
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

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

12 The purpose of this Act is to:

- 13 (1) Require procurement officers to complete periodic
14 performance evaluations of certain contractors;
15 (2) Establish factors to be included in any evaluation,
16 consideration, or review of past performance and
17 ratings standards for those factors;



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

(4) Require procurement officers to consider specific factors, including past performance, when making a determination of offeror responsibility;

(5) Allow procurement officers to delegate to contract administrators certain duties relating to contract administration; and

(6) Appropriate funds to the state procurement office to implement this Act.

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

"(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs,



1 and total or life cycle costs. Past performance shall be
2 evaluated in all bids expected to meet or exceed the small
3 purchase threshold. The invitation for bids shall set forth the
4 evaluation criteria to be used. No criteria may be used in bid
5 evaluation that are not set forth in the invitation for bids."

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

8 "(e) The request for proposals shall state the relative
9 importance of price and other evaluation factors. Past
10 performance shall be evaluated in all solicitations expected to
11 meet or exceed the small purchase threshold. The currency,
12 relevance, and source of the information, context of the data,
13 and general trends in the contractor's performance shall be
14 considered. This assessment of past performance information
15 shall be separate from the responsibility determination required
16 under section 103D-310. The solicitation shall describe the
17 approach for evaluating past performance, including evaluating
18 offerors with no relevant performance history, and shall provide
19 offerors an opportunity to identify past or current contracts
20 (including federal, state, local government, and private
21 contracts) with requirements that are similar to the



solicitation. The solicitation shall also authorize offerors to
provide information on problems encountered on the identified
contracts and the offeror's corrective actions. The
governmental body shall consider this information, as well as
information obtained from any other sources, when evaluating the
offeror's past performance. The procurement officer shall
determine the relevance of similar past performance information.
The evaluation shall take into account past performance
information regarding predecessor companies, key personnel who
have relevant experience, or subcontractors that will perform
major or critical aspects of the requirement when the
information is relevant to the procurement. In the case of an
offeror without a record of relevant past performance or for
whom information on past performance is not available, the
offeror may not be evaluated favorably or unfavorably on past
performance."

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

"(a) A contract may be awarded for goods, services, or construction without competition when the head of a purchasing agency determines in writing that there is only one source for



1 the required good, service, or construction, the determination
2 is reviewed and approved by the chief procurement officer, the
3 written determination is posted in the manner described in rules
4 adopted by the policy board, a review of past performance has
5 been conducted, and no objection is outstanding. The written
6 determination, any objection, past performance evaluations
7 relied upon, and a written summary of the disposition of any
8 objection shall be included in the contract file."

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

11 "§103D-310 Responsibility of offerors. (a) Purchases
12 shall be made from, and contracts shall be awarded to,
13 responsible prospective contractors only.

14 (b) No purchase or award shall be made unless the
15 procurement officer makes an affirmative determination of
16 responsibility. In the absence of information clearly
17 indicating that the prospective contractor is responsible, the
18 procurement officer shall make a determination of
19 nonresponsibility.

20 (c) The award of a contract to a prospective contractor
21 based on lowest evaluated price alone can be false economy if



1 there is subsequent default, late deliveries, or other
2 unsatisfactory performance resulting in additional contractual
3 or administrative costs. While it is important that a
4 governmental body's purchases be made at the lowest price, a
5 supplier shall not be awarded a contract solely because that
6 supplier submits the lowest offer. A prospective contractor
7 shall affirmatively demonstrate its responsibility, including,
8 when necessary, the responsibility of its proposed
9 subcontractors. To be determined responsible, a prospective
10 contractor shall:

- 11 (1) Have adequate financial resources to perform the
12 contract, or the ability to obtain the resources;
- 13 (2) Be able to comply with the required or proposed
14 delivery or performance schedule, taking into
15 consideration all existing commercial and governmental
16 business commitments;
- 17 (3) Have a satisfactory performance record. A prospective
18 contractor shall not be determined responsible or
19 nonresponsible solely on the basis of a lack of
20 relevant performance history. A prospective
21 contractor that is or recently has been seriously



1 deficient in contract performance shall be presumed to
2 be nonresponsible, unless the procurement officer
3 determines that the circumstances were properly beyond
4 the contractor's control, or that the contractor has
5 taken appropriate corrective action. Failure to meet
6 the quality requirements of a contract shall be a
7 significant factor to consider in determining
8 satisfactory performance. The procurement officer
9 shall consider the number of contracts involved and
10 the extent of deficient performance in each contract
11 when making this determination;

12 (4) Have a satisfactory record of integrity and business
13 ethics;

14 (5) Have the necessary organization, experience,
15 accounting and operational controls, and technical
16 skills, or the ability to obtain them, including, as
17 appropriate, production control procedures, property
18 control systems, quality assurance measures, and
19 safety programs applicable to materials to be produced
20 or services to be performed by the prospective
21 contractor and subcontractors;



1 (6) Have the necessary production, construction, and
2 technical equipment and facilities, or the ability to
3 obtain them; and

4 (7) Be otherwise qualified and eligible to receive an
5 award under applicable laws and regulations.

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

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



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

11 ~~[(e)]~~ (f) All offerors, upon award of contract, shall
12 comply with all laws governing entities doing business in the
13 State, including chapters 237, 383, 386, 392, and 393. Offerors
14 shall produce documents to the procuring officer to demonstrate
15 compliance with this subsection. Any offeror making a false
16 affirmation or certification under this subsection shall be
17 suspended from further offerings or awards pursuant to section
18 103D-702. The procuring officer shall verify compliance with
19 this subsection for all contracts awarded pursuant to sections
20 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts
21 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)~~] (g) 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. Chapter 103D, part V, Hawaii Revised Statutes,
9 is amended as follows:

10 1. By amending its title to read:

11 "PART V. MODIFICATION AND TERMINATION OF CONTRACTS AND CONTRACT
12 ADMINISTRATION"

13 2. By adding three new sections to read:

14 "§103D-A Contract administration office functions. (a)
15 The contract administrator shall perform contract administration
16 functions in accordance with this chapter, associated
17 administrative rules adopted by the procurement policy board,
18 the contract terms, and, unless otherwise agreed to in an
19 interagency agreement, the applicable rules of the procuring
20 agency.



1 (b) The procurement officer may delegate the following
2 contract administration functions to a contract administrator:

3 (1) Prepare evaluations of contractor performance in
4 accordance with section 103D-B;

5 (2) Review the contractor's compensation structure;

6 (3) Review the contractor's insurance plans;

7 (4) Conduct post-award orientation conferences;

8 (5) Determine the allowability of costs suspended or
9 disapproved as required, direct the suspension or
10 disapproval of costs when there is reason to believe
11 they should be suspended or disapproved, and approve
12 final payment;

13 (6) Issue notices of intent to disallow or not recognize
14 costs;

15 (7) Attempt to resolve issues in controversy;

16 (8) Determine the contractor's compliance with cost
17 accounting standards and disclosure statements, if
18 applicable;

19 (9) Negotiate price adjustments and execute supplemental
20 agreements;



- 1 (10) Ensure timely notification by the contractor of any
2 anticipated overrun or underrun of the estimated cost
3 under cost-reimbursement contracts;
- 4 (11) Monitor the contractor's financial condition and
5 advise the procurement officer, when it jeopardizes
6 contract performance;
- 7 (12) Issue work requests under maintenance, overhaul, and
8 modification contracts;
- 9 (13) Negotiate and assist the procurement officer in
10 executing contractual documents for settlement of
11 partial and complete contract terminations for
12 convenience;
- 13 (14) Negotiate and assist the procurement officer in
14 executing contractual documents settling cancellation
15 charges under multiyear contracts;
- 16 (15) Process and execute novation and change of name
17 agreements;
- 18 (16) Perform property administration;
- 19 (17) Perform necessary screening, redistribution, and
20 disposal of contractor inventory;



- 1 (18) Perform production support, surveillance, and status
2 reporting, including timely reporting of potential and
3 actual slippages in contract delivery schedules;
- 4 (19) Monitor contractor industrial labor relations matters
5 under the contract; apprise the procurement officer
6 and, if designated by the agency, the cognizant labor
7 relations advisor, of actual or potential labor
8 disputes; and coordinate the removal of urgently
9 required material from the strikebound contractor's
10 plant upon instruction from, and authorization of, the
11 procurement officer;
- 12 (20) Ensure contractor compliance with contractual quality
13 assurance requirements;
- 14 (21) Ensure contractor compliance with contractual safety
15 requirements;
- 16 (22) Perform engineering surveillance to assess compliance
17 with contractual terms for schedule, cost, and
18 technical performance in the areas of design,
19 development, and production;
- 20 (23) Evaluate for adequacy and perform surveillance of
21 contractor engineering efforts and management systems



1 that relate to design, development, production,
2 engineering changes, subcontractors, tests, management
3 of engineering resources, reliability and
4 maintainability, data control systems, configuration
5 management, and independent research and development;

6 (24) Review and evaluate for technical adequacy the
7 contractor's logistics support, maintenance, and
8 modification programs;

9 (25) Report to the procurement office any inadequacies
10 noted in specifications;

11 (26) Perform analyses of contractor cost proposals;

12 (27) Review, analyze, and submit comments and
13 recommendations to the procurement officer regarding
14 engineering and design studies proposed by a
15 contractor, as required;

16 (28) Review and submit comments to the procurement officer
17 regarding engineering change proposals for proper
18 classification, and, when required for need, technical
19 adequacy of design, producibility, and impact on
20 quality, reliability, schedule, and cost;



- 1 (29) Assist in evaluating and make recommendations for
2 acceptance or rejection of waivers and deviations;
- 3 (30) Approve the placement of subcontracts;
- 4 (31) Review, evaluate, and approve small business master
5 subcontracting plans, if applicable;
- 6 (32) Assign and perform supporting contract administration;
- 7 (33) Ensure timely submission of required reports;
- 8 (34) Issue administrative changes, correcting errors or
9 omissions in typing, contractor address, facility or
10 activity code, remittance address, computations that
11 do not require additional contract funds, and other
12 similar changes;
- 13 (35) Obtain contractor proposals for any contract price
14 adjustments resulting from amended shipping
15 instructions and review all amended shipping
16 instructions on a periodic, consolidated basis to
17 ensure that adjustments are timely made;
- 18 (36) Accomplish administrative closeout procedures;
- 19 (37) Support the program, product, and project offices
20 regarding program reviews, program status, program



1 performance, and actual or anticipated program
2 problems; and

3 (38) Monitor the contractor's environmental practices for
4 adverse impact on contract performance or contract
5 cost, and for compliance with environmental
6 requirements specified in the contract.

7 (c) Any additional contract administration functions not
8 specified in subsection (b), or not otherwise delegated, shall
9 remain the responsibility of the head of the purchasing agency.

10 **§103D-B Contract performance information; past performance**
11 **evaluations.** (a) Agencies shall monitor performance of
12 contractors under previously awarded contracts or orders, as
13 provided in this section for future evaluation purposes. An
14 evaluation shall:

15 (1) Include a clear, non-technical description of the
16 principal purpose of the contract or order;

17 (2) Reflect how the contractor performed, including clear
18 relevant information that accurately depicts the
19 contractor's performance, and be based on objective
20 facts supported by program and contract or order
21 performance data; and



1 (3) Be tailored to the contract type, size content, and
2 complexity of the contractual requirements.

3 (b) Evaluation factors for each assessment shall include,
4 at a minimum, the following:

5 (1) Technical (quality of product or service);

6 (2) Cost control (not applicable for firm-fixed-price or
7 fixed-price with economic price adjustment
8 arrangements);

9 (3) Schedule and timeliness;

10 (4) Management or business relations;

11 (5) Small business subcontracting, including reduced or
12 untimely payments to small business subcontractors
13 when the contract requires a subcontracting plan; and

14 (6) Other factors, as applicable (e.g., trafficking
15 violations, tax delinquency, failure to report in
16 accordance with contract terms and conditions,
17 defective cost or pricing data, terminations,
18 suspensions, and debarments).

19 (c) Evaluation factors may include subfactors.

20 (d) Each factor and subfactor used shall be evaluated and
21 a supporting narrative provided. Each evaluation factor shall



1 be rated in accordance with the following five scale rating
2 system:

- 3 (1) Exceptional;
4 (2) Very good;
5 (3) Satisfactory;
6 (4) Marginal; and
7 (5) Unsatisfactory;

8 provided that the ratings and narratives shall reflect the
9 definitions in subsection (n); provided further that plus or
10 minus signs may be used in conjunction with a rating to indicate
11 an improving or worsening trend that is insufficient to change
12 the evaluation status; and provided further that a "N/A" or "not
13 applicable" rating shall be used if the rating is not going to
14 be applied to a particular area for evaluation.

15 (e) Agencies shall monitor their compliance with the past
16 performance evaluation requirements, and measure the quality and
17 timely reporting of past performance information.

18 (f) Past performance evaluations shall be prepared at
19 least annually and at the time the work under a contract or
20 order is completed. Past performance evaluations shall be
21 required for contracts and orders as specified in subsections



1 (i) through (l). These evaluations are generally for the
2 entity, division, or unit that performed the contract or order.
3 Past performance information shall be entered into an evaluation
4 reporting tool for all past performance reports on contracts and
5 orders.

6 (g) Except as provided in subsection (l), agencies shall
7 prepare evaluations of contractor performance for each contract
8 that exceeds the small purchase threshold. Agencies shall also
9 prepare an evaluation if a modification to the contract causes
10 the dollar amount to exceed the small purchase threshold.

11 (h) Past performance evaluations shall be prepared for
12 each architect-engineer services contract of \$25,000 or more,
13 and for each architect-engineer services contract that is
14 terminated for default regardless of contract value. Past
15 performance evaluations may also be prepared for architect-
16 engineer services contracts of less than \$25,000.

17 (i) Past performance evaluations shall include an
18 assessment of a contractor's:

19 (1) Performance against, and efforts to achieve, the goals
20 identified in the contract; and



1 (2) Reduced or untimely payments made to small business
2 subcontractors, if determined by the procurement
3 officer to be unjustified. The procurement officer
4 shall:

5 (A) Consider and evaluate a contractor's written
6 explanation for a reduced or an untimely payment
7 when determining whether the reduced or untimely
8 payment is justified; and

9 (B) Determine that a history of unjustified reduced
10 or untimely payments has occurred when the
11 contractor has reported three or more occasions
12 of unjustified reduced or untimely payments under
13 a single contract within a twelve-month period;
14 provided that the following payment or nonpayment
15 situations shall not be considered unjustified:

16 (i) There is a contract dispute on performance;

17 (ii) A partial payment is made for amounts not in
18 dispute;

19 (iii) A payment is reduced due to past
20 overpayments;

21 (iv) There is an administrative mistake; or



1 (v) Late performance by the subcontractor leads
2 to later payment by the prime contractor.

3 (j) Agency evaluations of contractor performance,
4 including both negative and positive evaluations, shall be
5 provided to the contractor as soon as practicable after
6 completion of the evaluation. The contractor shall receive a
7 notification when an evaluation is ready for comment.

8 Contractors shall be afforded up to fourteen calendar days from
9 the date of notification of availability of the past performance
10 evaluation to submit comments, rebutting statements, or
11 additional information. Agencies shall provide for review at a
12 level above the contract administrator to consider disagreements
13 between the parties regarding the evaluation. The ultimate
14 conclusion on the performance evaluation is a decision of the
15 contracting agency. Copies of the evaluation, contractor
16 response, and review comments, if any, shall be retained as part
17 of the evaluation. The completed evaluation shall not be
18 released to anyone other than government personnel and the
19 contractor whose performance is being evaluated during the
20 period the information may be used to provide source selection
21 information.



1 (k) Evaluations used in determining award or incentive fee
2 payments may also be used to satisfy the requirement of this
3 section.

4 (1) Agencies shall require at least quarterly evaluations
5 of agency compliance with the reporting requirements of this
6 section. The evaluation shall identify delinquent past
7 performance reports and monitor reports for quality control.

8 (m) Agencies shall ensure that information is accurately
9 documented within seven calendar days after a procurement
10 officer:

11 (1) Issues a final determination that a contractor has
12 submitted defective cost or pricing data;

13 (2) Makes a subsequent change to the final determination
14 concerning defective cost or pricing data;

15 (3) Issues a final termination for cause or default
16 notice;

17 (4) Makes a subsequent withdrawal or a conversion of a
18 termination for default to a termination for
19 convenience; or

20 (5) Determines that a contractor has a history of three or
21 more unjustified reduced or untimely payments to small



1 business subcontractors under a single contract within
2 a twelve-month period.

3 (n) For the purpose of this section:

4 "Exceptional" means that performance meets contractual
5 requirements and exceeds many requirements to the government's
6 benefit. The contractual performance of the element or sub-
7 element being evaluated was accomplished with few minor problems
8 for which corrective actions taken by the contractor were highly
9 effective. To justify an exceptional rating, multiple
10 significant events should be identified with a statement of how
11 the events were of benefit to the government; provided that a
12 singular benefit could be of a magnitude that it alone
13 constitutes an exceptional rating; provided further that there
14 should have been no significant weaknesses identified.

15 "Marginal" means that performance does not meet some
16 contractual requirements. The contractual performance of the
17 element or sub-element being evaluated reflects a serious
18 problem for which the contractor has not yet identified
19 corrective actions. The contractor's proposed actions appear
20 only marginally effective or were not fully implemented. To
21 justify marginal performance, identify a significant event in



1 each category that the contractor had trouble overcoming and
2 state how it impacted the government.. A marginal rating shall
3 be supported by referencing the management tool that notified
4 the contractor of the contractual deficiency (e.g., management,
5 quality, safety, or environmental deficiency report or letter).

6 "Satisfactory" means that performance meets contractual
7 requirements. The contractual performance of the element or
8 sub-element contains some minor problems for which corrective
9 actions taken by the contractor appear or were satisfactory. To
10 justify a satisfactory rating, there should have been only minor
11 problems, or major problems the contractor recovered from
12 without impact to the contract or order; provided that there
13 should have been no significant weaknesses identified. A
14 fundamental principle of assigning ratings is that contractors
15 shall not be evaluated with a rating lower than satisfactory
16 solely for not performing beyond the requirements of the
17 contract or order.

18 "Unsatisfactory" means that performance does not meet most
19 contractual requirements and recovery is not likely in a timely
20 manner. The contractual performance of the element or sub-
21 element contains a serious problem or problems for which the



1 contractor's corrective actions appear or were ineffective. To
2 justify an unsatisfactory rating, identify multiple significant
3 events in each category that the contractor had trouble
4 overcoming and state how it impacted the government. A singular
5 problem, however, could be of such serious magnitude that it
6 alone constitutes an unsatisfactory rating. An unsatisfactory
7 rating should be supported by referencing the management tools
8 used to notify the contractor of the contractual deficiencies
9 (e.g., management, quality, safety, or environmental deficiency
10 reports, or letters).

11 "Very good" means that performance meets contractual
12 requirements and exceeds some requirements to the government's
13 benefit. The contractual performance of the element or sub-
14 element being evaluated was accomplished with some minor
15 problems for which corrective actions taken by the contractor
16 were effective. To justify a very good rating, a significant
17 event should be identified with a statement of how it was a
18 benefit to the government; provided that there should have been
19 no significant weaknesses identified.



1 §103D-C Contract administration. (a) The procurement
2 policy board shall adopt rules for the administration of
3 contracts which shall include:

4 (1) Functions the procurement officer may delegate to the
5 contract administrator;

6 (2) Oversight responsibilities and inherently governmental
7 duties; and

8 (3) Contractor performance evaluation procedures and
9 contract performance information."

10 SECTION 7. There is appropriated out of the general
11 revenues of the State of Hawaii the sum of \$ or so much
12 thereof as may be necessary for fiscal year 2018-2019 for the
13 purposes of implementing this Act for executive branch
14 departments and agencies.

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

17 SECTION 8. In codifying the new sections added by section
18 6 of this Act, the revisor of statutes shall substitute
19 appropriate section numbers for the letters used in designating
20 the new sections in this Act.



1 SECTION 9. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 10. If any provision of this Act, or the
5 application thereof to any person or circumstance, is held
6 invalid, the invalidity does not affect other provisions or
7 applications of the Act that can be given effect without the
8 invalid provision or application, and to this end the provisions
9 of this Act are severable.

10 SECTION 11. Statutory material to be repealed is bracketed
11 and stricken. New statutory material is underscored.

12 SECTION 12. This Act shall take effect on July 1, 2050;
13 provided that section 7 shall take effect on July 1, 2050.



Report Title:

Procurement; Past Performance; Criteria; Source Selection;
Evaluation; Appropriation

Description:

Requires procurement officers to complete periodic performance evaluations of certain contractors. Establishes factors to be included in any evaluation, consideration, or review of past performance, and ratings standards for those factors. Requires past performance to be factored into future bid selection of contractors for certain contracts. Requires past performance to be considered in all sole source procurement and any competitive sealed contracts that exceeds the small purchase threshold. Appropriates funds. (SB2601 HD1)

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

