

## **PROCUREMENT POLICY BOARD**

1151 Punchbowl Street  
Conference Room 410  
Honolulu, Hawaii 96813

Regular Meeting  
January 17, 2008  
1:00 pm

### **AGENDA**

- I. Call to Order.
- II. Approval of Minutes – Meeting of December 20, 2007.
- III. Proposed rules on Act 142/2007 on Administrative Fines.
- IV. SPO memo dated December 20, 2007 on Comments and Recommendations to HAR Chapter 127, Small Business Preference Rules.
- V. Compiled and amended HAR Chapter 3-124, Subchapter 9 (Interim).  
  
Amends HAR Chapter 3-124, Subchapter 9 to add new §3-124-73.1  
Implementation of Small Business Preference by Heads of Purchasing Agencies,  
previously submitted by Member Russ Saito.
- VI. Announcements.
- VII. Adjournment.

Individuals may present testimony on matters on the Procurement Policy Board's agenda when the agenda item is being discussed by the Board. Individuals intending to testify should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting. Written testimonies will be accepted through e-mail at [procurement.policy.board@hawaii.gov](mailto:procurement.policy.board@hawaii.gov) or faxed to (808) 587-4703 until 1:00 pm, January 15, 2008. Testimonies received after the January 15, 2008 deadline will be forwarded to the board after the January 17, 2008 meeting. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., January 14, 2008 to discuss accommodation arrangements.

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-131  
Hawaii Administrative Rules

Xxxxxxx xx, 2008

1. Chapter 3-131 of Title 3, Hawaii  
Administrative Rules, entitled ``Compliance''  
(Interim)'' is amended and compiled to read as follows:

``HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 131

[~~PROCUREMENT VIOLATIONS~~] COMPLIANCE (INTERIM)

§3-131-1	Definitions
§3-131-1.01	Applicability
§3-131-1.02	Procurement code of ethics
§3-131-2	Parceling
§3-131-3	Procurement violations
§3-131-4	Civil and criminal penalties
§3-131-5	Corrective action
§3-131-6	Processing procurement violations
§3-131-7	Repealed [R ]
§3-131-8	Administrative fine

Historical Note. This chapter 131, subtitle 11 of  
title 3, Hawaii Administrative Rules:

1. Replaces interim rules dated on 2/16/02 (file  
no. 2449) that amended sections 3-131-1, 3-131-2, 3-  
131-3, and 3-131-6.

§3-131-1 Definitions. Definitions are in section

103D-104, HRS. The following definitions are also applicable to terms used in this chapter:

"After-the-fact" means a request for approval, unless the context requires otherwise, for a procurement made in violation of proper procedures.

"Business integrity" means the practice of good business responsibility such as business ethics, honesty, fidelity, and trustworthiness.

"Parceling" means the artificial division or intentional division of a purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, in order to evade the statutory competitive requirements.

"Purchasing ethics" means the principles to be respected and applied, including the prohibition of any breach of the public trust by realizing or attempting to realize improper gain for oneself or another through conduct inconsistent with the requirements of this chapter.

"Reviewing officer" means the chief procurement officer, the head of a purchasing agency, or a designee above the level of a procurement officer, who has been delegated in writing by the chief procurement officer or head of a purchasing agency, the authority and responsibility to review procurement violations. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp ] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-104, 103D-305)

§3-131-1.01 Applicability. This chapter shall apply to any person, including any actual or prospective bidder, offeror, contractor or business. [Eff ] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-1.02 Procurement code of ethics. (a) Public employees shall act in good faith to discharge their duties to ensure the fair and equitable treatment of all persons who deal with government procurement; to foster public confidence in the integrity of the procurement process; and to ensure the appropriate application of purchasing ethics. Any person employed by a governmental body who, when engaging in procurement, shall be bound by this code, including but not limited to the following:

- (1) Avoid the intent and appearance of unethical behavior or practices;
- (2) Diligently follow the procurement laws, rules, and procedures;
- (3) Refrain from any activity that would create a conflict between personal interests and the interests of the State;
- (4) Identify and eliminate any conflicts of interest;
- (5) Avoid soliciting or accepting money, loans, credits, discounts, favors, or services from present or potential suppliers which may influence or appear to influence purchasing decisions; and
- (6) Ensure that all persons are afforded equal opportunity to compete in a fair and open environment.

(b) Governmental bodies shall conduct procurement in accordance with all applicable statutes and rules, including chapter 84, HRS, standards of conduct.

(c) Any person, including any actual or prospective bidder, offeror, contractor or business shall act in good faith to practice purchasing ethics, and when applicable, display business integrity as a responsible offeror. [Eff ] (Auth: HRS §103D-202) (Imp: HRS §§103D-101, 103D-106, 103D-310, 84-15, 84-16)

§3-131-2 Parceling. (a) Procurements should be done through a competitive process whenever possible. Since there is no definition of artificial division or intentional division that could address every circumstance, the procurement officer in deciding if a division is artificial or intentional, shall consider the following:

- (1) The higher the price of a group of procurements, the more likely they should be consolidated.
  - (2) The more similar the good, service, or construction, or the more likely it is to purchase a group of goods, services, or construction from one type of vendor, the more likely it should be consolidated.
  - (3) The more foreseeable the procurement of similar goods, services, and construction is, the more likely it should be consolidated.
- (b) In determining whether a competitive sealed

process is required and if consolidation is appropriate, the estimated expenditures for any twelve-month period exceeding the dollar limits as stated in section 103D-305, HRS, the competitive sealed process pursuant to subchapter 5 or 6 shall be used to establish a contract.

(c) A purchasing agency shall, where possible, make appropriate consolidations to obtain competition.

The procurement officer shall be responsible for decisions to proceed with small purchase procurements rather than with a competitive sealed process. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp ] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-131-3 Procurement violations. (a) The head of the purchasing agency is responsible for the agency's compliance with the law. Violations of chapter 103D, HRS, which are normally inadvertent, and the result of administrative error, lack of knowledge, or simple carelessness, may be avoided through the implementation of better procedures, employee training, and progressive discipline.

(b) The procurement officer may prepare a report of procurement violations for review by the reviewing officer. It may be helpful to prepare and maintain procurement violation reports, first, to pinpoint weaknesses in the State's procurement process, including the procurement code itself, and to find ways to improve State procurement, and second, to determine whether or not a violation has reached the level requiring civil or criminal penalties.

(c) Being responsible for the initial investigation of violations requires the head of the purchasing agency to carefully examine the in-place procurement procedures. Any improvements can best be achieved through the agency's own initiative. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; comp ] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-4 Civil and criminal penalties. (a) Certain violations of chapter 103D, HRS, may be subject to civil and criminal penalties as described below:

(1) Civil penalties. A person who contracts for, or purchases goods, services, or

construction, in a manner the person knows to be contrary to the requirements of the procurement law is liable for all costs and damages to the State arising out of the violation.

- (2) Criminal penalties. A person who intentionally or knowingly contracts for or purchases goods, services, or construction, under a scheme or artifice to avoid the requirements of the procurement law shall be guilty of a misdemeanor, and in addition to any applicable criminal penalties, shall be subject to removal from office and shall be liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county.

(b) In order for civil penalties to apply, a person must have knowingly violated the requirements of the law. In other words, the person committing the violation must be aware that he or she is acting contrary to the requirements of the law at the time the violation occurs. Violations that are the result of administrative error or mistake, ignorance, or carelessness are usually not subject to the civil penalties. The determining factor is what the person understood the procurement requirements to be when the violation occurred, and whether or not the person believed he or she was acting in compliance with those requirements.

(c) In order for criminal penalties to apply, a person must have knowingly or intentionally engaged in a scheme or artifice to avoid the requirements of the law. The violation must have been committed in a deliberate manner, involving some calculated means, such as parceling for a single procurement, a deliberate misstatement of fact, or an after-the-fact purchase, which is purposefully designed to avoid the requirements of the law. Legally admissible documentary evidence of the wrongdoing must be available to law enforcement authorities in order for criminal prosecution to be undertaken. Law enforcement authorities will also need to determine whether personal gain was intended or involved for either the person committing the violation, a friend or relative of the person, or the vendor, or whether some other vendor was significantly injured, whether intended or

not.

(d) In addition to any other civil and criminal penalty allowed by law, a chief procurement officer may render a written decision on any person found in violation of any provision of this chapter, and impose any of the following:

- (1) If an employee of a governmental agency:
  - (A) Payment for any sum paid in connection with the violation, including interest and costs;
  - (B) A recommendation for termination of employment;
  - (C) Reduction or rescission of delegated procurement authority; and
  - (D) Administrative fine as provided below.
- (2) If a person or actual or prospective offeror:
  - (A) Payment for any sum paid in connection with the violation, including interest and costs;
  - (B) Suspension and debarment action pursuant to section 103D-702, HRS; and
  - (C) Administrative fine as provided below.

[Eff 12/15/95; comp 11/17/97; comp 11/25/02; am and comp  
] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-5 Corrective action. When a procurement violation has occurred, the head of the purchasing agency shall determine whether any corrective action is necessary to remedy the situation, or prevent its reoccurrence. Action may include training, or a reduction of an employee's purchasing authority. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; am and comp  
] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-6 ~~[Processing procurement violations.]~~  
Report of findings and corrective actions. (a) The purchasing agency shall consult with the chief procurement officer on all procurement violations and ~~[shall]~~ provide ~~[the chief procurement officer with]~~ a report of findings and corrective actions[.] ~~[The chief procurement officer shall determine whether appropriate corrective actions were taken. The report of findings and corrective actions]~~ that shall include, at a minimum:

- (1) The facts and circumstances leading to the need for the good or service, including the explanation as to why established procedures were not followed;
- (2) Whether there are any indications of intent to deliberately evade established purchasing procedures;
- (3) Any lack of procurement information or training;
- (4) Whether this is the first occurrence; and
- (5) Whether appropriate written assurance and safeguards have been established to preclude a subsequent unauthorized procurement.

(b) If the head of the purchasing agency determines that payment to a vendor is also required, the head of the purchasing agency shall include a request for after-the-fact payment approval in the report of findings and corrective actions to the chief financial officer. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp ] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

~~§3-131-7 Interim rules. This chapter 131, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules previously adopted on 2/16/02 (file no. 2449).] [Eff 11/25/02; R ]~~

§3-131-8 Administrative fine. (a) A chief procurement officer may assess an administrative fine in the amounts as follows:

- (1) In an amount not to exceed \$5,000.00 for each violation involving a procurement which amount is in excess of the dollar levels specified by section 103D-305, HRS.
- (2) In an amount not to exceed \$1,000.00 for each violation involving a procurement which amount is less than the dollar levels specified by section 103D-305, HRS.

(b) Prior to the imposition of an administrative fine, the chief procurement officer shall notify the person in writing that the chief procurement officer intends to assess an administrative fine. The person then shall be given an opportunity to be heard by the chief procurement officer. A request for a meeting shall be made within seven calendar days after the





\_\_\_\_\_  
GREGORY L. KING  
Chairperson  
Procurement Policy Board

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RUSS SAITO  
State Comptroller

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

LINDA LINGLE  
GOVERNOR



PROCUREMENT POLICY BOARD  
DARRYL W. BARDUSCH  
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SPO-08-0136

December 20, 2007

TO: Procurement Policy Board  
FROM: Aaron S. Fujioka  
SUBJECT: Comments and Recommendations

The State Procurement Office (SPO) provides the following comments and recommendations, on HAR Chapter 127, Small Business Preference Rules (Interim).

As background Attachment A is a Chronology of Act 50/SLH 2005 reflecting the numerous events and processes that have occurred to-date related to this mandate.

The following are comments and concerns of the SPO and other jurisdictions on HAR Chapter 3-124, Subchapter 9, Small Business Preference Rules.

- HAR Chapter 3-124, Subchapter 9, Small Business Preference Rules are not applicable to the preference chapter. Chapter 3-124 was established for preferences where offeror's bid prices are either increased or decreased by the percentage of the preference. Act 50, small business assistance program established a set aside where a percentage of contracts would be awarded to small businesses. For that reason, these small business rules are not a preference and should be in chapter 3-127, which is the chapter designated for small business.
- Potential competition on the neighbor islands is considerably less than on Oahu. A solicitation limited to only small business may result in creating inadequate competition where no responses are received, or at best only a single or very limited competition.
- Section 3-124-74(a)(2) will add another point of contention for participating bidders.....potential for awards being delayed while resolving these concerns could increase precipitously....and negatively impact the timeliness of awards, thereby decreasing the effectiveness of the procurement process...
- The Chapter 3-124, Subchapter 9, Small Business Preference Rules do not provide a protest process but only refers agencies to chapter 3-126.

- The HAR are difficult to follow in terms of formulating a mental process as to how this program is to play itself out. It appears to require significant restructuring of solicitations, if not creation of a special one for the program. Jurisdictions have stated they may need position(s) to implement and manage.

These comments and concerns leans toward the thinking that the current rules require further details before a purchasing agency is able to use and implement, and a small business is awarded a contract solely through a set-aside program. When developing administrative rules relating to procurement, the SPO keeps in mind that the user, our purchasing agencies and business community, need to be able to clearly and easily understand the processes and steps in order to comply and participate.

Attachment B is offered as proposed amendments to the current interim rules, HAR Chapter 3-124, Preferences. The proposed amendments are a compilation of the current interim rules and the SPO proposed HAR Chapter 3-127, Small Business Assistance submitted to the PPB at its Oct. 5, 2006 meeting. This proposed draft HAR Chapter 3-127 will assist to set the basic requirements, however, further rules or amendments will still be required to enhance the details and processes for the purchasing agency and small business to implement a small business program.

c: SBUC

attachments

## ATTACHMENT A

### STATE PROCUREMENT OFFICE (SPO) **Chronology of Act 50/SLH 2005**

- July 1, 2005, Act 50/SLH 2005 (HB 162) became effective
- July 6, 2005  
Small Business Roundtable met to discuss Act 50 to develop the starting points for a small business preference program.
- August 11, 2005  
At the Procurement Policy Board (PPB) meeting, the board was informed that Act 50 was passed this legislative session and that the board will need to develop rules for small business preferences, set-asides, including its maintenance and compliance. The chair expressed the concern on the definition of a small business will be determined. Mr. Russ Saito explained that the certification will be patterned after the Federal regulations.
- September 2, 2005  
Small Business Roundtable meeting to discuss the goals of a small business preference program, implementation/oversight of a small business preference program, and the establishment of rules by the SPO.
- July 13, 2006  
At the PPB meeting, both the Small Business Roundtable proposed HARs and the SPO initial draft HARs for Chapter 3-127, Assistant to Small Business, were presented. The SPO proposed draft HARs was based on a conceptual proposal for a small business program. PPB members raised concerns on the small business definition, therefore the SPO agreed to consult with the Small Business Administration (SBA) in defining small business.
- September 22, 2006  
At the PPB meeting, the SPO proposed HARs agenda item was continued to 10/5/06 PPB meeting due to lack of time.
- October 5, 2006 PPB  
At the PPB meeting, the SPO proposed HAR, Chapter 3-127, Small Business Assistance, was withdrawn by PPB member, Mr. Russ Saito.
- October 27, 2006  
At the PPB meeting, Hawaii Procurement Institute (HPI) representatives proposed HARs, and after a lengthy discussion in which the SPO had concerns with the proposed HARs, the PPB adopted HAR Chapter 3-124.

SPO concerns: It is not feasible to adopt the entire draft rules in its current version, as the procedures, format, and language need to be simplified for ease of use by agencies and businesses. The rules as written would be an added burden to purchasing agencies and the program needed to be streamlined. The draft rules are for HAR, Chapter 3-124 on preferences, however SPO had proposed to place the rules within the Small Business Assistance Program (HAR, Chapter 3-127), as Act 50 amended sections in the Small Business Assistance part of HRS.

Motion to pass the draft rules: The vote was four in favor and three against.

## ATTACHMENT A

### Page 2

- January 6, 2007  
Interim HAR Chapter 3-124, Preferences, Subchapter 9, Small Business Preference Rules became effective.
- May 16, 2007  
The Small Business Utilization Council (SBUC) inaugural meeting that included a review of the HAR 3-124 rules pertaining to small business set-asides and establishment of the SBUC.
- June 12, 2007  
SBUC meeting that included a discussion on the differences between a “preference” and a “set-aside”, HPI’s proposal for size standard/criteria, and sending a request to the PPB for the adoption of the SBA’s Table of Small Business Size Standards.
- June 21, 2007  
PPB meeting for the consideration of SBUC’s recommendation on definition of small business. After discussion, the PPB approved the SBUC’s recommendation.
- July 16, 2007  
SBUC meeting on the proposal for adoption of SBA Table of Small Business Size Standards and evaluation criteria for subcontracting to small businesses.
- August 6, 2007  
SBUC meeting on the clarification of additional procedural guidelines on SBA size standards, follow-up letters sent to the County Mayors for representation on the SBUC, and suggestions for potential pilot sectors.
- August 16, 2007  
PPB meeting for the consideration of SBUC proposal to adopt SBA size criteria for creating set asides and subcontracting requirements; and nomination of Ms Mary Patricia Waterhouse as a voting member.

Ms. Ann Murata and Mr. Larry Orr of the Small Business Administration (SBA) explained the enrollment process for small businesses with the SBA the process federal agencies go through in utilizing the Federal Acquisition Regulations (FAR). PPB member Ms. Torres voiced her concerns on adopting the entire FAR, Subchapter D, Socioeconomic Programs, Part 19 as part of the rules. Ms. Jessica Horiuchi said on behalf of the HPI, she would volunteer the institute to redraft the amendment to specify which sections of the FAR be incorporated.

- October 18, 2007  
PPB meeting where Deputy Attorney General Pat Ohara informed the PPB that Mr. Terry Thomason called her to say that because Ms. Jessica Horiuchi left the firm of Alston Hunt Floyd and Ing, he would assist with drafting the guidelines on which sections of the FAR, Subchapter D, Socioeconomic Programs, Part 19 that should be incorporated into the SBUC size standard rules.

## **ATTACHMENT A**

### **Page 3**

- November 5, 2007  
SBUC meeting regarding the PPB's approval of Ms. Mary Patricia Waterhouse as a voting member of the SBUC, recommendation to the PPB to approve Mr. Kalbert Young, William Takaba and Wallace Rezentes as voting members of the SBUC, recommendation of the PPB regarding the adoption of the SBA guidelines of the FAR size standards, follow-up and discussion from the SBA on the Federal process of determining set asides for small business, discussion on potential pilot sectors, and budgetary issues.
- November 15, 2007  
PPB meeting where Mr. Kalbert Young, William Takaba, and Wallance Rezentes were approved as voting members of the SBUC,

ATTACHMENT B

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Adoption of Chapter 3-127  
Hawaii Administrative Rules

XXXXXXX xx, 2007

1. Chapter 127 of Title 3, Hawaii Administrative Rules, entitled "Small Business Assistance Preference Rules" (Interim) is adopted to read as follows: \_\_\_\_\_

"HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 127

SMALL BUSINESS ASSISTANCE ~~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~~

~~§3-124-74 Procedures and Clauses~~

§3-127-1 Purpose

§3-127-2 Applicability

§3-127-3 Definitions

§3-127-4 Small Business Utilization Council

§3-127-5 Qualification procedure

§3-127-6 Solicitation procedure

§3-127-7 Evaluation and contract award

§3-127-8 Disputes and challenges

12/20/07



§3-127-1

§3-127-9 Record of small business procurements

~~§3-127-1 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~~ promote the growth and development of small businesses 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~~ obtain and successfully perform ~~federal, state, and local government~~ governmental contracts;
- (4) Provide increased employment opportunities for ~~local~~ workers in high-skill trades and technical fields;
- (5) ~~Ensuring the Small Business Preference program is implemented so as to maximize~~ Maximize competition and obtain quality goods, services, and construction ~~at reasonable prices;~~
- (6) Assist small businesses in learning how to do business with the State; and
- (7) Assist and enable state and county agencies to achieve a goal that twenty percent of their annual purchases of goods, services, or construction are awarded to small business. [Eff \_\_\_\_\_] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

**Justification:**

The purpose of Act 50 is to create set-asides for the growth and development of small businesses and not to establish a preference program.

§3-127-2 Applicability. (a) These rules shall apply to solicitations made pursuant to chapter 103D issued by a governmental body.

(b) The procurement policy board by rules, or the chief procurement officer or designee by written determination, shall determine which solicitation shall be subject to this chapter.

(c) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff \_\_\_\_\_] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-3 Definitions. Definitions are in section 103D-901, HRS. The following definitions also apply to this chapter:

"Disadvantaged Business Enterprise (DBE) Program" is a program to assist disadvantaged businesses under the State of Hawaii Department of Transportation (DOT).

"Small Business" means a for-profit business that is independently owned and defined and qualified as a small business under one of the SBA programs of the United States Small Business Administration (SBA), and the disadvantaged business enterprise under the State of Hawaii Department of Transportation (DOT).

"Small Business Administration (SBA)" is the agency of the federal government whose function is to aid, counsel, and assist small businesses and help small businesses receive a fair portion of government contracts and sales of surplus property.  
[Eff ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-901 and 103D-902)

§3-127-4 ~~3-124-71~~ Small Business Utilization Council. (a) As provided by subchapter 4 of chapter 3-121, Hawaii Administrative Rules, the procurement policy board may establish an advisory council to assist with development of rules and other criteria for this chapter. There is established a Small Business Utilization Council. The Council shall consist of:

Voting Members

(b) Voting members of the small business utilization council shall consist of:

- (1) [Chair — Director,] Department of Business, Economic Development and Tourism, the director or designee, shall serve as chair;
- (2) [Vice-Chair — Director,] Department of Accounting and General Services, the director or designee, shall serve as vice-chair;
- (3) [Member — Director,] Department of Transportation, the director or designee; and
- (4) [Member — Such other agencies as many be nominated by the designated members and approved by the Board.] Any other agencies as may be nominated by the voting members and approved by the Procurement Policy Board.

Non-voting Members:

(c) Non-voting members of the small business utilization council shall consist of:

- ~~(5) Non-voting Member — Administrator of the State Procurement Office; and~~
- ~~(6) Such other non-voting members as may be nominated by the voting members and approved by the Board.~~
- (1) State Procurement Office, the Administrator; and
- (2) Any other agencies as may be nominated by the voting members and approved by the Procurement Policy Board.

~~[(b)]~~ (d) 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;
- (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; and
- (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.

~~[(e)]~~ (e) The council shall monitor and analyze the results of the ~~[Hawaii]~~ Small Business ~~[Preference]~~ assistance 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)]~~ (f) In performing its obligations, the council may consult with ~~DBEDT~~ the department of business, economic development and tourism, and any other state or ~~local~~ county 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 ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

#### **Justification:**

Clarification is made that the procurement policy board with the assistance of the utilization council develops rules and other criteria for this chapter. Clarification is also made that this chapter is about a small business assistance program and not a preference program, and that it is not necessary to

send the annual small business utilization report to the legislature and the governor.

§3-127-5 Qualification procedure. To be classified as a small business pursuant to this chapter a business must be certified a small business through the Small Business Administration (SBA) or the Disadvantaged Business Enterprise (DBE) Program. The responsibility for qualification and certification shall rest upon the business desiring the certification. [Eff ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-6 Solicitation procedure. (a) Solicitations shall include a reference to this chapter.

(b) Procurements determined to be appropriate for small businesses shall be solicited from only small businesses that are certified as a small business. Offers received from businesses that are not certified as a small business shall be considered non-responsive and will be rejected.

(c) The chief procurement officer or designee shall also encourage the use of small business as subcontractors on large contracts that are not susceptible to performance by a small business. Contract amounts awarded to a certified small business subcontractors may be included in meeting a purchasing agency's goal of small business awards.

(d) The contractor shall clearly identify the portions of its offer that are awarded to certified small business subcontractors. [Eff ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-7 Evaluation and contract award. a) To be eligible for an award in accordance with this chapter, a business shall be certified in accordance with section 3-127-5 no later than the date set for receipt of offers for the solicitation.

(b) A contractor or subcontractor shall provide or make available to the purchasing agency, their applicable small business certification to qualify as a small business.

(c) Contract award shall be made to the responsive and responsible offer meeting the requirements of the solicitation and this chapter. [Eff ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-8 Disputes and challenges. (a) A dispute or challenge of a small business certification may be filed with the purchasing agency. The agency shall check the validity of

the business's certification and may request additional information to determine the validity of the certification.

(b) Within fifteen calendar days of receiving the dispute or challenge, the purchasing agency shall approve or reject the certification in question and advise the small business and business challenging the certification of the determination.

(c) If the dispute or challenge is denied, the challenger within seven calendar days of the denial may file a request for review by the chief procurement officer. The chief procurement officer shall review the facts pertinent to the challenge and issue a final determination within twenty calendar days of receipt of the request for review.

(d) Any business that is found to have deliberately falsified their small business certification shall be subject to the debarment and suspension provisions of Chapter 126 of the Hawaii administrative rules. [Eff ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

**Justification:**

This section is required to help avoid delays as a result of a dispute or challenge of a small business certification.

§3-127-9 Record of small business procurements. (a) The chief procurement officer or designee shall maintain a record of all awards made pursuant to this chapter. The record shall contain at a minimum the total dollar value of contracts awarded to small businesses and name of awardee.

(b) Awards under this chapter shall be posted electronically within seven calendar days of the award, on the State Procurement Office webpage provided for this purpose. [Eff ] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

**Justification:**

This process will allow for the ease of collection of data from all agencies and jurisdictions.

§3-124-72 Administrator of the state procurement office.  
This section not necessary.

HRS §103D-201 on creation and membership of the procurement policy board (PPB) provides for support and staffing to the PPB.  
HAR §3-121-2 on procurement directives provides for issuance by the PPB.

HRS §103D-212 on collection of data concerning public procurement allows for the collection of data by CPOs and heads of agencies.

12/20/07

HRS §103D-213 on procurement advisory groups allows for advisory groups to assist in the development of procurement in specific areas, and any other matters.

**Justification:**

For administration of statutes and its rules, the SPO policy, and as directed by the Office of the Lt Governor, the office responsible for rules, has been to streamline the HARs so as not to replicate the statutory requirements in rules.

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

This section not necessary.

HRS §103D-205 on authority and duties of the CPO requires adherence to the provisions of all chapters and rules adopted by the PPB.

HRS §103D-212 on collection of data concerning public procurement allows for the collection of data by CPOs and heads of agencies.

**Justification:**

For administration of statutes and its rules, the SPO policy, and as directed by the Office of the Lt Governor, the office responsible for rules, has been to streamline the HARs so as not to replicate the statutory requirements in rules.

§3-124-74 Procedures and clauses.

**Comment:**

This section needs to be simplified and made user friendly, to enable agencies and businesses to step through each process. As written, this section is difficult to follow, the wording is not easy to comprehend, and not easily applied to the solicitation process. To assist users of these rules, both governmental and businesses, will need to reword this section to simplify the language, processes, and steps so it can be fully understood by all levels of agencies and businesses.

Examples:

1. Section 3-124-74 is 16 pages; should be simplified for user to easily comprehend and implement. Recommend further discussions with user agencies and other organizations.

2. The provision in section 3-124-74(a)(2) regarding "Meaning of Representation by Offeror & Protest Against Status" are not clear. Challenges to a small

business representation must follow applicable protest procedures in HAR Chapter 3-126. A more appropriate challenge process is proposed in section 3-127-8 of Attachment B.

3. The various provisions throughout section 3-124-74 that shall be included in solicitations such as "Notice of Small Business Set-Aside", "Meaning of Representation by Offeror & Protest Against Status", "Small Business Program Representations", "Very Small Business Set-aside", needs to be clear on how a purchasing agency is to implement and apply to a solicitation.
4. Paragraphs in Section 3-124-74 (5) on "Utilization of Small Business Concerns" seems to establish policies, but as stated in the HAR, it is not clear what is the intent of these clauses, or are they listed only as examples.
5. The procedures and provisions of sections "Small Business Subcontracting Plan (Jul 2005)", "Incentive Subcontracting Program", "Liquidated Damages-Subcontracting Plan", and "Limitations on Subcontracting" should be simplified and made easier to understand; needs to be clear on how a purchasing agency is to implement and apply to the procurement process.

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of  
Subchapter 9, Chapter 3-124  
Hawaii Administrative Rules

January 17, 2008

1. Subchapter 9 of Chapter 3-124, Hawaii Administrative Rules, entitled "Small Business Preference Rules (Interim)" is amended and compiled to read as follows:

"SUBCHAPTER 9

SMALL BUSINESS PREFERENCE RULES (Interim)

§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:

- (a) Strengthen and nurture emerging Hawaii industries;
- (b) Increase competition by broadening the local small business contractor base;
- (c) Develop and enhance the ability of local small businesses to win and successfully perform federal, state, and local government contracts;
- (d) Provide increased employment opportunities for local workers in high-skill trades and technical fields; and
- (e) 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 ]  
(Auth: HRS §§103D-202, 103D-902)(Imp: HRS §103D-902)



§3-124-71 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 - Such other agencies as may be nominated by the designated members and approved by the Board.

Non-voting Members:

- (5) Non-voting Member - Administrator of the State Procurement Office; and
- (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;
- (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; and
- (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 DBEDT 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 ] (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:

(a) Provide administrative support and assistance to the Council in achieving the purposes of this program;

(b) 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;

(c) Collect procurement information from purchasing agencies as need to support the Council's reporting obligations;

(d) Consult and coordinate with the Director, DBEDT to obtain necessary data analysis, economic information, and guidance the Director, DBEDT considers necessary and appropriate to assist the Council in the performance of its functions;

(e) Establish and operate web-based information systems and other appropriate methods to publicize, promote, and support this program. [Eff 1/6/07; comp ] (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 ] (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 Counsel 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 delegee.

- (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 ]

(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.
- (a) 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.
- (a) Definitions. As used in this contract, a small business concern is a firm which \_\_\_\_\_ [state small business eligibility criteria as published in Board directives].
- (b) 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 costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.
- (b) 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.
- (c) 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.

(d) 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 nonmanufacturer 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 ] (Auth: HRS §§103D-202, 103D-902) (Imp: HRS §103D-902)

2. Material, except source notes, to be repealed is bracketed. New material is underscored.

3. Additions to update source notes to reflect these amendments are not underscored.

4. These amendments and compilation of subchapter 9, chapter 3-124, Hawaii Administrative Rules (Interim), shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the forgoing are copies of the rules, drafted in Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted as interim rules on January 17, 2008, and filed with the Office of the Lieutenant Governor.

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GREGORY L. KING  
Chairperson  
Procurement Policy Board

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RUSS SAITO  
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General