
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

PART I

SECTION 1. The legislature finds that during challenging economic times, it is necessary for the State to investigate and employ new and innovative ways for the procurement of goods, services, and construction, while ensuring the prudent and cost-effective expenditure of public moneys. House Resolution No. 142, adopted during the regular session of 2016, demonstrated the legislature's foresight by requesting the state procurement office to review Hawaii's procurement laws in comparison to federal procurement law. The purpose of the review was to improve Hawaii's procurement process through understanding the efficient and effective ways in which the federal government conducts its procurement processes.

The legislature further finds that the state procurement office contracted with an independent third party to conduct the requested review, which was submitted to the legislature in January 2020. In conducting the review, the independent



1 contractor completed a detailed document review, interviewed a
2 diverse group of stakeholders, and thoroughly analyzed the data
3 collected. The report identified sixteen recommendations to
4 align the state procurement process to the federal procurement
5 process.

6 Accordingly, the purpose of this Act is to amend the state
7 procurement code to increase economy, efficiency, effectiveness,
8 and impartiality in public procurement. Specifically, this Act:

9 (1) Enacts statutory changes to implement certain
10 recommendations made by the state procurement office's
11 review of Hawaii procurement laws conducted pursuant
12 to House Resolution No. 142, Regular Session of 2016.

13 These recommendations:

14 (A) Allow selection committees for the procurement of
15 professional services the same flexibility
16 afforded to their federal counterparts to weigh
17 the selection criteria in the order of importance
18 relevant to their agency and project; and

19 (B) Require the state procurement office to develop a
20 vendor performance information system; and



(2) Allows a bidder of a public works construction project to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline.

PART II

SECTION 2. The legislature finds that while the federal and state procurement laws and rules regarding the procurement of design professionals use the same criteria, the state procurement process ranks these criteria by importance while the federal process does not. The ranking has purportedly caused some agencies to repeatedly award contracts to the same firms at the expense of new entrants that may be equally qualified.

The purpose of this part is to implement recommendation I-2 of the state procurement office's review of Hawaii procurement laws by amending the language of section 103D-304(e), Hawaii Revised Statutes, to allow selection committees for the procurement of professional services the same flexibility afforded to their federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.



1 SECTION 3. Section 103D-304, Hawaii Revised Statutes, is
2 amended by amending subsection (e) to read as follows:

3 "(e) The selection criteria employed [~~in descending order~~
4 ~~of importance~~] shall be:

5 (1) Experience and professional qualifications relevant to
6 the project type;

7 (2) Past performance on projects of similar scope for
8 public agencies or private industry, including
9 corrective actions and other responses to notices of
10 deficiencies;

11 (3) Capacity to accomplish the work in the required time;
12 and

13 (4) Any additional criteria determined in writing by the
14 selection committee to be relevant to the purchasing
15 agency's needs or necessary and appropriate to ensure
16 full, open, and fair competition for professional
17 services contracts."

18 PART III

19 SECTION 4. The legislature finds that the federal
20 government routinely captures vendor performance in a structured
21 and uniform way. This information can be accessed and utilized



1 when future procurements need to assess a vendor's
2 responsibility. The State does not have a comparable system.

3 The purpose of this part is to implement
4 recommendation II-2 of the state procurement office's review of
5 Hawaii procurement laws by requiring the state procurement
6 office to develop a vendor performance information system.

7 SECTION 5. Chapter 103D, Hawaii Revised Statutes, is
8 amended by adding a new section to part III to be appropriately
9 designated and to read as follows:

10 "§103D- Past performance database. (a) The state
11 procurement office shall implement and administer a past
12 performance database with regard to state contractors.

13 (b) The state procurement office shall adopt rules
14 pursuant to chapter 91 to establish:

15 (1) Information required to be included in the past
16 performance database; provided that the information
17 shall include:

18 (A) The name of the state contractor;

19 (B) The date of the project;

20 (C) The size of the project;

21 (D) A brief description of the project;



- 1 (E) The responsible managing employees for the
2 project;
- 3 (F) Whether the project was timely completed or not;
- 4 (G) The project's authorized budget; and
- 5 (H) The positive or negative difference between the
6 final cost of the project and the project's
7 authorized budget, including the reasons for the
8 difference, if any;
- 9 (2) Procedures to inform a contractor of the information
10 contained in the past performance database about that
11 contractor; and
- 12 (3) Procedures for a contractor to correct or respond to
13 the information contained in the past performance
14 database about that contractor."

15 SECTION 6. Section 103D-104, Hawaii Revised Statutes, is
16 amended as follows:

17 1. By adding a new definition to be appropriately inserted
18 and to read:

19 "Past performance" means available recent and relevant
20 performance of a contractor on state contracts that shall be
21 considered in a responsibility determination within the



1 relevance of the current solicitation, including the
2 considerations of section 103D-702(b)."

3 2. By amending the definition of "responsible bidder or
4 offeror" to read:

5 ""Responsible bidder or offeror" means a person who has the
6 capability in all respects to perform fully the contract
7 requirements, and the integrity and reliability [~~which~~] that
8 will assure good faith performance[~~-~~], pursuant to the
9 responsibility determination standards adopted by the policy
10 board."

11 SECTION 7. Section 103D-302, Hawaii Revised Statutes, is
12 amended by amending subsection (f) to read as follows:

13 "(f) Bids shall be evaluated based on the requirements set
14 forth in the invitation for bids. These requirements may
15 include criteria to determine acceptability such as inspection,
16 testing, quality, workmanship, delivery, and suitability for a
17 particular purpose. Those criteria that will affect the bid
18 price and be considered in evaluation for award shall be as
19 objectively measurable[~~-~~] as possible, such as discounts,
20 transportation costs, [~~and~~] total or life cycle costs[~~-~~], and
21 the bidder's past performance on state contracts of similar



1 scope, including but not limited to notices of deficiencies and
2 failure to complete a procurement contract. The invitation for
3 bids shall set forth the evaluation criteria to be used. No
4 criteria may be used in bid evaluation that are not set forth in
5 the invitation for bids."

6 SECTION 8. Section 103D-306, Hawaii Revised Statutes, is
7 amended by amending subsection (a) to read as follows:

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

19 SECTION 9. Section 103D-310, Hawaii Revised Statutes, is
20 amended by amending subsection (b) to read as follows:



1 "(b) Whether or not an intention to bid is required, the
2 procurement officer shall determine whether the prospective
3 offeror has the financial ability, resources, skills,
4 capability, and business integrity necessary to perform the
5 work. For ~~[this]~~ the purpose[~~, the~~] of making a responsibility
6 determination, the procurement officer shall possess or obtain
7 available information sufficient to be satisfied that a
8 prospective offeror meets the applicable standards, including
9 consideration of past performance as it applies to a
10 responsibility determination for the current solicitation. The
11 officer, in the officer's discretion, may require any
12 prospective offeror to submit answers, under oath, to questions
13 contained in a standard form of questionnaire to be prepared by
14 the policy board. Whenever it appears from answers to the
15 questionnaire or otherwise, that the prospective offeror is not
16 fully qualified and able to perform the intended work, a written
17 determination of nonresponsibility of an offeror shall be made
18 by the head of the purchasing agency, in accordance with rules
19 adopted by the policy board. The unreasonable failure of an
20 offeror to promptly supply information in connection with an
21 inquiry with respect to responsibility may be grounds for a



determination of nonresponsibility with respect to such offeror.
The decision of the head of the purchasing agency shall be final
unless the offeror applies for administrative review pursuant to
section 103D-709."

SECTION 10. Section 103D-320, Hawaii Revised Statutes, is
amended to read as follows:

"[+]§103D-320[+] **Retention of procurement records**[÷];
evaluations. All procurement records shall be retained and
disposed of in accordance with chapter 94 and records retention
guidelines and schedules approved by the comptroller. Written
past performance evaluations for all procurements over the small
purchase threshold shall be maintained in the department's
procurement files and in the statewide past performance
database."

PART IV

SECTION 11. The legislature finds that the Hawaii public
procurement code currently requires general contractors to
disclose the subcontractors they intend to use on a project.
The intent of this requirement is to deter bid shopping – the
practice of low-bidding general contractors unethically
extracting lower prices from subcontractors under the threat of



1 replacement. Although stakeholders agree that the disclosure
2 requirement accomplishes this goal, the legislature notes that
3 the federal government and a vast majority of states do not have
4 a similar disclosure requirement in their procurement processes.

5 The legislature further finds that this disclosure
6 requirement has the unintended consequence of increasing the
7 number and complexity of construction protests. The state
8 procurement office's review of Hawaii procurement laws found
9 that most protests allege technical issues stemming from the
10 subcontractor listing requirement. These technical mistakes
11 include instances where a bidder failed to list a required
12 subcontractor or when a listed subcontractor did not possess the
13 appropriate license and was not qualified to perform the work.

14 Recommendation III-2 of the state procurement office's
15 review of Hawaii procurement laws eliminates the requirement for
16 bidders to disclose the nature and scope of work expected to be
17 performed by a subcontractor. However, the legislature further
18 finds that this issue with the subcontractor listing may be
19 addressed instead by providing prime contractors with additional
20 time to correct non-material or technical issues with
21 subcontractor listings.



1 Inadvertent errors can occur due to the complexity of the
2 laws regarding contractor licenses under chapter 444, Hawaii
3 Revised Statutes; title 16, Hawaii Administrative Rules; and the
4 judicial, quasi-judicial, and agency interpretations of these
5 laws and rules. Time constraints from when a bidder receives
6 the bids from all of its subcontractors up until the procuring
7 agency's bid submission deadline may also cause inadvertent
8 failures to list a required subcontractor or the listing of
9 erroneous subcontractor license numbers in a bid. The
10 legislature further recognizes that the provision of additional
11 time for prime contractors to correct their subcontractor
12 listings would facilitate the legislature's intent of ensuring
13 that subcontractors are listed properly on the bid submittal and
14 are licensed, while maintaining the integrity of the bid
15 process.

16 The purpose of this part is to minimize bid challenges,
17 costs, and delays of public works construction projects by:

- 18 (1) Allowing a bidder of a public works construction
19 project to clarify and correct non-material or
20 technical issues with subcontractor listings for up to



1 twenty-four hours after the bid submission deadline;

2 and

3 (2) Requiring that bids for construction be publicly
4 opened no sooner than twenty-four hours after the bid
5 submission deadline.

6 SECTION 12. Section 103D-302, Hawaii Revised Statutes, is
7 amended by amending subsections (b), (c), and (d) to read as
8 follows:

9 "(b) An invitation for bids shall be issued, and shall
10 include a purchase description and all contractual terms and
11 conditions applicable to the procurement. If the invitation for
12 bids is for construction, it shall [specify]:

13 (1) Specify that all bids include the name of each person
14 or firm to be engaged by the bidder as a joint
15 contractor or subcontractor in the performance of the
16 contract and the nature and scope of the work to be
17 performed by each[-]; and

18 (2) Allow the bidder to clarify or correct non-material or
19 technical information required by paragraph (1) for up
20 to twenty-four hours after the bid submission
21 deadline; provided that any additions or substitutions



1 of listed joint subcontractors shall be prohibited,
2 including changes to the nature and scope of work as
3 listed.

4 Construction bids that do not comply with this requirement may
5 be accepted if acceptance is in the best interest of the State
6 and the value of the work to be performed by the joint
7 contractor or subcontractor is equal to or less than one per
8 cent of the total bid amount.

9 (c) Adequate public notice of the invitation for bids
10 shall be given a reasonable time before the date set forth in
11 the invitation for the opening of bids. The policy board shall
12 adopt rules [~~which~~] that specify:

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

14 (2) What constitutes a reasonable interim between
15 publication and bid opening; and

16 (3) How notice may be published, including publication in
17 a newspaper of general circulation, notice by mail to
18 all persons on any applicable bidders mailing list,
19 publication by any public or private telecommunication
20 information network, or any other method of
21 publication it deems to be effective.



1 (d) Bids shall be opened publicly in the presence of one
2 or more witnesses, at the time and place designated in the
3 invitation for bids[-]; provided that if the bid is for
4 construction, it shall be opened no sooner than twenty-four
5 hours after the deadline for the submission of the bids. The
6 amount of each bid and other relevant information specified by
7 rule, together with the name of each bidder, shall be recorded.
8 The record and each bid shall be open to public inspection."

9 PART V

10 SECTION 13. This Act does not affect rights and duties
11 that matured, penalties that were incurred, and proceedings that
12 were begun before its effective date.

13 SECTION 14. Statutory material to be repealed is bracketed
14 and stricken. New statutory material is underscored.

15 SECTION 15. This Act shall take effect on July 1, 2112;
16 provided that part III of this Act shall take effect on
17 December 31, 2022.



Report Title:

Procurement; State Procurement Office; Construction Procurement
Policy Review

Description:

Allows selection committees for procurement of professional services to weigh the selection criteria in the order of importance relevant to their agency and project. Beginning 12/31/2022, requires the state procurement office to develop a vendor past performance information system. Allows a bidder of a public works construction project to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline. Requires bids for construction to be publicly opened no sooner than twenty-four hours after the bid submission deadline. Effective 7/1/2112. (HD2)

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