

CHAPTER 102
CONCESSIONS ON PUBLIC PROPERTY

Section

- 102-1 Definition
- 102-2 Contracts for concessions; bid required, exception
- 102-3 Qualification of bidders
- 102-4 Advertisement for bids
- 102-5 Bids; opening; rejection
- 102-6 Deposits of legal tender, etc., to accompany bid
- 102-7 Forfeiture of deposits, return thereof
- 102-8 Bond may be substituted for deposits
- 102-9 Contracts to be in writing; highest responsible bidder
- 102-10 Modification of contract terms
- 102-11 Security for performance; conditions
- 102-12 Surety on bond; justification
- 102-13 Amendment of contracts, when authorized
- 102-14 Use of public buildings by blind or visually
handicapped persons
- 102-15 Violation voids contract
- 102-16 Penalty

Cross References

Hawaii public procurement code, see chapter 103D.

" **§102-1 Definition.** The word "concession" as used in this chapter means the grant to a person of the privilege to:

- (1) Conduct operations involving the sale of goods, wares, merchandise, or services to the general public including but not limited to food and beverage establishments, retail stores, motor vehicle rental operations under chapter 437D, advertising, and communications and telecommunication services, in or on buildings or land under the jurisdiction of any government agency;
- (2) Operate a parking lot on property owned or controlled by the State with the exception of buildings, facilities, and grounds operated by or otherwise under the jurisdiction of the department of education; and
- (3) Use, for compensation, space on public property to display advertising, or to conduct operations for communications or telecommunications purposes. [L 1963, c 93, §1; Supp, §7B-1.5; am L 1967, c 189, §3; HRS §102-1; am L 1997, c 208, §2; am L 2001, c 303, §1]

" **§102-2 Contracts for concessions; bid required, exception.**

(a) Except as otherwise specifically provided by law, no concession or concession space shall be leased, let, licensed, rented out, or otherwise disposed of either by contract, lease, license, permit or any other arrangement, except under contract let after public notice for sealed bids in the manner provided by law; provided that the duration of the grant of the concession or concession space shall be related to the investment required but in no event to exceed fifteen years; provided further that and subject to approval by county council resolution, the fifteen-year limit shall not apply to nonprofit corporations organized pursuant to chapter 414D.

(b) *[Repeal and reenactment on June 30, 2021. L 2014, c 141, §4.]* The bidding requirements of subsection (a) shall not apply to concessions or space on public property set aside for the following purposes:

- (1) For operation of ground transportation services and parking lot operations at airports, except for motor vehicle rental operations under chapter 437D;
- (2) For lei vendors;
- (3) For airline and aircraft operations;

- (4) For automated teller machines and vending machines, except vending machines located at public schools operated by blind or visually handicapped persons in accordance with section 302A-412;
- (5) For operation of concessions set aside without any charge;
- (6) For operation of concessions by handicapped or blind persons; except concessions operated in the public schools by blind or visually handicapped persons in accordance with section 302A-412;
- (7) For operation of concessions on permits revocable on notice of thirty days or less; provided that no such permits shall be issued for more than a one year period;
- (8) For operation of concessions or concession spaces for a beach service association dedicated to the preservation of the Hawaii beach boy tradition, incorporated as a nonprofit corporation in accordance with state law, and whose members are appropriately licensed or certified as required by law;
- (9) For operation of concessions at county zoos, botanic gardens, or other county parks which are environmentally, culturally, historically, or operationally unique and are supported, by nonprofit corporations incorporated in accordance with state law solely for purposes of supporting county aims and goals of the zoo, botanic garden, or other county park, and operating under agreement with the appropriate agency solely for such purposes, aims, and goals;
- (10) For operation of concessions that furnish goods or services for which there is only one source, as determined by the head of the awarding government agency in writing that shall be included in the contract file;
- (11) For any of the operations of the Hawaii health systems corporation and its regional system boards;
- (12) For airport operation of concessions providing electronic communication services;
- (13) For airport operation of concessions consisting solely of advertising;
- (14) For the stadium authority operation of concessions providing electronic communication services;
- (15) For the stadium authority operation of concessions consisting solely of advertising; and
- (16) For the operations of the natural energy laboratory of Hawaii authority.

(c) The bidding requirements of subsection (a) shall not apply to any nonrenewable dispositions granting rights for a period not in excess of fourteen days.

(d) The bidding requirements and fifteen-year limit in subsection (a) shall not apply to any disposition or grant of rights to anyone to place one or more names, in accordance with applicable county sign ordinances, on a state or county building. [L 1959, c 245, §1; am L 1960, c 14, §2; am L 1962, c 5, §2; am L 1963, c 93, §§2, 3; Supp, §7B-1; am L 1967, c 189, §§1, 2; HRS §102-2; am L 1986, c 185, §2; am L 1987, c 101, §1; am L 1991, c 232, §1; am L 1996, c 44, §1 and c 89, §9; am L 2001, c 303, §2; am L 2002, c 253, §6; am L 2004, c 201, §§2, 6; am L 2007, c 15, §1 and c 290, §14; am L Sp 2009, c 5, §2; am L 2014, c 9, §1 and c 141, §2; am L 2015, c 176, §1; am L 2016, c 121, §1]

Note

The 2016 amendment is exempt from the repeal and reenactment condition of L 2014, c 141, §4. L 2016, c 121, §3.

Attorney General Opinions

Chapter's bidding requirements not applicable to sale of broadcasting right to University of Hawaii athletic events. Att. Gen. Op. 84-5.

Case Notes

Noninclusion of foreign exchange concessions under section emphasizes legislature's contemplation that foreign exchange concession at airport could be exclusive. 745 F.2d 1281.

" **§102-3 Qualification of bidders.** Before any prospective bidder is entitled to submit any bid for the occupancy of any such space, the prospective bidder shall, not less than six calendar days prior to the day designated for opening bids, give written notice to the officer charged with letting the contract of the prospective bidder's intention to bid, and the officer shall satisfy oneself of the prospective bidder's financial ability, experience and competence to carry out the terms and conditions of any contract that may be awarded. For this purpose, the officer may, in the officer's discretion, require prospective bidders to submit answers, under oath, to questions contained in a form of questionnaire setting forth a complete statement of the experience, competence and financial standing of the prospective bidders. Whenever it appears to the officer,

from answers to the questionnaire or otherwise, that any prospective bidder is not fully qualified and able to carry out the terms and conditions of the contract that may be awarded, the officer shall, after affording the prospective bidder an opportunity to be heard and if still of the opinion that the bidder is not fully qualified to carry out the terms and conditions of the contract that may be awarded, refuse to receive or consider any bid offered by the prospective bidder. The officer charged with letting the contract shall not divulge or permit to be divulged the names and the number of persons who have submitted their notice of intention to bid until after the opening of bids. All information contained in the answers to questionnaires shall remain confidential, and any government officer or employee who knowingly divulges or permits to be divulged any such information to any person not fully entitled thereto shall be fined not more than \$250. Questionnaires so submitted shall be returned to the bidders after having served their purpose. [L 1959, c 245, §2; am L 1962, c 5, §3; Supp, §7B-2; HRS §102-3; gen ch 1985]

Case Notes

Bidders qualifications may be considered after bids have been received and considered as well as before. 47 H. 499, 393 P.2d 60; 5 H. App. 13, 674 P.2d 1019.

" **§102-4 Advertisement for bids.** Public notice of a call for bids shall be made not less than three different days statewide, with respect to any state agency, or county-wide within the particular county with respect to any county or county agency. [L 1959, c 245, §3; Supp, §7B-3; HRS §102-4; am L 2001, c 303, §3]

" **§102-5 Bids; opening; rejection.** The time of opening of such tenders shall be not less than five days after the last publication. All bids shall be sealed and delivered to the officer advertising therefor and shall be opened by the officer at the hour and place to be stated in the call for tenders in the presence of all bidders who attend, and may be inspected by any bidder. All bids which do not comply with the requirements of the call for tenders shall be rejected. The officer calling for bids may reject any or all bids and waive any defects when in the officer's opinion such rejection or waiver will be for the best interest of the public. [L 1959, c 245, §4; Supp, §7B-4; HRS §102-5; gen ch 1985]

Case Notes

Mandamus compelling acceptance of bid is inapplicable when officer has discretion to reject any and all bids. 47 H. 499, 393 P.2d 60.

" **§102-6 Deposits of legal tender, etc., to accompany bid.**

(a) All bids shall be accompanied by a deposit of legal tender or by a certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, or official check drawn by, or a certified check accepted by, a bank, savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, in a sum not less than five per cent of the amount bid, payable at sight or unconditionally assigned to the officer advertising for tenders; provided that when the amount bid exceeds \$50,000, the deposit shall be in a sum not less than \$2,500 plus two per cent of the amount in excess of \$50,000.

If the bid deposit is in the form of a surety bond, it shall be issued in accordance with subsection (b).

(b) A bid may be accompanied by a surety bond executed to the officer calling for bids by the bidder as principal and by any bonding company listed in the United States Treasury List; provided that the bond furnished by any surety listed shall not exceed the bonding capacity rating of that surety on the Treasury List; in a sum of equal amount, conditioned upon the bidder entering into the contract and furnishing satisfactory security within ten days after the award or within any further time as the officer may allow, if the bidder is awarded the contract. [L 1959, c 245, §5; am L 1962, c 5, §4; Supp, §7B-5; am L 1967, c 142, §1; HRS §102-6; am L 1975, c 167, §2; am L 1976, c 88, §2; am L 1983, c 108, §1; am L 1990, c 345, §2; am L 1992, c 274, §2; am L Sp 1993, c 8, §3; am L 1994, c 186, §3]

" **§102-7 Forfeiture of deposits, return thereof.** If the bidder to whom the contract is awarded fails or neglects to enter into the contract and furnish satisfactory security, as required by sections 102-11 and 102-12, within ten days after the award or within such further time as the officer awarding the contract may allow, the officer shall pay the amount of the deposit into the treasury as a realization of the State, county or other governmental agency, as the case may be. If the contract is entered into and the security furnished within the required time, the deposit, certificate, or check shall be returned to the successful bidder. The deposits made by the unsuccessful bidders shall be returned to them after the contract is entered into or, if the contract is not awarded or entered into, after the officer's determination to publish

another call for tenders. [L 1959, c 245, §6; Supp, §7B-6; HRS §102-7]

" **§102-8 Bond may be substituted for deposits.** In lieu of the deposits prescribed by section 102-6, a bid may be accompanied by a surety bond executed to the officer calling for bids by the bidder as principal and by any corporation organized for the purpose of becoming surety on bonds, authorized under the laws of the United States or of the State to act as surety and doing business in the State under the laws of the United States or of the State, if a foreign corporation, and under the laws of the State, if a Hawaii corporation, as surety, in a penal sum of equal amount, conditioned upon the bidder entering into the contract and furnishing satisfactory security within ten days after the award or within any further time as the officer may allow, if the bidder is awarded the contract. [L 1959, c 245, §7; Supp, §7B-7; HRS §102-8; am L 1990, c 345, §3; am L 1992, c 274, §3]

" **§102-9 Contracts to be in writing; highest responsible bidder.** All such contracts shall be in writing, shall be executed by the officer letting the contract in the name of the State, county, or the board, bureau, or commission thereof authorized to let contracts in its own name, as the case may be, and shall be made with the highest responsible bidder, if such bidder qualifies by providing the security required by sections 102-11 and 102-12. If the highest and best bid or any other bid is rejected, or if the bidder to whom the contract was awarded fails to enter into the contract and furnish satisfactory security, the officer may, in the officer's discretion, award the contract to the next highest and best remaining responsible bidder. [L 1959, c 245, §8; Supp, pt of §7B-8; HRS §102-9; gen ch 1985]

Case Notes

Mandamus will not be granted unsuccessful bidder where contract has been executed and there has been part performance by awardee; taxpayer's suit contesting award of contract under invalid specifications. 47 H. 499, 393 P.2d 60.

" **§102-10 Modification of contract terms.** If during the term of the contract (including contracts which have been executed and are presently in force) there has been a reduction of fifteen per cent or more in the volume of business of the concessionaire for a period of sixty days or more, computed on the average monthly gross income for the eighteen months just

prior to the period or as long as the concessionaire has been in the business, whichever period is shorter, and such reduction as determined by the officer letting the contract is caused by construction work conducted during the period of time on, or within or contiguous to, the public property upon which the concession is located by either the state or county governments, or both, the officer, with the approval of the governor in the case of a state officer and the chief executive of the respective county in the case of a county officer, may modify any of the terms of the contract, including the agreed upon rent, for a period which will allow the concessionaire to recoup the amount lost by such reduction; provided that if the contract includes provisions allowing modification for the above contingencies, this section shall not be applicable thereto; provided further that this provision shall not apply to any particular concession if the application thereto may impair any contractual obligations with bondholders of the State or counties or with any other parties. [L 1963, c 93, §5; Supp, pt of §7B-8; HRS §102-10]

" **§102-11 Security for performance; conditions.** (a) Before any contract is entered into, the party with whom the contract is proposed to be made shall give security for the performance thereof as follows:

- (1) For a concession required to provide security under the contract in an amount less than four months' rental and other charges, if any:
 - (A) A good and sufficient bond;
 - (B) A deposit of legal tender; or
 - (C) A certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, or official check drawn by, or a certified check accepted by, a bank, savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration; and
 - (2) For a concession required to provide security under the contract in an amount equal to or greater than four months' rental and other charges, if any: a good and sufficient bond.
- (b) All security provided under this section shall:
- (1) Be conditioned on the full and faithful performance of the contract in accordance with the terms and intent thereof;
 - (2) Be in an amount not less than two months' rental and other charges, if any, required under the contract; provided that any contract for the sale and delivery

of in bond merchandise at Honolulu International Airport shall require a bond in an amount not less than four months of the highest minimum annual rental guaranty required under the contract; and

- (3) By its terms inure to the benefit of the State or of the county, as the case may be. [L 1959, c 245, §9; Supp, §7B-9; HRS §102-11; am L 1982, c 141, §1; am L 2006, c 37, §2]

" **§102-12 Surety on bond; justification.** A surety company authorized to do business under the laws of the State may be accepted as surety on the bond, whenever, in the opinion of the officer letting the contract, the rights of all parties in interest will be fully protected. If the surety or sureties on the bond, whether individual or corporate, shall be other than a surety company authorized to do business under the laws of the State, there shall be not more than four sureties who shall severally justify in such amounts as, taken together, will aggregate the full amount of the bond; provided that in the case of the other sureties the officer letting the contract shall require that the surety shall also severally deposit with the officer certified checks, certificates of deposit, or share certificates (unconditionally assigned or on demand on or after such period as the officer may stipulate) or bonds, stocks, or other negotiable securities, or execute and deliver to the officer a deed of trust of real property, all of such character as shall be satisfactory to the officer, each surety to furnish the security to the full cash value of one hundred per cent of the amount for which the surety shall so have justified; provided further that the contracting officer, in the officer's discretion, may waive the necessity of furnishing the security, to any extent that the officer may deem warranted, in cases where, upon an actual examination, the officer is satisfied as to the financial responsibility of the proposed surety or sureties; provided that if there is but one personal surety the surety shall so justify for the full amount of the bond. [L 1959, c 245, §10; Supp, §7B-10; HRS §102-12; gen ch 1985; am L 1990, c 345, §4]

" **§102-13 Amendment of contracts, when authorized.** Where there is an outstanding contract, lease, license, permit, or any other such arrangement for the operation of concessions or concession spaces on governmental property, the parties may amend the instrument to permit a related use with an increased rental adjustment where the lessee, licensee or permittee, as the case may be, can show financial hardship arising out of changes of circumstances or otherwise, if required to continue

operation under the original permitted use. [L 1962, c 5, §5; Supp, §7B-11.5; HRS §102-13]

" **§102-14 Use of public buildings by blind or visually handicapped persons.** (a) For the purpose of providing blind or visually handicapped persons, as defined in sections 235-1, 347-1, and 347-2 with remunerative employment, enlarging their economic opportunities and stimulating them to greater efforts in striving to make themselves self-supporting, blind or visually handicapped persons registered by the department of human services under section 347-6 and issued permits under subsection (c) shall be authorized to operate vending facilities and machines in any state or county public building for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and such other articles or services prepared on or off the premises in accordance with all applicable laws.

(b) The department of human services, after consultation with authorities responsible for management of state or county public buildings, shall adopt rules in accordance with chapter 91, necessary for the implementation of this section, including, but not limited to rules to assure that priority be given to registered blind or visually handicapped persons in the operation of vending facilities in state or county public buildings and to establish, whenever feasible, one or more vending facilities in all state and county public buildings.

(c) Assignment of vending facilities and space for vending machines shall be by permit issued by the department of human services.

(d) No person shall advertise or otherwise solicit the sale of food or beverages for human consumption in any public building which is in competition with a vending facility or machine operated or maintained by a duly authorized blind or visually handicapped person as prescribed by rules and regulations established under chapter 91. Any person who violates this subsection shall be subject to a fine of not more than \$1,000.

(e) After July 1, 1981, or upon the expiration of vending machine contracts in existence on June 10, 1981, no vending machines shall be placed in any state or county public building in which there is a vending facility or machine assigned by permit to a blind or visually handicapped person except pursuant to a permit issued by the department of human services.

(f) Any permit granted pursuant hereto may be terminated by the department of human services if the department determines that the vending facility or machine is not being operated in accordance with prescribed rules.

(g) This section shall not apply to the judiciary history center facilities in the Ali`iolani Hale building, University of Hawai`i system, public library system facilities, department of education facilities, department of transportation airport and harbor restaurant and lounge facilities and operations, public parks, and state and county facilities designed and intended for use as facilities for entertainment and other public events.

(h) After July 1, 1981, any department, agency, or instrumentality of the State or any of its political subdivisions planning the construction, substantial alteration, or renovations of any building shall consider including plans for a vending facility maintained or operated by a blind or visually handicapped person. The present vendor who is operating a vending facility shall not be displaced or dislocated from any state or county building because of renovations or substantial alterations, except for any temporary displacement or dislocation which may be necessary for the completion of the renovations or alterations. Any such vendor shall have the first option to operate the facility upon completion of the renovations or substantial alterations. [L 1937, c 208, §1; RL 1945, §465; RL 1955, §7-20; am L 1959, c 246, §14; am L 1964, c 30, §2; HRS §102-14; am L 1981, c 131, §1; am L 1987, c 339, §4; am L 1993, c 328, §2; am L 1994, c 57, §3; am L 1996, c 138, §2]

Case Notes

As the federal adjudication path applied to disputes arising from the Hawaii Randolph-Sheppard Act, trial court lacked subject matter jurisdiction to decide the merits of the case. 112 H. 388, 146 P.3d 103.

" **§102-15 Violation voids contract.** After May 31, 1959, any contract awarded or executed in violation of sections 102-1 to 102-12 shall be void. [L 1959, c 245, §11; Supp, §7B-11; HRS §102-15]

" **§102-16 Penalty.** Any officer of the State or of any municipal, county, or other political subdivision thereof, or any person acting under or for such officer or any other person who violates any provisions of sections 102-1 to 102-12 shall be fined not more than \$1,000 or imprisoned not more than one year, or both. [L 1959, c 245, §12; Supp, §7B-12; HRS §102-16]