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# 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;



- 1           (3) Require that past performance be considered in future
- 2                   bid selection of contractors for sole source contracts
- 3                   and any competitive sealed contracts that exceeds the
- 4                   small purchase threshold;
- 5           (4) Require procurement officers to consider specific
- 6                   factors, including past performance, when making a
- 7                   determination of offeror responsibility;
- 8           (5) Allow procurement officers to delegate to contract
- 9                   administrators certain duties relating to contract
- 10                  administration; and
- 11           (6) Appropriate funds to the state procurement office to
- 12                  implement this Act.

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

15           "(f) Bids shall be evaluated based on the requirements set  
16 forth in the invitation for bids. These requirements may  
17 include criteria to determine acceptability such as inspection,  
18 testing, quality, workmanship, delivery, and suitability for a  
19 particular purpose. Those criteria that will affect the bid  
20 price and be considered in evaluation for award shall be  
21 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



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

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

19 "(a) A contract may be awarded for goods, services, or  
20 construction without competition when the head of a purchasing  
21 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. Part V of chapter 103D, Hawaii Revised  
9 Statutes, is amended to read as follows:

10 "PART V. [~~MODIFICATION AND TERMINATION OF CONTRACTS~~] CONTRACT

11 ADMINISTRATION

12 §103D-A Contract administration office functions. (a)

13 The contract administrator shall perform contract administration  
14 functions in accordance with this chapter, associated  
15 administrative rules adopted by the procurement policy board,  
16 the contract terms, and, unless otherwise agreed to in an  
17 interagency agreement, the applicable rules of the procuring  
18 agency.

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



- 1        (1) Prepare evaluations of contractor performance in
- 2                accordance with section 103D-B;
- 3        (2) Review the contractor's compensation structure;
- 4        (3) Review the contractor's insurance plans;
- 5        (4) Conduct post-award orientation conferences;
- 6        (5) Determine the allowability of costs suspended or
- 7                disapproved as required, direct the suspension or
- 8                disapproval of costs when there is reason to believe
- 9                they should be suspended or disapproved, and approve
- 10               final payment;
- 11        (6) Issue notices of intent to disallow or not recognize
- 12                costs;
- 13        (7) Attempt to resolve issues in controversy;
- 14        (8) Determine the contractor's compliance with cost
- 15                accounting standards and disclosure statements, if
- 16                applicable;
- 17        (9) Negotiate price adjustments and execute supplemental
- 18                agreements;
- 19        (10) Ensure timely notification by the contractor of any
- 20                anticipated overrun or underrun of the estimated cost
- 21                under cost-reimbursement contracts;



- 1        (11) Monitor the contractor's financial condition and  
2        advise the procurement officer, when it jeopardizes  
3        contract performance;
- 4        (12) Issue work requests under maintenance, overhaul, and  
5        modification contracts;
- 6        (13) Negotiate and assist the procurement officer in  
7        executing contractual documents for settlement of  
8        partial and complete contract terminations for  
9        convenience;
- 10       (14) Negotiate and assist the procurement officer in  
11       executing contractual documents settling cancellation  
12       charges under multiyear contracts;
- 13       (15) Process and execute novation and change of name  
14       agreements;
- 15       (16) Perform property administration;
- 16       (17) Perform necessary screening, redistribution, and  
17       disposal of contractor inventory;
- 18       (18) Perform production support, surveillance, and status  
19       reporting, including timely reporting of potential and  
20       actual slippages in contract delivery schedules;



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



- 1           maintainability, data control systems, configuration  
2           management, and independent research and development;
- 3       (24) Review and evaluate for technical adequacy the  
4           contractor's logistics support, maintenance, and  
5           modification programs;
- 6       (25) Report to the procurement office any inadequacies  
7           noted in specifications;
- 8       (26) Perform analyses of contractor cost proposals;
- 9       (27) Review, analyze, and submit comments and  
10           recommendations to the procurement officer regarding  
11           engineering and design studies proposed by a  
12           contractor, as required;
- 13       (28) Review and submit comments to the procurement officer  
14           regarding engineering change proposals for proper  
15           classification, and, when required for need, technical  
16           adequacy of design, producibility, and impact on  
17           quality, reliability, schedule, and cost;
- 18       (29) Assist in evaluating and make recommendations for  
19           acceptance or rejection of waivers and deviations;
- 20       (30) Approve the placement of subcontracts;



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



1 cost, and for compliance with environmental  
2 requirements specified in the contract.

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

6 §103D-B Contract performance information; past performance  
7 evaluations. (a) Agencies shall monitor performance of  
8 contractors under previously awarded contracts or orders, as  
9 provided in this section for future evaluation purposes. An  
10 evaluation shall:

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

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

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

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



- 1        (1) Technical (quality of product or service);
- 2        (2) Cost control (not applicable for firm-fixed-price or
- 3                fixed-price with economic price adjustment
- 4                arrangements);
- 5        (3) Schedule and timeliness;
- 6        (4) Management or business relations;
- 7        (5) Small business subcontracting, including reduced or
- 8                untimely payments to small business subcontractors
- 9                when the contract requires a subcontracting plan; and
- 10       (6) Other factors, as applicable (e.g., trafficking
- 11                violations, tax delinquency, failure to report in
- 12                accordance with contract terms and conditions,
- 13                defective cost or pricing data, terminations,
- 14                suspensions, and debarments).
- 15        (c) Evaluation factors may include subfactors.
- 16        (d) Each factor and subfactor used shall be evaluated and
- 17        a supporting narrative provided. Each evaluation factor shall
- 18        be rated in accordance with the following five scale rating
- 19        system:
- 20                (1) Exceptional;
- 21                (2) Very good;



- 1       (3) Satisfactory;  
2       (4) Marginal; and  
3       (5) Unsatisfactory;

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

11       (e) Agencies shall monitor their compliance with the past  
12 performance evaluation requirements, and measure the quality and  
13 timely reporting of past performance information.

14       (f) Past performance evaluations shall be prepared at  
15 least annually and at the time the work under a contract or  
16 order is completed. Past performance evaluations shall be  
17 required for contracts and orders as specified in subsections  
18 (i) through (l). These evaluations are generally for the  
19 entity, division, or unit that performed the contract or order.  
20 Past performance information shall be entered into an evaluation



1 reporting tool for all past performance reports on contracts and  
2 orders.

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

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

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

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

18 (2) Reduced or untimely payments made to small business  
19 subcontractors, if determined by the procurement  
20 officer to be unjustified. The procurement officer  
21 shall:



- 1           (A) Consider and evaluate a contractor's written  
2           explanation for a reduced or an untimely payment  
3           when determining whether the reduced or untimely  
4           payment is justified; and
- 5           (B) Determine that a history of unjustified reduced  
6           or untimely payments has occurred when the  
7           contractor has reported three or more occasions  
8           of unjustified reduced or untimely payments under  
9           a single contract within a twelve-month period;  
10           provided that the following payment or nonpayment  
11           situations shall not be considered unjustified:
- 12           (i) There is a contract dispute on performance;  
13           (ii) A partial payment is made for amounts not in  
14           dispute;
- 15           (iii) A payment is reduced due to past  
16           overpayments;
- 17           (iv) There is an administrative mistake; or  
18           (v) Late performance by the subcontractor leads  
19           to later payment by the prime contractor.
- 20           (j) Agency evaluations of contractor performance,  
21           including both negative and positive evaluations, shall be



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

18 (k) Evaluations used in determining award or incentive fee  
19 payments may also be used to satisfy the requirement of this  
20 section.



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

5       (m) Agencies shall ensure that information is accurately  
6 documented within seven calendar days after a procurement  
7 officer:

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

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

12       (3) Issues a final termination for cause or default  
13 notice;

14       (4) Makes a subsequent withdrawal or a conversion of a  
15 termination for default to a termination for  
16 convenience; or

17       (5) Determines that a contractor has a history of three or  
18 more unjustified reduced or untimely payments to small  
19 business subcontractors under a single contract within  
20 a twelve-month period.

21       (n) For the purpose of this section:



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

12       "Marginal" means that performance does not meet some  
13 contractual requirements. The contractual performance of the  
14 element or sub-element being evaluated reflects a serious  
15 problem for which the contractor has not yet identified  
16 corrective actions. The contractor's proposed actions appear  
17 only marginally effective or were not fully implemented. To  
18 justify marginal performance, identify a significant event in  
19 each category that the contractor had trouble overcoming and  
20 state how it impacted the government. A marginal rating shall  
21 be supported by referencing the management tool that notified



1 the contractor of the contractual deficiency (e.g., management,  
2 quality, safety, or environmental deficiency report or letter).

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

15 "Unsatisfactory" means that performance does not meet most  
16 contractual requirements and recovery is not likely in a timely  
17 manner. The contractual performance of the element or sub-  
18 element contains a serious problem or problems for which the  
19 contractor's corrective actions appear or were ineffective. To  
20 justify an unsatisfactory rating, identify multiple significant  
21 events in each category that the contractor had trouble



1 overcoming and state how it impacted the government. A singular  
2 problem, however, could be of such serious magnitude that it  
3 alone constitutes an unsatisfactory rating. An unsatisfactory  
4 rating should be supported by referencing the management tools  
5 used to notify the contractor of the contractual deficiencies  
6 (e.g., management, quality, safety, or environmental deficiency  
7 reports, or letters).

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

17 ~~§103D-501~~ §103D-C **Contract clauses and their**  
18 **administration.** (a) The policy board shall adopt rules  
19 requiring the inclusion of contract clauses providing for  
20 adjustments in prices, time of performance, or other contract  
21 provisions, as appropriate, and covering the following subjects:



- 1           (1) The unilateral right of the governmental body to order  
2           in writing:
- 3           (A) Changes in the work within the scope of the  
4           contract; and
- 5           (B) Changes in the time of performance of the  
6           contract that do not alter the scope of the  
7           contract work;
- 8           (2) Variations occurring between estimated quantities of  
9           work in a contract and actual quantities;
- 10          (3) Suspension of work ordered by the governmental body;  
11          and
- 12          (4) Site conditions differing from those indicated in the  
13          contract, or ordinarily encountered, except that  
14          differing site conditions clauses established by these  
15          rules need not be included in a contract:
- 16          (A) When the contract is negotiated;
- 17          (B) When the contractor provides the site or design;  
18          or
- 19          (C) When the parties have otherwise agreed with  
20          respect to the risk of differing site conditions.



1 (b) Adjustments in price permitted by rules adopted under  
2 subsection (a) shall be computed in one or more of the following  
3 ways:

4 (1) By agreement on a fixed price adjustment before  
5 commencement of the pertinent performance;

6 (2) By unit prices specified in the contract or  
7 subsequently agreed upon before commencement of the  
8 pertinent performance;

9 (3) By the costs attributable to the events or situations  
10 under such clauses with adjustment of profit or fee,  
11 all as specified in the contract or subsequently  
12 agreed upon before commencement of the pertinent  
13 performance;

14 (4) In any other manner as the contracting parties may  
15 mutually agree upon before commencement of the  
16 pertinent performance; or

17 (5) In the absence of agreement by the parties:

18 (A) For change orders with value not exceeding  
19 \$50,000 by documented actual costs of the work,  
20 allowing for twenty per cent of the actual costs  
21 for overhead and profit on work done directly by



1 the contractor and ten per cent on any  
2 subcontractor's billing to the contractor for the  
3 contractor's overhead and profit. There shall be  
4 no cap on the total cost of the work if this  
5 method is used. A change order shall be issued  
6 within fifteen days of submission by the  
7 contractor of proper documentation of completed  
8 force account work, whether periodic (conforming  
9 to the applicable billing cycle) or final. The  
10 procurement officer shall return any  
11 documentation that is defective to the contractor  
12 within fifteen days after receipt, with a  
13 statement identifying the defect; or  
14 (B) For change orders with value exceeding \$50,000 by  
15 a unilateral determination by the governmental  
16 body of the costs attributable to the events or  
17 situations under clauses with adjustment of  
18 profit or fee, all as computed by the  
19 governmental body in accordance with applicable  
20 sections of the rules adopted under section 103D-  
21 601 and subject to the provisions of part VII.



1           When a unilateral determination has been made, a  
2           unilateral change order shall be issued within  
3           ten days. Costs included in the unilateral  
4           change order shall allow for twenty per cent of  
5           the actual costs for overhead and profit on work  
6           done directly by the contractor and ten per cent  
7           on any subcontractor's billing to the contractor  
8           for the contractor's overhead and profit. Upon  
9           receipt of the unilateral change order, if the  
10          contractor does not agree with any of the terms  
11          or conditions, or the adjustment or nonadjustment  
12          of the contract time or contract price, the  
13          contractor shall file a notice of intent to claim  
14          within thirty days after the receipt of the  
15          written unilateral change order. Failure to file  
16          a protest within the time specified shall  
17          constitute agreement on the part of the  
18          contractor with the terms, conditions, amounts,  
19          and adjustment or nonadjustment of the contract  
20          time or the contract price set forth in the  
21          unilateral change order.



1 A contractor shall be required to submit cost or pricing  
2 data if any adjustment in contract price is subject to the  
3 provisions of section 103D-312. A fully executed change order  
4 or other document permitting billing for the adjustment in price  
5 under any method listed in paragraphs (1) through (4) shall be  
6 issued within ten days after agreement on the method of  
7 adjustment.

8 (c) The policy board shall adopt rules requiring the  
9 inclusion in contracts of clauses providing for appropriate  
10 remedies and covering the following subjects:

- 11 (1) Liquidated damages as appropriate;
- 12 (2) Specified excuses for delay or nonperformance;
- 13 (3) Termination of the contract for default; and
- 14 (4) Termination of the contract in whole or in part for  
15 the convenience of the governmental body.

16 (d) The chief procurement officer or the head of a  
17 purchasing agency may vary the clauses that may be required to  
18 be included in contracts under the rules adopted under  
19 subsections (a) and (c); provided that:



1 (1) Any variations are supported by a written  
2 determination that states the circumstances justifying  
3 such variations; and

4 (2) Notice of any such material variation be stated in the  
5 invitation for bids or request for proposals when the  
6 contract is awarded under section 103D-302 or 103D-  
7 303."

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

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

15 SECTION 8. In codifying the new sections added by section  
16 6 of this Act, the revisor of statutes shall substitute  
17 appropriate section numbers for the letters used in designating  
18 the new sections in this Act.

19 SECTION 9. This Act does not affect rights and duties that  
20 matured, penalties that were incurred, and proceedings that were  
21 begun before its effective date.



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

9           SECTION 12. This Act shall take effect on July 1, 2050;  
10 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. Effective 7/1/2050. (SD2)

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

