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# 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 \$500,000;

20 (2) The preference:

21 (A) Shall apply only when:



- 1            (i) The total bid price is less than
- 2                            \$10,000,000;
- 3            (ii) Application of the preference does not
- 4                            conflict with federal law, federal
- 5                            regulation, or a condition for the
- 6                            allocation of federal funds to the
- 7                            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 preference shall certify, under
- 15                            penalty of perjury, that:
- 16            (A) Not 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 bidder will maintain qualification as a
- 21                            Hawaii bidder throughout contract performance;



1       (5) Before award of a contract to a bidder receiving a  
2       preference pursuant to this subsection, the  
3       procurement officer shall verify that the bidder  
4       satisfies all eligibility requirements; provided that  
5       any bidder who does not satisfy the requirements shall  
6       be given a reasonable time to cure the deficiency.

7       (6) Failure to maintain qualification as a Hawaii bidder  
8       shall subject the contract to price adjustment equal  
9       to the value of the preference applied and may  
10       constitute cause for debarment pursuant to section  
11       103D-702; and

12       (7) Nothing in this subsection shall limit the authority  
13       of the chief procurement officer to apply a reciprocal  
14       preference against a nonresident bidder pursuant to  
15       section 103D-1004.

16       For the purposes of this subsection, "Hawaii bidder" and  
17       "Hawaii bidder preference certification" have the same meanings  
18       as those terms are defined in section 103D-1001."

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



1           "**§103D-303 Competitive sealed proposals.** (a) Competitive  
2 sealed proposals may be used to procure goods, services, or  
3 construction that are [~~either~~] not practicable or not  
4 advantageous to the State to procure by competitive sealed  
5 bidding.

6           (b) Proposals shall be solicited through a request for  
7 proposals.

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

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

14          (e) The request for proposals shall include as an  
15 evaluation factor, past performance on projects of similar scope  
16 for public agencies or private industry, and shall state the  
17 relative importance of price, past performance, and other  
18 evaluation factors.

19          (f) Discussions may be conducted with responsible offerors  
20 who submit proposals determined to be reasonably likely to be  
21 selected for a contract award for the purpose of clarification



1 to assure full understanding of, and responsiveness to, the  
2 solicitation requirements. Offerors shall be accorded fair and  
3 equal treatment with respect to any opportunity for discussion  
4 and revision of proposals, and revisions may be permitted after  
5 submissions and prior to award for the purpose of obtaining best  
6 and final offers. In conducting discussions, there shall be no  
7 disclosure of any information derived from proposals submitted  
8 by competing offerors.

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

15 (h) In cases of awards made under this section, non-  
16 selected offerors may submit a written request for debriefing to  
17 the procurement officer within three working days after the  
18 posting of the award of the contract. Thereafter, the  
19 procurement officer shall provide the non-selected offeror a  
20 prompt debriefing. Any protest by the non-selected offeror  
21 pursuant to section 103D-701 following debriefing shall be filed



1 in writing with the procurement officer within five working days  
2 after the date upon which the debriefing is completed.

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

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

14 (2) A conceptual design fee may be paid to non-selected  
15 offerors that submit a technically responsive  
16 proposal; provided that the cost of the entire project  
17 is greater than \$1,000,000;

18 (3) The criteria for pre-qualification of offerors, design  
19 requirements, development documents, proposal  
20 evaluation criteria, terms of the payment of a  
21 conceptual design fee, or any other pertinent



1 information shall be stated in the request for  
2 proposals; and

3 (4) Past performance on projects of similar scope for  
4 public agencies or private industries shall be an  
5 evaluation factor for the prequalification of  
6 offerors.

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

12 (1) The total preference amount shall not exceed \$500,000;

13 (2) The preference:

14 (A) Shall apply only when:

15 (i) The total contract value is less than  
16 \$10,000,000;

17 (ii) Application of the preference does not  
18 conflict with federal law, federal  
19 regulation, or a condition for the  
20 allocation of federal funds to the  
21 procurement; and



1           (iii) A Hawaii offeror competes against an offeror  
2           that does not qualify as a Hawaii offeror;  
3           and  
4           (B) Shall not be applied between two Hawaii offerors;  
5        (3) Award of contract shall be made at the original  
6        contract price and not at the reduced evaluated price;  
7        (4) An offeror receiving the preference shall certify,  
8        under penalty of perjury, that:  
9           (A) Not less than fifty-one per cent of the total  
10        direct labor hours required for performance of  
11        the contract will be performed within the State;  
12        and  
13        (B) The offeror will maintain qualification as a  
14        Hawaii offeror throughout contract performance;  
15        (5) Before award of a contract to an offeror receiving a  
16        preference pursuant to this subsection, the  
17        procurement officer shall verify that the offeror  
18        satisfies all eligibility requirements; provided that  
19        any offeror who does not satisfy the requirements  
20        shall be given a reasonable time to cure the  
21        deficiency.



1       (6) Failure to maintain qualification as a Hawaii offeror  
2       shall subject the contract to price adjustment equal  
3       to the value of the preference applied and may  
4       constitute cause for debarment pursuant to section  
5       103D-702; and

6       (7) Nothing in this subsection shall limit the authority  
7       of the chief procurement officer to apply a reciprocal  
8       preference against a nonresident offeror pursuant to  
9       section 103D-1004.

10       For the purposes of this subsection, "Hawaii offeror" and  
11       "Hawaii offeror preference certification" have the same meanings  
12       as those terms are defined in section 103D-1001."

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

15       "(b) The causes for debarment or suspension include the  
16 following:

17       (1) Conviction for commission of a criminal offense as an  
18 incident to obtaining or attempting to obtain a public  
19 or private contract or subcontract, or in the  
20 performance of the contract or subcontract;



- 1           (2) Conviction under state or federal statutes relating to
- 2           embezzlement, theft, forgery, bribery, falsification
- 3           or destruction of records, receiving stolen property,
- 4           or any other offense indicating a lack of business
- 5           integrity or business honesty which currently,
- 6           seriously, and directly affects responsibility as a
- 7           contractor;
- 8           (3) Conviction under state or federal antitrust statutes
- 9           arising out of the submission of bids or proposals;
- 10          (4) Violation of contract provisions, as set forth below,
- 11          of a character that is regarded by the chief
- 12          procurement officer to be so serious as to justify
- 13          debarment action:
- 14           (A) Deliberate failure without good cause to perform
- 15           in accordance with the specifications or within
- 16           the time limit provided in the contract; or
- 17           (B) A recent record of failure to perform or of
- 18           unsatisfactory performance in accordance with the
- 19           terms of one or more contracts; provided that
- 20           failure to perform or unsatisfactory performance
- 21           caused by acts beyond the control of the



1 contractor shall not be considered to be a basis  
2 for debarment;

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

7 [~~5~~] (6) Any other cause the chief procurement officer  
8 determines to be so serious and compelling as to  
9 affect responsibility as a contractor, including  
10 debarment by another governmental entity for any cause  
11 listed in the rules of the policy board; and

12 [~~6~~] (7) Violation of the ethical standards set forth in  
13 chapter 84 and its implementing rules, or the charters  
14 and ordinances of the several counties and their  
15 implementing rules."

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

19 "Hawaii bidder" means any person that:

20 (1) Holds a valid commercial place of business in the  
21 State that has been staffed by the person or an



1           employee of the person for not less than two  
2           consecutive years immediately preceding the time and  
3           date set for the opening of bids;

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

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

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

10           "Hawaii bidder preference certification" means a sworn  
11 statement executed under penalty of perjury by an authorized  
12 representative of a bidder attesting to eligibility for the  
13 Hawaii bidder preference established under section 103D-302(j)  
14 and agreeing to maintain qualification throughout contract  
15 performance.

16           "Hawaii offeror" means any person that:

17           (1) Holds a valid commercial place of business in the  
18           State that has been staffed by the person or an  
19           employee of the person for not less than two  
20           consecutive years immediately preceding the time and  
21           date set for the receipt of proposals;



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

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

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

7       "Hawaii offeror preference certification" means a sworn  
8 statement executed under penalty of perjury by an authorized  
9 representative of an offeror, attesting to eligibility for the  
10 Hawaii offeror preference established under section 103D-303(j)  
11 and agreeing to maintain qualification throughout contract  
12 performance."

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

15       "**§103D-1002 Hawaii products.** (a) This section shall only  
16 apply to bids and proposals for agricultural goods, value-added  
17 products, and commodities. A purchasing agency shall review all  
18 specifications in a bid or proposal for purchase of Hawaii  
19 products where these products are available and where  
20 procurement of these products will promote the State's goal of  
21 increasing agricultural production and sustainability.



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

3 (1) Include a description of the products that are listed  
4 in the Hawaii products list established pursuant to  
5 this section, which may be used to complete the scope  
6 of work specified in the invitation for bids or  
7 request for proposals; or

8 (2) Allow as part of the offer, self-certification that  
9 the Hawaii products qualify for preference;  
10 provided that the offer may be evaluated along with any other  
11 published criteria in the solicitation, including but not  
12 limited to considerations [~~such as~~] of specific nutritional  
13 content or its equivalent, timing of delivery, quality or  
14 freshness, and past performance, if applicable.

15 All Hawaii products in any bid or request for proposal  
16 shall be made available for inspection, or additional  
17 information may be requested to verify that the Hawaii product  
18 meets the minimum specifications.

19 (c) All persons submitting bids or proposals to claim a  
20 Hawaii products preference shall designate in their bids which



1 individual product and its price is to be supplied as a Hawaii  
2 product.

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

14 (e) Upon receipt and approval of application for Hawaii  
15 products preference, the administrator shall include within the  
16 Hawaii products list[~~7~~] the names of producers and manufacturers  
17 in the State who are authorized to supply locally manufactured  
18 soil enhancement products to state agencies under subsection  
19 [~~(1)~~] (m). The administrator of the state procurement office  
20 shall maintain and distribute copies of the list to the  
21 purchasing agencies of the various governmental agencies.



1 (f) Any person not on the Hawaii products list desiring a  
2 preference pursuant to this section shall certify the Hawaii  
3 product when submitting a response to a solicitation; provided  
4 that the person certifies under penalty of sanctions that the  
5 offered Hawaii products meet the requirements for the  
6 preference.

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

10 Any offeror whose product is deemed not qualified for the  
11 preference may appeal by filing a written request for  
12 reexamination of facts to the procurement officer. Upon  
13 determining that the offeror is qualified for the preference,  
14 the procurement officer shall notify the administrator and the  
15 administrator shall place the offeror on the Hawaii products  
16 list.

17 (g) Solicitations shall contain a provision notifying  
18 offerors who request application of the preference that, in the  
19 event of any change that materially alters the offeror's ability  
20 to supply Hawaii products, the offeror shall immediately notify  
21 the chief procurement officer in writing and the parties shall



1 enter into discussions for the purposes of revising the contract  
2 or terminating the contract for convenience.

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

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

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

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

13 (j) Any purchase made or any contract awarded or executed  
14 in violation of this section shall be void and no payment shall  
15 be made by any purchasing agency on account of the purchase or  
16 contract.

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



1       (1) The policy board shall adopt rules pursuant to chapter  
2 91 to implement the Hawaii bidder preference and Hawaii offeror  
3 preference established under sections 103D-302(j) and  
4 103D-303(j), respectively, including:

- 5       (1) Standardized certification forms;
- 6       (2) Verification procedures and documentation standards;
- 7       (3) Audit and compliance monitoring procedures;
- 8       (4) Methods for calculating direct labor hours; and
- 9       (5) Procedures for enforcement referral.

10       ~~[(1)]~~ (m) For the purposes of this section, "soil  
11 enhancement product" means any nonchemical soil preparation,  
12 conditioner, or compost mixture designed to supplement aeration  
13 or add organic, green waste, or decaying matter to the soil.  
14 "Soil enhancement product" does not include any plant fertilizer  
15 intended to stimulate or induce plant growth through chemical  
16 means. All state agencies shall include in their solicitations,  
17 when required, the soil enhancement products identified on the  
18 Hawaii products list pursuant to subsection (e)."

19       SECTION 7. 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 8. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3           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 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. Authorizes the false or misleading actions for the obtaining or retaining of a Hawaii bidder or offeror preference to constitute cause for debarment. Allows the Procurement Policy Board to adopt rules. Effective 7/1/2525. (SD1)

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

