
A BILL FOR AN ACT

RELATING TO PUBLIC PROCUREMENT.

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

1 SECTION 1. The legislature finds that supporting state
2 businesses strengthens the State's economy by creating local
3 employment, expanding workforce and business capacity, and
4 enhancing economic sustainability. The legislature further
5 finds that public procurement is a significant exercise of the
6 State's purchasing power and, when expending its own funds, the
7 State acts as a market participant.

8 The legislature recognizes that local preference programs
9 within the public procurement code have been adopted in numerous
10 jurisdictions. However, aggressive percentage preferences may
11 increase litigation risk under the dormant commerce clause,
12 equal protection clause, and related constitutional doctrines.

13 Therefore, the legislature determines that adopting a
14 modest and carefully structured preference percentage, with
15 clear verification standards, reciprocity provisions, and
16 federal funding limitations, will promote local economic



1 development while reducing the likelihood of undue court action
2 that could invalidate the program in its entirety.

3 Accordingly, the purpose of this Act is to adopt a
4 moderate, capped, and administratively verifiable five per cent
5 evaluation preference, limited in scope and accompanied by clear
6 certification, verification, enforcement, and reciprocity
7 provisions, to promote in-state economic participation while
8 preserving fairness, transparency, and fiscal responsibility in
9 the procurement process.

10 SECTION 2. Section 103D-302, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**§103D-302 Competitive sealed bidding.** (a) Contracts
13 shall be awarded by competitive sealed bidding except as
14 otherwise provided in section 103D-301. Awards of contracts by
15 competitive sealed bidding may be made after single or multi-
16 step bidding. Competitive sealed bidding does not include
17 negotiations with bidders after the receipt and opening of bids.
18 Award is based on the criteria set forth in the invitation for
19 bids.

20 (b) An invitation for bids shall be issued, and shall
21 include a purchase description and all contractual terms and



1 conditions applicable to the procurement. If the invitation for
2 bids is for construction, it shall specify that all bids include
3 the name of each person or firm to be engaged by the bidder as a
4 joint contractor or subcontractor in the performance of the
5 contract and the nature and scope of the work to be performed by
6 each. Construction bids that do not comply with this
7 requirement may be accepted if acceptance is in the best
8 interest of the State and the value of the work to be performed
9 by the joint contractor or subcontractor is equal to or less
10 than one per cent of the total bid amount.

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

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



1 information network, or any other method of
2 publication it deems to be effective.

3 (d) Bids shall be opened publicly in the presence of one
4 or more witnesses, at the time and place designated in the
5 invitation for bids. The amount of each bid and other relevant
6 information specified by rule, together with the name of each
7 bidder shall be recorded. The record and each bid shall be open
8 to public inspection.

9 (e) Bids shall be unconditionally accepted without
10 alteration or correction, except as authorized in this chapter
11 or by rules adopted by the policy board.

12 (f) Bids shall be evaluated based on the requirements set
13 forth in the invitation for bids. These requirements may
14 include criteria to determine acceptability, such as inspection,
15 testing, quality, workmanship, delivery, and suitability for a
16 particular purpose. [~~These~~] The criteria that will affect the
17 bid price and be considered in evaluation for award shall be as
18 objectively measurable as possible, such as discounts,
19 transportation costs, total or life cycle costs, and the
20 bidder's past performance, if available. The invitation for
21 bids shall set forth the evaluation criteria to be used. No



1 criteria may be used in bid evaluation that are not set forth in
2 the invitation for bids.

3 (g) Correction or withdrawal of inadvertently erroneous
4 bids before or after award, or cancellation of invitations for
5 bids, awards, or contracts based on such bid mistakes, shall be
6 permitted in accordance with rules adopted by the policy board.
7 After bid opening, no changes in bid prices or other provisions
8 of bids prejudicial to the interest of the public or to fair
9 competition shall be permitted. Except as otherwise provided by
10 rule, all decisions to permit the correction or withdrawal of
11 bids, or to cancel awards or contracts based on bid mistakes,
12 shall be supported by a written determination made by the chief
13 procurement officer or head of a purchasing agency.

14 (h) The contract shall be awarded with reasonable
15 promptness by written notice to the lowest responsible and
16 responsive bidder whose bid meets the requirements and criteria
17 set forth in the invitation for bids. In the event all bids
18 exceed available funds as certified by the appropriate fiscal
19 officer, the head of the purchasing agency responsible for the
20 procurement in question is authorized, in situations where time
21 or economic considerations preclude resolicitation of work of a



1 reduced scope, to negotiate an adjustment of the bid price,
2 including changes in the bid requirements, with the low
3 responsible and responsive bidder, in order to bring the bid
4 within the amount of available funds.

5 (i) When it is not practicable to initially prepare a
6 purchase description to support an award based on price, an
7 invitation for bids, which requests the submission of unpriced
8 offers to be followed by an invitation for bids limited to those
9 bidders whose offers have been qualified under the criteria set
10 forth in the first solicitation, may be used. If a multi-step
11 sealed bidding process is used, the notice and the invitation
12 for bids shall describe each step to be used in soliciting,
13 evaluating, and selecting unpriced offers.

14 (j) Hawaii bidder preference. For evaluation purposes
15 only, when a responsible and responsive bidder qualifies as a
16 Hawaii bidder and submits a Hawaii bidder preference
17 certification at or before the time set for bid opening, the bid
18 price shall be deemed reduced by five per cent; provided that:

19 (1) The total preference amount shall not exceed
20 \$ _____ ;

21 (2) The preference:



- 1 (A) Shall apply only when:
- 2 (i) The total bid price is less than
- 3 \$ _____ ;
- 4 (ii) Application of the preference does not
- 5 conflict with federal law or regulation or a
- 6 condition for the allocation of federal
- 7 funds to the procurement; and
- 8 (iii) A Hawaii bidder competes against a bidder
- 9 that does not qualify as a Hawaii bidder;
- 10 and
- 11 (B) Shall not be applied between two Hawaii bidders;
- 12 (3) Award of contract shall be made at the original bid
- 13 price and not at the reduced evaluated price;
- 14 (4) A bidder receiving the Hawaii bidder preference
- 15 pursuant to this subsection shall certify, under
- 16 penalty of perjury, that:
- 17 (A) No less than fifty-one per cent of the total
- 18 direct labor hours required for performance of
- 19 the contract will be performed within the State;
- 20 and



- 1 (B) The bidder will maintain qualification as a
2 Hawaii bidder throughout contract performance;
- 3 (5) Before award of a contract to a bidder receiving a
4 Hawaii bidder preference pursuant to this subsection,
5 the procurement officer shall verify that the bidder
6 satisfies all eligibility requirements; provided that
7 any bidder who does not satisfy the requirements shall
8 be given a reasonable time to cure the deficiency;
- 9 (6) Failure to maintain qualification as a Hawaii bidder
10 shall subject the contract to price adjustment equal
11 to the value of the preference applied and may
12 constitute cause for debarment pursuant to section
13 103D-702; and
- 14 (7) Nothing in this subsection shall limit the authority
15 of the chief procurement officer to apply a reciprocal
16 preference against a nonresident bidder pursuant to
17 section 103D-1004.

18 For the purposes of this subsection:
19 "Hawaii bidder" has the same meaning as in section 103D-
20 1001.



1 "Hawaii bidder preference certification" has the same
2 meaning as in section 103D-1001."

3 SECTION 3. Section 103D-303, Hawaii Revised Statutes, is
4 amended to read as follows:

5 "**§103D-303 Competitive sealed proposals.** (a) Competitive
6 sealed proposals may be used to procure goods, services, or
7 construction that are [~~either~~] not practicable or not
8 advantageous to the State to procure by competitive sealed
9 bidding.

10 (b) Proposals shall be solicited through a request for
11 proposals.

12 (c) Notice of the request for proposals shall be given in
13 the same manner as provided in section 103D-302(c).

14 (d) Proposals shall be opened so as to avoid disclosure of
15 contents to competing offerors during the process of evaluation.
16 A register of proposals shall be prepared and shall be open for
17 public inspection after contract award.

18 (e) The request for proposals shall include as an
19 evaluation factor, past performance on projects of similar scope
20 for public agencies or private industry, and shall state the



1 relative importance of price, past performance, and other
2 evaluation factors.

3 (f) Discussions may be conducted with responsible offerors
4 who submit proposals determined to be reasonably likely to be
5 selected for a contract award for the purpose of clarification
6 to assure full understanding of, and responsiveness to, the
7 solicitation requirements. Offerors shall be accorded fair and
8 equal treatment with respect to any opportunity for discussion
9 and revision of proposals, and revisions may be permitted after
10 submissions and prior to award for the purpose of obtaining best
11 and final offers. In conducting discussions, there shall be no
12 disclosure of any information derived from proposals submitted
13 by competing offerors.

14 (g) Award shall be made to the responsible offeror whose
15 proposal is determined in writing to be the most advantageous,
16 taking into consideration price and the evaluation factors set
17 forth in the request for proposals. No other factors or
18 criteria shall be used in the evaluation. The contract file
19 shall contain the basis on which the award is made.

20 (h) In cases of awards made under this section, non-
21 selected offerors may submit a written request for debriefing to



1 the procurement officer within three working days after the
2 posting of the award of the contract. Thereafter, the
3 procurement officer shall provide the non-selected offeror a
4 prompt debriefing. Any protest by the non-selected offeror
5 pursuant to section 103D-701 following debriefing shall be filed
6 in writing with the procurement officer within five working days
7 after the date upon which the debriefing is completed.

8 (i) In addition to any other provisions of this section,
9 construction projects may be solicited through a request for
10 proposals to use the design-build method; provided that:

11 (1) A request for proposals is issued to prequalify
12 offerors to select a short list of ~~no~~ not more than
13 three responsible offerors~~[, prior to]~~ before the
14 submittal of proposals; provided that the number of
15 offerors to be selected for the short list shall be
16 stated in the request for proposals and prompt notice
17 is given to all offerors as to which offerors have
18 been short-listed;

19 (2) A conceptual design fee may be paid to non-selected
20 offerors that submit a technically responsive



1 proposal; provided that the cost of the entire project
2 is greater than \$1,000,000;

3 (3) The criteria for pre-qualification of offerors, design
4 requirements, development documents, proposal
5 evaluation criteria, terms of the payment of a
6 conceptual design fee, or any other pertinent
7 information shall be stated in the request for
8 proposals; and

9 (4) Past performance on projects of similar scope for
10 public agencies or private industries shall be an
11 evaluation factor for the prequalification of
12 offerors.

13 (j) Hawaii offeror preference. For evaluation purposes
14 only, when a responsible offeror qualifies as a Hawaii offeror
15 and submits a Hawaii offeror preference certification at or
16 before the time set for receipt of proposals, the proposal price
17 shall be deemed reduced by five per cent; provided that:

18 (1) The total preference amount shall not exceed
19 \$ _____ ;

20 (2) The preference:

21 (A) Shall apply only when:



- 1 (i) The total contract value is less than
- 2 \$ _____ ;
- 3 (ii) Application of the preference does not
- 4 conflict with federal law or regulation or a
- 5 condition for the allocation of federal
- 6 funds to the procurement; and
- 7 (iii) A Hawaii offeror competes against an offeror
- 8 that does not qualify as a Hawaii offeror;
- 9 and
- 10 (B) Shall not be applied between two Hawaii offerors;
- 11 (3) Award of contract shall be made at the original
- 12 contract price and not at the reduced evaluated price;
- 13 (4) An offeror receiving the Hawaii offeror preference
- 14 pursuant to this subsection shall certify, under
- 15 penalty of perjury, that:
- 16 (A) No less than fifty-one per cent of the total
- 17 direct labor hours required for performance of
- 18 the contract will be performed within the State;
- 19 and
- 20 (B) The offeror will maintain qualification as a
- 21 Hawaii offeror throughout contract performance;



- 1 (5) Before award of a contract to an offeror receiving a
2 Hawaii offeror preference pursuant to this subsection,
3 the procurement officer shall verify that the offeror
4 satisfies all eligibility requirements; provided that
5 any offeror who does not satisfy the requirements
6 shall be given a reasonable time to cure the
7 deficiency;
- 8 (6) Failure to maintain qualification as a Hawaii offeror
9 shall subject the contract to price adjustment equal
10 to the value of the preference applied and may
11 constitute cause for debarment pursuant to section
12 103D-702; and
- 13 (7) Nothing in this subsection shall limit the authority
14 of the chief procurement officer to apply a reciprocal
15 preference against a nonresident offeror pursuant to
16 section 103D-1004.

17 For the purposes of this subsection:

18 "Hawaii offeror" has the same meaning as in section 103D-
19 1001.

20 "Hawaii offeror preference certification" has the same
21 meaning as in section 103D-1001."



1 SECTION 4. Section 103D-702, Hawaii Revised Statutes, is
2 amended by amending subsection (b) to read as follows:

3 "(b) The causes for debarment or suspension include the
4 following:

5 (1) Conviction for commission of a criminal offense as an
6 incident to obtaining or attempting to obtain a public
7 or private contract or subcontract, or in the
8 performance of the contract or subcontract;

9 (2) Conviction under state or federal statutes relating to
10 embezzlement, theft, forgery, bribery, falsification
11 or destruction of records, receiving stolen property,
12 or any other offense indicating a lack of business
13 integrity or business honesty which currently,
14 seriously, and directly affects responsibility as a
15 contractor;

16 (3) Conviction under state or federal antitrust statutes
17 arising out of the submission of bids or proposals;

18 (4) Violation of contract provisions, as set forth below,
19 of a character that is regarded by the chief
20 procurement officer to be so serious as to justify
21 debarment action:



1 (A) Deliberate failure without good cause to perform
2 in accordance with the specifications or within
3 the time limit provided in the contract; or

4 (B) A recent record of failure to perform or of
5 unsatisfactory performance in accordance with the
6 terms of one or more contracts; provided that
7 failure to perform or unsatisfactory performance
8 caused by acts beyond the control of the
9 contractor shall not be considered to be a basis
10 for debarment;

11 (5) Knowingly making, or causing to be made, a false or
12 misleading statement or certification of material fact
13 for the purposes of obtaining or retaining a
14 preference under section 103D-302(j) or 103D-303(j);

15 [~~5~~] (6) Any other cause the chief procurement officer
16 determines to be so serious and compelling as to
17 affect responsibility as a contractor, including
18 debarment by another governmental entity for any cause
19 listed in the rules of the policy board; and

20 [~~6~~] (7) Violation of the ethical standards set forth in
21 chapter 84 and its implementing rules, or the charters



1 and ordinances of the several counties and their
2 implementing rules."

3 SECTION 5. Section 103D-1001, Hawaii Revised Statutes, is
4 amended by adding four new definitions to be appropriately
5 inserted and to read as follows:

6 "Hawaii bidder" means any person that:

7 (1) Holds a valid commercial place of business in the
8 State that has been staffed by the person or an
9 employee of the person for no less than two
10 consecutive years immediately preceding the time and
11 date set for the opening of bids;

12 (2) Submits a bid under the name under which the person is
13 authorized to do business in the State; and

14 (3) If a joint venture, is composed entirely of persons
15 meeting the requirements of paragraphs (1) and (2).

16 For the purpose of this definition, "person" includes an agency,
17 corporation, and other business entity.

18 "Hawaii bidder preference certification" means a sworn
19 statement executed under penalty of perjury by an authorized
20 representative of a bidder attesting to eligibility for the
21 Hawaii bidder preference established under section 103D-302(j)



1 and agreeing to maintain qualification throughout contract
2 performance.

3 "Hawaii offeror" means any person that:

4 (1) Holds a valid commercial place of business in the
5 State that has been staffed by the person or an
6 employee of the person for no less than two
7 consecutive years immediately preceding the time and
8 date set for the receipt of proposals;

9 (2) Submits a proposal under the name under which the
10 person is authorized to do business in the State; and

11 (3) If a joint venture, is composed entirely of persons
12 meeting the requirements of paragraphs (1) and (2).

13 For the purposes of this definition, "person" includes an
14 agency, corporation, and other business entity.

15 "Hawaii offeror preference certification" means a sworn
16 statement executed under penalty of perjury by an authorized
17 representative of an offeror, attesting to eligibility for the
18 Hawaii offeror preference established under section 103D-303(j)
19 and agreeing to maintain qualification throughout contract
20 performance."



1 SECTION 6. Section 103D-1002, Hawaii Revised Statutes, is
2 amended to read as follows:

3 **"§103D-1002 Hawaii products.** (a) This section shall only
4 apply to bids and proposals for agricultural goods, value-added
5 products, and commodities. A purchasing agency shall review all
6 specifications in a bid or proposal for purchase of Hawaii
7 products where these products are available and where
8 procurement of these products will promote the State's goal of
9 increasing agricultural production and sustainability.

10 (b) All invitations for bids and requests for proposals to
11 which this section applies shall:

12 (1) Include a description of the products that are listed
13 in the Hawaii products list established pursuant to
14 this section, which may be used to complete the scope
15 of work specified in the invitation for bids or
16 request for proposals; or

17 (2) Allow as part of the offer, self-certification that
18 the Hawaii products qualify for preference;
19 provided that the offer may be evaluated along with any other
20 published criteria in the solicitation, including but not
21 limited to considerations [~~such as~~] of specific nutritional



1 content or its equivalent, timing of delivery, quality or
2 freshness, and past performance, if applicable.

3 All Hawaii products in any bid or request for proposal
4 shall be made available for inspection, or additional
5 information may be requested to verify that the Hawaii product
6 meets the minimum specifications.

7 (c) All persons submitting bids or proposals to claim a
8 Hawaii products preference shall designate in their bids which
9 individual product and its price is to be supplied as a Hawaii
10 product.

11 (d) Where a bid or proposal contains both Hawaii and non-
12 Hawaii products, then for the purpose of selecting the lowest
13 bid or purchase price only, the price or bid offered for a
14 Hawaii product item shall be decreased by subtracting ten per
15 cent for class I Hawaii product items bid or offered, or fifteen
16 per cent for class II Hawaii product items bid or offered. The
17 lowest total bid or proposal, taking the preference into
18 consideration, shall be awarded the contract unless the bid or
19 offer provides for additional award criteria. The contract
20 amount of any contract awarded, however, shall be the amount of
21 the bid or price offered, exclusive of the preferences.



1 (e) Upon receipt and approval of application for Hawaii
2 products preference, the administrator shall include within the
3 Hawaii products list~~[7]~~ the names of producers and manufacturers
4 in the State who are authorized to supply locally manufactured
5 soil enhancement products to state agencies under subsection
6 ~~[(1)]~~ (m). The administrator of the state procurement office
7 shall maintain and distribute copies of the list to the
8 purchasing agencies of the various governmental agencies.

9 (f) Any person not on the Hawaii products list desiring a
10 preference pursuant to this section shall certify the Hawaii
11 product when submitting a response to a solicitation; provided
12 that the person certifies under penalty of sanctions that the
13 offered Hawaii products meet the requirements for the
14 preference.

15 The procurement officer may request additional information
16 deemed necessary to qualify a product and shall have sole
17 discretion in determining qualification for the preference.

18 Any offeror whose product is deemed not qualified for the
19 preference may appeal by filing a written request for
20 reexamination of facts to the procurement officer. Upon
21 determining that the offeror is qualified for the preference,



1 the procurement officer shall notify the administrator and the
2 administrator shall place the offeror on the Hawaii products
3 list.

4 (g) Solicitations shall contain a provision notifying
5 offerors who request application of the preference that, in the
6 event of any change that materially alters the offeror's ability
7 to supply Hawaii products, the offeror shall immediately notify
8 the chief procurement officer in writing and the parties shall
9 enter into discussions for the purposes of revising the contract
10 or terminating the contract for convenience.

11 (h) Nothing in this section shall limit, restrict, or
12 preclude a Hawaii product from any preferences, set-asides, or
13 criteria that may be applied under section 103D-906, and this
14 section shall operate instead to mutually enhance the purpose of
15 this section and section 103D-906.

16 (i) This section shall not apply when at least one of the
17 following conditions is met:

18 (1) Its application will disqualify any governmental
19 agency from receiving federal funds or aid; or

20 (2) The solicitation is for public works construction.



1 (j) Any purchase made or any contract awarded or executed
2 in violation of this section shall be void and no payment shall
3 be made by any purchasing agency on account of the purchase or
4 contract.

5 (k) The department of accounting and general services
6 shall provide written notice to all vendors of construction
7 products who are registered on the Hawaii products list with the
8 state procurement office regarding any amendments to this
9 section, including effective dates and dates of repeal.

10 (1) The policy board shall adopt rules pursuant to chapter
11 91 to implement the Hawaii bidder preference and Hawaii offeror
12 preference established under sections 103D-302(j) and
13 103D-303(j), respectively, including:

- 14 (1) Standardized certification forms;
15 (2) Verification procedures and documentation standards;
16 (3) Audit and compliance monitoring procedures;
17 (4) Methods for calculating direct labor hours; and
18 (5) Procedures for enforcement referral.

19 [+1+] (m) For the purposes of this section, "soil
20 enhancement product" means any nonchemical soil preparation,
21 conditioner, or compost mixture designed to supplement aeration



1 or add organic, green waste, or decaying matter to the soil.
2 "Soil enhancement product" does not include any plant fertilizer
3 intended to stimulate or induce plant growth through chemical
4 means. All state agencies shall include in their solicitations,
5 when required, the soil enhancement products identified on the
6 Hawaii products list pursuant to subsection (e)."

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

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

12 SECTION 9. This Act shall take effect on July 1, 2525.



Report Title:

Public Procurement; Local Preference; Hawaii Bidders; Hawaii Offerors; Competitive Sealed Bidding; Competitive Sealed Proposals; Debarment; Rules

Description:

Requires purchasing agencies to apply a five per cent flat rate local preference in evaluating bids or proposals from qualified Hawaii bidders or offerors who submit a timely preference certification. Establishes criteria for a bid or proposal to qualify for a local preference. Establishes requirements for the qualification and certification of Hawaii bidders and offerors and consequences for failure to maintain qualification. Requires the Procurement Policy Board to adopt rules. Effective 7/1/2525. (HD2)

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

