

ACT 150

S.B. NO. 21

A Bill for an Act Relating to Government.

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

PART I

SECTION 1. The legislature finds that the enactment of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, envisioned by President Obama as money going “out the door immediately,” will require expedited

procedures to allow the State to take full advantage of funding from the federal stimulus plan to address, at the earliest practicable time, the programs, services, and benefits needed by the people of Hawaii.

The legislature further finds that in these times of economic turmoil, this Act would be instrumental in bringing, as soon as possible, additional financial assistance and other social services to Hawaii residents who have been affected by the current economic circumstances as well as improving and expanding benefits to the neediest individuals and families in Hawaii.

The purpose of this Act is to provide temporary exemptions from statutes relating to procurement and rulemaking to allow the State to expedite the implementation or expansion of programs, services, and benefits authorized by the American Recovery and Reinvestment Act of 2009. It is not the intent of the legislature to provide permanent exemptions to the relevant statutes, and this Act shall be applied only to expedite the expenditure of federal funds authorized in the American Recovery and Reinvestment Act of 2009, or to expending the matching state funds, if any, required to access the federal funding from the American Recovery and Reinvestment Act of 2009.

The American Recovery and Reinvestment Act of 2009 has specific accountability and transparency provisions to prevent fraud, waste, and abuse, to ensure against poor contracting or grant management, and to ensure the use of competitive procedures. The federal government is provided expansive investigatory and auditing powers to monitor, oversee, and ensure that the American Recovery and Reinvestment Act of 2009 funds are used for their intended purposes and with the full review and vetting required by law. Therefore, the goal of this Act is to strike the appropriate balance between expedited procedures and necessary accountability and transparency.

SECTION 2. To the extent not covered by any exemptions adopted by the procurement policy board or the respective chief procurement officers, and any law to the contrary notwithstanding, governmental bodies, and state agencies contracting for goods, services, construction, or health and human services using federal funds authorized by the American Recovery and Reinvestment Act of 2009, and matching state funds, if any, required to access the federal funding in the American Recovery and Reinvestment Act of 2009, may do so exempt from chapter 103D and chapter 103F, Hawaii Revised Statutes, and sections 103-8.5 and 103-53(a), Hawaii Revised Statutes, and subject to the requirements of section 3.

The chief procurement officer of each respective entity shall adopt and implement procedural requirements to carry out the purposes this Act.

SECTION 3. (a) Procurements for goods, services, construction, or health and human services shall be made through an electronic procurement system to obtain price quotations based on specifications; and registered vendors, contractors, and service providers that supply the goods, services, construction, or health and human services shall be solicited and considered to meet the minimum requirements. For purposes of this Act, "electronic procurement system" means a system that incorporates, at minimum, electronic notification to registered vendors, contractors, and service providers; electronic receipt of responses; and electronic notification of awards.

(b) An award shall be made to the lowest responsive and responsible offeror, using a fixed-price contract. For purposes of this Act, "fixed-price contract" means a contract providing for a firm price, or a price that may be adjusted only in accordance with contract clauses providing for revision of the contract price under stated circumstances.

(c) Prior to the issuance of the solicitation, the chief procurement officer, or the chief procurement officer's designee, shall determine in writing whether an award to the lowest responsive and responsible offeror is not practicable or not advantageous to the State.

(d) When an award to the lowest responsive and responsible offeror is not practicable, an award shall be made to the offeror whose offer provides the best value to the State. For purposes of this Act, "best value" is defined as the most advantageous offer determined by evaluating and comparing all relevant evaluation criteria, in addition to price, so that the offer meeting the overall combination that best serves the State and is rated the highest, shall be selected. The quantitative criteria may include, but shall not be limited to, the total cost of ownership, performance history of the vendor, contractor, and service provider, quality of goods, services, construction, or health and human services, delivery, and proposed technical performance.

(e) If only one responsive and responsible offeror submits an acceptable offer, award may be made to the single offeror, provided the chief procurement officer, or the chief procurement officer's designee, determines in writing that the price submitted is fair and reasonable. If no offers are received, direct negotiations may be conducted, provided the chief procurement officer, or the chief procurement officer's designee, determines in writing, the need for the goods, services, construction, or health and human services.

(f) The chief procurement officer, or the chief procurement officer's designee, shall designate an evaluation committee consisting of a minimum of three governmental employees with sufficient and relevant qualifications related to the procurement. In designating the members of the evaluation committee, the chief procurement officer or designee shall ensure the impartiality and independence of committee members.

The chief procurement officer, or the chief procurement officer's designee, shall award the contract or contracts based upon the information provided by the evaluation committee. Written determination for the selection shall be placed in the procurement file.

(g) Construction contracts shall include security for bid, payment, and performance bonds when the estimated contract amount is \$50,000 or more, and conforms to the requirements of sections 103D-323 and 103D-324, Hawaii Revised Statutes.

(h) Any actual or prospective vendor, contractor, or service provider aggrieved by an award of a contract pursuant to this Act may protest a purchasing agency's failure to follow procedures established by this Act. The protest shall be submitted to the chief procurement officer, or the chief procurement officer's designee, in writing, within five working days after posting of the notice of award. The chief procurement officer, or the chief procurement officer's designee, may settle and resolve a protest by one or more of the following means:

- (1) Amending or canceling the solicitation;
- (2) Terminating the contract that was awarded;
- (3) Declaring the contract null and void from the time of its award; or
- (4) Affirming the purchasing agency's contract award decision.

If the protest is not resolved by mutual agreement, the chief procurement officer or designee shall issue a decision in writing within ten working days of receipt of the protest. The decision shall state the reasons for the action taken. A copy of the written decision shall be mailed or otherwise furnished to the vendor, contractor, or service provider who initiated the protest, the person awarded the contract, and to all other non-selected offerors.

The decision of the chief procurement officer or designee shall be final and conclusive. The procedures and remedies provided for in this Act shall be the

exclusive means available for vendors, contractors, or service providers aggrieved in connection with the award of a contract under this Act. The fact that a protest is filed shall not stay the award of any contract made under this Act, unless so ordered by the chief procurement officer.

(i) The procedures and remedies provided for in subsections (g) and (h) shall be the exclusive means available to resolve the concerns of persons aggrieved in connection with the award of a contract under this Act. The fact that a protest or a request for reconsideration is filed shall not stay the award of any contract made under this Act, unless so ordered by the chief procurement officer.

(j) 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, Hawaii Revised Statutes. To demonstrate compliance, offerors shall be registered on the Hawaii compliance express. The procurement officer shall verify compliance for all contracts awarded. Any offeror making a false affirmation or certification under this subsection shall be suspended from further offerings or awards.

(k) Upon award, award information shall be posted on each respective governmental jurisdiction's website, except information determined to be confidential under chapter 92F, Hawaii Revised Statutes.

(l) The chief procurement officers may be more restrictive in their jurisdiction procedures, and impose any other requirement, as applicable, to ensure compliance with this Act.

(m) Nothing in this Act, any rules adopted thereunder, or any other authority shall be construed to exempt a bidder, offeror, contractor, or provider, as applicable, from any action that would otherwise be a cause for debarment or suspension under section 103D-702, Hawaii Revised Statutes, if the contract or procurement, but for this Act, would be subject to section 103-8.5 or 103-53(a), or chapter 103D or 103F, Hawaii Revised Statutes.

This subsection shall not be interpreted to absolve any person from applicable criminal penalties.

SECTION 4. The state procurement office shall adopt rules to implement the procurement procedures applicable to this Act. Any responsible agency shall also adopt rules whenever required to implement new or expanded programs, services, or benefits authorized or funded by the American Recovery and Reinvestment Act of 2009. Any such rules may be issued as interim rules by adoption and filing with the lieutenant governor, and by posting the interim rules on the lieutenant governor's website. Interim rules adopted pursuant to this Act shall be exempt from the requirements of chapter 91, Hawaii Revised Statutes, and shall take effect upon filing with the lieutenant governor. All interim rules adopted pursuant to this section shall be effective only through December 31, 2010. For any new or expanded programs, services, or benefits that have been implemented under interim rules to continue in effect beyond December 31, 2010, the responsible agency shall adopt rules in conformance with all the requirements of chapter 91, Hawaii Revised Statutes.

SECTION 5. There is appropriated out of the federal temporary assistance for needy families funds provided to the State under the American Recovery and Reinvestment Act of 2009 the sum of \$15,000,000, or so much thereof as may be necessary for fiscal year 2008-2009 to be used for the temporary assistance for needy families program; provided that the sum appropriated shall be in addition to the appropriation of temporary assistance for needy family funds in the General Appropriations Act of 2009¹, and any other appropriations of temporary assistance for needy families funds for fiscal year 2008-2009.

The sum appropriated shall be expended by the department of human services.

PART II

SECTION 6. (a) There is established a legislative federal economic stimulus program oversight commission, to be comprised of eleven members, as follows:

- (1) Six voting members:
 - (A) One member of the senate, to be appointed by the president of the senate;
 - (B) One member of the house of representatives to be appointed by the speaker of the house of representatives; and
 - (C) Four members of the public, representing citizens and local government, one each to be appointed by the president of the senate, speaker of the house of representatives, senate minority leader, and house of representatives minority leader; and
- (2) Five non-voting members, one each appointed by:
 - (A) Each member of Hawaii's congressional delegation; and
 - (B) The governor.

The voting members of the commission shall elect the chairperson of the commission.

(b) Legislative staff offices as determined by the president of the senate and the speaker of the house of representatives shall provide administrative assistance to the commission.

(c) In providing oversight of the distribution of any federal economic stimulus program funds and the implementation of program expenditures, the commission may:

- (1) Evaluate the coordination of federal stimulus funded programs within the State;
- (2) Determine if criteria developed for setting priorities are being followed;
- (3) Determine the adequacy of public notice and opportunity for public comment and input;
- (4) Evaluate the transparency of the bidding and the contracting process;
- (5) Evaluate the integrity of the distribution and expenditure of federal stimulus funded programs;
- (6) Determine the extent to which duplication and waste is prevented; and
- (7) Undertake any other tasks or efforts to ensure the integrity and fairness of the distribution and expenditure of all funds and implementation of all programs.

(d) Executive branch agencies shall provide information on the receipt and expenditure of federal economic stimulus program funds upon request of the commission.

(e) The commission may request specific audit services from the state auditor.

(f) For the purposes of this section, "commission" means the legislative federal economic stimulus program oversight commission.

PART III

SECTION 7. This Act shall take effect on June 29, 2009, and shall be repealed on June 30, 2011.

(Approved June 24, 2009.)

Note

1. Act 162.