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# A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 PART I

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

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



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

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

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

13 These recommendations:

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

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



1 (C) Allow the head of a purchasing agency the option  
2 to negotiate an adjustment of an otherwise  
3 successful bid for construction procurements to  
4 more closely align with an internal project price  
5 estimation; and

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

10 PART II

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

18 The purpose of this part is to implement recommendation I-2  
19 of the state procurement office's review of Hawaii procurement  
20 laws by amending the language of section 103D-304(e), Hawaii  
21 Revised Statutes, to allow selection committees for the



1 procurement of professional services the same flexibility  
2 afforded to their federal counterparts to weigh the selection  
3 criteria in the order of importance relevant to their agency and  
4 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  
8 recommendation II-2 of the state procurement office's review of  
9 Hawaii procurement laws by requiring the state procurement  
10 office to develop a vendor performance information 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           (A) The name of the state contractor;
- 2           (B) The date of the project;
- 3           (C) The size of the project;
- 4           (D) A brief description of the project;
- 5           (E) The responsible managing employees for the  
6           project;
- 7           (F) Whether the project was timely completed or not;
- 8           (G) The project's authorized budget; and
- 9           (H) The positive or negative difference between the  
10           final cost of the project and the project's  
11           authorized budget, including the reasons for the  
12           difference, if any;
- 13          (2) Procedures to inform a contractor of the information  
14           contained in the past performance database about that  
15           contractor; and
- 16          (3) Procedures for a contractor to correct or respond to  
17           the information contained in the past performance  
18           database about that contractor."

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



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

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

8           2. By amending the definition of "responsible bidder or  
9 offeror" to read:

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

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

18           "(f) Bids shall be evaluated based on the requirements set  
19 forth in the invitation for bids. These requirements may  
20 include criteria to determine acceptability such as inspection,  
21 testing, quality, workmanship, delivery, and suitability for a



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

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

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



1 relied upon, and a written summary of the disposition of any  
2 objection shall be included in the contract file."

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

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



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

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

11 "[~~§~~103D-320~~]~~ **Retention of procurement records**~~[-]~~;  
12 **evaluations.** All procurement records shall be retained and  
13 disposed of in accordance with chapter 94 and records retention  
14 guidelines and schedules approved by the comptroller. Written  
15 past performance evaluations for all procurements over the small  
16 purchase threshold shall be maintained in the department's  
17 procurement files and in the statewide past performance  
18 database."

19 PART IV

20 SECTION 11. The legislature finds that the State allows  
21 for price negotiations only when all bids exceed available funds



1 and a re-solicitation with revised scope is not possible. In  
2 contrast, the federal government has a broader scope for price  
3 negotiations. Specifically, the federal process allows  
4 negotiations to occur for construction bids when the winning bid  
5 is higher than the price the government believes it should be  
6 based on its internal estimate.

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

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

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

16 "(a) Contracts shall be awarded by competitive sealed  
17 bidding except as otherwise provided in section 103D-301.  
18 Awards of contracts by competitive sealed bidding may be made  
19 after single or multi-step bidding. Competitive sealed bidding  
20 does not include negotiations with bidders after the receipt and  
21 opening of bids[-], except for construction procurement that



1 meets the criteria in subsection (h) (2). Award is based on the  
2 criteria set forth in the invitation for bids."

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

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

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

19 (2) The lowest responsive and responsible bid for a  
20 construction procurement significantly differs from  
21 the amount estimated by the State for that project,



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

## PART V

15           SECTION 13. The legislature finds that the Hawaii public  
16 procurement code currently requires general contractors to  
17 disclose the subcontractors they intend to use on a project.  
18 The intent of this requirement is to deter bid shopping – the  
19 practice of low-bidding general contractors unethically  
20 extracting lower prices from subcontractors under the threat of  
21 replacement. Although stakeholders agree that the disclosure



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

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

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



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

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

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



1 twenty-four hours after the bid submission deadline;  
2 and

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

6 SECTION 14. Section 103D-302, Hawaii Revised Statutes, is  
7 amended by amending subsections (b), (c), and (d) to read as  
8 follows:

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

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

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



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

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

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

- 13           (1) The form that the notice is to take;  
14           (2) What constitutes a reasonable interim between  
15           publication and bid opening; and  
16           (3) How notice may be published, including publication in  
17           a newspaper of general circulation, notice by mail to  
18           all persons on any applicable bidders mailing list,  
19           publication by any public or private telecommunication  
20           information network, or any other method of  
21           publication it deems to be effective.



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

9 PART VI

10 SECTION 15. This Act does not affect rights and duties  
11 that matured, penalties that were incurred, and proceedings that  
12 were begun before its effective date.

13 SECTION 16. Statutory material to be repealed is bracketed  
14 and stricken. New statutory material is underscored.

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



**Report Title:**

Procurement; State Procurement Office; Construction Procurement Policy Review

**Description:**

Allows selection committees for procurement of professional services to weigh the selection criteria in the order of importance relevant to their agency and project. Beginning 12/31/2022, requires the state procurement office to develop a vendor past performance information system. Gives the head of a purchasing agency the option to negotiate an adjustment of a bid for construction procurements to more closely align with an internal project price estimation. Allows a bidder of a public works construction project to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline. Requires bids for construction to be publicly opened no sooner than twenty-four hours after the bid submission deadline. Effective 7/1/2112. (HD1)

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

