

**ACT 253**

H.B. NO. 2060

A Bill for an Act Relating to Procurement.

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

SECTION 1. The legislature finds that in July 2015, the auditor released report no. 15-09: "Procurement Examination of the Department of Health: Lack of Procurement Controls Exposes Health Department to Waste and

Abuse,” conducted pursuant to section 23-4, Hawaii Revised Statutes, which requires the auditor to conduct postaudits of the transactions, accounts, programs, and performance of all departments, offices, and agencies of the State and its political subdivisions.

The legislature further finds that the auditor’s report highlighted an example of a contract award that was renegotiated at a price that was three hundred forty-five per cent higher than the original bid amount. The same contract was then amended three times, which resulted in a final contract amount that was six hundred eleven per cent higher than the original bid, as well as a reduction in the scope of work provided and a one-year extension of the performance deadline.

The legislature additionally finds that a reform of procurement law is necessary in light of the auditor’s report.

The purpose of this Act is to protect the public’s interest in the procurement process by:

- (1) Establishing a fair and reasonable pricing policy for every contract action;
- (2) Clarifying that contractors are required to submit cost or pricing data and a certification of the accuracy of the data for certain change orders and contract modifications, even if the original contract award did not require cost and pricing data; and
- (3) Clarifying that the state procurement administrator has the authority to perform periodic compliance reviews of the procurement practices and procedures of all governmental bodies, in collaboration with the state procurement board.

SECTION 2. Section 103D-205, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) For their respective jurisdictions and unless otherwise specifically provided in this chapter, each chief procurement officer shall serve as the central procurement officer for the officer’s respective jurisdiction and:

- (1) Procure or supervise the procurement of all goods, services, and construction;
- (2) Exercise general supervision and control over all inventories of goods;
- (3) Sell, trade, or otherwise dispose of surplus goods;
- (4) Establish and maintain programs for the inspection, testing, and acceptance of goods, services, and construction;
- (5) Coordinate with the administrator regarding procurement policies, opportunities for statewide innovation implementation, and concerns; ~~and~~
- (6) Report procurement contract data pursuant to requirements established by the administrator, in the form and manner prescribed by the state procurement office[-]; and
- (7) Assist and cooperate with the administrator regarding any compliance review by the administrator pursuant to section 103D-206.”

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 and procedures of all governmental bodies[;], in collaboration with the state procurement policy board, for compliance with the procurement code;
- (2) Assist, advise, and guide governmental bodies in matters relating to procurement;
- (3) Determine corrective actions; provided that if a procurement officer under the jurisdiction of the administrator of the state procurement office or a chief procurement officer of any of the other state entities under section 103D-203, fails to comply with any determination rendered by the administrator within thirty days from the date of the issuance of the determination, or longer if permitted by the administrator upon request by the procurement officer or a chief procurement officer, the procurement officer or chief procurement officer shall be subject to an administrative fine under section 103D-106, for every day of noncompliance;
- (4) Develop and administer a statewide procurement orientation and training program;
- (5) Develop, distribute, and maintain a procurement manual for all state procurement officials; and
- (6) Develop, distribute, and maintain a procurement guide for vendors wishing to do business with the State and its counties.”

SECTION 4. Section 103D-312, Hawaii Revised Statutes, is amended to read as follows:

**“§103D-312 ~~[Cost]~~ Fair and reasonable pricing policy; cost or pricing data.** (a) A procurement officer shall purchase goods, services, and construction from responsible sources at fair and reasonable prices. A procurement officer shall make a written determination whether a price is fair and reasonable for each contracting action, including change orders and contract modifications that adjust prices. In establishing whether a price is fair and reasonable, the procurement officer shall obtain:

- (1) Certified cost or pricing data for every contract to which subsection (c) applies; and
- (2) Other data as necessary to perform a cost or price analysis of the data and determine a fair and reasonable price, regardless of whether subsection (c) applies to the contract.

(b) The policy board may adopt rules, pursuant to chapter 91, to establish an order of preference in the type of data required under subsection (a)(2).

~~[(a)]~~ (c) A contractor, except as provided in subsection ~~[(e);~~ (e), shall submit cost or pricing data and shall certify that, to the best of the contractor’s knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date ~~[prior to]~~ before the date of:

- (1) The pricing of any contract awarded by competitive sealed proposals or pursuant to the sole source procurement authority, where the total contract amount is expected to exceed an amount established by rules adopted by the policy board; or
- (2) The pricing of any change order or contract modification that is expected to exceed an amount established by rules adopted by the policy board. The requirement of this paragraph shall apply regardless of whether the original contract award did not require certified cost and pricing data.

~~[(b)]~~ (d) Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that the price was increased because the contractor furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between the parties.

~~[(e)]~~ (e) The requirements of this section, except for the requirements of paragraph (c)(2), shall not apply to ~~[contracts:]~~ original contract awards:

- (1) Where the original contract price is based on adequate price competition;
- (2) Where the original contract price is based on established catalog prices or market prices;
- (3) Where the original contract prices are set by law or rule; or
- (4) Where it is determined in writing in accordance with rules adopted by the policy board that the requirements of this section may be waived, and the reasons for the waiver are stated in writing~~[-];~~ provided that the requirements for price and costing data required under subsection (a)(2) shall not be waived without the approval of the chief procurement officer; provided further that the chief procurement officer shall not delegate this authority.”

SECTION 5. Section 103D-318, Hawaii Revised Statutes, is amended to read as follows:

~~“[§103D-318]~~ **Finality of determinations.** The determinations required by sections 103D-302(g), 103D-303(a), 103D-303(g), 103D-306, 103D-307, 103D-310, ~~[103D-312(e)]~~ 103D-312(e), 103D-313, and 103D-314 shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.”

SECTION 6. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

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

SECTION 8. This Act shall take effect on July 1, 2016.

(Approved July 12, 2016.)