DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-122
Hawaii Administrative Rules

February 21, 2008

SUMMARY

1. §3-122-1 is amended.

2. §3-122-4 is amended.

3. §3-122-5 is repealed.

4. §3-122-6 is amended.

5. §§3-122-9 to 3-122-9.02 are amended.

6. §§3-122-12 and 3-122-13 are amended.

7. §3-122-16 is amended.

8. New §§3-122-16.01 to 3-122-16.09 are added.

9. New §§3-122-16.30 and 3-122-16.31 are added.

10. §§3-122-18 t0 3-122-20 are repealed.

11. §3-122-21 is amended.

12. §§3-122-22 to 3-122-29 are repealed.

13. §§3-122-30 and 3-122-31 are amended.

14. §3-122-32 is repealed.

15. §3-122-33 is amended.

16. §3-122-35 is amended.

17. §3-122-42 is repealed.

18. §§3-122-43 is amended.

19. §3-122-45 is amended.

20. A new §3-122-45.01 is added.

21. §3-122-46 is amended.

22. §§3-122-48 to 3-122-50 are repealed.

23. §§3-122-51 to 3-122-54 are amended.

24. §§3-122-55 and 3-122-56 are repealed.

25. §§3-122-57 to 3-122-59 are amended.

26. A new §3-122-60 is added.

27. New §§3-122-61.05 to 3-122-61.08 are added.

28. §3-122-63 is amended.

29. §§3-122-64 and 3-122-65 are repealed.

30. §§3-122-66 and 3-122-67 are amended.

31. §3-122-68 is repealed.

32. New §§3-122-69 and 3-122-70 are amended.

33. §§3-122-74 and 3-122-75 are amended.

34. §3-122-76 is repealed.

35. §3-122-77 is amended.

36. A new §3-122-78 is added.

37. §§3-122-81 and 3-122-82 are amended.

38. §§3-122-83 and 3-122-84 are repealed.

39. §3-122-88 is amended.

40. §3-122-89 is repealed.

41. §3-122-90 is amended.

42. §3-122-91 is repealed.

43. §§3-122-95 to 3-122-97 are amended.

44. §3-122-102 is amended.

45. §3-122-103 is repealed.

46. §§3-122-108 and 3-122-109 are amended.

47. §3-122-110 is repealed.

48. New §§3-122-111 and 3-122-112 are added.

49. §3-122-117 is repealed.

50. §3-122-121 is amended.

51. §§3-122-123 and 3-122-124 are amended.

52. §§3-122-134 to 3-122-141 are amended.

53. §3-122-143 is amended.

54. §§3-122-145 to 3-122-149 are amended.

55. Subchapter 17 is repealed.

56. Subchapter 20 is repealed.

57. §3-122-201 is amended.

58. Subchapter 23 is repealed.

59. §§3-122-222 to 3-122-225 are amended.

60. §3-122-226 is repealed.

61. §3-122-227 is amended.

62. Chapter 122 is compiled.

HAWAII ADMINISTRATIVE RULES

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DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 122

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Historical Note: This chapter 122, effective [illegible], subtitle 11 of title 3, Hawaii Administrative Rules:

1. Replaces interim rules effective 7/25/02 (file no. 2470) which added a new section 3-122-111; amended sections 3-122-1, 3-122-4, 3-122-6, 3-122-9.01, 3-122-9.02, 3-122-13, 3-122-19, 3-122-20, 3-122-21, 3-122-22,

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2. Replaces interim rule sections effective 7/03/03 (file no. 2543) which added new sections 3-122-60, 3-122-69, 3-122-70, and 3-122-112; and amended sections 3-122-9.01, 3-122-21, 3-122-22, 3-122-23, 3-122-24, 3-122-26, 3-122-46, 3-122-63, 3-122-67, 3-122-74, and 3-122-75; and repealed section 3-122-76.

3. Replaces interim rules effective 11/15/03 (file no. 2562) which added new sections 3-122-16.01, 3-122-16.02, 3-122-16.03, 3-122-16.04, 3-122-16.05, 3-122-16.06, 3-122-16.07, 3-122-16.08, 3-122-16.09, 3-122-16.30, 3-122-16.31, 3-122-45.01, 3-122-60, 3-122-61.05, 3-122-61.06, 3-122-61.07, 3-122-61.08, 3-122-69, and 3-122-70; amended sections 3-122-16, 3-122-21, 3-122-30, 3-122-31, 3-122-33, 3-122-43, 3-122-46, 3-122-52, 3-122-54, 3-122-57, 3-122-90, 3-122-112, 3-122-123, 3-122-136, 3-122-137, and 3-122-138; and repealed sections 3-122-18, 3-122-19, 3-122-20, 3-122-22, 3-122-23, 3-122-24, 3-122-25, 3-122-26, 3-122-27, 3-122-28, 3-122-29, 3-122-32, 3-122-42, 3-122-48, 3-122-49, 3-122-50, 3-122-55, 3-122-56, 3-122-64, and 3-122-117.

4. Replaces interim rule effective 1/1/05 (file no. 2619) which amended section 3-122-112.

5. Replaces interim rule effective 4/18/05 (file no. 2635) which compiled Chapter 122.

6. Replaces interim rule effective 2/27/06 (file no. 2699) which amended section 3-122-112.

7. Replaces interim rule effective 10/9/06(file no. 2724) which added a new section 3-122-78; amended 3-122-9, 3-122-12, 3-122-13, 3-122-16.02, 3-122-16.03, 3-122-16.07, 3-122-21, 3-122-75, 3-122-77, 3-122-111, and 3-122-112.

8. Replaces interim rule effective 9/04/07 (file no. 2774) which amended sections 3-122-13 and 3-122-112.

SUBCHAPTER 1

DEFINITIONS

§3-122-1 Definitions. Definitions for terms used in this chapter are in section 103D-104, HRS. The following definitions are also applicable to terms used in this chapter:

"Alternative procurement method" means a procurement method used due to a waiver from the competitive sealed bids or proposals process when one or no responsive, responsible offer is received.

"Award" means the written notification of the State's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror.

"Best value" means the most advantageous offer determined by evaluating and comparing all relevant criteria in addition to price so that the offer meeting the overall combination that best serves the State is selected. These criteria may include, in addition to others, the total cost of ownership, performance history of the vendor, quality of goods, services, or construction, delivery, and proposed technical performance.

"Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

"Brand name or equal specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet requirements, and which provides for the submission of equivalent products.

"Brand name specification" means a specification limited to one or more items by manufacturers' names or catalogue numbers, commonly referred to as a restrictive specification.

"Capability" means capability at the time of award of contract.

"Chief financial officer" means, depending upon the purchasing agency, either the comptroller, a county's director of finance, or the respective chief financial officers of the University of Hawaii, the department of education, the judiciary, or the legislative branches of the State or county.

"Contract administrator" means the person designated to manage the various facets of contracts to

ensure the contractor's total performance is in accordance with the contractual commitments and obligations to the purchasing agency are fulfilled.

"Contract price" means the amount designated on the face of the contract for the performance of the work including allowances for extras, if any.

"Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the State to consider whether the item meets its needs.

"Design specifications" means the dimensional and other physical requirements of the item being purchased, how a product is to be fabricated or constructed.

"Discussion" means an exchange of information to promote understanding of a state agency's requirements and offeror's proposal and to facilitate arriving at a contract that will be the best value to the State. Discussions are not permissible in competitive sealed bidding, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

"Opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

"Performance specifications" means the functional or performance requirements of the item, what a product does and how well it performs.

"Practicable" and "Advantageous" shall be given ordinary dictionary meanings. "Practicable" means what may be accomplished or put into practical application. "Advantageous" means a judgmental assessment of what is in the State's best interest. The use of competitive sealed bidding may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the State's best interest.

"Qualified products list" means an approved list of goods, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirement.

"Quotation" means a statement of price, terms of sale, and description of goods, services, or construction offered by a prospective seller to a prospective purchaser, usually for purchases pursuant to section 103D-305, HRS.

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"Request for information" means a request soliciting information to obtain recommendations from suppliers for a procurement that cannot be described in sufficient detail to prepare a solicitation.

"Standard commercial product" means a product or material, in the normal course of business, is customarily maintained in stock or readily available by a manufacturer, distributor, or dealer for the marketing of the product. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-104, 103D-202)

SUBCHAPTER 2

GENERAL PROVISIONS

§3-122-2 Extension of time for acceptance of offer received in response to a solicitation. After opening offers, the procurement officer may request offerors to extend the time during which the State may accept their offers, as stated in the terms and conditions of the solicitation, provided that, with regard to competitive sealed bids, no other change is permitted. The reasons for requesting the extension shall be documented. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-3 Extension of time on contracts. (a) If a contract has exhausted its provision for extension(s) of time of performance, or if the contract does not include a provision for extension(s) of time of performance, the contract may be extended upon approval of the chief procurement officer, provided:

(1) The period of each extension is for one hundred eighty calendar days or less;

(2) The procurement officer makes a written determination that it is not practical to award another contract at the time of the expiration of the contract for reasons to include but not be limited to the following:

(A) A new contract cannot be executed by the time the contract expires; or

(B) The need for the good or service is short term;

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(3) All parties agree to the extension of time of performance; and

(4) The price(s) or conditions of the contract remain the same as the original contract, or as amended per the contract; or if not the same or as amended, they are fair and reasonable.

(b) If paragraph (2) of subsection (a) is met, but paragraph (3) or (4) of subsection (a) or both are not met and the procurement officer determines in writing that the need for the good or service continues, provided subchapters 8, 9, and 10 do not apply, the chief procurement officer, may upon request in writing, approve an alternative procurement method, including but not limited to direct negotiations with a party other than the contractor, subject to the maximum one hundred eighty calendar day contract period.

(c) This section shall not apply to adjustments in performance time under chapter 3-125. [Eff 12/15/95; am and comp 11/17/97; comp MAR 2 1 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-4 <u>Multiple or alternate offers.</u> (a) Unless specifically provided for in the solicitation, multiple or alternate offers shall not be accepted and all such offers shall be rejected.

(b) If multiple or alternate offers are allowed, the solicitation shall specify their treatment. [Eff 12/15/95; comp 11/17/97; am and comp MAR 2 1 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-5 REPEALED. [R MAR 2 1 2008]

§3-122-6 <u>Conditioning offers upon other contracts not acceptable.</u> Any offer which is conditioned upon receiving a contract other than as provided for in the solicitation shall be deemed nonresponsive and not acceptable. [Eff 12/15/95; comp 11/17/97; am and comp MAR 2 1 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-7 <u>Determination of contractual terms and conditions.</u> The chief procurement officer or the head of a purchasing agency is authorized to determine the

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contractual provisions, terms, and conditions of solicitations and contracts, provided the provisions, terms, and conditions are not contrary to statutory or chapter 91 administrative rule requirements governing the procurement. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-8 Purchase of items separately from construction contract. The chief procurement officer or the head of a purchasing agency is authorized to determine whether a good item or group of good items shall be included as part of, or procured separately from, any contract for construction. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9 Use of facsimile machines, electronic mail, or electronic procurement systems. (a) Copies of documents transmitted by vendors via facsimile machine, electronic mail, or an electronic procurement system may include the notice of intent to offer; the offer with required documentation for evaluation purposes; and modifications or withdrawal of offers, pursuant to subsections (b) and (c).

(b) Notices of intent to submit an offer and modifications or withdrawal of an offer may be submitted by facsimile machine, electronic mail, or an electronic procurement system pursuant to sections 3-122-111 and 3-122-16.07, respectively.

(c) An offer transmitted via facsimile machine, electronic mail, or through an electronic procurement system shall be acceptable only when specifically allowed in the invitation for bids or request for proposals, provided:

(1) The facsimile or the electronically submitted offer is received at the designated office by the time and date set for receipt of offers; and

(2) The facsimile or the electronically submitted offer contains:

(A) The identification number of the invitation for bids or request for proposals;

(B) The item;

(C) The quantity;

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(D) The price for the offer;
(E) All pages of the offer requiring an original signature;
(F) The bid bond, if required; and
(G) A signed statement that the offeror agrees to all the terms, conditions, and provisions of the invitation for bids or request for proposals.

(d) Unless otherwise specified in the solicitation, if the facsimile or electronically submitted offer is the lowest responsive bid, or is the proposal determined in writing to provide the best value to the State, the offeror must submit the complete original offer, with the original bid bond, if required, so that it is received within five working days from the notification of intent to award. If the offeror fails to comply with this requirement, the procurement officer has the option to reject the facsimile or electronically submitted offer. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-302, 103D-303, 103D-310) (Imp: HRS §§103D-302, 103D-303, 103D-310)

§3-122-9.01 Disclosure of information. (a) A purchasing agency is not required to disclose information identifying the number or the names of organizations or persons that obtained a solicitation, attended a pre-offeror's conference, or submitted a notice of intent to offer; or an offer until:

(1) The purchase order is issued or the purchasing card order is placed, in the case of a small purchase request for quotations pursuant to subchapter 8;
(2) After the time and date set for receipt of priced bids, in the case of invitation for bids pursuant to subchapters 5 and 6.5; and
(3) The posting of the award in the case of a request for proposals pursuant to subchapter 6.

(b) A purchasing agency shall not disclose the name of members of an evaluation committee established by section 3-122-45.01 prior to the posting of the award pursuant to section 3-122-57(a) for multi-step bids and competitive sealed proposals.

(c) In the case of procurement of professional services, a purchasing agency is not required to

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disclose the information specified in section 3-122-63(b) until after the contract is awarded. [Eff and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9.02 Request for information. When it is considered impractical to initially prepare a definitive purchase description or when discussions with vendors are not productive, the procurement officer may, prior to issuing a competitive sealed bid or proposal, issue a request for information which shall include but not be limited to:

(1) The objective of the procurement;
(2) That the response is to provide the purchasing agency with recommendations that will serve to accomplish the work required by the procurement;
(3) That the purchasing agency reserves the right to incorporate in a solicitation, if issued, any recommendations presented in the response to the request for information; and
(4) That neither the purchasing agency nor the supplier responding has any obligation under the request for information. Eff and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

SUBCHAPTER 3

SPECIFICATIONS

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. Purchasing agencies shall seek to procure standard commercial products, if practicable, and obtain the most advantageous prices. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-

401, 103D-405)

§3-122-11 Authority to prepare specifications. (a) The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer.

(1) The written delegation shall include a determination made by the chief procurement officer that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the State.

(2) Using agencies delegated the authority to prepare specifications may use any of the specifications defined herein.

(b) If a specification for general or common use item or a qualified products list exists for an item to be procured under subchapter 8, for small purchases, it shall be used. If no specification exists, purchasing agencies are hereby granted the authority to prepare specifications for use in such purchases.

(c) In an emergency under subchapter 10, any necessary specifications may be utilized by the purchasing agency without regard to the provisions of this subchapter. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-402)

§3-122-12 Duties of the administrator. (a) The administrator of the state procurement office shall serve as the central procurement officer to coordinate, guide, and distribute specifications used by purchasing agencies, including specifications on recycled products and the guidelines for purchasing energy-efficient vehicles. This effort will allow for the use of standard specifications by purchasing agencies on purchases for common or general use items or standard commercial products or energy-efficient vehicles.

(b) The administrator of the state procurement office shall review and establish purchase specifications to guide state and county purchasi agencies in the procurement of recycled products.

§3-122-13

(1) The specifications shall:

(A) Be consistent with applicable current

federal specification standards on recycled products incorporated in Presidential Executive Orders No. 12873, dated October 20, 1993, and any subsequent amendments to that order;

(B) Include minimum standards of recovered material and post-consumer content; and

(C) Ensure, to the maximum extent economically feasible, the purchase of materials which may be recycled or reused when discarded and avoid the purchase of products deemed environmentally harmful.

(2) The administrator shall periodically review its specifications to determine whether discrimination against procured goods with recycled content exists and shall revise these specifications to eliminate any discrimination.

(3) Purchase specifications shall include, but not be limited to, office paper, printed material, paper products, paper, glass-by-products, plastic products, mulch and soil amendments, tires, batteries, oil, paving materials and base, subbase, and pervious backfill materials. Paving materials to be considered shall include, but are not limited to, asphalt, tires, crushed concrete for base, subbase, and paving materials. The standards and specifications shall provide for the use of recycled materials and shall not reduce the quality standards for any product or construction.

(c) Pursuant to section 103D-412, HRS, the procurement policy for all agencies purchasing or leasing motor vehicles shall be to obtain energy-efficient vehicles in accordance with the guidelines established by the department of business, economic development and tourism. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] Auth: HRS §§103D-202, 103D-401)(Imp: HRS §§103D-401, 103D-412)

§3-122-13 Development of specifications. (a) A specification should provide for the following:

(1) Identify minimum requirements;

(2) Allow for competition;

(3) List reproducible test methods to be used in

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testing for compliance with specifications; and

(4) Provide for an equitable award at the best value.

(b) Types of specifications include the following, and may be used in combination when developing the specification:

(1) Design specification sets the requirements for the product, detailing the characteristics that the item must possess, how the item is to be manufactured;

(2) Performance specifications describes the capabilities that the product must meet, use of test or criteria are developed to measure the item's ability to perform as required;

(3) Brand name specification commonly referred to as restrictive specifications, may be used upon approval of the chief procurement officer after the purchasing agency makes a written determination that only the identified brand name item will satisfy the State's needs, and it is not practicable to use a less restrictive specification, provided that procurements pursuant to section 103D-305, HRS, do not require approval;

(4) Brand name or equal specification cites one or more brand names, model numbers, or other designations that identify the specific products as having the characteristics of the item desired; and

(5) Qualified or pre-approved products list is a list of goods, services, or construction items, which, prior to the opening of the competitive solicitation, are examined, tested, and determined to meet the applicable specification requirements.

(c) To the extent practicable, the State may procure standard commercial products using accepted commercial specifications. Specifications shall emphasize functional or performance criteria. Design or other detailed physical descriptions may be used when necessary to meet the needs of the State. Specifications shall not discriminate against the use of recycled materials; and when purchasing or leasing motor vehicles; specifications shall be developed in compliance with section 103D-412, HRS, as follows:

(1) Agencies are directed to the acquisition of

motor vehicle guidelines established by the department of business, economic development and tourism. When acquiring new vehicles, agencies shall determine its motor vehicle fleet as defined by these guidelines; and

(2) Motor vehicle fleets determined to be outside of the "covered fleet" definition, shall obtain energy-efficient vehicles in order to increase energy efficiency and use of renewable energy resources pursuant to section 103D-412(b), HRS, and further defined in the guidelines established by the department of business, economic development and tourism.

(d) The using agency shall submit advice and assistance in the development of specifications or plans pursuant to a request from the purchasing officer.

(e) A contractor paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation.

(f) Specifications prepared by architects, engineers, consultants and others for public contracts, shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs and shall not be unduly restrictive. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-401, 103D-402) (Imp: HRS §§103D-401, 103D-404, 103D-405, 103D-406, 103D-412)

§3-122-14 Exempted items. Purchasing agencies are granted the authority to prepare specifications for goods, services, and construction procured under sections 103D-102 and 103D-304, HRS. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-403) (Imp: HRS §§103D-102, 103D-304, 103D-403)

§3-122-15 (Reserved).

SUBCHAPTER 4

METHODS OF SOURCE SELECTION AND GENERAL GUIDANCE

§3-122-16 Methods of source selection. Unless authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to subchapters 5 and 6.5, except as provided in:

(1) Subchapter 4.5 - Source selection for federal grants;
(2) Subchapter 6 - Competitive sealed proposals;
(3) Subchapter 7 - Professional services procurement;
(4) Subchapter 8 - Small purchases;
(5) Subchapter 9 - Sole source procurements; and
(6) Subchapter 10 - Emergency procurements.

[Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-301)

§3-122-16.01 Procurement dollar thresholds. Procurements exceeding the threshold of section 103D-305, HRS, shall be made pursuant to subchapters 5, 6, 6.5, 7, 9, and 10. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-305)

§3-122-16.02 Preparation time for offer. (a) The minimum time period between the first date of the public notice of the solicitation and the date set for receipt of offers, except as provided by subsection (b) for construction, including design-build projects, shall be as follows:

(1) For a single-step invitation for bids pursuant to subchapter 5, ten calendar days;
(2) For competitive sealed proposals pursuant to subchapter 6, thirty calendar days, unless the procurement officer makes a written determination that a shorter time will provide for adequate competition; and
(3) For multi-step invitation for bids pursuant to subchapter 6.5, fifteen calendar days for the phase one unpriced technical proposal, unless the procurement officer makes a written determination that a shorter time will provided for adequate competition; and ten calendar days for the phase two priced bid.

(b) For construction, including design-build

projects, a minimum of fifteen calendar days shall be provided between the date of the pre-bid conference pursuant to section 3-122-16.05(b) and the date set for receipt of offers. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-302, 103D-303) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.03 Public notice. (a) Public notice of the solicitation pursuant to subchapter 4.5, 5, 6, 6.5, or 7 shall be made for the purpose of securing competition.

(b) The public notice of the solicitation pursuant to subchapters 4.5, 5, 6, and 6.5 shall include the following information:

(1) A brief description of the good, service, or construction desired; or for solicitations seeking providers for federal grant contracts, the title of the grant application or funding source and a brief description of the services being sought;
(2) Where and when the solicitation will be available and a phone number or e-mail address where interested parties may request a copy;
(3) How long the solicitation will be available, i.e., the deadline for the responses to the solicitation;
(4) Other appropriate information, e.g., a notice of intention to offer pursuant to section 3-122-111 or the time, date, and location of the pre-bid or pre-proposal conference;
(5) For request for interest pursuant to section 3-122-16.31, a statement that the purpose of the request is to select a provider or providers for federal grants; and
(6) For a multi-step invitation for bids pursuant to subchapter 6.5, a general statement that the bid is multi-step and the due date(s) of the unpriced technical offer and priced offer.

A copy of the solicitation shall be made available for public inspection and pick up at the office of the procurement officer issuing the solicitation.

(c) Public notice for professional services pursuant to section 103D-304, HRS, and subchapter 7 shall invite persons to submit statements of qualifications that may include but not be limited to:

(1) The name of the firm or person, the principal place of business, and location of all of its offices;
(2) The age of the firm and its average number of employees over the past years;
(3) The education, training, and qualifications of key members of the firm;
(4) The names and phone numbers of up to five clients who may be contacted, including at least two for whom services were rendered during the preceding year; and
(5) Any promotional or descriptive literature which the firm desires to submit.

Firms or persons may amend statements of qualifications at any time by filing a new statement and shall immediately inform the head of the purchasing agency of any change in their submission that would disqualify the firm or person from being considered for a contract award.

(d) The public notice under subsections (b) and (c) shall be publicized as follows:
(1) At a minimum, statewide and countywide public notices shall be publicized on a purchasing agency or provider internet site;
(2) Optionally, and in addition to paragraph (1), the following may be used:
(A) Newspaper publication:
(i) For statewide publication, a daily or weekly publication of statewide circulation; or separate daily or weekly publications whose combined circulation is statewide;
(ii) For countywide publication, a daily or weekly publication in the pertinent county;
(B) Notice by mail, electronic mail, or facsimile transmission to persons on any applicable bidders mailing list, if any; and
(C) Any other method the procurement officer deems effective for publicizing the solicitation. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103 §3-122-16.05
302, 103D-303, 103D-304) (Imp: HRS §§103
302, 103D-303, 103D-304)

§3-122-16.04 <u>List of potential offerors.</u> (a) A

list may be compiled to provide the procurement officer with the names of businesses that may be interested in competing for various types of contracts.

(b) Unless otherwise provided, inclusion of the name of a business is discretionary and does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract; nor does it guarantee notification of each solicitation.

(c) Businesses that fail to respond to solicitations or notices of availability may be removed from the list.

(d) Names and addresses on the list shall be available for public inspection. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-302, 103D-303, 103D-304) (Imp: HRS §§103D-302, 103D-303, 103D-304)

§3-122-16.05 Pre-bid or pre-proposal conference. (a) The purpose of a pre-bid or pre-proposal conference is to explain the procurement requirements and allow potential offerors to ask questions.

(1) An agency may hold a pre-bid or pre-proposal conference and require or not require attendance by all prospective bidders as a condition for submitting an offer for solicitations that have special or unusual requirements, e.g., requiring physical inspection.

(2) For construction, including design-build projects, pursuant to section 103D-303.5, HRS, an agency shall hold a pre-bid or pre-proposal conference and invite all interested parties to attend.

(b) If conference attendance is mandatory for submission of an offer, the requirement:

(1) Shall be stated in the public notice issued pursuant to section 3-122-16.03; and

(2) Prominently in the solicitation or if the decision to hold a mandatory pre-bid or pre-proposal conference is made after the issuance of the solicitation, the mandatory requirement shall be announced in an addendum.

(c) A pre-bid or pre-proposal conference shall be announced to all prospective offerors in the public notice issued pursuant to section 3-122-16.03 and in

the solicitation, or if the decision to hold a pre-bid or pre-proposal conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.

(d) The conference should be held long enough after the solicitation has been issued to allow offerors to become familiar with the solicitation, but sufficiently before the deadline for receipt of offers to allow consideration of the conference results in preparing their offers.

(e) Unless a change is made by written addendum as provided in section 3-122-16.06, nothing stated at the pre-bid or pre-proposal conference shall change the solicitation.

(f) A summary of the conference, in addition to any changes to the solicitation, shall be issued by addendum and shall be supplied sufficiently before the deadline for receipt of offers to allow consideration of the summary results and changes to all those prospective offerors known to have received a solicitation. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-303.5) (Imp: HRS §§103D-302, 103D-303.5)

§3-122-16.06 <u>Amendment and clarification to solicitation.</u> (a) An addendum shall be issued for amendments and clarifications to a solicitation prior to submission of offers, except as provided in subsection (f).

(1) Amendments include any material changes to the solicitation as in quantity, purchase descriptions, delivery schedules, scope of work, and opening dates. The addendum shall reference the portions of the solicitation it amends and detail the amendments;

(2) Clarifications include pre-bid or pre-proposal communications other than amendments.

(b) Addenda shall be used to:

(1) Correct minor defects or ambiguities;

(2) Furnish to other offerors information given to one offeror if the information will assist the other offerors in submitting offers or if the lack of the information would prejudice the other offerors; and

(3) Provide any other information or clarification to the solicitation that will

result in fair competition.

(c) Addenda may require that offerors acknowledge receipt of the addendum issued.

(d) Addenda shall be issued to all prospective offerors known to have received a solicitation, or if issued after the deadline for submission of notice of intention to offer, to those persons who have submitted such notice.

(e) Addenda for:

(1) Amendments shall be distributed within a reasonable time to allow prospective offerors to consider them in preparing their offers; however, if the time and date set for receipt of bids will not permit adequate time for preparation, the time shall be increased to the extent possible in the addendum or, if necessary, by facsimile or telephone and confirmed in the addendum;

(2) Clarifications may be issued any time up to the scheduled deadline for receipt of offers.

(f) After submission of proposals, amendments may be made by addenda for solicitations pursuant to subchapters 6 and 6.5, subject to sections 3-122-53(d) and (e) and 3-122-54(b). [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.07 <u>Pre-opening modification or withdrawal of offer</u>. (a) Bids or proposals submitted pursuant to subchapters 5, 6, and 6.5 may be modified or withdrawn prior to the established due date by the following documents:

(1) Modification of bids or proposals:

(A) A written notice accompanying the actual modification received in the office designated in the solicitation, stating that a modification to the bid or proposal is submitted; or

(B) A facsimile or electronic notice accompanying the actual modification submitted either by facsimile machine, electronic mail, or an electronic procurement system pursuant to section 3-122-9 to the office designated in the solicitation; provided if other than through an electronic system, offeror submits the actual written notice and

modification within two working days of receipt of the facsimile or the electronic transmittal.

(2) Withdrawal of bids or proposals:

(A) A written notice received in the office designated in the solicitation; or

(B) A notice by facsimile machine or other electronic method pursuant to section 3-122-9, to the office designated in the solicitation.

For the purposes of this section and section 3-122-16.08, the established due date for proposals pursuant to subchapter 6 or 6.5 is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only priority listed offerors may submit best and final offers.

(b) The documents shall be made a part of the appropriate procurement file. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.08 Late offer, late withdrawal, and late modification. (a) Any notice of withdrawal, notice of modification of a bid or proposal with the actual modification, or any bid or proposal is late when received at the place designated for receipt and opening of an offer after the established due date, additionally defined in section 3-122-16.06(a), except when received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity.

(b) A late bid or proposal or late modification will not be considered for award and shall be returned to the offeror unopened as soon as practicable, accompanied by a letter from the procurement activity stating the reason for its return.

(c) A late withdrawal request except as provided for in section 3-122-31, shall be responded to with a statement of the reason for non-acceptance of the withdrawal.

(d) Records of each late offer, late modification, or late withdrawal and any related correspondence shall be made a part of the appropriate procurement file, except for the late offer or late

modification itself which shall be disposed of in accordance with subsection (b). [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.09 Cancellation of solicitation and rejection of offer. Cancellation of solicitations and rejection of bids or proposals shall be pursuant to subchapter 10 and section 103D-308, HRS. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303, 103D- 308)

SUBCHAPTER 4.5

SOURCE SELECTION FOR FEDERAL GRANTS

§3-122-16.30 Purpose. (a) The purpose of this subchapter is to provide rules for the selection of providers for federal grants.

(b) The selection of providers for federal grants shall be in accordance with the appropriate source selection methods in section 3-122-16. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-301)

§3-122-16.31 Exception; request for interest. (a) "Request for interest" as used in this subchapter means all documents utilized for soliciting interest in providing goods, services, or construction under a federal grant.

(b) Where time or economic situations preclude the use of other source selection methods in section 3-122-16, purchasing agencies may, with the approval of the head of purchasing agency, issue a request for interest to select a provider or providers for a federal grant.

(c) A public notice shall be publicized pursuant to section 3-122-16.03(d) and shall include but not be limited to the information in section 3-122-16.03(b).

(d) The request for interest may include but not be limited to the following:

(1) Identification and purpose of the federal funding;

(2) The target population or clients to be

served;

(3) A description of the good, service, or construction;

(4) The evaluation criteria and their relative weights for selecting a provider or providers;

(5) The format, if any, and procedure for submitting responses to the request;

(6) The deadline for submittal of written responses to the request which shall be a minimum of five working days from the date of public notice;

(7) A statement that the purchasing agency reserves the right to incorporate or not incorporate in the State's application for federal grants any recommendations presented in response to the request; and

(8) A statement that neither the purchasing agency nor the interested provider has any obligation under the request.

(e) The selection of a provider or providers shall be based on the criteria established in the request for interest.

(f) A notice of the selected provider or providers shall be posted to a state governmental website or all respondents shall be notified in writing.

(g) Nothing in this section shall be construed to disqualify a purchasing agency from receiving federal funds. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

SUBCHAPTER 5

COMPETITIVE SEALED BIDDING

§3-122-17 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed bidding method of source selection. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008 §3-122-21 (Auth: HRS §103D-202) (Imp: HRS §103D-302

§3-122-18 REPEALED [R MAR 21 2008]

§3-122-19 REPEALED [R MAR 21 2008]

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§3-122-20 REPEALED [R MAR 21 2008]

§3-122-21 Preparing a competitive sealed bid. The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:

(1) Instructions and information to bidders concerning the bid submission requirements, including:
   (A) The time and date set for receipt of bids;
   (B) The address of the office to which bids are to be delivered or if bid submittal is required through an electronic procurement system;
   (C) The maximum time for bid acceptance by the procurement officer issuing the bid; and
   (D) Any other special information, such as any requirement of intention to bid, if required, or the time, date, and location of the pre-bid conference.

   The bid opening shall be held at the time, date, and location of the receipt of bids;

(2) The purchase description or specifications, evaluation factors, delivery or performance schedule, and inspection and acceptance requirements as are not included in the purchase description;

(3) The contract terms and conditions, including but not limited to the following, as applicable:
   (A) Requirements pursuant to section 103D-310(c), HRS;
   (B) Warranty requirement;
   (C) Bonding or other security requirements pursuant to subchapter 24;
   (D) Contract extension provisions; and
   (E) Statement that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids;

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(4) A bid form which shall include space for, but not limited to, the following:
   (A) Bid price;
   (B) Brand name and model number and packaging for goods; and
   (C) Information on applicable preferences;
(5) With the exception of bid offers submitted through an electronic procurement system, a requirement that the bidder shall sign the bid form in ink and submit the bid form with the original signature included in the offer. Unless otherwise specified in the solicitation, if facsimile or other electronically transmitted bid offer is allowed, then the bidder shall submit the signed original offer in accordance with section 3-122-9(d);
(6) Documents by reference, provided that the invitation for bids specifies where the documents can be obtained;
(7) A statement that bidders shall designate those portions of their offer that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-30(c) and (d); and that the material designated as confidential shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid;
(8) For construction projects, instructions to the bidder that the bidder shall include in its offer information on joint contractor or subcontractor pursuant to section 103D-302(b), HRS. Construction bids that do not comply with this requirement may be accepted pursuant to section 103D-302(b), HRS. The terms, requirements, and conditions of an invitation for bids, including the specifications appended or incorporated by reference therein, may be amended only by a written addendum issued by the procurement officer, pursuant to section 3-122-16.06. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-310)

§3-122-22 REPEALED. [R MAR 21 2008]

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§3-122-23 REPEALED. [R MAR 21 2008]

§3-122-24 REPEALED. [R MAR 21 2008]

§3-122-25 REPEALED. [R MAR 21 2008]

§3-122-26 REPEALED. [R MAR 21 2008]

§3-122-27 REPEALED. [R MAR 21 2008]

§3-122-28 REPEALED. [R MAR 21 2008]

§3-122-29 REPEALED. [R MAR 21 2008]

§3-122-30 Receipt, opening, and recording of bids. (a) Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place by the procurement officer until the time and date set for opening. Purchasing agencies may use other methods of receipt when approved by the procurement officer.

(b) Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the invitation for bids.

(1) The name of each bidder, the bid price(s), and other information as is deemed appropriate by the procurement officer or the procurement officer's designated representative, shall be read aloud or otherwise made available. If practicable, the information shall also be recorded at the time of opening; that is, the bids shall be tabulated or a bid abstract made;

(2) The name(s) and address(es) of the required witnesses shall also be recorded at the opening.

(c) The opened bids shall be available for public inspection at the time of opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential subject to

subsection (d).

(d) The procurement officer or the procurement officer's designated representative, shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing.

(1) If the parties do not agree as to the disclosure of data, the procurement officer or the procurement officer's designated representative shall inform the bidders present at the opening that the material designated for nondisclosure pursuant to section 3-122-21 shall be subject to written determination by the respective attorney general or corporation counsel for confidentiality in accordance with chapter 92F, HRS;

(A) If the attorney general or corporation counsel determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the opening shall be so notified in writing and the material shall be open to public inspection unless the bidder protests under chapter 3-126;

(B) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS;

(2) The prices, makes and models, or catalogue numbers of items offered, deliveries, and terms of payment shall be publicly available at the time of opening regardless of any designation to the contrary.

(d) Bids shall be unconditionally accepted without alteration or correction, except as allowed in sections 3-122-16.08 and 3-122-31. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§92F-42, 103D-202) (Imp: HRS §§92F-42, 103D-302)

§3-122-31 Mistakes in bids. (a) An obvious mistake in a bid may be corrected or withdrawn, or

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waived by the offeror to the extent it is not contrary to the best interest of the purchasing agency or to the fair treatment of other bidders.

(b) A mistake in a bid discovered before the deadline for receipt of bids may be corrected or withdrawn as provided in section 3-122-16.07.

(c) A mistake in a bid discovered after the deadline for receipt of bids but prior to award may be:

(1) Corrected or waived under the following conditions:

(A) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern;

(B) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting documentation that demonstrates a mistake was made. Examples of mistakes include:

(i) Typographical errors;

(ii) Transposition errors;

(iii) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound;

(C) The procurement officer may correct or waive the mistake if it is not allowable under subparagraphs (A) and (B), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the purchasing agency and is fair to other bidders;

(2) Withdrawn if the mistake is attributable to an obvious error that shall affect price, quantity, quality, delivery, or contractual conditions, provided:

A) The bidder requests withdrawal by submitting documentation that demonstrates a mistake was made; and

(B) The procurement officer prepares a written approval or denial in response to

this request.

(d) A mistake in a bid discovered after award of contract may be corrected or withdrawn if the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

(e) The determination required by this section shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-302, 103D-318)

§3-122-32 REPEALED. [R MAR 21 2008]

§3-122-33 Bid evaluation and award. (a) The award shall be made to the lowest responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids.

(b) Only objectively measurable criteria which are set forth in the invitation for bids shall be applied and may include but not be limited to:

(1) Discounts;

(2) Transportation costs; and

(3) Total or life cycle costs.

(c) Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall:

(1) Be reasonable estimates based upon information the government jurisdiction has available concerning future use; and

(2) Treat all bids equitably.

(d) The invitation for bids shall set forth any evaluation criterion to be used in determining product acceptability:

(1) The solicitation may require the submission of samples, descriptive literature, technical data, or other material to verify product acceptability;

(2) The solicitation may also provide for accomplishing any of the following prior to award:

(A) Inspection or testing of a product for characteristics as quality or workmanship;

(B) Examination of elements as appearance, finish, taste, or feel; or

(C) Other examinations to determine whether the product conforms to any other purchase description requirements;

(3) The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the invitation for bids;

(5) Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(e) The award shall be issued to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids and posted pursuant to section 103D-701, HRS, for five working days.

(f) In the event all bids exceed available funds, the provisions of section 103D-302(h), HRS, shall apply. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-34 Low tie bids. (a) Low tie bids are bids from responsive, responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

(b) At the discretion of the procurement officer, award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

(1) Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State; and

(2) Award the contract to the bidder offering a low tie bid who received the previous award, and continue to award succeeding contacts to the same bidder so long as all low bids are identical.

(c) If no permissible method will be effective in resolving tie bids and a written determination is made so stating, award may be made by drawing lots.

(d) Records shall be made of all invitations for bids on which tie bids are received showing at least the following information and shall be made a part of

the procurement file:

(1) The identification number of the invitation for bids;

(2) The good, service, or construction item; and

(3) A listing of all the bidders and the prices submitted. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-35 Waiver to competitive sealed bid process. (a) If for a given invitation for bids, including multi-step bidding, there is only one responsive, responsible bidder:

(1) An award may be made to the single bidder, provided:

(A) The procurement officer determines in writing that the price submitted is fair and reasonable, and that either:

(i) Other prospective bidders had reasonable opportunity to respond; or

(ii) There is not adequate time for resolicitation; or

(B) The bid exceeds available funds as certified by the appropriate fiscal officer and the price is negotiated pursuant to section 103D-302(h), HRS;

(2) The bid may be rejected pursuant to subchapter 11 and new bids or offers may be solicited if the conditions in paragraph (1) are not met;

(3) The proposed procurement may be canceled; or

(4) An alternative procurement method may be conducted to include but not be limited to direct negotiations with the sole bidder first, and then with any contractor or vendor should negotiations with the sole bidder fail, provided the procurement officer determines in writing that the need for the good, service, or construction continues, but that the price of the one bid is not fair and reasonable and either that:

(A) There is no time for resolicitation; or

(B) Resolicitation would likely be futile.

(b) If for a given invitation for bids, including multi-step bidding, there are no bids received or there are no responsive, responsible bidders, the procurement

officer may determine that it is neither practicable, nor advantageous to the State to issue a new solicitation.

(1) When making this determination, consideration shall be given to:
  (A) Time constraints;
  (B) Competition in the marketplace; and
  (C) Whether the additional potential cost of preparing, soliciting, and evaluating competitive sealed bids is expected to exceed the benefits normally associated with the solicitations;

(2) In the event of this determination, an alternative procurement method may be selected to include, but not be limited to, direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

(1) State the reasons for selection and length of contract period;

(2) Receive prior approval of the chief procurement officer or a designee; and

(3) Be made a part of the contract file upon award by the procurement officer. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§§3-122-36 to 3-122-40 (Reserved).

SUBCHAPTER 6

COMPETITIVE SEALED PROPOSALS

§3-122-41 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed proposal method of source selection when it is determined that competitive sealed bidding is neither practicable nor advantageous to the State. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§S-122-42 REPEALED. [R MAR 21 2008]

§3-122-43 When competitive sealed bidding is not practicable or advantageous. (a) Unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids, competitive sealed bidding is not practicable or advantageous.

(b) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not practicable, even though advantageous. Factors to be considered in determining whether competitive sealed bidding is not practicable include:

(1) Whether the primary consideration in determining award may not be price;

(2) Whether the contract needs to be other than a fixed-price type;

(3) Whether the specifications for the goods, services, or construction, or delivery requirements cannot be sufficiently described in the invitation for bids;

(4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;

(5) Whether offerors may need to be afforded the opportunity to revise their proposals, including price; and

(6) Whether award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.

(c) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not advantageous, even though practicable. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

(1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and

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(2) Whether the factors listed in subsection (b)(4) through (b)(6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous.

(d) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-44 REPEALED. [R 11/17/97]

§3-122-45 Determinations. (a) Pursuant to section 103D-303(a), HRS, the procurement policy board may approve a list of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency.

(b) The list, entitled "Procurements Approved for Competitive Sealed Proposals," shall be reviewed biennially by the procurement policy board and issued by procurement directive. Although the good, service, or construction is listed, purchasing agencies may use the competitive sealed bidding process under section 103D-302, HRS.

(c) If the procurement is not listed pursuant to subsection (a), the head of a purchasing agency shall then determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous. The determinations may be made for categories of goods, services, or construction rather than by individual procurement.

(d) When it is determined that it is more practicable or advantageous to the State to procure construction by competitive sealed proposals:

(1) A procurement officer may issue a request for proposals requesting the submission of proposals to provide construction in accordance with a design provided by the offeror; and

(2) The request for proposals shall require that

each proposal submitted contain a single price that includes both design and build.

(e) The head of the purchasing agency who made the determination pursuant to subsection (c) or (d) may modify or revoke it at any time and the determination shall be reviewed for current applicability on the next procurement for the goods, services, or construction. The head of the purchasing agency may also request that the procurement of the goods, services, or construction by competitive sealed proposals be added to or deleted from the list in subsection (b).

(f) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am 07/06/99; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-303, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-45.01 Evaluation committee. Prior to the preparation of the request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals. A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.

(1) The evaluation committee shall consist of at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured;

(2) Private consultants may also serve on the committee and shall:

(A) Have sufficient knowledge to serve on the committee;

(B) Serve without compensation, unless justified and determined in writing by the head of the purchasing agency that compensation is justified; and

(C) Sign an affidavit:

(i) Attesting to having no personal, business, or any other relationship that will influence their decision in the evaluation process;

(ii) Agreeing not to disclose any information on the evaluation

process to other than an employee of a governmental body; and

(iii) Agreeing that their names will become public information upon award of the contract;

(3) The contract administrator shall serve as a member of the committee;

(4) The contract administrator or a designee shall serve as chairperson, and the procurement officer or a designee shall serve as advisor. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-46 Preparing a request for proposals. The request for proposals is used to initiate a competitive sealed proposal procurement and shall include:

(1) The specifications for the goods, services, or construction items to be procured, including a description of the performance or benefit required;

(2) All contractual terms and conditions applicable to the procurement;

(3) A statement as to when and in what manner prices are to be submitted;

(4) A statement concerning whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;

(5) The term of the contract and conditions of renewal or extension, if any;

(6) Instructions and information to offerors, including pre-proposal conferences, the location where proposals are to be received, and the date, time, and place where proposals are to be received and reviewed;

(7) The relative importance of price and other evaluation criteria; and specific evaluation criteria to be used in evaluation of proposals which may include but is not limited to:

(A) Technical capability and approach for meeting performance requirements;

(B) Competitiveness and reasonableness of price;

(C) Managerial capabilities; and

(D) Best value factors;

(8) A statement that discussions may be conducted with "priority-listed offerors" pursuant to section 3-122-53, but that proposals may be accepted without discussions; and

(9) A statement that offerors shall designate in writing those portions of the unpriced proposal that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-58; that the material designated as confidential shall be readily separable from the proposal in order to facilitate inspection of the nonconfidential portion of the proposal.

[Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-47 REPEALED. [R 11/17/97]

§3-122-48 REPEALED. [R MAR 21 2008]

§3-122-49 REPEALED. [R MAR 21 2008]

§3-122-50 REPEALED. [R MAR 21 2008]

§3-122-51 Receipt and registration of proposals. (a) Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the procurement officer until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

(1) Proposals and modifications shall not be opened publicly, but shall be opened in the presence of two or more state officials;

(2) Proposals and modifications shall be shown only to members of the evaluation committee and state personnel or their designees having legitimate interest in them.

(b) After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals:

(1) The name of each offeror;

(2) The number of modifications received, if any;

and

(3) A description sufficient to identify the good, service, or construction item offered.

(c) The register of proposal shall be open to public inspection as provided in section 3-122-58.

(d) Proposals shall be open to public inspection as provided in section 3-122-58. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-52 Evaluation of proposals. (a) Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered.

(b) A numerical rating system shall be used. The relative priority to be applied to each evaluation factor shall also be set out in the request for proposals.

(c) The points to be applied to each evaluation factor shall be set out in the request for proposals.

(1) The procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing which shall be placed in the procurement file;

(2) The written ranking evaluations or explanations shall be available for public inspection after the award of the contract is posted.

(d) When applicable, cost shall be an evaluation factor.

(1) The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost;

(2) The points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price.

(e) An evaluation factor must be included which takes into consideration whether an offeror qualifies for any procurement preferences pursuant to chapter 3-124.

(f) Evaluations may not be based on

discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation of the offeror. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-53 Discussions with offerors. (a) Before conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

(1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable;

(2) All responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list;

(3) If numerous acceptable and potentially acceptable proposals have been submitted, the procurement officer or the evaluation committee may rank the proposals and limit the priority list to at least three responsible offerors who submitted the highest-ranked proposals;

(4) Those responsible offerors who are selected for the priority list are referred to as the "priority-listed offerors".

(b) Discussions will be limited to only "priority-listed offerors" and are held to:

(1) Promote understanding of a state agency's requirements and priority-listed offerors' proposals; and

(2) Facilitate arriving at a contract that will provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals.

The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings, and those attending.

(c) Proposals may be accepted on evaluation without discussion.

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

(1) Any substantial oral clarification of a

proposal shall be reduced to writing by the priority-listed offeror;

(2) If during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended by an addendum to incorporate the clarification or change.

(e) Addenda to the request for proposals shall be distributed only to priority-listed offerors.

(1) The priority-listed offerors shall be permitted to submit new proposals or to amend those submitted;

(2) If in the opinion of the procurement officer or the evaluation committee, a contemplated amendment will significantly change the nature of the procurement, the request for proposals shall be canceled and a new request for proposals issued.

(f) The contents of any proposal shall not be disclosed so as to be available to competing offerors during the discussion process. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-54 Best and final offers. (a) The procurement officer shall establish a date and time for the priority-listed offerors to submit their best and final offers.

(b) Best and final offers shall be submitted only once, unless the chief procurement officer or the head of a purchasing agency or a designee of either officer above the level of procurement officer determines in writing that it is in the State's best interest to conduct additional discussions or change the State's requirements by an addendum distributed only to priority-listed offerors and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award.

(c) Priority-listed offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(d) After best and final offers are received, final evaluations will be conducted for an award pursuant to section 3-122-57. [Eff 12/15/95; am and

comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-55 REPEALED. [R MAR 21 2008]

§3-122-56 REPEALED. [R MAR 21 2008]

§3-122-57 Award of contract. (a) The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals and posted pursuant to section 103D-701, HRS, for five working days. Other criteria may not be used in the evaluation. The contract file shall include the basis for selecting the successful offeror.

(b) Cost or pricing data requirements shall be as specified in section 103D-312, HRS, and subchapter 15.

(c) The determinations required by this section shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-58 Public inspection. (a) The existing contract file, except those portions the offeror designates in writing as trade secrets or other proprietary data to be confidential subject to subsection (b), shall be available for public inspection upon posting of award pursuant to section 103D-701, HRS. The contract file shall include but not be limited to the following:

(1) The register of proposals prepared pursuant to section 3-122-51;
(2) A listing of all vendors to whom copies of the request for proposals were distributed;
(3) Name of successful offeror and dollar amount of offer;
(4) The basis on which the award was made;
(5) A copy of the request for proposals;
(6) A copy of the successful offeror's proposal;
(7) A copy of all unsuccessful offerors' proposals; and

(8) A copy of the executed contract resulting from the request for proposals.

(b) If a person requests to inspect the portions of an offeror's proposal designated as confidential pursuant to section 3-122-46(9), the inspection shall be subject to written determination by the respective attorney general or corporation counsel for confidentiality in accordance with chapter 92F, HRS.

(c) If the attorney general or corporation counsel determines in writing that the material designated as confidential is subject to disclosure, the material shall be open to public inspection unless the offeror appeals pursuant to section 92F-42(1), HRS.

(d) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-15.5, HRS. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§92F-42, 103D-303)

§3-122-59 Waiver to competitive sealed proposal process. (a) If for a given request for proposals, there is only one responsible offeror submitting an acceptable proposal:

(1) An award may be made to the single offeror, provided the procurement officer determines in writing that the price submitted is fair and reasonable and that either:
   (A) Other prospective offerors had reasonable opportunity to respond; or
   (B) There is not adequate time for resolicitation;
(2) The offer may be rejected pursuant to subchapter 11 and new requests for proposals may be solicited if the conditions in paragraph (1) are not met;
(3) The proposed procurement may be cancelled;
(4) An alternative procurement method may be conducted to include, but not be limited to, direct negotiations with the sole offeror first, and then with any contractor or vendor should negotiations with the sole offeror fail, provided the procurement officer determines in writing that the need for the good, service, or construction continues, but that the price of the one offer is not fair

and reasonable and that either:
(A) There is no time for resolicitation, or
(B) Resolicitation would likely be futile.

(b) If for a given request for proposals, there are no proposals received or there are no responsible offerors submitting acceptable proposals, the procurement officer may determine that it is neither practical nor advantageous to issue a new solicitation.

(1) When making this determination, consideration shall be given to:
(A) Time constraints;
(B) Competition in the marketplace; and
(C) Whether the additional potential cost of preparing, soliciting, and evaluating competitive sealed proposals is expected to exceed the benefits normally associated with the solicitations;

(2) In the event of this determination, an alternative procurement method may be selected, to include but not be limited to, direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

(1) State the reasons for selection and length of contract period;

(2) Receive prior approval of the chief procurement officer or a designee; and

(3) Be made a part of the contract file upon award by the procurement officer. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-60 Debriefing. (a) The purpose of a debriefing is to inform the nonselected offerors of the basis for the source selection decision and contract award.

(b) A written request for a debriefing shall be made within three working days after the posting of the award of the contract.

(c) Debriefing shall be held by the procurement officer or designee, to the maximum extent practicable, within seven working days; provided the procurement officer or designee may determine whether or not to conduct individual or combined debriefings.

(d) A protest by the requestor submitted pursuant to section 103D-701, HRS, following a debriefing shall

be filed within five working days, as specified in section 103D-303(h), HRS. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-61 (Reserved).

SUBCHAPTER 6.5

MULTI-STEP COMPETITIVE SEALED BIDDING

§3-122-61.05 Purpose. The purpose of this subchapter is to provide rules for the use of the multi-step competitive sealed bidding method of source selection when it is determined that award to the lowest responsive, responsible bidder is desired, but it is not practical to initially prepare a definitive purchase description which will be suitable to permit an award based on price, and it is desirable, prior to soliciting priced bids, to:

(1) Invite and evaluate technical proposals to determine their acceptability to fulfill the purpose of the procurement; and
(2) Conduct discussions pursuant to section 3-122-53. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-61.06 Preparing a multi-step invitation for bids. (a) The multi-step sealed bidding process uses an invitation for bids consisting of two phases, and combines the receipt of technical proposals of the competitive sealed proposals process and the low priced bid award of the competitive sealed bidding process.

(1) Phase one is composed of one or more steps in which bidders submit unpriced technical proposals to be evaluated based on criteria set forth in the invitation for bids;and
(2) Phase two is to consider the priced bids from bidders whose unpriced technical proposals are determined to be acceptable in phase one, and award is made to the lowest responsive, responsible bidder.

(b) The two-phase invitation for bids shall conform to the requirements of section 3-122-21, including the following:

(1) That unpriced technical proposals are requested;

(2) Whether priced bids are to be submitted at the same time as unpriced technical proposals, and if they are, that the priced bids shall be submitted in a separately sealed envelope;

(3) That the priced bids will be considered only in phase two and only from those bidders whose unpriced technical proposals are found acceptable in phase one;

(4) That the State, to the extent the procurement officer finds necessary, may conduct discussions pursuant to section 3-122-53; and

(5) That the good, service, or construction being procured shall be furnished generally in accordance with the bidder's unpriced technical proposal as found to be finally acceptable and shall meet the requirements of the invitation for bids. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-61.07 Phase one. Phase one shall be conducted in accordance with subchapter 6, with the exception of the rules relating to the priced offer and the following:

(1) The procurement officer may initiate phase two of the procedure if there is only one acceptable unpriced technical proposal. If no proposals are submitted, the procurement officer may make a determination pursuant to section 3-122-59(b);

(2) The procurement officer shall notify the bidder in writing when oral or written discussions are not conducted, and upon written request from the bidder, the bidder shall be given the opportunity to review the evaluation of its offer and meet with the evaluator(s) to discuss the evaluation at least five working days prior to the deadline for receipt and opening of the priced offers. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-61.08 Phase two. (a) Upon completion of phase one, the procurement officer shall:

(1) If priced bids were required to be submitted in phase one, open the priced bids from bidders whose unpriced technical proposals were found to be acceptable;

(2) If technical discussions have been held, or if material modifications to the procurement item, project, or procedure have been made after the original submission of priced bids, return the sealed priced bids to bidders and provide them reasonable opportunity to submit a modified priced bid; or

(3) If priced bids have not been submitted, invite each acceptable bidder to submit a priced bid.

(b) Phase two shall be conducted as any other competitive sealed bid procurement except as specifically set forth in this section and no public notice need be given to phase two, submission of priced bids, because the notice was previously given. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

SUBCHAPTER 7

PROCUREMENT OF PROFESSIONAL SERVICES

§3-122-62 REPEALED. [R 11/17/97]

§3-122-63 General provisions. (a) Professional services shall be in accordance with section 103D-304, HRS.

(b) After the contract is awarded, the following information shall be open to public inspection, including but not limited to the contract, the list of qualified persons, the screening committee's criteria for selection established under section 103D-304(d), HRS, and the statements of qualifications and related information submitted by the qualified persons, except those portions for which a written request for confidentiality has been made subject to section 3-122-58.

(c) Amendment to a professional services contract shall require prior approval of the head of the purchasing agency when the increase is at least $25,000 and ten per cent or more of the initial contract price. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-64 REPEALED. [R MAR 21 2008]

§3-122-65 REPEALED. [R MAR 21 2008]

§3-122-66 <u>Waiver to requirement for procurement of professional services.</u> (a) If the names of less than three qualified persons are submitted pursuant to section 103D-304(g), HRS, the head of the purchasing agency may determine that:

(1) Negotiations under section 103D-304(h), HRS, may be conducted provided that:
   (A) The prices submitted are fair and reasonable; and
   (B) Other prospective offerors had reasonable opportunity to respond; or there is not adequate time to resolicit through public notice statements of qualifications and expressions of interest;
(2) The offers may be rejected pursuant to subchapter 11 and new statements of qualifications and expressions of interest may be solicited if the conditions in paragraph (1)(A) and (B) are not met;
(3) The proposed procurement may be cancelled; or
(4) An alternative procurement method may be conducted to include but not be limited to direct negotiations with other potential offerors if the head of the purchasing agency determines in writing that the need for the service continues, but that either the price of the offers received are not fair and reasonable or that the qualifications of the offerors are not adequate to meet the procurement needs, and there is no time for resolicitation, or resolicitation would likely be futile.

(b) If no names are submitted pursuant to section 103D-304(g), HRS, the head of the purchasing agency may

determine that for a given request it is neither practicable nor advantageous for the State to procure a service by again soliciting statements of qualifications and expressions of interest.

(1) When making this determination, consideration shall be given to the competition in the marketplace and whether the additional potential cost of preparing, soliciting, and evaluating responses is expected to exceed the benefits normally associated with the solicitations; and

(2) In the event of this determination, a more cost effective procurement method may be selected, to include but not be limited to direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

(1) State the reasons for selection and length of contract period;

(2) Receive written approval of the chief procurement officer or a designee; and

(3) Be made a part of the contract file upon award by the procurement officer. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-67 Small purchases of professional services. Small purchases of professional services, except small purchase of design professional services furnished by licensees under chapter 464, HRS, may be conducted pursuant to section 103D-304(j), HRS, or subchapter 8. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-304, 103D-305)

§3-122-68 REPEALED. [R MAR 21 2008]

§3-122-69 Review and selection committees. (a) Persons who serve on the review or selection committee who are not employees of a governmental body shall:

(1) Have sufficient knowledge to serve on the review or selection committee;

(2) Serve without compensation, unless justified and determined in writing by the head of the

purchasing agency that compensation is justified; and

(3) Sign an affidavit:

(A) Attesting to having no personal, business, or any other relationship that will influence their decision in the review or selection process;

(B) Agreeing not to disclose any information on the review or selection process; and

(C) Agreeing that their names will become public information upon award of the contract.

(b) Deputy directors or equivalent appointed positions shall not serve on review or selection committees. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202)(Imp: HRS §103D-304)

§3-122-70 Debriefing. (a) The purpose of a debriefing is to inform providers of professional services of the basis for non-selection.

(1) A written request for a debriefing shall be made within three working days after the posting of the award of the contract;

(2) Debriefing shall be held by the procurement officer or designee, to the maximum extent practicable, within seven working days; provided the procurement officer or designee may determine whether or not to conduct individual or combined debriefings.

(b) A protest by the requestor submitted pursuant to section 103D-701, HRS, following a debriefing shall be filed within five working days, as specified in section 103D-304(k), HRS. [Eff and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§§3-122-71 to 3-122-72 (Reserved).

SUBCHAPTER 8

SMALL PURCHASES

§3-122-73 Definitions. As used in this

subchapter:

"Adequate and reasonable competition" means the amount of vendors solicited based upon the number of vendors available and the value or price of the goods, service, or construction. Because of variations in circumstances, it is not possible to define what is adequate and reasonable competition for every small procurement. However, in general, the more vendors there are that can meet the needs of the agency, or the higher the price of the goods, services, or construction, then a greater number of vendors should be solicited. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-104, 103D-305)

§3-122-74 General provisions. (a) Small purchases shall be subject to section 103D-305, HRS, and do not require public notice or public bid openings.

(b) Small purchase contracts for professional services may be procured pursuant to this subchapter or section 103D-304(j), HRS; provided that small purchase of design professional services furnished by licensees under chapter 464, HRS, shall be procured in accordance with section 103D-304, HRS.

(c) Unless otherwise exempt, purchasing agencies delegated small purchase authority shall comply with state procurement office price or vendor lists, price schedules, or other chief procurement officer lists and schedules, where applicable.

(d) Purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, so as to evade the statutory competitive bidding requirements. For additional details, refer to chapter 3-131.

(e) Preferences pursuant to part X, chapter 103D, HRS, shall not apply to small purchases. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-75 Goods, services, and construction. (a) Based on specifications and with adequate and reasonable competition:

(1) No less than three quotes shall be solicited

for expenditures of $5,000 to less than $15,000;

(2) No less than three written quotes shall be obtained for expenditures of $15,000 to less than $25,000; and

(3) For the period up to and including June 30, 2007, no less than three written quotes shall be obtained for expenditures of $25,000 to less than $50,000.

(b) Only vendors that supply the goods, services, or construction required, shall be solicited and considered to meet the minimum quotation requirements.

(c) Considering the criteria, including but not limited to quality, warranty, and delivery; award shall be made to the lowest responsive, responsible offeror.

(d) When award to the lowest responsive, responsible offeror is not practicable, award shall be made to the offeror whose quotation provides the best value to the State. Written determination for the selection shall be placed in the procurement file.

(e) When the minimum quotations are not obtained, for reasons such as insufficient sources, written justification shall be placed in the procurement file.

(f) Expenditures with an estimated total cost that are less than $5,000 shall be by procedures established by each chief procurement officer.

(g) Chief procurement officers may be more restrictive in their jurisdiction's small purchase procedures, e.g., requiring written quotes at lower dollar limits. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-76 REPEALED. [R MAR 21 2008]

§3-122-77 <u>Procurement file and disclosure of information.</u> All quotations received shall be recorded and placed in a procurement file. Pursuant to section 3-122-9.01, a purchasing agency is not required to disclose quotation information received from vendors until the purchase order is issued or the purchasing card order is placed. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-78 Electronic procurement. (a) Effective July 1, 2007, small purchase procurements of $25,000 to less than $50,000 shall be made through an electronic procurement system.

(b) This section shall not apply to procurements subject to sections 103D-306 and 103D-307, HRS.

(c) The electronic procurement system shall include at a minimum, the functionality of notifying registered vendors of the procurement opportunity and the electronic receipt of offers.

(d) If no responsive, responsible quotes, or reasonable prices are received through an electronic procurement solicitation, the head of the purchasing agency or designee may determine that it is neither practicable, nor advantageous to the State to issue a new solicitation.

(1) When making this determination, consideration shall be given to whether the specifications can be revised, time constraints, and competition in the marketplace;

(2) In the event of this determination, an alternative procurement method may be selected to include, but not limited to, direct negotiations; and

(3) Documentation of the alternative procurement determination shall be made part of the procurement file.

(e) Procurements of goods, services, or construction of $25,000 to less than $50,000, which cannot be purchased through an electronic procurement system may be conducted pursuant to sections 103D-302, 103D-303, and 103D-304, HRS.

(f) The chief procurement officer may determine what goods, services, or construction, less than $25,000 will be made through an electronic procurement system. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§§3-122-79 to 3-122-80 (Reserved).

SUBCHAPTER 9

SOLE SOURCE PROCUREMENT

§3-122-81 General provisions. (a) Sole source

procurement shall be in accordance with section 103D-306, HRS, with the exception of sole source procurement subject to section 103D-305, HRS.

(b) A sole source purchase may be made when only one source is available for a purchase, unless the expenditure is expressly exempt from public bidding by law or rule.

(c) Justification for a sole source purchase must establish that the good, service, or construction has a unique feature, characteristic, or capability essential to the agency to accomplish its work and is available from only one supplier or source.

Examples are:

(1) Proprietary item;
(2) Compatibility to existing equipment; or
(3) Public utility repair or construction that can only be provided by the utility company.

(d) The contract period for a sole source procurement shall not exceed one year, unless approval is granted for a multi-term contract pursuant to section 3-122-149.

(e) Approval for sole source procurement may be granted by the chief procurement officer when there is a requirement for a good or service in limited quantity for test or evaluation purpose.

(f) The following are not justifications for sole source procurements:

(1) An item is referred to by an exact brand, but there are other brands that qualify as "equals";
(2) An item is unique, but is available from more than one supplier, is called a "restrictive" purchase subject to bidding;
(3) The fact that a person or organization is or has been furnishing services to a purchasing agency does not, by itself, render the person or organization the only source for the type of service required;
(4) The potential loss of funds at the end of a fiscal year.

(g) The procurement officer should conduct negotiations with the sole source vendor to determine the factors as cost, quality, terms, and delivery.

(h) Cost or pricing data requirements shall be as specified in section 103D-312, HRS, and subchapter 15.

(i) A purchase order shall be issued or a certification that funds are available for the amount

of the purchase shall be obtained for a sole source purchase, pursuant to section 103D-309, HRS, and subchapter 12.

(j) Pursuant to section 103D-306(c), HRS, the procurement policy board shall maintain a list, entitled "Procurements Approved for Sole Source" that may be procured without obtaining a sole source approval, pursuant to section 3-122-82. The chief procurement officer may request reports from the heads of purchasing agencies on sole source procurements.

The list of sole source procurements shall be reviewed by the procurement policy board biennially and issued by procurement directive. Purchasing agencies shall cite on the purchase order or on the contract the sole source authority as "Approved for Sole Source Procurement pursuant to Section 3-122-81, (cite sole source number from attached list), Hawaii Administrative Rules". [Eff 12/15/95; am and comp 11/17/97; am 7/6/99; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-306, 103D-312) (Imp: HRS §§103D-306, 103D-309, 103D-312)

§3-122-82 Sole source approvals and amendments. (a) Forms required to implement the provisions for sole source approval will be distributed by the chief procurement officer.

(b) To obtain sole source approval from the chief procurement officer, the following procedures shall be followed:

(1) Complete and submit a "Request For Sole Source" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct; and

(2) Complete and submit a "Notice of Sole Source" which shall serve as a written determination to issue a sole source contract.

(c) The chief procurement officer shall post a copy of the "Notice of Sole Source" in a designated area accessible to the public, at least seven days prior to any approval action.

(1) Any inquiries shall be directed to the designated contact person of the purchasing agency.

(2) Any objections to the request for sole source shall be submitted in writing and received by

the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection, and provide a written determination to the person submitting the objection. All documents relating to the objection, including written summary of the disposition of the objection, shall be kept with the sole source file.

(d) Amendment to a contract that would change the original scope of the contract, or increase the original contract price by ten per cent or more, may only be made with the approval of the chief procurement officer. The annual renewal of a sole source contract for services shall not be submitted as an amendment, but as a new request. To amend a sole source contract, the purchasing agency shall complete and submit a "Notice of Amendment to Sole Source Contract" to the chief procurement officer. The posting and approval procedures provided in subsection (c) shall be followed.

(e) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-306, 103D-318) (Imp: HRS §§103D-306, 103D-318)

§3-122-83 REPEALED. [R MAR 21 2008]

§3-122-84 REPEALED. [R MAR 21 2008]

§§3-122-85 to 3-122-87 (Reserved).

SUBCHAPTER 10

EMERGENCY PROCUREMENT

§3-122-88 General provisions. (a) Emergency procurement shall be in accordance with section 103D-307, HRS. Section 103D-305, HRS, small purchases are not subject to emergency procurement procedures.

(b) Emergency procurement as defined in section 103D-307, HRS, may be utilized to purchase only the immediate needs for the emergency and not subsequent non-emergency requirements.

(c) The potential loss of funds at the end of a fiscal year is not an emergency. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-307)

§3-122-89 REPEALED. [R MAR 21 2008]

§3-122-90 Procedures. (a) Prior to the procurement or if time does not permit, as soon as practicable thereafter, the head of the purchasing agency responsible for the emergency procurement shall prepare a written determination requesting the approval from the chief procurement officer, indicating the following:

(1) Nature of the emergency;
(2) Name of contractor;
(3) Amount of expenditure;
(4) Listing of the good, service, or construction; and
(5) Reason for selection of the contractor.

(b) Competition as is practicable shall be obtained to assure that the required good, service, or construction item is procured in time to meet the emergency.

(c) As soon as is practicable, a confirming purchase order must be prepared. Include in detail any agreements, including price, made orally with the contractor.

(d) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-307, 103D-318) (Imp: HRS §§103D-307, 103D-318)

§3-122-91 REPEALED. [R MAR 21 2008]

§§3-122-92 to 3-122-94 (Reserved).

SUBCHAPTER 11

CANCELLATION OF SOLICITATIONS AND REJECTION OF OFFERS

§3-122-95 Cancellation of solicitations and rejection of offers. A solicitation may be canceled, or an offer rejected in whole or in part pursuant to section 103D-308, HRS. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-96 Cancellation of solicitation. (a) A solicitation may be cancelled for reasons including but not limited to the following:

(1) Cancellation prior to opening:
  (A) The agency no longer requires the goods, services, or construction;
  (B) The agency no longer can reasonably expect to fund the procurement;
  (C) Proposed amendments to the solicitation would be of a magnitude that a new solicitation is desirable; or
  (D) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.

(2) Cancellation after opening but prior to award:
  (A) The goods, services, or construction being procured are no longer required;
  (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
  (C) The solicitation did not provide for consideration of all factors of significance to the agency;
  (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
  (E) All otherwise acceptable offers received are at clearly unreasonable prices;
  (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been

submitted in bad faith; or

(G) A determination by the chief procurement officer or a designee that a cancellation is in the public interest.

(b) A notice of cancellation shall be sent to all businesses solicited and the notice shall include:

(1) Identity of the solicitation;

(2) Brief explanation of the reason(s) for cancellation; and

(3) Where appropriate, an explanation that an opportunity will be given to compete on any resolicitation or any future procurements of similar goods, services, or construction.

(c) Documentation on the reasons for cancellation shall be made a part of the procurement file and shall be available for public inspection. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-97 Rejection of offer. (a) A bid shall be rejected for reasons including but not limited to:

(1) The bidder is nonresponsible as determined by subchapter 13; or

(2) The bid is not responsive, that is, it does not conform in all material respects to the solicitation by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the solicitation, pursuant to section 3-122-33.

(b) A proposal may be accepted with modification or correction, unless the solicitation states otherwise.

(1) This allowance must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

(2) A proposal shall be rejected for reasons including but not limited to:

(A) The offeror is nonresponsible as determined by subchapter 13;

(B) The proposal, after any opportunity has passed for modification or clarification, fails to meet the announced requirements of the agency in some material respect; or

(C) The proposed price is clearly unreasonable.

(c) An offeror may not limit acceptance to the entire bid or proposal offering, unless allowed by the solicitation:

(1) If the acceptance of an offer is so limited by the offeror but not allowed, the offer will be determined to be not acceptable and rejected.

(2) If the acceptance of an offer is so limited by the offeror and allowed, the purchasing agency shall not reject part of the offer and award on the remainder.

(d) A written notice shall be sent to the offeror advising of the reasons for the rejection. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-98 Disposition of offers. When offers are rejected, or a solicitation cancelled after offers are received:

(1) The offers which have been opened shall be retained in the procurement file; and

(2) The unopened offers shall be returned to the offerors upon request; or otherwise disposed of. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§§3-122-99 to 3-122-101 (Reserved).

SUBCHAPTER 12

CONTRACT NOT BINDING UNLESS FUNDS AVAILABLE

§3-122-102 Contract not binding unless funds available. (a) Certification that there is an appropriation or balance of an appropriation sufficient to cover the amount required by the contract as well as the application of federal funds shall comply or be exempt under section 103D-309, HRS.

(b) Additional certification exceptions are for the following types of contracts for which the respective chief financial officer shall only be required to certify that there is an appropriation or balance of an appropriation over and above all

outstanding contracts that is sufficient to cover the amount required to be paid under the contract during the initial fiscal period and the contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds:

(1) A lease contract pursuant to section 3-122-147; and

(2) An installment purchase payment contract pursuant to section 3-122-148.

(c) Certification of a portion of the total funds required for a contract may be permitted when an immediate solicitation will result in significantly more favorable contract terms and conditions to the State than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the respective chief financial officer, as the case may be, states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues. All contracts partially funded shall be enforceable only to the extent to which funds have been certified as available. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-309, 103D-315)

§3-122-103 REPEALED. [R MAR 21 2008]

§3-122-104 REPEALED. [R 11/17/97]

§§3-122-105 to 3-122-107 (Reserved).

SUBCHAPTER 13

RESPONSIBILITY OF BIDDERS AND OFFERORS

§3-122-108 Qualification of offeror or prospective offeror. (a) Pursuant to section 103D-310, HRS, a determination of responsibility or nonresponsibility of an offeror or prospective offeror to perform the work called for in the solicitation shall be made by the procurement officer on the basis

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of available information.

(b) If the procurement officer requires additional information, the offeror or prospective offeror may be required to answer questions contained in the sample questionnaire provided by the policy board.

(c) The requested information shall be furnished upon request within two working days or longer at the discretion of the procurement officer. Failure to furnish the requested information within the time allowed may be grounds for a determination of nonresponsibility.

(d) Upon determination of nonresponsibility, the offeror or prospective offeror shall be notified in writing. The decision shall be final unless the offeror or prospective offeror applies for administrative hearing pursuant to section 3-126-42. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-109 Questionnaire. The questionnaire shall request information for the following categories:

(1) Financial ability to deliver the goods or perform the work required;
(2) Material, equipment, facility, and personnel resources and expertise available, or the ability to obtain them, in order to meet contractual requirements;
(3) References for the determination of a satisfactory record of performance;
(4) References for the determination of a satisfactory record of integrity;
(5) Legal qualifications to contract with the State; and
(6) Additional information necessary for a determination of responsibility. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-110 REPEALED. [R MAR 21 2008]

§3-122-111 Notice of intent to offer. (a) When required by the solicitation, a prospective offeror shall file a notice of intent to offer, subject to the

following:

(1) The notice shall be received not less than ten days prior to the deadline for receipt of offers; and

(2) The notice may be submitted by facsimile or electronically, pursuant to section 3-122-9, and the date of receipt as evidenced by the time indicated on the electronic transmittal or the procurement officer's transaction receiving report, shall determine timeliness of the notice.

(b) A notice of intent to offer may be waived in the case of a single offer when the procurement officer determines that acceptance is in the best interest of the public and the basis for the acceptance is explained in the written determination. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-112 Responsibility of offerors. (a) The offeror, as proof of compliance with the requirements of section 103D-310(c), HRS, upon award of a contract made pursuant to section 103D-302, 103D-303, 103D-304, or 103D-306, HRS, shall provide:

(1) A tax clearance certificate from the department of taxation and the Internal Revenue Service, subject to section 103D-328, HRS, current within six months of issuance date;

(2) A certificate of compliance for chapters 383, 386, 392, and 393, HRS, from the department of labor and industrial relations, current within six months of issuance date; and

(3) A certificate of good standing from the business registration division of the department of commerce and consumer affairs, current within six months of issuance date.

(b) In lieu of the certificates referenced in subsection (a), offeror may make available proof of compliance through a state procurement office designated certification process.

(c) Except for any contract of less than $25,000 or any contract entered into pursuant to section 103D-307, HRS, all state and county procurement officers or agents shall withhold final payment of a contract made pursuant to section 103D-302, 103D-303, 103D-304, or 103D-306, HRS, until receipt of:

(1) A tax clearance certificate from the director of taxation and the Internal Revenue Service, subject to section 103D-328, HRS, current within two months of issuance date; and a certification from the contractor affirming that the contractor has, as applicable, remained in compliance with all laws as required by this section. A contractor making a false affirmation shall be suspended and may be debarred pursuant to section 103D-702, HRS; or

(2) Proof of compliance as provided in subsection (b).

(d) This section shall not apply to any contract to the extent it jeopardizes federal funding. [Eff and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§§3-122-113 to 3-122-115 (Reserved).

SUBCHAPTER 14

PREQUALIFICATION OF SUPPLIERS

§3-122-116 Conditions for prequalification of suppliers. Prequalification of suppliers for particular types of goods, services, and construction shall be allowed under the following conditions:

(1) To limit a solicitation to those vendors who meet statutory or licensing requirements applicable to the solicitation;

(2) To minimize the time necessary to verify vendor qualifications which otherwise would jeopardize timely award of contracts. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-311) (Imp: HRS §103D-311)

§3-122-117 REPEALED. [R MAR 21 2008]

§§3-122-118 to 3-122-120 (Reserved).

SUBCHAPTER 15

COST OR PRICING DATA

§3-122-121 Scope and application. The cost and pricing data requirement in this subchapter applies to contracts when either cost or pricing data or both are required to be submitted pursuant to section 3-122-123, except for the following:

(1) Small purchases; or

(2) A contract let by competitive sealed bidding or multi-step bidding, except when price adjustments are subsequently made to the contract pursuant to section 3-122-123. [Eff 12/5/95; comp 11/17/97; am and comp MAR 21 2008] Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-122 Cost or pricing data defined. Cost and pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of a prospective contractor's judgment about future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all facts that can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include factors as:

(1) Vendor quotations;

(2) Nonrecurring costs;

(3) Information on changes in production methods and in production or purchasing volume;

(4) Data supporting projections of business prospects and objectives and related operations costs;

(5) Unit cost trends as those associated with labor efficiency;

(6) Make or buy decisions;

(7) Labor union contract negotiations; and

(8) Information on management decisions that could have a significant bearing on costs.

[Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-123 Requirement for cost or pricing data. The procurement officer shall require cost or pricing data or both in support of the following, and may require for professional services pursuant to subchapter 7:

(1) Any contract, resulting from competitive sealed proposals or sole source procurement, expected to exceed $100,000;

(2) Any price adjustment to a contract involving aggregate increases and decreases in costs plus applicable profits expected to exceed $100,000, including a contract resulting from competitive sealed bidding, whether or not cost or pricing data were required in connection with the initial pricing of the contract, except when unrelated and separately priced adjustments, not requiring cost or pricing data if considered separately, are consolidated for administrative convenience; or

(3) A written determination by a procurement officer that the circumstances warrant requiring submission of cost or pricing data provided, however, when less than complete cost analysis, for example; analysis of only specific factors will provide a reasonable pricing result on awards under $100,000 without the submission of complete cost or pricing data, the procurement officer shall request only that data considered adequate to support the limited extent of the cost analysis needed and need not require certification. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-124 Exceptions to the requirement for cost or pricing data. (a) Cost or pricing data need not be submitted or certified where the contract price is based on:

(1) Adequate price competition which means at least two responsible offerors independently

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compete for a contract to be awarded to the offeror submitting the lowest evaluated price.

(2) Established catalogue price which means the price included in a catalogue, price list, schedule, or other form that is regularly maintained by a manufacturer or contractor; is either published or otherwise available for inspection by customers; and states the price at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general (non-government) buying public for the goods or services involved.

(3) Established market price which means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

(4) Prices set by law or regulation which means the price of a good or service is set by law or rule if some governmental body establishes the price that the contractor may charge the State and other customers.

(b) If, despite the existence of an established catalogue price or market price, and after consultation with the prospective contractors, the procurement officer considers that the price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those listed in the catalogue or market, requests should be so limited.

(c) When the chief procurement officer or the head of a purchasing agency determines in writing to waive the applicable requirements of section 3-122-123(1) or 3-122-123(2) for submission of cost or pricing data in a particular pricing action and the reasons for the waiver are stated in the determination, a copy of the determination shall be kept in the contract file and made available to the public upon request.

(d) If after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be

certified. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-312) (Imp: HRS §103D-312)

§3-122-125 Submission of cost or pricing data and certification. (a) When cost or pricing data are required, they shall be submitted to the procurement officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the procurement officer. When the procurement officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, the data shall either be actually submitted or specifically identified in writing.

(b) The offeror or contractor is required to keep the submission current until the negotiations are concluded.

(c) The offeror or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of the date of reaching agreement on price.

(d) A refusal by an offeror to supply the required data shall be referred to the chief procurement officer or the head of a purchasing agency, whose duty shall be to determine in writing whether to disqualify the noncomplying bidder or offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the chief procurement officer or the head of a purchasing agency who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under chapter 3-126. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-126 Certificate of current cost or pricing data. (a) When cost or pricing data must be certified, the certificate of current cost or pricing data form provided by the policy board shall be included in the contract file along with any award documentation required under this subchapter. The offeror or contractor shall be required to submit the

certificate as soon as practicable after agreement is reached on the contract price or adjustment.

(b) Although the certificate pertains to "cost or pricing data," it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A certificate of current cost or pricing data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

(c) Whenever it is anticipated that a certificate of current cost or pricing data may be required, notice of this requirement shall be included in the solicitation. If a certificate is required, the contract shall include a clause giving the State a contract right to reduction in the price as provided herein.

(d) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

[Eff 12/15/95; comp 11/17/97; comp MAR 21 2008]
(Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-127 Defective cost or pricing data. (a) If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or not current as of the date stated in the certificate, the State is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced by the amount. In establishing that the defective data caused an increase in the contract price, the procurement officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(b) In determining the amount of a downward

adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the State's claim for overstated cost or pricing data arising out of the same pricing action.

(c) If the contractor and the procurement officer cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the procurement officer shall set an amount in accordance with the provisions of this subchapter and the contractor may appeal this decision as a contract controversy under chapter 3-126. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-128 Cost analysis techniques. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

(1) Specific elements of costs which may include direct labor, indirect costs, direct material, other direct costs, subcontract costs, and fixed fee or profit;
(2) The necessity for certain costs;
(3) The reasonableness of amounts estimated for the necessary costs;
(4) The reasonableness of allowances for contingencies;
(5) The basis used for allocation of indirect costs;
(6) The appropriateness of allocations of particular indirect costs to the proposed contract; and
(7) The reasonableness of the total cost or price. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-129 Price analysis techniques. (a) Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

(1) Price submissions of prospective bidders or offerors in the current procurement;

(2) Prior price quotations and contract prices charged by the bidder, offeror, or contractor;
(3) Prices published in catalogues or price lists;
(4) Prices available on the open market; and
(5) In-house estimates of cost.

(b) In making the analysis, consideration must be given to any differing terms and conditions. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-130 Evaluation of cost or pricing data. Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent state price and cost estimates. They shall also include consideration of whether the costs are reasonable and allocable under the pertinent provisions of chapter 3-123. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§§3-122-131 to 3-122-132 (Reserved).

SUBCHAPTER 16

TYPES OF CONTRACTS

§3-122-133 Restrictive or prohibitive use of certain types of contracts. (a) Subject to the limitations of this section, any type of contract that will promote the purchasing agency's best interests may be used, except that cost-reimbursement and cost-plus-a-percentage-of-cost contracts are:
(1) Restricted to only when the chief procurement officer determines in writing that the contracts are likely to be less costly than any other type of contract or that it is impracticable to obtain the goods, services, or construction required except by means of the contracts.
(2) Prohibited if their use would jeopardize the receipt of federal assistance moneys or

reduce the amount of the assistance under any applicable federal statute or regulation.

(b) Award of a cost-plus-a-percentage-of-cost contract may not be made unless:

(1) Notice is given to the head of the compliance audit unit, president of the senate, speaker of the house of representatives, and the chairpersons of the senate ways and means and house finance committees; and

(2) Notice is conspicuously posted in an area accessible to the public in the office of the procurement officer and available for public inspection during normal business hours.

(c) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313, 103D-318) (Imp: HRS §§103D-313, 103D-318)

§3-122-134 Selection of contract types. (a) The selection of an appropriate contract type depends on factors, including but not limited to:

(1) The nature of the goods, services, or construction to be procured;

(2) The uncertainties which may be involved in contract performance;

(3) The extent to which the purchasing agency or the contractor is to assume the risk of the cost of performance of the contract; and

(4) The degree of responsibility assumed by the contractor.

(b) The objective when selecting a contract type is to obtain the best value in needed goods, services, or construction in the time required and at the lowest cost or price to the purchasing agency.

(1) To achieve this objective, the procurement officer, before choosing a contract type, should review the elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance;

(2) Factors to be considered in selecting any type of contract include but are not limited to:

(A) The type and complexity of the good, service, or construction item being

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procured;

(B) The difficulty of estimating performance costs as the inability of the agency to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirement of the contract;

(C) The administrative costs to both parties;

(D) The degree to which the purchasing agency must provide technical coordination during the performance of the contract;

(E) The effect of the choice of the type of contract on the amount of competition to be expected;

(F) The stability of material or commodity market prices or wage levels;

(G) The urgency of the requirement; and

(H) The length of contract performance.

[Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-135 Types of contracts. (a) Contract types described below are the principal contract types and any other type not described may be used, subject to the prohibition and restriction in section 3-122-133.

(b) Contract types are categorized based on the following and a type of contract may be a combination of any of the following:

(1) Compensation, which includes:

(A) Fixed-price contract, pursuant to section 3-122-136, as follows:

(i) Firm fixed-price contract; and

(ii) Fixed-price contract with price adjustment;

(B) Cost-reimbursement contract, pursuant to section 3-122-137, as follows:

(i) Cost contract without fee;

(ii) Cost-plus-fixed fee contract of the completion form type or the term form type; and

(iii) Cost-plus-a-percentage-of-cost

contract;

(2) Cost incentives to provide special incentives to reduce total costs of performance, which includes cost-incentive contract, pursuant to section 3-122-138, as follows:
   (A) Fixed-price cost incentive contract; and
   (B) Cost-reimbursement contract with cost incentive fee;
(3) Performance incentive, pursuant to section 3-122-139;
(4) Time and materials, pursuant to section 3-122-140;
(5) Labor hour, pursuant to section 3-122-141;
(6) Quantity, which includes:
   (A) Definite quantity contract, pursuant to section 3-122-142; and
   (B) Indefinite quantity contract, which includes requirements contract, pursuant to section 3-122-143;
(7) Use of multiple sources when conditions exist under which it is either necessary or advantageous to award a contract to more than one supplier for the same item on a solicitation, or for similar items, which includes:
   (A) Incremental award contract of a definite quantity, pursuant to section 3-122-144;
   (B) Multiple award contract of an indefinite quantity, pursuant to section 3-122-145; and
   (C) Geographic or regional award contract, pursuant to section 3-122-146;
(8) Passing of title, which includes lease contracts, pursuant to section 3-122-147;
(9) Installment purchase payments, pursuant to section 3-122-148; and
(10) Length of contract, which includes multi-term contracts, pursuant to section 3-122-149.

[Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313, 103D-322) (Imp: HRS §§103D-313, 103D-315, 103D-322)

§3-122-136 Fixed-price contract. (a) The fixed-price contract is the only type of contract that can be used in competitive sealed bidding. It places responsibility on the contractor for the delivery of

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the goods or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. It is appropriate for use when the extent and type of work necessary to meet the purchasing agency's requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case of construction or standard commercial products.

(b) The firm fixed-price contract is one type of fixed-price contract. It provides a price that is not subject to adjustment due to variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the purchasing agency can be established at the outset. Bases upon which firm fixed prices may be established include:

(1) Adequate price competition for the contract;

(2) Comparison of prices in similar prior procurement in which prices were fair and reasonable;

(3) Establishment of realistic costs of performance by utilizing available cost or price data and identifying certainties in contract performance; or

(4) Use of other adequate means to establish a firm price.

(c) The fixed-price contract with price adjustment is another type of fixed-price contract. It provides for variation in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications to the work. The formula or other basis by which the adjustment in contract price can be made shall be specified in the solicitation and the resulting contract. Adjustment allowed may be upward or downward only or both upward and downward.

(d) Examples of conditions under which adjustments may be provided are:

(1) In fixed-priced contracts:

(A) Changes in the contractor's labor agreement rates as supplied to industry or area wide; or

(B) Changes due to rapid and substantial price fluctuations, which can be related to an accepted index; and

(2) In requirements contracts:

(A) When a general price change applicable

to all customers occurs; or

(B) When a general price change alters the base price, as a change in a manufacturer's price to which a fixed discount is applied pursuant to the contract to determine the contract price. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-137 Cost-reimbursement contract. (a) The cost-reimbursement contract, subject to section 3-122-133, provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with subchapter 15 and as provided in the contract.

(b) It establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed, except at its own expense, without prior approval or subsequent ratification by the procurement officer and, in addition, may provide for payment of a fee.

(c) It has a provision whereby the contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever occurs first.

(d) It is appropriate when the uncertainties involved in contract performance are of the magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract.

(e) It necessitates appropriate monitoring by agency personnel during performance so as to give reasonable assurance that the objectives of the contract are being met.

(f) It is particularly suitable for research, development, and study type contracts.

(g) It may be used only when it is determined that:

(1) A contract is likely to be less costly to the purchasing agency than any other type or that it is impracticable to obtain otherwise the goods, services, or construction;

(2) The proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by

the specified contract type contemplated; and

(3) The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

(h) The cost contract is one type of cost-reimbursement contract which provides that the contractor will be reimbursed for allowable costs incurred in performing the contract but will not receive a fee.

(i) The cost-plus-fixed fee contract is another type of cost-reimbursement contract:

(1) It provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is established at the time of contract award and does not vary whether or not the actual cost of contract performance is greater or less than the initial estimated cost established for the work. Thus, the fee is fixed but not the contract amount because the final contract amount will depend on the allowable costs reimbursed. The fee is subject to adjustment only if the contract is modified to provide for an increase or decrease in the scope of work specified in the contract.

(2) It can be either a completion form or term form.

(A) The completion form is one which describes the scope of work to be done as a clearly defined task or job with a definite goal or target expressed and with a specified end-product required. This form of cost-plus-fixed fee contract normally requires the contractor to complete and deliver the specified end-product as a condition for payment of the entire fixed-fee established for the work and within the estimated cost if possible. However, in the event the work cannot be completed within the estimated cost, the agency can elect to require more work and effort from the contractor without increase in fee provided it increases the estimated cost.

(B) The term form is one which describes the

scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time. The fixed fee is payable at the termination of the agreed period of time. Payment is contingent upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for and that the performance is considered satisfactory by the purchasing agency.

(C) The completion form of the cost-plus-fixed fee contract is preferred over the term form whenever the following can be defined with sufficient precision to permit the development of estimates within which prospective contractors can reasonably be expected to complete the work:

(i) The work itself; or

(ii) Specific milestones which are definable points in a program when certain objectives can be said to have been accomplished.

(D) In no event should the term form of the cost-plus-fixed fee contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time.

(j) The cost-plus-a-percentage-of-cost contract is another type of cost-reimbursement contract. Its use is restricted or prohibited, pursuant to section 3-122-133. Prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. The contract provides incentive for the contractor to incur cost at the expense of the State since the more the contractor spends, the greater its fee. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-138 <u>Cost-incentive contract.</u> (a) The cost-incentive contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the

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contractor is rewarded for performing at less than target costs or is penalized if it exceeds target cost.

(b) The profit or fee under the contract will vary inversely with the actual, allowable costs of performance and consequently is dependent on how effectively the contractor controls cost in the performance of the contract.

(c) The fixed-price cost incentive contract is one type of cost incentive contract. The parties establish at the outset a target cost, a target profit, a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with subchapter 15 and as provided in the contract. The final contract price is then established in accordance with the formula using the actual cost of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.

The fixed-price cost incentive contract serves three objectives:

(1) It permits the establishment of a firm ceiling price for performance of the contract which takes into account uncertainties and contingencies in the cost of performance;

(2) It motivates the contractor economically since cost is in inverse relation to profit--the lower the cost, the higher the profit; and

(3) It provides a flexible pricing mechanism for establishing a cost sharing responsibility between the State and contractor depending on the nature of the goods, services, or construction being procured, the length of the contract performance, and the performance risks involved.

(d) The cost-reimbursement contract with cost incentive fee is another type of cost-incentive contract. The parties establish at the outset a target cost, a target fee, a formula for increase or decrease of fee depending on whether actual cost of performance is less than or exceeds the target cost, with maximum and minimum fee limitations, and a cost ceiling which

represents the maximum amount which the agency is obligated to reimburse the contractor. The contractor continues performance until the work is complete or costs reach the ceiling specified in the contract. After performance is complete or costs reach the ceiling, the total incurred, allowable costs reimbursed in accordance with subchapter 15 and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor. This type of contract gives the contractor a stronger incentive to efficiently manage the contract than a cost-plus-fixed-fee contract provides.

(e) Prior to entering into any cost incentive contract, or any cost-reimbursed contract with cost incentive fee, the procurement officer shall make the written determination required by section 3-122-137(g). [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-139 Performance incentive contract. In a performance incentive contract, the parties establish at the outset a pricing basis for the contract, performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met. For example, early completion may entitle the contractor to a bonus while later completion may entitle the State to a price decrease. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-140 Time and materials contract. (a) A time and materials contract provides an agreed basis for payment for materials supplied and labor performed.

(b) A time and materials contract shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior agency approval.

(c) A time and materials contract shall be entered into only after the procurement officer determines in writing that:

(1) Agency personnel have been assigned to closely monitor the performance of the work; and

(2) In the circumstances, it would not be

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practicable to use any other type of contract to obtain needed goods, services, or construction, in the time required, and at the lowest cost or price to the purchasing agency. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-141 Labor hour contract. (a) A labor hour contract provides only for the payment of labor performed.

(b) A labor hour contract shall contain the same ceiling as provided in section 3-122-140(b).

(c) Prior to the award of the contract, the procurement officer shall make the determination as required in section 3-122-140(c). [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-142 Definite quantity contract. A definite quantity contract is a type of fixed-price contract that provides for delivery of a specified quantity of goods or services either at specified times or when ordered. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-143 Indefinite quantity contract. (a) An indefinite quantity contract is a type of fixed-price contract for an indefinite amount of goods or services to be furnished at specified times, or as ordered.

(b) The solicitation for an indefinite quantity contract:

(1) Shall include an approximate quantity or the best information available as to quantity;

(2) May provide a minimum quantity the purchasing agency is obligated to order and may also provide for a maximum quantity provision that limits the purchasing agency's obligation to order.

(c) A requirements contract is a type of indefinite quantity contract for goods or services that obligates the purchasing agency to order all the actual requirements of designated agencies during a specified period of time, and for the protection of the

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purchasing agency and the contractor, may include the following:

(1) A provision which requires the purchasing agency and any other users named in the solicitation to order their actual requirements of the goods or services covered; and

(2) A provision to reserve the right to take bids separately if a particular quantity requirement arises which exceeds the purchasing agency's normal requirements or an amount specified in the contract.

(d) An exemption from ordering under a requirements contract may be granted when the chief procurement officer, head of the purchasing agency, or a designee approves a finding that the good or service under the contract will not meet the needs of the purchasing agency. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-144 Incremental award contract. (a) An incremental award contract is a type of a definite quantity contract resulting from conditions under which it was either necessary or advantageous to award a contract to more than one supplier for the same item on a solicitation, or for similar items.

(b) An incremental award contract is a contract based on an award of portions of a definite quantity requirement to more than one contractor, and each portion is for a definite quantity and the sum of the portions is the total definite quantity required.

(c) This type of contract may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery dates.

(d) If this type of contract is anticipated prior to issuing a bid or proposal, the State shall reserve the right to make an incremental award and the criteria for award shall be stated in the bid or proposal and the bid or proposal shall provide for separate-item bids on less than the full quantity or the total delivery.

(e) Evaluation and award shall be made by accepting prices and deliveries beginning with the most economical and progressing to higher offers until the full requirements are committed at the lowest overall

cost available.

(f) Competitive sealed bidding, subchapter 5, is the conventional procurement method for establishing this type of contract, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined in accordance with subchapters 6, 8, and 10.

(g) The procurement officer shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-322) (Imp: HRS §103D-322)

§3-122-145 Multiple award contract. (a) A multiple award contract is a contract resulting from an award of an indefinite quantity requirement for one or more similar goods or services to more than one bidder or offeror. The relative importance of price may vary based on the requirement and method of source selection. In making a best value determination under a competitive sealed proposals process, the purchasing agency may consider among other factors: special features, trade-in, life cycle, warranties, service availability, past performance, environmental or energy efficiency considerations or both, and competition in the marketplace.

(b) The chief procurement officer shall determine, and the solicitation shall so state, if use of multiple award contracts is voluntary or mandatory for purchasing agencies.

(c) Multiple awards may be limited to a number of suppliers necessary to meet the valid requirements of using agencies and to provide for best value and competitive pricing.

(d) All eligible users of the contract shall be named in the solicitation or be allowed to participate at a later date.

(e) The State shall reserve the right to take offers separately if:

(1) A particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract; or

(2) The head of a purchasing agency approves a finding that the goods or services available under the contract will not meet a nonrecurring special need of the State.

(f) The contract shall allow the using agencies to procure goods produced, or services performed, incidental to the State's own programs, as correctional industries, when the goods or services satisfy the need.

(g) A multiple award contract may also be awarded through a single competitive solicitation on a geographic or regional basis, pursuant to section 3-122-146. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-322) (Imp: HRS §103D-322)

§3-122-146 Geographic or regional award contract. (a) Geographic or regional award contract is a type of multiple-award contract made when goods or services are required to widely scattered locations or a particular requirement is of a local nature.

(b) Geographic regions may include:

(1) Oahu as region 1, and further subdivided into leeward 1A, central Oahu-lower 1B, central Oahu-upper 1C, and windward 1D;

(2) Maui as region 2, Hawaii as region 3, Kauai as region 4;

(3) Those vendors that can provide goods, services, or construction anywhere in the State would be identified as region 5, or they may select one or more of the regions in paragraphs (1) and (2) depending on their capabilities.

(c) Geographic purchasing can be advantageous, or even necessary, for a number of reasons related to cost of transportation in terms of cost of the product or to the need for local service, and limits the purchases to firms located in the area involved and to firms which serve that area.

(d) Geographic bidding should not be used, however, where a larger contract can satisfy agencies requirements by more effective competition and at lower costs.

(e) If a regional award is anticipated prior to issuing a solicitation, the State shall reserve the right to make the award and the criteria for award shall be stated in the solicitation.

(f) The procurement officer shall make a written determination setting forth the reasons for a regional award, which shall be made a part of the procurement file. [Eff 12/15/95; comp 11/17/97; am and

comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-322) (Imp: HRS §§103D-322, 103D-904)

§3-122-147 Lease contract. (a) A lease is a contract for the use of goods under which title does not pass to the agency.

(b) A lease may be entered into provided:

(1) It is in the best interest of the purchasing agency;

(2) All conditions for renewal and costs of termination are set forth in the lease; and

(3) The lease is not used to circumvent normal procurement procedures.

(c) A lease contract shall comply with the certification of funds requirement, pursuant to section 3-122-102(b).

(d) The following lease arrangements are subject to the competitive sealed bidding or proposals process when section 103D-305, HRS, does not apply:

(1) When a lease is for at least one year;

(2) When a lease agreement contains an option to purchase and the total expenditure under this option includes lease or rental payments; or

(3) When the total expenditure is for a multi-term contract.

(e) When the lease arrangement is subject to the competitive sealed bidding or proposals process and an option to purchase is contemplated, an option to purchase provision shall be included in the solicitation. The provision shall provide that to exercise the option is at the purchasing agency's discretion only, and not subject to agreement or acceptance by the contractor. Before exercising the option the procurement officer shall:

(1) Investigate alternative means of procuring comparable goods; and

(2) Compare estimated costs and benefits associated with the alternative means and the exercise of the option, for example, the benefit of buying new state-of-the-art goods compared to the estimated, initial savings associated with exercise of a purchase option. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-148 Installment purchase payment contract. (a) Goods contracts may provide for purchase payments, including interest charges, over a period of time.

(b) Installment payments should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the head of the purchasing agency.

(c) Heads of purchasing agencies shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained.

(d) When used, a provision for installment payments shall be included in the solicitation document.

(e) An installment purchase payment contract shall comply with the certification of funds requirement pursuant to section 3-122-102(b). [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-149 Multi-term contract. (a) The objective of the multi-term contract is to encourage effective competition or otherwise promote economies in the procurement of goods and services.

(b) A multi-term contract extends over more than one fiscal period but funds are available for only the initial fiscal period, and the contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the good or service delivered under the contract.

(d) A multi-term contract may be considered:

(1) When it is in the best interest of the State to provide uninterrupted service over more than one fiscal period and where the contract will result in significantly more favorable contract terms and prices compared to a series of shorter term contracts for the same good or service due to:

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(A) High start-up costs; for example, a student bus transportation contractor would incur high start-up costs for buses and other equipment solely to meet the State's requirements but the equipment would have useful life in excess of one year; or

(B) A changeover of service contractors with both high phase-in and high phase-out costs during a transition period;

(2) When special production, involving alteration in the contractor's facilities or high start-up costs, for definite quantities of goods for more than one fiscal period is necessary to best meet the needs of the State and funds are available only for the initial fiscal period;

(3) When firms, otherwise not willing or able to compete because of high start-up costs or capital investment in facility expansion, will be encouraged to participate in the competition because of assurance of recouping the costs during the period of contract performance;

(4) When lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

(5) When stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or

(6) When the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

(e) A multi-term contract may be entered into for any period of time deemed to be in the best interest of the State, provided the head of the purchasing agency determines in writing that:

(1) The contract will serve the best interest of the State by encouraging effective competition or otherwise promoting economies in procurement; and

(2) Sufficient funds to pay for the initial term of the contract are available.

(f) The solicitation for a multi-term contract shall state:

(1) The term of the contract and conditions for

renewal or extension, if any;

(2) That funds are available for only the initial term of the contract, and the contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds;

(3) The amount of goods or services required for the proposed contract period;

(4) That a unit price shall be given for each good or service, and that the unit prices shall be the same throughout the contract, except to the extent price adjustment is allowed;

(5) That the contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the initial term of the contract; however, this does not affect either the State's rights or the contractor's rights under any termination clause of the contract;

(6) That the head of the purchasing agency must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period; and

(7) That, in the event of cancellation as provided in paragraph (5), the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

(g) A cancellation, as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available.

(1) Cancellation of a multi-term contract shall result when the head of the purchasing agency:

(A) Notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or

(B) Fails to notify the contractor that funds are available for the succeeding fiscal period or that funds which may be used for the contract have not been appropriated or otherwise made available, by the date set forth in the

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contract, unless the parties agree to extend the date;

(2) This subsection does not limit the rights of the State or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this subsection. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-315)

§§3-122-150 to 3-122-154 (Reserved).

SUBCHAPTER 17

§3-122-155 REPEALED. [R MAR 21 2008]

§§3-122-156 to 3-122-165 REPEALED. [R MAR 21 2008]

SUBCHAPTER 18

RIGHT TO INSPECT PLANT

§3-122-166 Inspection of plant or site. Circumstances under which the State may perform inspections include, but are not limited to, inspections of the contractor's plant or site in order to determine:

(1) Whether the standards set forth in section 3-122-108 have been met or are capable of being met; and

(2) If the contract is being performed in accordance with its terms. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-167 Access to plant or place of business. The State may enter the plant or place of business of a contractor, subcontractor, vendor, material supplier, or a professional services provider to:

(1) Inspect goods or services for acceptance by

the State pursuant to the terms of a contract;

(2) Audit cost or pricing data or audit the books and records pursuant to section 3-122-175; and

(3) Investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to sections 3-126-11 through 3-126-18. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-168 Inspection and testing of goods and services. (a) State contracts may provide that the State may inspect supplies and services as required at any site or facility and perform tests to determine whether they conform to solicitation requirements, or after award, to contract requirements, and are therefore acceptable. The inspections and tests shall be conducted in accordance with the terms of the solicitation and contract.

(b) The chief procurement officer may establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by any state agency, and the application of resulting information and data to specifications or procurements. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-169 Conduct of inspections. (a) Inspections or tests shall be performed so as not to unduly delay the work. The presence or absence of an inspector shall not result in the waiver of any requirements of the contract, nor shall any act, statement or omission by an inspector constitute or be deemed a change unless the procedure for changes is followed.

(b) When an inspection is made in a plant or place of business, the contractor or subcontractor shall provide without charge, all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

(c) Inspection or testing of supplies and services performed at a plant or place of business shall be performed at reasonable times. [Eff 12/15/95;

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am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-170 Inspection of construction projects. On-site inspection of construction shall be performed in accordance with the terms of the contract. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§§3-122-171 to 3-122-174 (Reserved).

SUBCHAPTER 19

RIGHT TO AUDIT RECORDS

§3-122-175 Statutory authority to audit. Pursuant to section 103D-317, HRS, the State may, at reasonable times and places, audit the books and records of a contractor, prospective contractor, subcontractor, or prospective subcontractor which are related to:

(1) The cost or pricing data submitted under sections 3-122-122 through 3-122-130;
(2) A state contract, including subcontracts, other than a firm fixed-price contract, awarded pursuant to subchapters 5 through 10; and
(3) Any claim for additional compensation or for changes. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-176 Auditors' audit reports. Audits requested under this subchapter shall be performed by the office of the chief procurement officer, the head of a purchasing agency, the attorney general or corporation counsel with legal authority over the procuring agency, or an independent auditor. An audit report shall be prepared in accordance with section 3-122-178 or section 3-122-180. Except when the audit is done in response to a claim for additional compensation or in connection with an investigation for criminal conduct or fraud relating to the procurement, the report shall be made available to the party audited

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upon request. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-177 Cost or pricing data audit. (a) The chief procurement officer, head of a purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer may require an audit of cost or pricing data submitted under section 3-122-125.

(b) An audit should be required when in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:

(1) A question as to the adequacy of accounting policies or cost systems;
(2) A substantial change in the methods or levels of operation;
(3) Previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
(4) A lack of cost experience due to the procurement of a new supply or service; or
(5) Other evidence that an audit is in the State's best interests as determined by the chief procurement officer, head of the purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-178 Cost or pricing data audit report. (a) When the chief procurement officer, the head of a purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer requires an audit under section 3-122-177, the auditor shall submit a written report to the officer by an agreed upon date.

(b) Subject to final determination by the auditor, the report should contain the following in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:

(1) A description of the original proposal and all submissions of cost or pricing data;
(2) An explanation of the basis and the method used in preparing the proposal;
(3) A statement identifying any cost or pricing

data not submitted but examined by the auditor which has a significant effect on the proposed cost or price;

(4) A description of any deficiency in the cost or pricing data not submitted and an explanation of its effect on the proposal;

(5) A statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and

(6) A statement identifying any information obtained from other sources. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-179 Contract audit. (a) Under the authority of section 3-122-175, the type of contract under which books and records should be audited is that in which price is based on costs or is subject to adjustment based on costs, or that in which auditing would be appropriate to assure satisfactory performance, as a time and materials contract.

(b) The requirement of a contract audit may be warranted when a question arises in connection with:

(1) The financial condition, integrity, and reliability of the contractor or subcontractor;

(2) Any prior audit experience;

(3) The adequacy of the contractor's or subcontractor's accounting system;

(4) The number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;

(5) The use of federal assistance funds;

(6) The fluctuation of market prices affecting the contract; or

(7) Any other situation when the procurement officer finds that an audit is necessary for the protection of the State's interest.

(c) The scope of the audit may be limited by the chief procurement officer, the head of the purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-180 Contract audit report. Where the chief procurement officer, head of a purchasing agency, or a designee of either officer requires a contract audit under section 3-122-179, the auditor shall submit a written report to the officer by an agreed upon date. The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-181 Retention of books and records. (a) Any contractor who receives a contract, change order, or contract modification for which cost or pricing data are required shall maintain the books and records that relate to the cost or pricing data for three years from the date of final payment under the contract.

(b) Books and records that relate to a state contract, including subcontracts, other than a firm fixed-price contract, awarded under any method set forth in section 3-122-175 shall be maintained:

(1) By a contractor, for three years from the date of final payment under the price contract; and

(2) By a subcontractor, for three years from the date of final payment under the subcontract. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-182 Sanctions for lack of cooperation. A party or entity that fails to comply or fully cooperate with an authorized audit shall be subject to any and all of the following sanctions:

(1) Rejection of the claim related to the audit; or

(2) Declaration of contractor default or breach of contract; or

(3) Debarment from future contracts pursuant to section 103D-702, HRS. [Eff12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-183 to 3-122-185 (Reserved).

§3-122-187 TO 3-122-190 REPEALED. [R MAR 21 2008]

SUBCHAPTER 20

§3-122-186 REPEALED. [R MAR 21 2008]

SUBCHAPTER 21

REPORTING OF ANTICOMPETITIVE PRACTICES

§3-122-191 Anticompetitive practices. For the purposes of these rules, an anticompetitive practice is a practice among bidders or offerors which reduces or eliminates competition or restrains trade. An anticompetitive practice can result from an agreement or understanding among competitors to restrain trade as submitting collusive offers, or result from illicit business actions which have the effect of restraining trade, as controlling the resale price of products or an improper collective refusal to submit an offer. Indications of suspected anticompetitive practices include, but are not limited to, identical offers, rotated low offers, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-192 Independent price determination. Every solicitation shall provide that by submitting an offer, the offeror certifies that the price submitted was independently arrived at without collusion. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-193 Detection of anticompetitive practices. In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the procurement officer should be alert and sensitive to conditions of the market place

and will often find it necessary to perform the following, as appropriate:

(1) Study the pricing history of a good, service, or construction item over a period of time sufficient to determine any significant pricing patterns or changes;

(2) Review similar state contract awards over a period of time; or

(3) Consult with outside sources of information, as offerors who have competed for similar state business in the past but who are no longer competing for the business. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-194 Identical bidding and price fixing. (a) The term "identical bidding" means the submission by offerors of the same total price or the same price on a particular line item. The submission of identical offers may or may not signify the existence of collusion. In some instances, price controls imposed by state or federal governments result in the submission of identical offers. Identical offers for supplies are more likely to occur in the absence of collusion if:

(1) The supply is a commodity with a well-established market price or a brand name with a "suggested retail price;"

(2) The quantity being purchased is small in relation to the supplier's total sales;

(3) Early delivery is required; or

(4) Transportation expenses are low relative to total costs.

(b) In seeking to determine whether collusion has taken place, the procurement officer should view the identical offers against present and past pricing policies of the bidders or offerors, the structure of the industry involved including comparisons of prices f.o.b. shipping point and f.o.b. destination, and the nature of the supply, service, or construction involved, as whether it is a basic chemical or metal. Identical offers may also result from resale price maintenance agreements which are described in section 3-122-83. Any other attempt by offerors to fix prices should also be reported. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

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§3-122-195 Other anticompetitive practices. (a) The practices which are described in this section and which the procurement officer suspects might be anticompetitive shall be reported in accordance with section 3-122-196.

(b) Rotated low offers result where all offerors participating in the collusive scheme submit offers and by agreement, alternate being the lowest offeror. To aid in determining whether rotation may be occurring, the procurement officer should review past similar procurements in which the same offerors have participated.

(c) The practice of resale price maintenance consists of an agreement between a manufacturer and a distributor or a dealer to fix the resale price of a good. A procurement officer should consider the possibility that an agreement exists where prices offered adhere to an established pattern, as a published price schedule, and when identical bidding occurs.

(d) Sharing of the business occurs where potential offerors allocate business among themselves based on the customers or the territory involved. Thus, a procurement officer might discover that a potential offeror is not participating in a state procurement because a particular state agency, or a particular territory, has not been allocated to the offeror by the producer or manufacturer.

(e) "Tie-in" sales are those in which an offeror attempts to sell one good or service only upon the condition that the procurement officer purchase another particular good or service.

(f) A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a state procurement until the boycotting competitors' conditions are met by the boycotted competitor or the State. The boycott of a competitor by other competitors may have an effect on the market structure or price of a good, service, or construction item needed by the State. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-196 Reporting suspected anticompetitive

practices. The chief procurement officer, in consultation with the respective attorney general or corporation counsel, may develop procedures, including forms, for reporting suspected anticompetitive practices. A procurement officer who suspects that anticompetitive practice has occurred or may be occurring shall follow these procedures. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§§3-122-197 to 3-122-200 (Reserved).

SUBCHAPTER 22

RETENTION OF PROCUREMENT RECORDS

§3-122-201 Retention of procurement records. All procurement records shall be retained and disposed of in accordance with chapter 94, HRS, and records retention guidelines and schedules approved by the governmental body. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-320)

§§3-122-202 to 3-122-210 (Reserved).

SUBCHAPTER 23

§3-122-211 REPEALED. [R MAR 21 2008]

§3-122-212 to 3-122-220 REPEALED. [R MAR 21 2008]

SUBCHAPTER 24

BID SECURITY, CONTRACT PERFORMANCE, AND PAYMENT BONDS

§3-122-221 General. (a) The term "bid security", as used in this subchapter means security provided at the time an offer is submitted.

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(b) Bid security protects the State against the failure or refusal of an offeror to execute the contract for the work bid or to supply the necessary performance and payment bonds, as required.

(c) A contract performance bond indemnifies the State against loss resulting from the failure of the contractor to perform a contract, in particular a construction contract, in accordance with the plans and specifications.

(d) A contract payment bond guarantees payment and protection for those furnishing labor and materials to the contractor or its subcontractors for the work bonded. [Eff 12/15/95; am and comp 11/17/97; comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-323, 103D-324) (Imp: HRS §§103D-323, 103D-324)

§3-122-222 Acceptable bid security, contract performance and payment bonds. (a) Acceptable bid security and contract performance and payment bonds, pursuant to sections 103D-323 and 103D-324, HRS, shall be limited to:

(1) Surety bond underwritten by a company licensed to issue bonds in this State;
(2) Legal tender; or
(3) A certificate of deposit; credit union share certificate; or cashier's, treasurer's, teller's, or official check drawn by, or a certified check accepted by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, and payable at sight or unconditionally assigned to the procurement officer advertising for offers. These instruments may be utilized only to a maximum of $100,000. If the required amount totals over $100,000, more than one instrument not exceeding $100,000 each and issued by different financial institutions shall be accepted.

(b) All documentation provided to the purchasing agency shall contain the original signatures signed in ink. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-323, 103D-324) (Imp: HRS §§103D-323, 103D-324)

§3-122-223 Bid security. (a) Bid security shall

be required for:

(1) Construction bids exceeding the limits of section 103D-305, HRS;

(2) Goods and services bids exceeding the limits of section 103D-305, HRS, when the head of a purchasing agency has secured the approval of the chief procurement officer; and

(3) Federally funded contracts wherein the conditions of the funding requires performance or payment bonds or both.

(b) Bid security, when required, shall be in an amount equal to at least five per cent of the base bid and additive alternates or in an amount required by the terms of the federal funding.

(c) If a contractor fails to accompany its offer with the bid security when required, the offer shall then be deemed nonresponsive in accordance with the definition of "responsive bidder or offeror" in section 3-120-2, except as provided by subsection (d).

(d) If an offer does not comply with the security requirements of this subchapter, the offer shall be rejected as nonresponsive, unless the failure to comply is determined by the chief procurement officer, the head of a purchasing agency, or a designee of either officer, to be nonsubstantial where:

(1) Only one offer is received, and there is not sufficient time to resolicit the contract;

(2) The amount of the bid security submitted, though less than the amount required by the solicitation, is equal to or greater than the difference in the price stated in the next higher acceptable offer plus an amount to cover reasonable administrative costs and expenses, including the cost of rebidding the project, resulting from the failure of the bonded bidder to enter into a contract for the work bid; or

(3) The bid security becomes inadequate as a result of the correction of a mistake in the offer or offer modification in accordance with section 3-122-31, if the offeror increases the amount of security to required limits within the time established by the procurement officer.

(e) When it is determined that failure to comply with required bid security is nonsubstantial, the chief procurement officer, the head of a purchasing agency, or a designee of either officer shall indicate the

reasons for that determination in writing and a copy of the determination shall be kept in the contract file and made available to the public upon request. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-323) (Imp: HRS §103D-323)

§3-122-224 Contract performance and payment bonds. (a) Performance and payment bonds shall be required for:

(1) Construction contracts exceeding the limits of section 103D-305, HRS;

(2) Goods and services contracts exceeding the limits of section 103D-305, HRS, when the head of the purchasing agency has secured the approval of the chief procurement officer; and

(3) Federally funded contracts wherein the conditions of the funding requires a performance or payment bond or both.

(b) The amounts of the performance and payment bonds, when required, shall be as follows:

(1) For construction contracts, performance and payment bonds shall each be in an amount equal to one hundred per cent of the amount of the contract price;

(2) For goods and services contracts, performance and payment bonds shall each be in an amount not to exceed fifty per cent of the amount of the contract price;

(3) For contracts where contract price cannot be determined at the time of award, the amounts of the performance and payment bonds shall each be stated in the solicitation; and

(4) For federally funded contracts, performance or payment bond or both shall each be in amount required by the terms of the federal funding.

(c) The performance and payment bonds, if required, shall be delivered by the contractor to the State at the same time the contract is executed. If the contractor fails to deliver the required performance and payment bonds, the contractor's award shall be cancelled, the contractor shall be subject to a claim by the State for all resulting damages, its bid security shall be enforced, and award of the contract may be made to the next lowest offeror in accordance

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with subchapter 11. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-225 Reduction of contract performance and payment bond amounts. (a) Prior to the deadline for receipt of offers and during performance of the contract, the amounts of a performance bond and a payment bond may be reduced upon written determination by the chief procurement officer or head of a purchasing agency that it is in the best interest of the State to do so.

(1) For construction contracts only, and prior to the deadline for receipt of offers, reduction of performance and payment bond amounts shall be limited to not less than fifty per cent of the contract price;

(2) During performance of the contract, the amount of the performance bond may be reduced as work is completed and the amount of the payment bond may be reduced as payments are made by the contractor.

(b) Additional performance bond or payment bond may be required by the procurement officer for a contract change order or modification where the contract amount increases. [Eff 12/15/95; comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-226 REPEALED. [R MAR 21 2008]

§3-122-227 Payment claims against the bond. (a) Any person or entity who has furnished labor or material to the contractor for the work provided in the contract, for which a payment bond or a performance and payment bond is furnished under this section, and who has not been paid amounts due before the expiration of a period of ninety days after the day on which the last of the labor was done or performed or material was furnished or supplied, for which such a claim is made, may institute an action for the amount, or balance thereof, unpaid at the time of the institution of the action against the contractor or the contractor and its sureties, on the payment bond and have their rights and claims adjudicated in the action, and judgment rendered

thereon; subject to the State's priority on the bond.

(b) If the full amount of the liability of the contractor or the contractor and its sureties on the security is insufficient to pay the full amount of the claims, then, after paying the full amount due the State, the remainder shall be distributed pro rata among the claimants.

(c) As a condition precedent to any such suit, written notice shall be given to contractor and surety, within ninety days from the date on which the person did or performed the last labor or furnished or supplied the last of the material for which claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied for whom the labor was done or performed.

(d) The written notice shall be served by registered or certified mailing of the notice, to the contractor and surety, at any place they maintain an office or conduct their business, or in any manner authorized by law to serve summons.

(e) Every suit instituted under subsection (a) shall be brought in the circuit court of the circuit in which the project is located, but no suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied for the work provided in the contract. The obligee named in the bond need not be joined as a party in any suit.

(f) The terms "labor" and "material" have the same meanings in this section as the terms are used in section 507-41, HRS. [Eff 12/15/95; am and comp 11/17/97; am and comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-228 Bond forms. (a) The required bond forms for bid security, performance, payment, and combination performance and payment bonds shall be in conformance with sections 3-122-221, 3-122-222, and 3-122-227 and shall be as specified by the procurement policy board and issued by procurement directive.

(b) Certified copies of bonds may be requested and obtained by any person from the State upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original. [Eff 12/15/95; am and comp 11/17/97;

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comp MAR 21 2008] (Auth: HRS §§103D-202, 103D-325) (Imp: HRS §103D-325)

§§3-122-229 to 3-122-240 (Reserved).

SUBCHAPTER 25

FISCAL RESPONSIBILITY

§3-122-241 Fiscal responsibility. Every contract modification, change order, or contract price adjustment under a contract shall be subject to prior written certification by the appropriate fiscal officer for funding the project or the contract, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer discloses a resulting increase in the total project budget or the total contract budget, the procurement officer shall not execute or make contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with this section. [Eff 12/15/95; comp 11/17/97; comp MAR 21 2008] (Auth: HRS §103D-326) (Imp: HRS §103D-326)

§3-122-242 (Reserved).

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DEPARTMENT OF ACOUNTING AND GENERAL SERVICES

Amendments to and compilation of chapter 3-122, Hawaii Administrative Rules, on the Summary Page dated February 21, 2008 were adopted at the Procurement Policy Board meeting on February 21, 2008 following a public hearing held on February 6, 2008, after public notice was given in the Honolulu Star-Bulletin, The Maui News, The Garden Island, Hawaii Tribune-Herald, and West Hawaii Today newspapers on January 5, 2008.

The rules replace interim rules previously adopted and effective on 7/25/02, 7/03/03, 11/15/03, 1/1/05, 4/18/05, 2/27/06, 10/09/06, and 9/04/07. The rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

GREGORY L. KING
Chairperson
Procurement Policy Board

RUSS K. SAITO
State Comptroller

LINDA LINGLE
Governor
State of Hawaii

Dated: MAR 10 2008

Filed

'08 MAR 11 A10:39
LIEUTENANT GOVERNOR'S OFFICE

APPROVED AS TO FORM:

Deputy Attorney General

HAR Chapter 3-122
PROCUREMENTS APPROVED FOR COMPETITIVE SEALED PROPOSALS
07/13/06

The following goods, services, or constructions may be procured by Competitive Sealed Proposals, pursuant to HAR §3-122-45, and has been approved by the procurement policy board:

No.	Competitive Sealed Proposal
1	Consulting services in the areas of software and telecommunications.
2	Travel agency services to include air and ground transportation, and lodging services.
3	Computer software and hardware systems.
4	Design and build construction projects.

HAR Chapter 3-122
PROCUREMENTS APPROVED FOR SOLE SOURCE
01/18/07

The following list of Sole Source procurements, pursuant to HAR §3-122-81, has been approved by the procurement policy board:

Sole Source No.	Sole Source
1	Rental of booth space for exhibits at conventions and trade shows when organized by a single sponsor. Criteria: When rental is available only through a single organizer or sponsor of the convention or trade show.
2	For the repair, replacement, installation (connection, activation or hookup), or relocation of public utility company equipment or facilities. Criteria: When the equipment or facilities are owned or controlled by utility companies such as an electric, telephone, gas, or cable television company.
3	Annual license renewal and maintenance for computer software. Criteria: When the license renewal and maintenance can be obtained from only a single source, normally the developer of the software.
4	Procurement of computer software conversions, modifications, and maintenance for existing programs from the manufacturer of the software. Criteria: When the conversion, modification, or maintenance can only be obtained from the manufacturer of the software.
5	Transcripts of court proceedings. Criteria: When the transcripts of court proceedings are only available from the respective assigned court reporter provided by the Judiciary.
6	Repair and maintenance services and supplies from the original equipment manufacturer or its designated representative; when the manufacturer or its designated representative is required to provide the services and supplies to retain the manufacturer's warranty or guarantee. Criteria: When the services or supplies can only be obtained from the manufacturer or its designated representative to retain the manufacturer's warranty or guarantee.
7	Procurement of equipment upgrades from the original manufacturer to existing equipment and information technology hardware, when the upgrades can only be obtained from the manufacturer. Criteria: When the upgrades are available only from the manufacturer.