

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of
Subchapter 9, Chapter 3-124 (Interim)
Hawaii Administrative Rules
July 16, 2009

SUMMARY

1. §§3-124-70 to 3-124-74 are amended.
2. Subchapter 9 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

SUBCHAPTER 9

SMALL BUSINESS PREFERENCE RULES

Subchapter 9 Small Business Preference Rules
(Interim)

§3-124-70	Purpose
§3-124-71	Small Business Utilization Council
§3-124-72	Administrator of the state procurement office
§3-124-73	Chief procurement officers and heads of purchasing agencies
§3-124-73.1	Implementation of Small Business Preference by Heads of Purchasing Agencies
§3-124-74	Procedures and Clauses

Historical Note: This chapter:

1. Replaces interim rules effective 1/6/07 (file no. 2739) that added a new Subchapter 9 with new §§3-124-70, 3-124-71, 3-124-72, 3-124-73, and 3-124-74.
2. Replaces interim rules effective 3/3/08 (file no. 2799) that added §3-124-73.1 and compiled Subchapter 9.
3. Replaces interim rule effective 10/3/08 (file no. 2826) that amended §3-124-71.

§3-124-70 Purpose. The purpose of this subchapter is to establish procedures to implement the Hawaii Small Business Preference program. The procedures are intended to be flexible to allow for ongoing assessment and modification to:

- (1) Strengthen and nurture emerging Hawaii industries;
- (2) Increase competition by broadening the local small business contractor base;
- (3) Develop and enhance the ability of local small businesses to win and successfully perform federal, state, and local government contracts;
- (4) Provide increased employment opportunities for local workers in high-skill trades and technical fields; and
- (5) Ensure the Small Business Preference program is implemented so as to maximize competition and obtain quality goods, services, and construction at reasonable prices. [Eff 1/6/07; comp 3/3/08; am and comp **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

S3-124-71 Small Business Utilization Council. (a)

There is established a Small Business Utilization Council. The Council shall consist of:

Voting Members

- (1) Chair - Director, Department of Business, Economic Development & Tourism;
- (2) Vice-Chair - Director, Department of Accounting and General Services;
- (3) Member - Director, Department of Transportation;
- (4) Member - Administrator of the State Procurement Office; and
- (5) Member- Such other agencies as may be nominated by the designated members and approved by the board.

Non-voting Members:

- (6) Such other non-voting members as may be nominated by the voting members and approved by the Board.

(b) The Council shall provide the Procurement Policy Board specific recommendations to:

- (1) Set annual small business utilization goals;
- (2) Adopt, and modify as needed, size standard criteria to identify business as qualified to

participate in the program. As the initial program size standard criteria, the Council may recommend the standards set under federal Small Business Administration programs and include as eligible contractors all those enrolled in Small Business Administration programs.

(A) Procurement Directive No. 2008-06, adopted the Small Business Administration guidelines for small business size determinations.

(3) Identify emerging industries, geographic areas within the State, and under-utilized workforce resources where government purchases using small business preferences will promote the purposes of this subchapter and the improve the welfare of Hawaii's businesses and workers.

(A) Procurement Directive No. 2008-06 approved the geographic areas set-asides for the Waianae District, Kau and Puna Districts, Hamakua Coast and the island of Molokai; and

(B) Procurement Directive No. 2009-01 approved targeted areas of emerging industries for 'custom computer programming/software development' and 'energy efficiency' using alternative energy for energy efficiency programs.

(4) Coordinate with purchasing agencies to promote and encourage set-asides for small businesses of such contracts as are appropriate for performance by small businesses.

(c) The Council shall monitor and analyze the results of the Hawaii Small Business Preference program and prepare for the Procurement Policy Board, an annual small business utilization report suitable for public release and submission to the legislature and the governor. The report shall contain data and analysis addressing:

(1) The total dollar amount of expenditures on contracts awarded to small businesses under this program by purchasing agency;

(2) Industries, geographic areas, labor pools or other groups targeted for assistance under the program;

- (3) Assessments of success achieved and short comings identified in the operation of the program; and
- (4) Recommendations for program improvements.

(d) In performing its obligations, the Council may consult with the Department of Business, Economic Development and Tourism and any other state or local agency, industry groups, labor organizations, federal purchasing agencies, the federal Small Business Administration, and other organizations or groups the Council deems helpful in achieving the goals of the program. [Eff 1/6/07; comp 3/3/08; am 10/03/08; am and comp **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

§3-124-72 Administrator of the state procurement office. The Administrator of the State Procurement Office shall:

- (1) Provide administrative support and assistance to the Council in achieving the purposes of this program;
- (2) Implement the Procurement Policy Board actions on Council recommendations through the issuance of procurement directives and circulars to inform the public and purchasing agencies of goals, size standards, and procedures under this program;
- (3) Collect procurement information from purchasing agencies as need to support the Council's reporting obligations;
- (4) Consult and coordinate with the Director, Department of Business, Economic Development and Tourism to obtain necessary data analysis, economic information, and guidance the Director considers necessary and appropriate to assist the Council in the performance of its functions;
- (5) Establish and operate web-based information systems and other appropriate methods to publicize, promote, and support this program. [Eff 1/6/07; comp 3/3/08; am and comp **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

§3-124-73 Chief procurement officers and heads of purchasing agencies. The various chief procurement

officers and heads of purchasing agencies shall comply with reporting requirements and contracting procedures established by the Policy Board. In overseeing the overall procurement program under their jurisdiction, Chief Procurement Officers will apply the criteria set by the Policy Board and set-aside such contracts as are susceptible to performance by small businesses. For contracts that are not susceptible to performance by small businesses, chief procurement officers shall cause to be placed in such solicitations and resulting contracts, evaluation criteria and performance clauses that encourage utilization of small businesses. [Eff 1/6/07; comp 3/3/08; am and comp **AUG 24 2009**] (Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

§3-124-73.1 Implementation of Small Business Preference by Heads of Purchasing Agencies. (a) Heads of purchasing agencies shall implement the Hawaii Small Business Preference by doing the following:

- (1) Step #1 - Identification of Relevant Size Standard. Heads of purchasing agencies shall require that each procurement proposed to meet an agency need include in the proposal documents the identification of the applicable small business size standard set by the policy board for the type of work to be solicited.
- (2) Step #2 - Identification of Individual Procurements for small business Set-Aside. Heads of purchasing agencies shall review each proposed procurement and determine whether the procurement is suitable for performance by businesses meeting the applicable small business size standard. Factors to be considered in making the determination include anticipated manpower requirements, bonding capacity, contractor financing needs, and any other work and responsibility factors relevant to the individual procurement.
 - (i) Procurements identified by the policy board for small business utilization.

Pursuant to HAR § 3-124-71, the Small Business Utilization Council recommends to the policy board for its approval the identification of targeted areas of emerging industries, geographic areas within the state, and under-utilized workforce resources where government purchases from small businesses would promote the purposes of HRS § 103D-906. If the proposed procurement falls within an industry or other targeted area approved by the policy board for small business utilization and the work is susceptible of performance by a small business, the head of purchasing agency shall set the procurement aside for competition limited to small businesses.

- (ii) If the proposed procurement does not fall within an area targeted for small business utilization by the policy board but is susceptible of performance by a small business, the head of the purchasing agency may set the procurement aside for competition limited to small businesses. In exercising discretion to set aside procurements not identified for small business utilization by the policy board, the head of the purchasing agency shall consider whether the set aside of the procurement will further the achievement of any small business utilization goals and whether set aside will promote the development of future competition for work of the nature required by the proposed procurement.

- (3) Step #3 - Insertion of small business set-aside solicitation provisions. (a) For those procurements the head of purchasing agency sets aside for small business

- utilization, the head of contracting agency shall direct insertion into the solicitation of the provisions provided at HAR §§ 3-124-74(a)(1), (2), (3) and (7). (b) For those procurements the head of purchasing agency sets aside for very small businesses under such criteria as the policy board may establish, the head of the purchasing agency shall direct insertion into the solicitation of the provisions provided at HAR §§ 3-124-74(a)(4) and (7).
- (4) Step #4 - Identification of individual procurements for full and open competition. If the head of the purchasing agency determines the procurement is not susceptible of performance by a small business, the head of the purchasing agency shall require that the successful competitor for the procurement develop and implement a small business utilization plan as a part of the competitive process. To impose this requirement, the head of purchasing agency shall direct the insertion into the solicitation of the provision at HAR § 3-124-74(a)(5). The Head of the purchasing agency shall also direct the insertion of either the small business subcontracting incentive clause or the liquidated damages clause at HAR §§ 3-124-74(a)(6). The determination of which of these alternate clauses is to be inserted into the solicitation shall be as directed by the chief procurement officer or designee.
- (5) Step #5 - Competition of All Procurements. The Hawaii small business preference procedures operate solely to identify the appropriate class of competitors for agency procurements. The small business preference procedures do not release the agency from its obligation to use competitive source selection requirements. Accordingly, heads of purchasing agencies

shall direct and require that all procurements set aside for small business be processed in compliance with applicable source selection procedures.

(b) Reliance upon federal small business preference program principles. In the implementation and interpretation of this section, contractors and procurement officials may reference and rely upon relevant small business preference principles set out in Federal Acquisition Regulation (FAR) Part 19, unless such principles are inconsistent with the provisions of this section. [Eff 3/3/08; am and comp **AUG 24 2009**]
(Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

§3-124-74 Procedures and Clauses. (a) In implementing the program and applying such procedures and criteria as the Council may direct, Chief Procurement Officers shall use solicitation provisions substantially as follows:

- (1) A Notice to Offerors shall be included in all solicitations set-aside for award to small businesses by the Chief Procurement Officer.

NOTICE OF SMALL BUSINESS SET-ASIDE

- (a) Definition. "Small business concern," as used in this clause, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.
- (b) General.
 - (1) Offers are solicited only from small business concerns. Offers received from concerns that are not small business concerns shall be rejected.

- (2) Any award resulting from this solicitation will be made only to a small business concern.

(End of Solicitation Provision)

- (2) The solicitation shall include the following provision informing all Offerors of the requirement for good faith representation of size status, the meaning of the representation, and the procurement officer's enforcement authority.

**MEANING OF REPRESENTATION BY OFFEROR
& PROTEST AGAINST STATUS.**

- (a) To be eligible for award of this contract as a small business, Offeror must represent in good faith that it is a small business at the time of its written representation. The representation must reflect that Offeror meets the definition of a small business concern as stated in the solicitation.
- (b) The procurement officer shall accept an Offeror's representation that it is a small business unless another Offeror challenges Offeror's small business representation to the contracting officer through applicable protest procedures under HAR Chapter 126.
- (c) Upon receipt of a protest, the Chief Procurement Officer shall require the Offeror to provide proof of its status as an eligible small business Offeror.
- (d) If the Chief Procurement Officer determines that the Offeror has misrepresented its status as an eligible small business, the Chief Procurement Officer may disqualify the Offeror from the competition.

- (e) If the Chief Procurement Officer concludes the misrepresentation was not inadvertent and was intended to unfairly enable the Offeror to compete in a solicitation when it knew or should have known it was not eligible, the Chief Procurement Officer shall initiate debarment action under HAR Chapter 126.
- (f) Any time after contract award, the procurement officer may question the small business representation of any Offeror and require the Offeror to confirm its represented size status and eligibility for award. If the procurement officer determines the Offeror misrepresented its size status, the procurement officer may terminate the contract for cause and resolicit unless the Chief Procurement Officer determines in writing that contract termination would be detrimental to the interests of the state. The Chief Procurement Officer shall also determine whether to initiate debarment proceedings under HAR Chapter 126 based upon the Offeror's misrepresentation of size status and eligibility.

(End of Solicitation Provision)

- (3) The solicitation shall include a provision as follows that states the small business eligibility criteria and requiring each Offeror to state affirmatively that it is eligible for award under the applicable criteria. The provisions shall further require the Offeror to disclose its number of employees and gross revenues.

SMALL BUSINESS PROGRAM REPRESENTATIONS

- (a) The small business eligibility criteria for this is ____ [The procurement officer shall insert size

standard, geographic location of headquarters or other criteria as published in Board directives].

- (b) Offeror hereby affirmatively represents that it is a qualified small business concern eligible for award of the contract under the eligibility criteria above.
- (c) Offeror further represents that Offeror's average number of employees for the past 12 months and Offeror's annual gross revenue for the preceding fiscal year was as reflected below (Offeror must check and initial one block in each column):

<i>Number of Employees</i>	<i>Average Annual Gross Revenues</i>
___ 15 or fewer	___ \$500,000 or less
___ 16 - 50	___ \$500,001 -- 1 million
___ 51 - 100	___ \$1,000,001 -- \$2 million
___ 101 - 250	___ \$2,000,001 -- \$3.5 million
___ 251 - 500	___ \$3,500,001 -- \$5 million
___ 501 - 750	___ \$5,000,001 -- \$10 million
___ 751 -- 1,000	___ \$10,000,001 -- \$17 million
___ Over 1,000	___ Over \$17 million

(Signed by Offeror)

(End of Solicitation Provision)

- (4) If the Council recommends and the Board establishes set-aside criteria for very small businesses of less than 15 employees, revenues of less than a specified amount, or a targeted geographic area, the solicitation shall include a provision that states the applicable small business eligibility criteria without further representation requirements.

VERY SMALL BUSINESS SET-ASIDE

- (a) Definition. Very Small Business Concern, as used in this clause, means a concern whose headquarters is located within the geographical area of _____ [state the geographic region for the set-aside] which, together with its affiliates, has no more than 15 employees and has average annual revenues that do not exceed \$ _____ [state applicable amount of revenues].
- (b) Eligibility. Offers or quotations under this acquisition are solicited from very small business concerns only. Offers that are from other than an eligible very small business concern shall not be considered and shall be rejected.
- (c) The Offeror affirmatively represents that it is an eligible very small business concern eligible for contract award under the criteria above.

(Signed by Offeror)

(End of Solicitation Provision)

- (5) If the Chief Procurement Officer determines the requirement solicited is not susceptible of performance by small businesses, the Chief Procurement Officer shall establish evaluation criteria to encourage subcontracting with small businesses. The Chief Procurement Officer shall also include clauses in the solicitation and contract to enforce the policy in favor of subcontracting to small businesses.

UTILIZATION OF SMALL BUSINESS CONCERNS

- (a) It is the policy of the State of Hawaii that small business concerns shall have the maximum practicable opportunity to participate in

performing contracts let by any state agency, including contracts and subcontracts for subsystems, assemblies, components, and related services. It is further the policy of the State of Hawaii that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns

- (b) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by agencies of the State of Hawaii as may be necessary to determine the extent of the Contractor's compliance with this clause.
- (c) Definitions. As used in this contract, a small business concern is a firm which _____ [state small business eligibility criteria as published in Board directives].
- (d) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern.

(End of clause)

**SMALL BUSINESS SUBCONTRACTING PLAN (JUL
2005)**

- (a) Definitions. As used in this clause a subcontracting plan means a plan that covers the entire contract period (including option periods), applies specifically to this contract, and has goals that are based on the Offeror's planned subcontracting in support of the contract, except that indirect

- (b) costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.
- (c) Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by the prime Contractor or its lower-tier subcontractors calling for supplies or services required for performance of the contract or subcontract.
- (d) The Offeror, upon request by the procurement officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business concerns. The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the procurement officer. Failure to submit and negotiate the subcontracting plan shall make the Offeror ineligible for award of a contract.
- (e) The Offeror's subcontracting plan shall include the following:
 - (1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns as subcontractors. The Offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.
 - (2) A statement of total dollars planned to be subcontracted to small business concerns.

- (3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to small business concerns.
- (4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.
- (5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Department of Defense Central Contract Registration data base ("CCR") "Dynamic Small Business Search" function at <http://www.ccr.gov/>, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in the CCR "Dynamic Small Business Search" function as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a

small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of the CCR as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

- (6) The name of the individual employed by the Offeror who will administer the Offeror's subcontracting program, and a description of the duties of the individual.
- (7) A description of the efforts the Offeror will make to assure that small business concerns have an equitable opportunity to compete for subcontracts.
- (8) Assurances that the Offeror will require all subcontractors that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public work) to adopt a subcontracting plan that complies with the requirements of this clause.
- (9) Assurances that the Offeror will cooperate in any studies or surveys as may be required and provide requested information so that the Government can

determine the extent of compliance by the Offeror with the subcontracting plan.

(End of clause)

- (6) The Chief Procurement Officer may, in his or her discretion, include clauses in the solicitation and contract to create incentives or impose liquidated damages to enforce the policy in favor of subcontracting to small businesses.

INCENTIVE SUBCONTRACTING PROGRAM

- (a) Of the total dollars it plans to spend under subcontracts, the Contractor has committed itself in its subcontracting plan to try to award certain percentages to small business concerns.
- (b) If the Contractor exceeds its subcontracting goals for small business concerns in performing this contract, it will receive [Chief Procurement Officer to insert the appropriate number between 0 and 5] percent of the dollars in excess of each goal in the plan not to exceed (formula), unless the procurement officer determines that the excess was not due to the Contractor's efforts (e.g., a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the subcontracting plan, or the award of subcontracts that had been planned but had not been disclosed in the subcontracting plan during contract negotiations). Determinations under this paragraph are unilateral decisions made solely at the discretion of the Government.

(End of clause)

LIQUIDATED DAMAGES --SUBCONTRACTING PLAN

- (a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Business Subcontracting Plan," or willful or intentional action to frustrate the plan.
- (b) Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars. If, at contract completion, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled "Small Business Subcontracting Plan," the Contractor shall pay the Government liquidated damages in an amount equal to the actual dollar amount by which the Contractor failed to achieve its subcontract goal.
- (c) Before the procurement officer makes a final decision that the Contractor has failed to make such good faith effort, the procurement officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good

faith efforts have been made and to discuss the matter. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the procurement officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the procurement officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

- (d) The Contractor shall have the right of appeal, under the clause in this contract entitled Disputes, from any final decision of the procurement officer.
- (e) Liquidated damages shall be in addition to any other remedies that the Government may have including debarment.

(End of clause)

- (7) In all small business set-asides, the Chief Procurement Officer shall include a clause in the solicitation and contract to prevent the small business concern receiving award from passing the work to other contractors through subcontracts.

LIMITATIONS ON SUBCONTRACTING

By submission of its offer, the Contractor agrees that in performance of the contract in the case of a contract for:

- (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall

be expended for employees of the concern.

- (2) Supplies (other than procurement from a non-manufacturer of such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.
- (3) General construction. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.
- (4) Construction by special trade contractors. The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

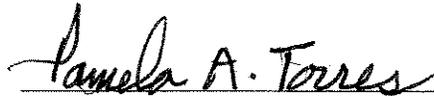
“(End of clause)”

[Eff 1/6/07; comp 3/3/08; am and comp AUG 24 2009]
(Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

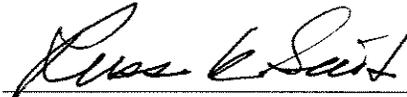
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to and compilation of subchapter 9, chapter 3-124, Hawaii Administrative Rules, on the Summary page dated July 16, 2009 were adopted as interim rules at the Procurement Policy Board meeting on July 16, 2009. Pursuant to section 103D-202, HRS, these rules shall be issued by Procurement Directive and be effective for not more than eighteen months.

These interim rules shall take effect ten days after filing with the Office of the Lieutenant Governor.



PAMELA A. TORRES
Chairperson
Procurement Policy Board



RUSS K. SAITO
State Comptroller

APPROVED AS TO FORM:



Deputy Attorney General

AUG 13 2009