

ACT 175

H.B. NO. 1470

A Bill for an Act Relating to Hawaii Public Procurement Code.

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

**PART I
PROCUREMENT EXEMPTIONS**

SECTION 1. Section 103D-102, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Notwithstanding subsection (a), this chapter shall not apply to contracts by governmental bodies:

- (1) Solicited or entered into before July 1, 1994, unless the parties agree to its application to a contract solicited or entered into prior to July 1, 1994;
- (2) To disburse funds, irrespective of their source:
 - (A) For grants or subsidies as those terms are defined in section 42F-101, made by the State in accordance with standards provided by law as required by article VII, section 4, of the State Constitution; or by the counties pursuant to their respective charters or ordinances;
 - (B) To make payments to or on behalf of public officers and employees for salaries, fringe benefits, professional fees, or reimbursements;
 - (C) To satisfy obligations that the State is required to pay by law, including paying fees, permanent settlements, subsidies, or other claims, making refunds, and returning funds held by the State as trustee, custodian, or bailee;
 - (D) For entitlement programs, including public assistance, unemployment, and workers' compensation programs, established by state or federal law;
 - (E) For dues and fees of organizations of which the State or its officers and employees are members, including the National Association of Governors, the National Association of State and County Governments, and the Multi-State Tax Commission;
 - (F) For deposit, investment, or safekeeping, including expenses related to their deposit, investment, or safekeeping;
 - (G) To governmental bodies of the State;
 - (H) As loans, under loan programs administered by a governmental body; and
 - (I) For contracts awarded in accordance with chapter 103F[-];
- (3) To procure goods, services, or construction from a governmental body other than the University of Hawaii bookstores, from the federal government, or from another state or its political subdivision;
- (4) To procure the following goods or services which are available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State:
 - (A) Services of expert witnesses for potential and actual litigation of legal matters involving the State, its agencies, and its officers and employees, including administrative quasi-judicial proceedings;
 - (B) Works of art for museum or public display;
 - (C) Research and reference materials including books, maps, periodicals, and pamphlets, which are published in print, video, audio, magnetic, or electronic form;
 - (D) Meats and foodstuffs for the Kalaupapa settlement;
 - (E) Opponents for athletic contests;
 - (F) Utility services whose rates or prices are fixed by regulatory processes or agencies;
 - (G) Performances, including entertainment, speeches, and cultural and artistic presentations;
 - (H) Goods and services for commercial resale by the State;
 - (I) Services of printers, rating agencies, support facilities, fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;

- (J) Services of attorneys employed or retained to advise, represent, or provide any other legal service to the State or any of its agencies, on matters arising under laws of another state or foreign country, or in an action brought in another state, federal, or foreign jurisdiction, when substantially all legal services are expected to be performed outside this [State;] state;
 - (K) Financing agreements under chapter 37D; and
 - (L) Any other goods or services which the policy board determines by rules or the chief procurement officer determines in writing is available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State; [and]
- (5) Which are specific procurements expressly exempt from any or all of the requirements of this chapter by:
- (A) References in state or federal law to provisions of this chapter or a section of this chapter, or references to a particular requirement of this chapter; and
 - (B) Trade agreements, including the Uruguay Round General Agreement on Tariffs and Trade (GATT) which require certain non-construction and non-software development procurements by the comptroller to be conducted in accordance with its terms[-]; and
- (6) With a bidder or offeror who is a United States General Services Administration-approved sole source vendor, who shall be exempt from complying with section 103D-302, 103D-303, or 103D-304, as applicable, in any procurement funded by state and federal matching funds, if the bidder or offeror was responsible for obtaining and was the recipient of the federal funds.”

SECTION 2. Section 103D-305, Hawaii Revised Statutes, is amended to read as follows:

“§103D-305 Small purchases; prohibition against parceling. (a) Procurements of less than [~~\$50,000~~] \$100,000 for goods[-] or services, or \$250,000 for construction shall be made in accordance with procedures set forth in rules adopted by the policy board that are designed to ensure administrative simplicity and as much competition as is practicable; provided that multiple expenditures shall not be created at the inception of a transaction or project so as to evade the requirements of this chapter; and provided further that procurement requirements shall not be artificially divided or parceled so as to constitute a small purchase under this section.

(b) Procurements of greater than \$50,000 for construction under subsection (a) shall require security by a performance bond delivered to the purchasing agency that is:

- (1) In a form prescribed by the rules of the policy board;
- (2) Executed by a surety company authorized to do business in this state; and
- (3) In an amount equal to one hundred per cent of the price specified in the contract.

or shall otherwise be secured by a performance bond in a manner satisfactory to the purchasing agency.

~~[(b)]~~ (c) Procurements of \$25,000 to less than [~~\$50,000~~] \$100,000 shall be made in accordance with small purchase procedures; provided that small purchase procurements through an electronic system shall be required after the

policy board has adopted rules for electronic procurement and provided training to the affected agency.”

PART II PROCUREMENT PREFERENCES

SECTION 3. Chapter 103D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§103D- Agricultural products subject to this chapter. The following agricultural products shall be subject to this chapter:

- (1) Fresh meats and produce; and
- (2) Animals and plants.

Except for the exemptions under section 103D-102(b), no exemptions under this chapter shall apply to this section.”

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

“§103D- Failure to adequately verify, deliver, or supply Hawaii products.

If the administrator or procurement officer who has awarded a contract under section 103D-1002, finds that in the performance of that contract there has been a failure to comply with section 103D-1002, the contract shall be voidable and the findings shall be referred for debarment or suspension proceedings under section 103D-702.”

SECTION 5. Section 103D-1001, Hawaii Revised Statutes, is amended as follows:

1. By adding the definition of “Hawaii input” to be appropriately inserted and to read:

““Hawaii input” means the part of the cost of a product that is attributable to production, manufacturing, or other expenses arising within the state. “Hawaii input” includes but is not limited to:

- (1) The cost to mine, excavate, produce, manufacture, raise, or grow the materials in Hawaii;
- (2) The added value of that portion of the cost of imported materials that is incurred after landing in Hawaii, including but not limited to other articles, materials, and supplies, added to the imported materials;
- (3) The cost of labor, variable overhead, utilities, and services, incurred in the production and manufacturing of materials or products in Hawaii; and
- (4) Fixed overhead cost and amortization or depreciation cost, if any, for buildings, tools, and equipment, situated and located in Hawaii and used in the production or manufacturing of a product.”

2. By amending the definition of “Hawaii products” to read:

““Hawaii products” means products that are mined, excavated, produced, manufactured, raised, or grown in the [State] state and where the [input constitutes no less than twenty-five] cost of the Hawaii input towards the product exceeds fifty per cent of the [manufactured] total cost[;] of the product; provided that:

- (1) ~~Where the value of the input constitutes twenty five per cent or more, but less than fifty per cent, of the manufactured cost, the product shall be classified as class I;~~

- (2) (1) Where the value of the input [~~constitutes~~] exceeds fifty per cent [or more, but less than seventy five per cent,] of the [~~manufactured~~] total cost, the product shall be classified as class [H;] I; and
- (3) ~~Where the value of the input constitutes seventy five per cent or more of the manufactured cost, the product shall be classified as class III.]~~
- (2) Where any agricultural, aquacultural, horticultural, silvicultural, floricultural, or livestock product is raised, grown, or harvested in the state, the product shall be classified as class II."

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

“§103D-1002 Hawaii products. (a) A purchasing agency shall review all specifications in a bid or proposal for purchase [~~from the]~~ of Hawaii products [~~list]~~ where these products are available~~]; provided that the products:~~

- (1) ~~Meet the minimum specifications and the selling price f.o.b. jobsite;~~
- (2) ~~Unloaded including applicable general excise tax and use tax does not exceed the lowest delivered price in Hawaii f.o.b. jobsite; and~~
- (3) ~~Unloaded, including applicable general excise tax and use tax, does not exceed the lowest delivered price of a similar non-Hawaii product by more than:~~

- (A) ~~Three per cent where class I Hawaii products are involved;~~
- (B) ~~Five per cent where class II Hawaii products are involved; or~~
- (C) ~~Ten per cent where class III Hawaii products are involved].~~

- (b) All invitations for bids and requests for proposals shall [~~include]~~:
 - (1) Include a description of the products that are listed in the Hawaii products list established pursuant to this section, [~~and their established classes,]~~ which may be used to complete the scope of work specified in the invitation for bids or request for proposals~~]; where the products are]; or~~
 - (2) Allow as part of the offer, self-certification that the Hawaii products qualify for preference;

provided that the offer may be evaluated along with any other published criteria in the solicitation, including but not limited to considerations such as specific nutritional content or its equivalent, timing of delivery, quality or freshness, and past performance, if applicable.

All Hawaii products in any bid or request for proposal shall be made available [~~and meet]~~ for inspection, or additional information may be requested to verify that the Hawaii product meets the minimum specifications.

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

(d) Where a bid or proposal contains both Hawaii and non-Hawaii products, then for the purpose of selecting the lowest bid or purchase price only, the price or bid [~~or]~~ offered for a Hawaii product item shall be decreased by subtracting [~~therefrom: three per cent, five per cent, or]~~ ten per cent for [~~the]~~ class I~~], class II, or class III] Hawaii product items bid or offered, [~~respectively,]~~ or fifteen per cent for class II Hawaii product items bid or offered. The lowest total bid or proposal, taking the preference into consideration, shall be awarded the contract unless the bid or offer provides for additional award criteria. The contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of the preferences.~~

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

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

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

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

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

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

~~[(f)]~~ (i) This section shall not apply whenever its application will disqualify any governmental agency from receiving federal funds or aid.

~~[(g)]~~ (j) Any purchase made or any contract awarded or executed in violation of this section shall be void and no payment shall be made by any purchasing agency on account of the purchase or contract.

~~[(h)]~~ (k) For the purposes of this section, "soil enhancement product" means any nonchemical soil preparation, conditioner, or compost mixture designed to supplement aeration or add organic, green waste, or decaying matter to the soil; provided that the term does not include any plant fertilizer intended to stimulate or induce plant growth through chemical means. All state agencies shall include in their solicitations, when required, the soil enhancement products identified on the Hawaii products list pursuant to subsection (e)."

PART III PROCUREMENT PROTESTS AND DISPUTES

SECTION 7. Chapter 103D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§103D- Procurement statistics. The state procurement office shall keep statistics on solicitations and awards protested under section 103D-701 for the purpose of improving procurement procedures. The statistics shall include information on protests involving inadvertent errors."

SECTION 8. Section 103-32.1, Hawaii Revised Statutes, is amended to read as follows:

“§103-32.1 Contract provision for retainage; subcontractors. (a) Any retainage provided for in this section or requested to be withheld by the contractor shall be held by the procurement officer.

(b) A dispute between a contractor and subcontractor of any tier shall not constitute a dispute to which the State or any county is a party, and there is no right of action against the State or any county. The State and a county may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(c) Any public contract may include a provision for the retainage of a portion of the amount due under the contract to the contractor to ensure the proper performance of the contract; provided that:

(1) The sum withheld by the procurement officer from the contractor shall not exceed five per cent of the total amount due the contractor and that, after fifty per cent of the contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the procurement officer may continue to withhold, as retainage, sums not exceeding five per cent of the amount due the contractor; and

(2) The retainage shall not include sums deducted as liquidated damages from moneys due or that may become due the contractor under the contract.

(d) Where a subcontractor has provided evidence to the contractor of:

(1) A valid performance and a payment bond for the project that is acceptable to the contractor and executed by a surety company authorized to do business in this [State;] state;

(2) Any other bond acceptable to the contractor; or

(3) Any other form of collateral acceptable to the contractor,

the retention amount withheld by the contractor from its subcontractor shall be not more than the same percentage of retainage as that of the contractor. This subsection shall also apply to the subcontractors who subcontract work to other subcontractors.

(e) This section shall not be construed to impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions that:

(1) Permit the contractor or subcontractor to retain, without cause, a specified percentage of no more than ten per cent of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract, without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond, subject however, to the limitations of subsection (d); and

(2) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's payment request may be withheld by the procurement officer in accordance with the subcontract agreement, without incurring any obligation to pay interest or a late payment penalty if:

(A) ~~A notice conforming to the standards of subsection (f) has been previously furnished to the subcontractor; and~~

~~(B)~~ A copy of any notice issued by the contractor or subcontractor pursuant to subparagraph (A) has been furnished to the procurement officer.

~~(f)~~ A written notice of any withholding ~~[shall be]~~ is issued to a subcontractor, with a copy to the procurement officer, specifying the following:

~~[(1)]~~ (A) The amount to be withheld;

~~[(2)]~~ (B) The specific causes for the withholding under the terms of the subcontract; and

~~[(3)]~~ (C) The remedial actions to be taken by the subcontractor to receive payment of the amounts withheld.

~~[(g)]~~ (f) A contractor may not request payment from the procurement officer of any amount withheld or retained in accordance with subsection (e) until such time as the contractor has determined and certified to the procurement officer that the subcontractor is entitled to the payment of such amount.

~~[(h)]~~ (g) The provisions of this section shall not be construed to require payment to subcontractors of retainage released to a contractor pursuant to an agreement entered into with the procurement officer meeting the requirements of section 103-32.2.”

SECTION 9. Section 103D-709, Hawaii Revised Statutes, is amended to read as follows:

“**§103D-709 Administrative proceedings for review.** (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

(b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision [which] not later than forty-five days from the receipt of the request under subsection (a), that shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710.

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and ~~[(103D-702)(g)]~~ may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. ~~[The rules of evidence shall apply.]~~ Fact finding under section 91-10 shall apply.

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or

(2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;
- (2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

~~[(d)]~~ (f) The hearings officers shall ensure that a record of each proceeding which includes the following is compiled:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings of fact;
- (5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710.

~~[(e)]~~ (g) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103D-701(f).

~~[(f)]~~ (h) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

~~[(g)]~~ (i) The policy board shall adopt such other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard.

(j) As used in this section, "estimated value of the contract" or "estimated value," with respect to a contract, means the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable."

SECTION 10. Section 103D-710, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (c) to read:

"(c) Within ~~twenty~~ ten calendar days of the filing of an application for judicial review, the hearings officer shall transmit the record of the administrative proceedings to the circuit court of the circuit where the case or controversy arises."

2. By amending subsection (e) to read:

"(e) ~~Upon~~ No later than thirty days from the filing of the application for judicial review, based upon review of the record the circuit court may affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand

the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion[-];

provided that if an application for judicial review is not resolved by the thirtieth day from the filing of the application, the court shall lose jurisdiction and the decision of the hearings officer shall not be disturbed. All time limitations on actions, as provided for in section 103D-712, shall remain in effect.”

PART IV MISCELLANEOUS PROVISIONS

SECTION 11. Part II does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 12. 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 the Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 13. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 14. This Act shall take effect on July 1, 2009; provided that:

- (1) Part I shall be repealed on July 1, 2012, and sections 103D-102 and 103D-305, Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the effective date of this Act; and
- (2) Part III shall be repealed on July 1, 2011, and sections 103-32.1, 103D-709, 103D-710(c) and 103D-710(e), Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the effective date of this Act.

(Approved July 13, 2009.)