing



1 goods[7] and services [~~and construction~~] to best meet the needs  
2 of the State."

3 SECTION 14. Section 103D-303.5, Hawaii Revised Statutes,  
4 is repealed.

5 [~~"§103D-303.5 Pre bid conference. (a) At least fifteen~~  
6 ~~days prior to submission of bids pursuant to section 103D-302~~  
7 ~~for a construction or design-build project with a total~~  
8 ~~estimated contract value of \$500,000 or more, and at least~~  
9 ~~fifteen days prior to submission of proposals pursuant to~~  
10 ~~section 103D-303 for a construction or design-build project with~~  
11 ~~a total estimated contract value of \$100,000 or more, the head~~  
12 ~~of the purchasing agency shall hold a pre bid conference and~~  
13 ~~shall invite all potential interested bidders, offerors,~~  
14 ~~subcontractors, and union representatives to attend.~~

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

17 SECTION 15. Section 103D-323, Hawaii Revised Statutes, is  
18 repealed.

19 [~~"§103D-323 Bid security. (a) Unless the policy board~~  
20 ~~determines otherwise by rules, bid security shall be required~~  
21 ~~only for construction contracts to be awarded pursuant to~~



1 ~~sections 103D-302 and 103D-303 and when the price of the~~  
2 ~~contract is estimated by the procurement officer to exceed~~  
3 ~~\$25,000 or, if the contract is for goods or services, the~~  
4 ~~purchasing agency secures the approval of the chief procurement~~  
5 ~~officer. Bid security shall be a bond provided by a surety~~  
6 ~~company authorized to do business in the State, or the~~  
7 ~~equivalent in cash, or otherwise supplied in a form specified in~~  
8 ~~rules.~~

9 ~~(b) Bid security shall be in an amount equal to at least~~  
10 ~~five per cent of the amount of the bid.~~

11 ~~(c) Unless, pursuant to rules, it is determined that a~~  
12 ~~failure to provide bid security is nonsubstantial, all bids~~  
13 ~~required to be accompanied by bid security shall be rejected~~  
14 ~~when not accompanied by the required bid security.~~

15 ~~(d) After the bids are opened, they shall be irrevocable~~  
16 ~~for the period specified in the invitation for bids, except as~~  
17 ~~provided in section 103D-302(g). If a bidder is permitted to~~  
18 ~~withdraw its bid before award, no action shall be had against~~  
19 ~~the bidder or the bid security." ]~~

20 SECTION 16. Section 103D-407, Hawaii Revised Statutes, is  
21 repealed.



1           ~~["§103D-407 Construction projects, roadway materials,~~  
2 ~~recycled glass content requirements. (a) When purchasing~~  
3 ~~roadway materials or other high value, end use applications for~~  
4 ~~public projects, state and county agencies may purchase~~  
5 ~~materials with minimum recycled glass content meeting~~  
6 ~~specifications adopted by the policy board which, at a minimum,~~  
7 ~~shall provide for:~~

8           ~~(1) A minimum recycled glass content of ten per cent~~  
9           ~~crushed aggregate in treated or untreated basecourse~~  
10           ~~in paving materials that shall not reduce the quality~~  
11           ~~standards for highway and road construction; and~~

12           ~~(2) The use of one hundred per cent aggregate in~~  
13           ~~nonstructural capital improvement applications.~~

14           ~~(b) All highway and road construction and improvement~~  
15 ~~projects funded by the State or a county or roadways that are to~~  
16 ~~be accepted by the State or a county as public roads may use a~~  
17 ~~minimum of ten per cent crushed glass aggregate as specified by~~  
18 ~~the department of transportation in all basecourse (treated or~~  
19 ~~untreated) and subbase when the glass is available to the quarry~~  
20 ~~or contractor at a price no greater than that of the equivalent~~  
21 ~~aggregate.~~



1       ~~(c) All state and county construction projects calling for~~  
2 ~~nonstructural backfill shall utilize one hundred per cent~~  
3 ~~crushed glass when available at a cost equal to or lower than~~  
4 ~~the equivalent aggregate.~~

5       ~~(d) As used in this section:~~

6       ~~"Basecourse" means the layer or layers of specified~~  
7 ~~material or selected material of a designed thickness to support~~  
8 ~~a surface course.~~

9       ~~"Environmental management special fund" means the fund~~  
10 ~~established by section 342G 63.~~

11       ~~"Nonstructural backfill" means use as fill in areas not~~  
12 ~~subject to structural loading, including but not limited to~~  
13 ~~utility line bedding, drainage backfill behind retaining walls,~~  
14 ~~drainage line backfill in leachfields or french drains, and~~  
15 ~~similar uses."]~~

16       SECTION 17. This Act does not affect rights and duties  
17 that matured, penalties that were incurred, and proceedings that  
18 were begun before its effective date.

19       SECTION 18. Statutory material to be repealed is bracketed  
20 and stricken. New statutory material is underscored.



1 SECTION 19. This Act shall take effect upon its approval.

2 INTRODUCED BY: *Anna Mercado Hill*



# S.B. NO. 2499

**Report Title:**

Procurement Code; Construction; Federal Requirements

**Description:**

Subjects the procurement of construction contracts to federal procurement laws.

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

