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# A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

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**PART I**

SECTION 1. The legislature finds that the procurement process is in need of clear legislative direction to award state contracts to responsible bidders or offerors, increase accountability with performance on state contracts, and more efficiently utilize taxpayer dollars. Some state contracts may currently be awarded to the lowest bidder through the invitation for bid process without regard to poor past performance. Such bidders may be considered qualified despite poor performance on state, federal, or private contracts in the past, which may result in repeated inefficiencies and substandard work.

The purpose of this part is to:

- (1) Require that past performance be considered in future bid selection of contractors for sole source contracts and any competitive sealed bid or proposal contracts that exceeds the small purchase threshold; and



1           (2) Require procurement officers to consider specific  
2           factors, including past performance, when making a  
3           determination of offeror responsibility.

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

6           "(f) Bids shall be evaluated based on the requirements set  
7 forth in the invitation for bids. These requirements may  
8 include criteria to determine acceptability such as inspection,  
9 testing, quality, workmanship, delivery, and suitability for a  
10 particular purpose. Those criteria that will affect the bid  
11 price and be considered in evaluation for award shall be  
12 objectively measurable, such as discounts, transportation costs,  
13 and total or life cycle costs. Past performance shall be  
14 evaluated in all bids expected to meet or exceed the small  
15 purchase threshold. The invitation for bids shall set forth the  
16 evaluation criteria to be used. No criteria may be used in bid  
17 evaluation that are not set forth in the invitation for bids."

18           SECTION 3. Section 103D-303, Hawaii Revised Statutes, is  
19 amended by amending subsection (e) to read as follows:



1           "(e) The request for proposals shall state the relative  
2 importance of price and other evaluation factors. Past  
3 performance shall be evaluated in all solicitations expected to  
4 meet or exceed the small purchase threshold."

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

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

18           SECTION 5. Section 103D-310, Hawaii Revised Statutes, is  
19 amended to read as follows:



1           "§103D-310 Responsibility of offerors. (a) Purchases  
2 shall be made from, and contracts shall be awarded to,  
3 responsible prospective offerors only.

4           ~~[(a)]~~ (b) Unless the policy board, by rules, specifies  
5 otherwise, before submitting an offer, a prospective offeror,  
6 not less than ten calendar days prior to the day designated for  
7 opening offers, shall give written notice of the intention to  
8 submit an offer to the procurement officer responsible for that  
9 particular procurement.

10          ~~[(b)]~~ (c) Whether or not an intention to bid is required,  
11 the procurement officer shall determine whether the prospective  
12 offeror has the financial ability, past performance, resources,  
13 skills, capability, and business integrity necessary to perform  
14 the work. For this purpose, the officer, in the officer's  
15 discretion, may require any prospective offeror to submit  
16 answers, under oath, to questions contained in a standard form  
17 of questionnaire to be prepared by the policy board. Whenever  
18 it appears from answers to the questionnaire or otherwise, that  
19 the prospective offeror is not fully qualified and able to  
20 perform the intended work, a written determination of



1 nonresponsibility of an offeror shall be made by the head of the  
2 purchasing agency, in accordance with rules adopted by the  
3 policy board. The unreasonable failure of an offeror to  
4 promptly supply information in connection with an inquiry with  
5 respect to responsibility may be grounds for a determination of  
6 nonresponsibility with respect to [~~such~~] the offeror. The  
7 decision of the head of the purchasing agency shall be final  
8 unless the offeror applies for administrative review pursuant to  
9 section 103D-709.

10 [~~(e)~~] (d) All offerors, upon award of contract, shall  
11 comply with all laws governing entities doing business in the  
12 State, including chapters 237, 383, 386, 392, and 393. Offerors  
13 shall produce documents to the procuring officer to demonstrate  
14 compliance with this subsection. Any offeror making a false  
15 affirmation or certification under this subsection shall be  
16 suspended from further offerings or awards pursuant to section  
17 103D-702. The procuring officer shall verify compliance with  
18 this subsection for all contracts awarded pursuant to sections  
19 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts  
20 and procurements of \$2,500 or more awarded pursuant to section



1 103D-305; provided that the attorney general may waive the  
2 requirements of this subsection for contracts for legal services  
3 if the attorney general certifies in writing that comparable  
4 legal services are not available in this State.

5 ~~[(d)]~~ (e) Information furnished by an offeror pursuant to  
6 this section shall not be disclosed to any person except to law  
7 enforcement agencies as provided by chapter 92F."

8 SECTION 6. Section 103D-709, Hawaii Revised Statutes, is  
9 amended by amending subsection (c) to read as follows:

10 (c) Only parties to the protest made and decided pursuant  
11 to sections 103D-701, 103D-709(a), [~~103D-310(b)~~], 103D-310(c),  
12 and 103D-702(g) may initiate a proceeding under this section.  
13 The party initiating the proceeding shall have the burden of  
14 proof, including the burden of producing evidence as well as the  
15 burden of persuasion. The degree or quantum of proof shall be a  
16 preponderance of the evidence. All parties to the proceeding  
17 shall be afforded an opportunity to present oral or documentary  
18 evidence, conduct cross-examination as may be required, and  
19 present argument on all issues involved. Fact finding under  
20 section 91-10 shall apply."



PART II

SECTION 7. The purpose of this part is to form an initial procurement working group.

SECTION 8. (a) There is established the initial procurement working group, which shall be made up of procurement representatives from the state and county. The working group shall:

- (1) Identify issues relating to existing procurement methods and collect data to determine the magnitude of the problem;
- (2) Document existing practices and processes, including but not limited to procurement methods; preparation of solicitation documents; evaluation and basis of award, including the consideration of past performance when deemed appropriate; post award contract administration; suspension; and debarment;
- (3) Identify lessons learned from case studies of projects identified as having bad contractors or subcontractors;



1 (4) Identify shortfalls, needs, gaps, or challenges in  
2 laws and rules, processes, knowledge, and resources;

3 (5) Find potential methods or mechanisms available to  
4 address the problems identified, including but not  
5 limited to the use of a past performance database, by:

6 (A) Examining the pros and cons of each potential  
7 method or mechanism;

8 (B) Determining the most promising methods or  
9 mechanisms to determine requirements for  
10 implementation, including but not limited to  
11 time, costs, and resources;

12 (C) Obtaining industry feedback; and

13 (D) Prioritizing for purposes of recommendations; and

14 (6) Recommend specific objective criteria to be used to  
15 evaluate the past performance of bidders in a  
16 competitive sealed bid procurement.

17 (b) The initial procurement working group shall consist of  
18 the following members or their designees:

19 (1) State procurement administrator, who shall serve as  
20 chair;





- 1 (2) Comptroller;
  - 2 (3) Attorney General;
  - 3 (4) Chief information officer;
  - 4 (5) University of Hawaii chief procurement officer;
  - 5 (6) Department of education chief procurement officer;
  - 6 (7) Director of transportation;
  - 7 (8) County of Hawaii chief procurement officer;
  - 8 (9) County of Maui chief procurement officer;
  - 9 (10) County of Kauai chief procurement officer; and
  - 10 (11) City and county of Honolulu chief procurement officer.
- 11 (c) The initial procurement working group shall submit a  
12 report of its findings and recommendations, including any  
13 proposed legislation, to the legislature no later than  
14 November 1, 2020; provided that the working group shall bring  
15 together leaders and organizations from the construction and  
16 information technology industry to review and discuss any gaps  
17 or problems with the proposed recommendations prior to  
18 finalization of the working group's recommendations to the  
19 legislature.

20 **PART III**



1 SECTION 9. There is appropriated out of the general  
2 revenues of the State of Hawaii the sum of \$250,000 or so much  
3 thereof as may be necessary for fiscal year 2019-2020 and the  
4 same sum or so much thereof as may be necessary for fiscal year  
5 2020-2021 for the purposes of implementing this Act; provided  
6 that the sums shall be allocated as follows:

- 7 (1) \$50,000 to develop and create a statewide past  
8 performance database; and  
9 (2) \$200,000 for the outsourcing of two full-time  
10 equivalent (2.0 FTE) positions to assist with  
11 developing rules, including facilitating community and  
12 government meetings, and benchmarking analysis in  
13 determining the most fair, objective, and descriptive  
14 procedures for the State.

15 The sums appropriated shall be expended by the state  
16 procurement office for the purposes of this Act.

17 **PART IV**

18 SECTION 10. This Act does not affect rights and duties  
19 that matured, penalties that were incurred, and proceedings that  
20 were begun before its effective date.



1 SECTION 11. If any provision of this Act, or the  
2 application thereof to any person or circumstance, is held  
3 invalid, the invalidity does not affect other provisions or  
4 applications of the Act that can be given effect without the  
5 invalid provision or application, and to this end the provisions  
6 of this Act are severable.

7 SECTION 12. Statutory material to be repealed is bracketed  
8 and stricken. New statutory material is underscored.

9 SECTION 13. This Act shall take effect on January 1, 2050.

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**Report Title:**

Procurement; Past Performance; Appropriation; Working Group;  
Database

**Description:**

Requires procurement officers to complete past performance evaluations of contractors. Requires past performance to be considered in all sole source procurement and any competitive contracts that exceeds the small purchase threshold. Establishes an initial procurement working group that will evaluate and make recommendations to the legislature about the effectiveness of existing procurement methods. Requires the development and implementation of a statewide past performance database. Appropriates funds. Effective 1/1/2050. (SD1)

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

