

ACT 52

S.B. NO. 1262

A Bill for an Act Relating to Procurement.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to establish procurement policies and procedures that:

- (1) Ensure in-state contractors' ability to win awards of public funds for state contracts;
- (2) Promote public confidence in the integrity of the procurement process;
- (3) Increase openness in the award of competitive sealed proposals and professional services contracts;
- (4) Enhance procurement education in the Pacific by creating a Hawaii procurement institute;

- (5) Require a pre-bid conference to be attended by all potential bidders, offerors, subcontractors, and union representatives, that will allow all interested parties to raise their protests prior to bidding, so that any subsequent protests can be resolved quickly and efficiently pursuant to the timeframe established in section 103D-701, Hawaii Revised Statutes; and
- (6) Technically correct chapter 103D, Hawaii Revised Statutes.

SECTION 2. Part X of chapter 103D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§103D- Pre-bid conference. (a) At least fifteen days prior to submission of bids pursuant to section 103D-302 for a construction or design-build project with a total estimated contract value of \$500,000 or more, and at least fifteen days prior to submission of proposals pursuant to section 103D-303 for a construction or design-build project with a total estimated contract value of \$100,000 or more, the head of the purchasing agency shall hold a pre-bid conference and shall invite all potential interested bidders, offerors, subcontractors, and union representatives to attend.

(b) The procurement policy board shall adopt rules under chapter 91 to effectuate this section.”

SECTION 3. Section 103D-206, Hawaii Revised Statutes, is amended to read as follows:

“[§103D-206] Additional duties of the administrator of the procurement office. In addition to the duties referred to in section 103D-205, the administrator shall:

- (1) Perform periodic review of the procurement practices of all governmental bodies;
- (2) Assist, advise, and guide governmental bodies in matters relating to procurement;
- (3) Develop and administer a statewide procurement orientation and training program;
- (4) Develop, distribute, and maintain a procurement manual for all state procurement officials; ~~and~~
- (5) Develop, distribute, and maintain a procurement guide for vendors wishing to do business with the State and its counties[-]; and
- (6) Establish and maintain a Hawaii procurement institute, in cooperation with the University of Hawaii William S. Richardson school of law and other public and private entities and/or persons, to promote and develop a professional acquisition workforce and to improve and enhance the State of Hawaii’s contractor industrial base through education and training. The Hawaii procurement institute may:
 - (A) Conduct and participate in procurement education and training for entry level and higher qualified State of Hawaii employees and others, including persons not employed by the State of Hawaii;
 - (B) Conduct and promote research, conferences, and studies to improve the procurement process, laws, policies, methods, regulations, procedures, and forms relating to state and local government procurement;

- (C) Report on and make recommendations regarding goals, guidelines, innovations, and evaluation of state and local government procurement initiatives; and
- (D) Establish and maintain a procurement library within the State of Hawaii.”

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

“§103D-303 Competitive sealed proposals. (a) Competitive sealed proposals may be utilized to procure goods, services, or construction designated in rules adopted by the procurement policy board as goods, services, or construction which are either not practicable or not advantageous to the State to procure by competitive sealed bidding. Competitive sealed proposals may also be utilized when the head of a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State.

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

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

(d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared in accordance with rules adopted by the policy board and shall be open for public inspection after contract award.

(e) The request for proposals shall state the relative importance of price and other evaluation factors.

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

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

(h) In cases of awards made under this section, nonselected offerors may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed.”

SECTION 5. Section 103D-304, Hawaii Revised Statutes, is amended to read as follows:

“§103D-304 Procurement of professional services. (a) Professional services shall be procured in accordance with sections 103D-302, 103D-303, 103D-305, 103D-306, or 103D-307, or this section[-]; provided that design professional services furnished by licensees under chapter 464 shall be procured pursuant to this

section or section 103D-307. Contracts for professional services shall be awarded on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(b) At a minimum, before the beginning of each fiscal year, the head of each purchasing agency shall publish a notice inviting persons engaged in providing professional services which the agency anticipates needing in the next fiscal year, to submit current statements of qualifications and expressions of interest to the agency. Additional notices ~~[may]~~ shall be given if:

- (1) The response to the initial notice is inadequate;
- (2) The response to the initial notice does not result in adequate representation of available sources; ~~[or]~~
- (3) ~~[Previously unanticipated]~~ New needs for professional services arise[-];
or
- (4) Rules adopted by the policy board so specify.

The chief procurement officer may specify a uniform format for statements of qualifications. Persons may amend these statements by filing a new statement prior to the date designated for submission.

(c) The head of the purchasing agency shall designate a review committee consisting of a minimum of three ~~[employees from the agency or from another governmental body,]~~ persons with sufficient education, training, and licenses or credentials for each type of professional service which may be required. In designating the members of the review committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of the review committee established under this section shall be placed in the contract file.

The committee shall review and evaluate all submissions and other pertinent information, including references and reports, and prepare a list of qualified persons to provide these services. Persons included on the list of qualified persons may amend their statements of qualifications as necessary or appropriate. Persons shall immediately inform the head of the purchasing agency of any change in information furnished which would disqualify the person from being considered for a contract award.

(d) Whenever during the course of the fiscal year the agency needs a particular professional service, the head of the purchasing agency shall designate a ~~[screening]~~ selection committee to evaluate the statements of qualification and performance data of those persons on the list prepared pursuant to subsection (c) along with any other pertinent information, including references and reports. The ~~[screening]~~ selection committee shall be comprised of a minimum of three ~~[employees of the purchasing agency]~~ persons with sufficient education, training, and licenses or credentials in the area of the services required. ~~[If the purchasing agency and using agency are different, the committee shall include at least one qualified employee from the using agency. When the committee includes an employee from a using agency, the employee shall be appointed by the head of the using agency. If qualified employees are not available from these agencies, the officers may designate employees of other governmental bodies.]~~ In designating the members of the selection committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of a selection committee established under this section shall be placed in the contract file.

(e) The ~~[primary]~~ selection criteria employed ~~[by the screening committee]~~ in descending order of importance shall ~~[include but not]~~ be ~~[limited to]~~:

- (1) Experience and professional qualifications ~~[of the staff to be assigned]~~ relevant to the project[;] type;

- (2) Past performance on projects of similar scope for public agencies or private industry[; and], including corrective actions and other responses to notices of deficiencies;
- (3) Capacity to accomplish the work in the required time[-]; and
- (4) Any additional criteria determined in writing by the selection committee to be relevant to the purchasing agency's needs or necessary and appropriate to ensure full, open, and fair competition for professional services contracts.

(f) The [screening] selection committee shall evaluate the submissions of persons on the list prepared pursuant to subsection (c) and any other pertinent information which may be available to the agency, against the selection criteria. The committee may conduct confidential discussions with any person who is included on the list prepared pursuant to subsection (c) regarding the services which are required and the services they are able to provide. In conducting discussions, there shall be no disclosure of any information derived from [proposals submitted by competing offerors. The committee shall provide the head of the purchasing agency with the names of a minimum of three persons who the committee concludes are the most qualified to provide the services required, with a summary of each of their qualifications.] the competing professional service offerors.

(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. The contract file shall contain a copy of [the criteria established for the selection and] the [committee's] summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency [by the committee.] for contract negotiations. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications.

~~[(e) The head of the purchasing agency shall evaluate the summary of qualifications for each of the persons provided by the screening committee and may conduct additional discussions with any of them. The head of the purchasing agency shall then rank the persons based on the selection criteria.]~~

(h) The head of the purchasing agency or designee shall negotiate a contract with the first ranked person, including a rate of compensation which is fair and reasonable, established in writing, and based upon the estimated value, scope, complexity, and nature of the services to be rendered. If a satisfactory contract cannot be negotiated with the first ranked person, negotiations with that person shall be formally terminated and negotiations with the second ranked person on the list shall commence. The contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked or next ranked person. Failing accord with the second ranked person, negotiations with the next ranked person on the list shall commence. If a contract at a fair and reasonable price cannot be negotiated, the [screening] selection committee may be asked to submit a minimum of three additional persons for the head of the purchasing agency to [rank, and] resume negotiations in the same manner provided in this subsection. Negotiations shall be conducted confidentially.

~~[(f)]~~ (i) Contracts awarded under this section for \$5,000 or more shall be posted electronically within seven days of the contract award by the chief procurement officer or designee and shall remain posted for at least one year. Information to be posted shall include[-], but not be limited to:

- (1) The names of the [top five] persons submitted under subsection [(d), or, if the list submitted under subsection (d) is less than five, all of the persons submitted] (g);
- (2) The name of the person or organization receiving the award;
- (3) The dollar amount of the contract;

(4) The name of the head of the purchasing agency or designee [head] making the selection; and

(5) Any relationship of the principals to the official making the award.

~~[(g)]~~ (j) Contracts for professional services of less than [\$25,000] the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, with at least any two persons [who appear] on the list of qualified persons established pursuant to subsection (c). Negotiations shall be conducted in the manner set forth in subsection [(e), but without establishing any order of preference.] (h), with ranking based on the selection criteria of subsection (e) as determined by the head of the agency.

(k) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed."

SECTION 6. Section 103D-310, Hawaii Revised Statutes, is amended to read as follows:

"§103D-310 Responsibility of offerors. (a) Unless the policy board, by rules, specifies otherwise, before submitting an offer, a prospective offeror, not less than ten calendar days prior to the day designated for opening offers, shall give written notice of the intention to submit an offer to the procurement officer responsible for that particular procurement.

(b) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709.

(c) All offerors, upon award of contract, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392, and 393, and shall:

(1) Be incorporated or organized under the laws of the State; or

(2) Be registered to do business in the State as a separate branch or division that is capable of fully performing under the contract.

Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. Any offeror making a false affirmation or certification under this subsection shall be suspended from further offerings or awards pursuant to section 103D-702.

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

SECTION 7. Section 103D-701, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. [A] Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract [either] under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.”

SECTION 8. Section 103D-1007, Hawaii Revised Statutes, is repealed.

SECTION 9. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to that extent the provisions of this Act are severable.

SECTION 10. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 11. This Act shall take effect on July 1, 2003.

(Approved May 12, 2003.)

Note

1. Edited pursuant to HRS §23G-16.5.