
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, increase accountability with performance on
5 state contracts, and more efficiently utilize taxpayer dollars.
6 Some state contracts may currently be awarded to the lowest
7 bidder through the invitation for bid process without regard to
8 poor past performance. Such bidders may be considered qualified
9 despite prior poor performance on state, federal, or private
10 contracts, which may result in repeated inefficiencies and
11 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 past performance to 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; and
- 5 (4) Require procurement officers to consider specific
6 factors, including past performance, when making a
7 determination of offeror responsibility.

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

10 "(f) Bids shall be evaluated based on the requirements set
11 forth in the invitation for bids. These requirements may
12 include criteria to determine acceptability such as inspection,
13 testing, quality, workmanship, delivery, and suitability for a
14 particular purpose. Those criteria that will affect the bid
15 price and be considered in evaluation for award shall be
16 objectively measurable, such as discounts, transportation costs,
17 and total or life cycle costs. Past performance shall be
18 evaluated in all bids expected to meet or exceed the small
19 purchase threshold. The invitation for bids shall set forth the
20 evaluation criteria to be used. No criteria may be used in bid
21 evaluation that are not set forth in the invitation for bids."



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

3 "(e) The request for proposals shall state the relative
4 importance of price and other evaluation factors. Past
5 performance shall be randomly evaluated in at least ten
6 solicitations expected to meet or exceed the small purchase
7 threshold per year. The currency, relevance, and source of the
8 information, context of the data, and general trends in the
9 contractor's performance shall be considered. This assessment
10 of past performance information shall be separate from the
11 responsibility determination required under section 103D-310.
12 The solicitation shall describe the approach for evaluating past
13 performance, including evaluating offerors with no relevant
14 performance history, and shall provide offerors an opportunity
15 to identify past or current contracts, including federal, state,
16 local government, and private contracts, with requirements that
17 are similar to the solicitation. The solicitation shall also
18 authorize offerors to provide information on problems
19 encountered on the identified contracts and the offeror's
20 corrective actions. The governmental body shall consider this
21 information, as well as information obtained from any other



1 sources, when evaluating the offeror's past performance. The
2 procurement officer shall determine the relevance of similar
3 past performance information. The evaluation shall take into
4 account past performance information regarding predecessor
5 companies, key personnel who have relevant experience, or
6 subcontractors that will perform major or critical aspects of
7 the requirement when the information is relevant to the
8 procurement. In the case of an offeror without a record of
9 relevant past performance or for whom information on past
10 performance is not available, the offeror may not be evaluated
11 favorably or unfavorably on past performance."

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

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



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

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

6 "**§103D-310 Responsibility of offerors.** (a) Purchases
7 shall be made from, and contracts shall be awarded to,
8 responsible prospective contractors only.

9 (b) In said bids, no purchase or award shall be made
10 unless the procurement officer makes an affirmative
11 determination of responsibility. In the absence of information
12 clearly indicating that the prospective contractor is
13 responsible, the procurement officer shall make a determination
14 of nonresponsibility.

15 (c) The award of a contract to a prospective contractor
16 based on lowest evaluated price alone can be false economy if
17 there is subsequent default, late deliveries, or other
18 unsatisfactory performance resulting in additional contractual
19 or administrative costs. While it is important that a
20 governmental body's purchases be made at the lowest price, a
21 supplier shall not be awarded a contract solely because that



1 supplier submits the lowest offer. A prospective contractor
2 shall affirmatively demonstrate its responsibility, including,
3 when necessary, the responsibility of its proposed
4 subcontractors. To be determined responsible, a prospective
5 contractor shall:

6 (1) Have adequate financial resources to perform the
7 contract, or the ability to obtain the resources;

8 (2) Be able to comply with the required or proposed
9 delivery or performance schedule, taking into
10 consideration all existing commercial and governmental
11 business commitments;

12 (3) Have a satisfactory performance record. A prospective
13 contractor shall not be determined responsible or
14 nonresponsible solely on the basis of a lack of
15 relevant performance history. A prospective
16 contractor that is or recently has been seriously
17 deficient in contract performance shall be presumed to
18 be nonresponsible, unless the procurement officer
19 determines that the circumstances were properly beyond
20 the contractor's control, or that the contractor has
21 taken appropriate corrective action. Failure to meet



1 the quality requirements of a contract shall be a
2 significant factor to consider in determining
3 satisfactory performance. The procurement officer
4 shall consider the number of contracts involved and
5 the extent of deficient performance in each contract
6 when making this determination;

7 (4) Have a satisfactory record of integrity and business
8 ethics;

9 (5) Have the necessary organization, experience,
10 accounting and operational controls, and technical
11 skills, or the ability to obtain these skills,
12 including, as appropriate, production control
13 procedures, property control systems, quality
14 assurance measures, and safety programs applicable to
15 materials to be produced or services to be performed
16 by the prospective contractor and subcontractors;

17 (6) Have the necessary production, construction, and
18 technical equipment and facilities, or the ability to
19 obtain the equipment and facilities; and

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



1 [~~(a)~~] (d) Unless the policy board, by rules, specifies
2 otherwise, before submitting an offer, a prospective offeror,
3 not less than ten calendar days prior to the day designated for
4 opening offers, shall give written notice of the intention to
5 submit an offer to the procurement officer responsible for that
6 particular procurement.

7 [~~(b)~~] (e) Whether or not an intention to bid is required,
8 the procurement officer shall determine whether the prospective
9 offeror has the financial ability, resources, skills,
10 capability, and business integrity necessary to perform the
11 work. For this purpose, the officer, in the officer's
12 discretion, may require any prospective offeror to submit
13 answers, under oath, to questions contained in a standard form
14 of questionnaire to be prepared by the policy board. Whenever
15 it appears from answers to the questionnaire or otherwise, that
16 the prospective offeror is not fully qualified and able to
17 perform the intended work, a written determination of
18 nonresponsibility of an offeror shall be made by the head of the
19 purchasing agency, in accordance with rules adopted by the
20 policy board. The unreasonable failure of an offeror to
21 promptly supply information in connection with an inquiry with



1 respect to responsibility may be grounds for a determination of
2 nonresponsibility with respect to [~~such~~] the offeror. The
3 decision of the head of the purchasing agency shall be final
4 unless the offeror applies for administrative review pursuant to
5 section 103D-709.

6 [~~e~~] (f) All offerors, upon award of contract, shall
7 comply with all laws governing entities doing business in the
8 State, including chapters 237, 383, 386, 392, and 393. Offerors
9 shall produce documents to the procuring officer to demonstrate
10 compliance with this subsection. Any offeror making a false
11 affirmation or certification under this subsection shall be
12 suspended from further offerings or awards pursuant to section
13 103D-702. The procuring officer shall verify compliance with
14 this subsection for all contracts awarded pursuant to sections
15 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts
16 and procurements of \$2,500 or more awarded pursuant to section
17 103D-305; provided that the attorney general may waive the
18 requirements of this subsection for contracts for legal services
19 if the attorney general certifies in writing that comparable
20 legal services are not available in this State.



1 [~~(d)~~] (g) Information furnished by an offeror pursuant to
2 this section shall not be disclosed to any person except to law
3 enforcement agencies as provided by chapter 92F."

4 SECTION 6. Chapter 103D, Hawaii Revised Statutes, is
5 amended by adding a new section to part V to be appropriately
6 designated and to read as follows:

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

- 12 (1) Include a clear, non-technical description of the
13 principal purpose of the contract or order;
14 (2) Reflect how the contractor performed, including clear
15 relevant information that accurately depicts the
16 contractor's performance, and be based on objective
17 facts supported by program and contract or order
18 performance data; and
19 (3) Be tailored to the contract type, size content, and
20 complexity of the contractual requirements.



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

- 3 (1) Technical (quality of product or service);
4 (2) Cost control (not applicable for firm-fixed-price or
5 fixed-price with economic price adjustment
6 arrangements);
7 (3) Schedule and timeliness;
8 (4) Management or business relations;
9 (5) Small business subcontracting, including reduced or
10 untimely payments to small business subcontractors
11 when the contract requires a subcontracting plan; and
12 (6) Other factors, as applicable (such as trafficking
13 violations, tax delinquency, failure to report in
14 accordance with contract terms and conditions,
15 defective cost or pricing data, terminations,
16 suspensions, and debarments).

17 (c) Evaluation factors may include subfactors.

18 (d) Each factor and subfactor used shall be evaluated and
19 a supporting narrative shall be provided. Each evaluation
20 factor shall be rated in accordance with the following five
21 scale rating system:



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

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

13 (e) Agencies shall monitor their compliance with the past
14 performance evaluation requirements on said chosen projects and
15 measure the quality and timely reporting of past performance
16 information.

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



1 for the entity, division, or unit that performed the contract or
2 order. Past performance information shall be entered into an
3 evaluation reporting tool for past performance reports on
4 contracts and orders on identified projects under this section.

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

11 (h) Past performance evaluations shall include an
12 assessment of a contractor's:

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

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

19 (A) Consider and evaluate a contractor's written
20 explanation for a reduced or an untimely payment



1 when determining whether the reduced or untimely
2 payment is justified; and

3 (B) Determine that a history of unjustified reduced
4 or untimely payments has occurred when the
5 contractor has reported three or more occasions
6 of unjustified reduced or untimely payments under
7 a single contract within a twelve-month period;
8 provided that the following payment or nonpayment
9 situations shall not be considered unjustified:

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

11 (ii) A partial payment is made for amounts not in
12 dispute;

13 (iii) A payment is reduced due to past
14 overpayments;

15 (iv) There is an administrative mistake; or

16 (v) Late performance by the subcontractor leads
17 to later payment by the prime contractor.

18 (i) Agency evaluations of selected contractor performance,
19 including both negative and positive evaluations, shall be
20 provided to the contractor as soon as practicable after
21 completion of the evaluation. The contractor shall receive a



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

16 (j) Evaluations used in determining award or incentive fee
17 payments may also be used to satisfy the requirement of this
18 section.

19 (k) Agencies shall require at least quarterly evaluations
20 of agency compliance on selected projects with the reporting
21 requirements of this section. The evaluation shall identify



1 delinquent past performance reports and monitor reports for
2 quality control.

3 (1) Agencies shall ensure that information on these
4 identified projects is accurately documented within ninety
5 calendar days after a procurement officer:

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

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

10 (3) Issues a final termination for cause or default
11 notice;

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

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

19 (m) For the purpose of this section:

20 "Exceptional" means that performance meets contractual
21 requirements and exceeds many requirements to the government's



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

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



1 management, quality, safety, or environmental deficiency report
2 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, multiple significant events in
21 each category should be identified that the contractor had



1 trouble overcoming with a statement of how it impacted the
2 government. A singular problem, however, could be of such
3 serious magnitude that it alone constitutes an unsatisfactory
4 rating. An unsatisfactory rating should be supported by
5 referencing the management tools used to notify the contractor
6 of the contractual deficiencies, such as management, quality,
7 safety, or environmental deficiency 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 SECTION 7. Section 103D-709, Hawaii Revised Statutes, is
18 amended by amending subsection (c) to read as follows:

19 "(c) Only parties to the protest made and decided pursuant
20 to sections 103D-701, 103D-709(a), [~~103D-310(b),~~] 103D-310(e),
21 and 103D-702(g) may initiate a proceeding under this section.



1 The party initiating the proceeding shall have the burden of
2 proof, including the burden of producing evidence as well as the
3 burden of persuasion. The degree or quantum of proof shall be a
4 preponderance of the evidence. All parties to the proceeding
5 shall be afforded an opportunity to present oral or documentary
6 evidence, conduct cross-examination as may be required, and
7 present argument on all issues involved. Fact finding under
8 section 91-10 shall apply."

9 SECTION 8. The state procurement office shall submit
10 preliminary reports to the legislature on the implementation of
11 this Act no later than twenty days prior to the convening of the
12 regular sessions of 2022, 2023, 2024, and 2025, and a final
13 report to the legislature on the implementation of this Act,
14 including any proposed legislation, no later than twenty days
15 prior to the convening of the regular session of 2026.

16 SECTION 9. This Act does not affect rights and duties that
17 matured, penalties that were incurred, and proceedings that were
18 begun before its effective date.

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



H.B. NO. 1210

1 SECTION 11. This Act shall take effect on July 1, 2021;
2 provided that on June 30, 2026, this Act shall be repealed and
3 sections 103D-302(f), 103D-303(e), 103D-306(a), 103D-310, and
4 103D-709(c), Hawaii Revised Statutes, shall be reenacted in the
5 form in which they read on the day prior to the effective date
6 of this Act.

7

INTRODUCED BY: _____

A handwritten signature in black ink, consisting of a large, stylized initial 'O' followed by a horizontal line extending to the right.

JAN 26 2021



H.B. NO. 1210

Report Title:

Procurement; Past Performance; Criteria; Source Selection; Evaluation

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. Requires the state procurement office to submit preliminary and final reports to the legislature. Repeals 6/30/2026.

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

