

JAN 24 2007

A BILL FOR AN ACT

RELATING TO THE PROCUREMENT CODE.

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

1 SECTION 1. Chapter 103D, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 **"PART . CONSULTANTS' COMPETITIVE NEGOTIATION**

5 **§103D-A Definitions.** Unless the context clearly indicates
6 otherwise, as used in this part, the following words shall as
7 mean as follows:

8 "Agency" means the State, a state agency, or a county.

9 "Design-build entity" means an entity that:

10 (1) Is licensed under chapter 444 to engage in
11 contracting; or

12 (2) Is licensed under chapter 464 to practice or to offer
13 to practice engineering, architecture, or landscape
14 architecture.

15 "Design-build contract" means a single contract with a
16 design-build entity for the design and construction of a public
17 construction project.



1 "Design criteria package" means concise, performance-
2 oriented drawings or specifications of the public construction
3 project that is sufficient to furnish information to permit
4 design-build entities to prepare a bid or a response to an
5 agency's request for proposal, or to permit an agency to enter
6 into a negotiated design-build contract, and that includes, at a
7 minimum, the following performance-based criteria: the legal
8 description of the site, survey information concerning the site,
9 interior space requirements, material quality standards,
10 schematic layouts and conceptual design criteria of the project,
11 cost or budget estimates, design and construction schedules,
12 site development requirements, provisions for utilities,
13 stormwater retention and disposal, and parking requirements
14 applicable to the project.

15 "Design criteria professional" means an entity who is
16 licensed under chapter 464 to practice architecture, landscape
17 architecture, or engineering, and who is employed by or under
18 contract to the agency for the providing of professional
19 architect services, landscape architect services, or engineering
20 services in connection with the preparation of the design
21 criteria package.



1 "Entity" means any individual, firm, partnership,
2 corporation, association, or other legal entity permitted by law
3 to engage in business as a licensed contractor or to practice
4 architecture, engineering, or surveying and mapping in the
5 State.

6 "Negotiate" or any form of that word means to conduct
7 legitimate, arms length discussions and conferences to reach an
8 agreement on a term or price. For purposes of this definition,
9 the term does not include presentation of flat-fee schedules
10 with no alternatives or discussion.

11 "Professional services" means those services within the
12 scope of the practice of architecture, professional engineering,
13 landscape architecture, or registered surveying and mapping, as
14 defined by the laws of the State, or those performed by any
15 architect, professional engineer, landscape architect, or
16 registered surveyor and mapper in connection with the person's
17 professional employment or practice.

18 "Project" means that fixed capital outlay study or planning
19 activity described in the public notice of the State or a state
20 or county agency under section 103D-B. A project may include:

- 21 (1) A grouping of minor construction, rehabilitation, or
22 renovation activities; or



1 (2) A grouping of substantially similar construction,
2 rehabilitation, or renovation activities.

3 **§103D-B Public announcement and qualification procedures.**

4 (a) Each agency shall publicly announce, in a uniform and
5 consistent manner, each occasion when professional services are
6 to be purchased for a project, the basic construction cost of
7 which is estimated by the agency to exceed the threshold amount
8 of \$250,000, or for a planning or study activity when the fee
9 for professional services exceeds the threshold amount of
10 \$25,000, except in cases of valid public emergencies certified
11 by the agency head. The public notice shall include a general
12 description of the project and must indicate how interested
13 consultants may apply for consideration.

14 Each agency shall provide a good faith estimate in
15 determining whether the proposed activity meets the threshold
16 amounts referred to in this subsection.

17 (b) Each agency shall encourage design-build entities
18 engaged in the lawful practice of their professions that desire
19 to provide professional services to the agency to submit
20 annually statements of qualifications and performance data.



1 (c) Any entity or individual desiring to provide
2 professional services to the agency shall first be certified by
3 the agency as qualified.

4 (d) Each agency shall evaluate professional services,
5 including capabilities, adequacy of personnel, past record,
6 experience, and other factors determined by the agency to be
7 applicable to its particular requirements. The agency shall
8 make a determination whether the entity or individual to be
9 employed is fully qualified to render the required service.

10 (e) The agency's determination shall be a public record.

11 **§103D-C Competitive selection.** (a) For each proposed
12 project, the agency shall evaluate current statements of
13 qualifications and performance data if design-build entities on
14 file with the agency, together with those that may be submitted
15 by other entities regarding the proposed project, and shall
16 conduct discussions with, and may require public presentations
17 by, no fewer than three entities regarding their qualifications,
18 approach to the project, and ability to furnish the required
19 services.

20 (b) The agency shall select, in order of preference, no
21 fewer than three design-build entities deemed to be the most
22 highly qualified to perform the required services. In



1 determining whether an entity is qualified, the agency shall
2 consider such factors as the ability of professional personnel,
3 past performance, willingness to meet time and budget
4 requirements, location, workloads of the entities, and the
5 volume of work previously awarded to each entity by the agency,
6 with the object of effecting an equitable distribution of
7 contracts among qualified entities, provided such distribution
8 does not violate the principle of selection of the most highly
9 qualified entities. The agency may request, accept, and consider
10 proposals for the compensation to be paid under the contract
11 only during competitive negotiations under section 103D-D.

12 (c) This section shall apply to a professional service
13 contract for a project the basic construction cost of which is
14 estimated by the agency to be \$250,000 or more, or for a
15 planning or study activity when the fee for professional
16 services is estimated to be \$25,000 or more.

17 **§103D-D Competitive negotiation.** (a) The agency shall
18 negotiate a contract with the most qualified design-build entity
19 for professional services at a compensation level that the
20 agency determines is fair, competitive, and reasonable. In
21 making such determination, the agency shall conduct a detailed



1 analysis of the cost of the professional services required in
2 addition to considering their scope and complexity.

3 (b) For any lump-sum or cost-plus-a-fixed-fee professional
4 service contract in the amount of \$150,000 or more, the agency
5 shall require the entity receiving the award to execute a truth-
6 in-negotiation certificate stating that wage rates and other
7 factual unit costs supporting the compensation are accurate,
8 complete, and current at the time of contracting. Any
9 professional service contract under which such a certificate is
10 required shall contain a provision that the original contract
11 price and any additions thereto will be adjusted to exclude any
12 significant sums by which the agency determines the contract
13 price was increased due to inaccurate, incomplete, or noncurrent
14 wage rates and other factual unit costs. All contract
15 adjustments shall be made within one year following the end of
16 the contract.

17 (c) If the agency is unable to negotiate a satisfactory
18 contract with the entity considered to be the most qualified at
19 a price the agency determines to be fair, competitive, and
20 reasonable, negotiations with that entity shall be formally
21 terminated. The agency shall then undertake negotiations with
22 the second most qualified entity. Failing accord with the second



1 most qualified entity, the agency shall terminate negotiations.
2 The agency shall then undertake negotiations with the third most
3 qualified entity.

4 (d) If the agency is unable to negotiate a satisfactory
5 contract with any of the selected entities, the agency shall
6 select additional entities in the order of their competence and
7 qualification and continue negotiations in accordance with this
8 section until an agreement is reached.

9 **§103D-E Prohibition against contingent fees.** (a) Each
10 contract entered into by the agency for professional services
11 shall contain a prohibition against contingent fees as follows:
12 "The architect (surveyor, or professional engineer, as
13 applicable) warrants that no company or person has been employed
14 or retained, other than a bona fide employee working solely for
15 the architect (surveyor, or professional engineer, as
16 applicable) to solicit or secure this agreement and that no
17 person, company, corporation, individual, or firm, other than a
18 bona fide employee working solely for the architect (surveyor,
19 professional engineer, as applicable) has been paid or has
20 agreed to be paid any fee, commission, percentage, gift, or
21 other consideration contingent upon or resulting from the award
22 or making of this agreement.



1 For the breach or violation of this prohibition, the agency
2 shall have the right to terminate the agreement without
3 liability and, at its discretion, to deduct from the contract
4 price, or otherwise recover, the full amount of any fee,
5 commission, percentage, gift, or consideration.

6 (b) Any person who confers, or offers or agrees to confer,
7 directly or indirectly, any pecuniary benefit upon a public
8 servant with the intent to influence the public servant's vote,
9 opinion, judgment, exercise of discretion, or other action as a
10 public servant under this part shall be guilty of a misdemeanor.

11 (c) Any public servant who solicits, accepts, or agrees to
12 accept, directly or indirectly, any pecuniary benefit with the
13 intent that the person's vote, opinion, judgment, exercise of
14 discretion, or other action as a public servant under this part
15 will thereby be influenced, shall be guilty of a misdemeanor.

16 **§103D-F Authority of department of accounting and general**
17 **services.** Notwithstanding any other provision of this part, the
18 department of accounting and general services shall be the
19 agency of state government that is solely and exclusively
20 authorized and empowered to administer and perform the functions
21 described in sections 103D-B, 103D-C, and 103D-D with respect to
22 projects for which state funds are expended; provided that the



1 department may delegate authority to administer and perform the
2 functions described in sections 103D-B, 103D-C, and 103D-D to
3 other agencies. Under the terms of the delegation, the agency
4 may reserve its right to accept or reject a proposed contract.

5 **§103D-G State assistance to counties.** On any professional
6 service contract for which the fee is over \$25,000, the
7 department of accounting and general services shall provide,
8 upon request by a county, and upon reimbursement of the costs
9 involved, assistance in selecting consultants and in negotiating
10 consultant contracts.

11 **§103D-H Applicability to design-build contracts.** (a)
12 Except as provided in this section, this part shall not be
13 applicable to the procurement of design-build contracts by any
14 agency, and the agency shall award design-build contracts in
15 accordance with the procurement laws, rules, and ordinances
16 applicable to the agency.

17 (b) The design criteria package shall be prepared and
18 sealed by a design criteria professional employed by or retained
19 by the agency. If the agency elects to enter into a professional
20 services contract for the preparation of the design criteria
21 package, then the design criteria professional shall be selected
22 and contracted with under the requirements of sections 103D-C



1 and 103D-D. A design criteria professional who has been
2 selected to prepare the design criteria package shall not be
3 eligible to render services under a design-build contract
4 executed pursuant to the design criteria package.

5 (c) The department of accounting and general services
6 shall adopt rules under chapter 91 for the award of design-build
7 contracts to be followed by state agencies.

8 (d) If the procuring agency elects the option of
9 qualifications-based selection, during the selection of the
10 design-build entity the procuring agency shall employ or retain
11 a licensed design professional appropriate to the project to
12 serve as the agency's representative. Procedures for the use of
13 a competitive proposal selection process must include as a
14 minimum the following:

15 (1) The preparation of a design criteria package for the
16 design and construction of the public construction
17 project;

18 (2) The qualification and selection of no fewer than three
19 design-build entities as the most qualified, based on
20 the qualifications, availability, and past work of the
21 entities, including the partners or members thereof;



- 1 (3) The criteria, procedures, and standards for the
2 evaluation of design-build contract proposals or bids,
3 based on price, technical, and design aspects of the
4 public construction project, weighted for the project;
- 5 (4) The solicitation of competitive proposals, pursuant to
6 a design criteria package, from those qualified
7 design-build entities and the evaluation of the
8 responses or bids submitted by those entities based on
9 the evaluation criteria and procedures established
10 prior to the solicitation of competitive proposals;
- 11 (5) For consultation with the employed or retained design
12 criteria professional concerning the evaluation of the
13 responses or bids submitted by the design-build
14 entities, the supervision or approval by the agency of
15 the detailed working drawings of the project; and for
16 evaluation of the compliance of the project
17 construction with the design criteria package by the
18 design criteria professional; and
- 19 (6) In the case of public emergencies, for the agency head
20 to declare an emergency and authorize negotiations
21 with the best qualified design-build entity available
22 at that time.



1 **§103D-I Reuse of existing plans.** Notwithstanding any
2 other provision of this part, there shall be no public notice
3 requirement or utilization of the selection process as provided
4 in this part for projects in which the agency is able to reuse
5 existing plans from a prior project of the agency. Public
6 notice for any plans that are intended to be reused at some
7 future time shall contain a statement that provides that the
8 plans are subject to reuse in accordance with this section.

9 **§103D-J Construction of part.** If any provision of this
10 part is in conflict with any other provision of this chapter,
11 the provision in this part shall apply."

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

14 "(a) Professional services shall be procured in accordance
15 with sections 103D-302, 103D-303, 103D-305, 103D-306, or 103D-
16 307, or this section; provided that design professional services
17 furnished by licensees under chapter 464 shall be procured
18 pursuant to this section or section 103D-307[-] or part .
19 Contracts for professional services shall be awarded on the
20 basis of demonstrated competence and qualification for the type
21 of services required, and at fair and reasonable prices."



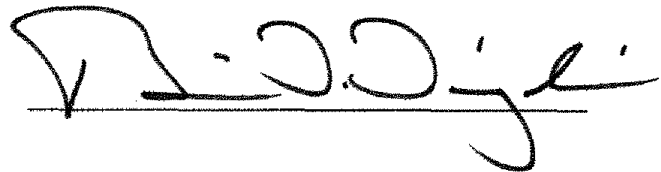
1 SECTION 3. In codifying the new sections added by section
2 1 of this Act, the revisor of statutes shall substitute
3 appropriate section numbers for the letters used in designating
4 the new sections in this Act.

5 SECTION 4. Statutory material to be repealed is bracketed
6 and stricken. New statutory material is underscored.

7 SECTION 5. This Act shall take effect on July 1, 2007.

8

INTRODUCED BY:





Report Title:

Procurement Code

Description:

Authorizes best value procurement by permitting governmental agencies to award design-build contracts.

