

JAN 27 2021

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# A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

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PART I

SECTION 1. The legislature finds that House Resolution No. 142, adopted during the regular session of 2016, requested the state procurement office to review Hawaii's procurement process in comparison with the federal government's procurement process. The purpose of the review was to examine ways that the State could improve its procurement process by better understanding the efficient and effective ways in which the federal government conducts procurement.

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 contractor completed a detailed document review, interviewed a diverse group of stakeholders, and conducted a thorough analysis of the data collected. The report identified sixteen recommendations to closer align the state procurement process to the federal procurement process.





1 Revised Statutes, to allow selection committees the same  
2 flexibility afforded to their federal counterparts to weigh the  
3 selection criteria in the order of importance relevant to their  
4 agency and project.

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

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

- 9 (1) Experience and professional qualifications relevant to  
10 the project type;
- 11 (2) Past performance on projects of similar scope for  
12 public agencies or private industry, including  
13 corrective actions and other responses to notices of  
14 deficiencies;
- 15 (3) Capacity to accomplish the work in the required time;  
16 and
- 17 (4) Any additional criteria determined in writing by the  
18 selection committee to be relevant to the purchasing  
19 agency's needs or necessary and appropriate to ensure  
20 full, open, and fair competition for professional  
21 services contracts."



1 PART III

2 SECTION 4. The legislature finds that the federal  
3 government routinely captures vendor performance in a structured  
4 and uniform way. This information can be accessed and utilized  
5 when future procurements need to assess a vendor's  
6 responsibility. The State does not have a comparable system.

7 The purpose of this part is to implement recommendation  
8 II-2 of the state procurement office's review of Hawaii  
9 procurement laws by requiring the state procurement office to  
10 develop a vendor performance tracking system.

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

14 "§103D- Past performance database. (a) The state  
15 procurement office shall implement and administer a past  
16 performance database with regard to state contractors.

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

19 (1) Information required to be included in the past  
20 performance database; provided that the information  
21 shall include:





1        ""Past performance" means available recent and relevant  
2 performance of a contractor on state contracts that shall be  
3 considered in a responsibility determination within the  
4 relevance of the current solicitation, including the  
5 considerations of section 103D-702(b)."

6        2. By amending the definition of "responsible bidder or  
7 offeror" to read:

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

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

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



1 objectively measurable~~[r]~~ as possible, such as discounts,  
2 transportation costs, ~~[and]~~ total or life cycle costs~~[r]~~, and  
3 the bidder's past performance on state contracts of similar  
4 scope, including but not limited to notices of deficiencies and  
5 failure to complete a procurement contract. The invitation for  
6 bids shall set forth the evaluation criteria to be used. No  
7 criteria may be used in bid evaluation that are not set forth in  
8 the invitation for bids."

9 SECTION 8. Section 103D-303, Hawaii Revised Statutes, is  
10 amended by amending subsection (g) to read as follows:

11 "(g) Award shall be made to the responsible offeror whose  
12 proposal is determined in writing to be the most advantageous,  
13 taking into consideration price and the evaluation factors set  
14 forth in the request for proposals~~[r]~~, which shall include the  
15 offeror's past performance on state contracts of similar scope,  
16 including but not limited to notices of deficiencies and failure  
17 to complete a procurement contract. No ~~[other factors or]~~  
18 criteria ~~[shall]~~ may be used in the evaluation~~[r]~~ that are not  
19 set forth in the request for proposals. The contract file shall  
20 contain the basis on which the award is made."



1 SECTION 9. Section 103D-306, Hawaii Revised Statutes, is  
2 amended by amending subsection (a) to read as follows:

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

14 SECTION 10. Section 103D-310, Hawaii Revised Statutes, is  
15 amended by amending subsection (b) to read as follows:

16 "(b) Whether or not an intention to bid is required, the  
17 procurement officer shall determine whether the prospective  
18 offeror has the financial ability, resources, skills,  
19 capability, and business integrity necessary to perform the  
20 work. For [~~this~~] the purpose[~~, the~~] of making a responsibility  
21 determination, the procurement officer shall possess or obtain



1 available information sufficient to be satisfied that a  
2 prospective offeror meets the applicable standards. The  
3 procurement officer shall consider past performance of the  
4 offeror as it applies to a responsibility determination for the  
5 current solicitation. The officer, in the officer's discretion,  
6 may require any prospective offeror to submit answers, under  
7 oath, to questions contained in a standard form of questionnaire  
8 to be prepared by the policy board. Whenever it appears from  
9 answers to the questionnaire or otherwise, that the prospective  
10 offeror is not fully qualified and able to perform the intended  
11 work, a written determination of nonresponsibility of an offeror  
12 shall be made by the head of the purchasing agency, in  
13 accordance with rules adopted by the policy board. The  
14 unreasonable failure of an offeror to promptly supply  
15 information in connection with an inquiry with respect to  
16 responsibility may be grounds for a determination of  
17 nonresponsibility with respect to such offeror. The decision of  
18 the head of the purchasing agency shall be final unless the  
19 offeror applies for administrative review pursuant to section  
20 103D-709."



1 PART IV

2 SECTION 11. The legislature finds that the State allows  
3 for price negotiations only when all bids exceed available funds  
4 and a re-solicitation with revised scope is not possible. In  
5 contrast, the federal government has a broader scope for price  
6 negotiations. Specifically, the federal process allows  
7 negotiations to occur for construction bids when the winning bid  
8 is higher than the price the government believes it should be  
9 based on its internal estimate.

10 The purpose of this part is to implement recommendation  
11 II-3 of the state procurement office's review of Hawaii  
12 procurement laws by giving the head of a purchasing agency the  
13 option to negotiate an adjustment of an otherwise successful bid  
14 for construction procurements to closer align with an internal  
15 project price estimation.

16 SECTION 12. Section 103D-302, Hawaii Revised Statutes, is  
17 amended as follows:

18 1. By amending subsection (a) to read:

19 "(a) Contracts shall be awarded by competitive sealed  
20 bidding except as otherwise provided in section 103D-301.  
21 Awards of contracts by competitive sealed bidding may be made



1 after single or multi-step bidding. Competitive sealed bidding  
2 does not include negotiations with bidders after the receipt and  
3 opening of bids[~~-~~], except for construction procurement that  
4 meets the criteria in subsection (h) (2). Award is based on the  
5 criteria set forth in the invitation for bids."

6 2. By amending subsection (h) to read:

7 "(h) The contract shall be awarded with reasonable  
8 promptness by written notice to the lowest responsible and  
9 responsive bidder whose bid meets the requirements and criteria  
10 set forth in the invitation for bids[~~-~~ ~~In the event all~~];  
11 provided that if:

12 (1) All bids exceed available funds as certified by the  
13 appropriate fiscal officer, the head of the purchasing  
14 agency responsible for the procurement in question is  
15 authorized in situations where time or economic  
16 considerations preclude resolicitation of work of a  
17 reduced scope to negotiate an adjustment of the bid  
18 price, including changes in the bid requirements, with  
19 the low responsible and responsive bidder, in order to  
20 bring the bid within the amount of available funds[~~-~~];  
21 and



1       (2) The lowest responsive and responsible bid for a  
2       construction procurement significantly differs from  
3       the amount estimated by the State for that project,  
4       and the estimated amount was developed prior to the  
5       opening of any bids for that project, the head of the  
6       purchasing agency may engage in negotiations with the  
7       low bidder to ensure the bid amount is reasonable and  
8       realistic for the scope of the construction project.  
9       The negotiations may include the reduction of the bid  
10      amount or an increase in the bid amount to align with  
11      the State's estimate; provided that the bid does not  
12      raise the low bidders' bid to an amount that makes it  
13      no longer the low bid. If the negotiation with the  
14      low bidder does not result in any change to the bid  
15      amount, the original bid amount shall continue to be  
16      used."

PART V

18       SECTION 13. The legislature finds that the Hawaii public  
19      procurement code currently requires general contractors to  
20      disclose the subcontractors they intend to use on a project.  
21      The intent of this requirement is to deter bid shopping (the



1 practice of low-bidding general contractors unethically  
2 extracting lower prices from subcontractors under threat of  
3 replacement). Although stakeholders agree that the disclosure  
4 requirement accomplishes this goal, the legislature notes that  
5 the federal government and a vast majority of states do not have  
6 a similar disclosure requirement in their procurement processes.

7 The legislature also finds that this disclosure requirement  
8 has the unintended consequence of increasing the number and  
9 complexity of construction protests. The state procurement  
10 office's review of Hawaii procurement laws found that most  
11 protests allege issues stemming from the subcontractor listing  
12 requirement. The review recommended that the State amend its  
13 disclosure requirement to require disclosure of only the name of  
14 a subcontractor and not repeal the requirement that the bid  
15 disclose what a subcontractor will do. This change would  
16 substantially reduce the risk of protests while continuing to  
17 protect subcontractors from the undesirable practice of bid  
18 shopping.

19 The purpose of this part is to implement recommendation  
20 III-2 of the state procurement office's review of Hawaii  
21 procurement laws by eliminating the requirement that bidders



1 disclose the nature and scope of work expected to be performed  
2 by a subcontractor.

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

5 "(b) An invitation for bids shall be issued, and shall  
6 include a purchase description and all contractual terms and  
7 conditions applicable to the procurement. If the invitation for  
8 bids is for construction, it shall specify that all bids include  
9 the name of each person or firm to be engaged by the bidder as a  
10 joint contractor or subcontractor in the performance of the  
11 contract [~~and the nature and scope of the work to be performed  
12 by each~~]. Construction bids that do not comply with this  
13 requirement may be accepted if acceptance is in the best  
14 interest of the State and the value of the work to be performed  
15 by the joint contractor or subcontractor is equal to or less  
16 than one per cent of the total bid amount."

17 PART VI

18 SECTION 15. The state procurement office shall submit a  
19 report to the legislature no later than twenty days prior to the  
20 convening of the regular session of 2022 regarding the progress  
21 it has made toward addressing recommendations from parts I, II,



1 III, V, and VI of the procurement policy review conducted  
2 pursuant to House Resolution No. 142, Regular Session of 2016,  
3 and include any proposed legislation necessary to implement  
4 those recommendations.

5 PART VII

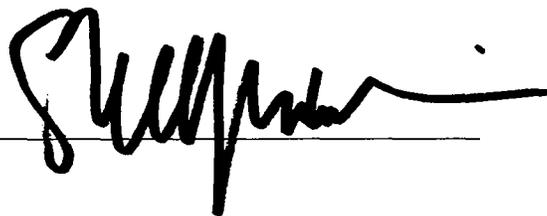
6 SECTION 16. This Act does not affect rights and duties  
7 that matured, penalties that were incurred, and proceedings that  
8 were begun before its effective date.

9 SECTION 17. Statutory material to be repealed is bracketed  
10 and stricken. New statutory material is underscored.

11 SECTION 18. This Act shall take effect on July 1, 2021.

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INTRODUCED BY: \_\_\_\_\_

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be 'S. J. ...'.

# S.B. NO. 1017

**Report Title:**

Procurement; State Procurement Office; Construction Procurement Policy Review

**Description:**

Implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016. Requires the state procurement office to submit a report to the legislature regarding its progress in implementing the procurement policy review recommendations.

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

