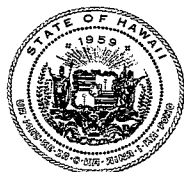


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PAMELA A. TORRES

AARON S. FUJIOKA
ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4700 Fax: (808) 587-4703
<http://hawaii.gov/spo>

August 17, 2010

PROCUREMENT CIRCULAR NO. 2010-02

TO: Office of the Governor
Office of the Lieutenant Governor
Executive Department Heads
State Librarian

Chief Procurement Officers:

Department of Education, Superintendent
University of Hawaii, President
Office of Hawaiian Affairs, Chairperson of the Board
Hawaii Health Systems Corporation, Chief Executive Officer
Judiciary, Administrative Director of the Courts
Senate, President
House, Speaker of the House of Representatives
Counties of Hawaii, Kauai, Maui and City & County of Honolulu:
Executive Branch, Finance Director
Legislative Branch, Chairperson of the County Council
Boards/Departments of Water Supply, Manager/Chief Engineer

FROM: Aaron S. Fujioka 

SUBJECT: 2010 Procurement Related Legislation

The following legislative bills, passed by the Legislature and enacted into law that affect procurement, are provided for your information and or action.

ACT 68 – (SB 2840, SD2, HD1) - [VETO OVERRIDE]

RELATING TO PUBLIC PROCUREMENT.

Application: Creates a new chapter separate from the Hawaii Public Procurement Code (Code) for construction contracts applicable to IFB, RFP, sole source and emergency procurement methods, and subcontracts of \$50,000 or more in connection with any general contract. Not applicable to procurements for professional services, Hawaii Revised Statutes (HRS) §103D-304, and small purchases, HRS §103D-305.

Requirements:

- Awarded contractor shall ensure Hawaii residents compose not less than 80% of the workforce employed on the contract/project. The 80% is determined by dividing the total hours worked by residents by the total hours worked by all employees; subcontractor hours are applicable to this calculation. Shortage trades, as determined by the Department of Labor and Industrial Relations, shall not be included in the calculation.
- Percentage shall be maintained for the entire duration of the contract.
- Monthly certification of compliance shall be made by Contractor to the Procurement Officer.
- A non-compliant contractor shall be subject to sanctions:
 1. Temporary suspension of work;
 2. Withholding of payment;
 3. Permanent disqualification on any further work on the project;
 4. Recovery by government of any monies expended; or
 5. Debarment or suspension proceedings of contractor or subcontractor.

Effective date: April 29, 2010

This bill creates a new chapter on "*Employment of State Residents on Construction Procurement Contracts*" to require a contractor's workforce be comprised of 80% or more Hawaii residents. NOTE: The Procurement Policy Board is not authorized to adopt rules for this new chapter that is not part of HRS chapter 103D or 103F.

ACT 69 – (HB1642, HD1, SD2, CD1) - [VETO OVERRIDE]

RELATING TO THE PURCHASES OF HEALTH AND HUMAN SERVICES.

Application: Clarifies request for proposal (RFP) procedures for contracts pursuant to HRS Chapter 103F, Purchases of Health and Human Services.

Requirements: Requires offerors to be licensed providers for the health and human services being solicited. Proposals shall include all costs, fees, and taxes, including any insurance premium taxes or general excise taxes. Prohibits awards or contracts to include any other payment, rebate, or direct or indirect consideration not included in the proposal.

Effective date: April 29, 2010

Further guidance is forthcoming and will be issued via Procurement Circular.

ACT 71 – (HB 2085, HD1, SD2) - [VETO OVERRIDE]

RELATING TO HEALTH.

Application: Amends HRS §103F-402 on competitive purchase of services applicable to HRS chapter 103F, Purchases of Health and Human Services.

Requirement: Establishes limits on the RFP from health and human services providers for QUEST contracts that shall not exceed \$100,000,000 and on the commencement date of the contract if it is after the expiration of the purchasing agency director's term of office.

Effective date: April 29, 2010

The bill is limited to QUEST contracts issued by the Department of Human Services, and ties the solicitation to the expiration of the term of the department director, and that the contract shall not be greater than \$100 million.

ACT 082 – (HB 347, HD2, SD2, CD1)

RELATING TO THE UNIVERSITY OF HAWAII.

Application: Exempts the University of Hawaii (UH) and the Board of Regents (BOR) from specific provisions of HRS chapter 103D, the Hawaii Public Procurement Code. Adds four new sections to HRS Chapter 304A (University of Hawaii System) relating to construction projects, pre-bid conference, right to audit records and preference for small business; set-asides; use as subcontractors.

Requirement: SECTION 2 of Act 082 amends HRS §103D-102(c) by temporarily authorizing the UH or the BOR limited exemption from the procurement code. The following sections of the Code still apply to the UH or the BOR:

- §103D-110, Education and training
- §103D-304, Procurement of professional services, with respect to design professional services furnished by licensees under chapter 464
- §103D-324, Contract performance and payment bonds
- §103D-707, Remedies after an award
- §103D-906, Preference for small businesses; set-asides; use as subcontractors
- §103D-1002, Hawaii products

Effective date: 7/1/2010; repealed on 7/1/2012

In their desire to be independent and separate from the Code, the Legislature granted the UH and BOR independence from the Code. The Act also severs the State Procurement Office oversight duties and responsibilities, including corrective actions to ensure a consistent and fair procurement system for all affected parties.

The provision of HRS §103D-102(b)(3), on application of the code "To procure goods, services, or construction from a governmental body..." is applicable when the goods, services, or construction is available directly from the UH. However, agencies are advised that contracts entered into with the UH, during the effective period of the Act, may not be appropriate when the UH procures the goods or services from non-government sources, as this arrangement may be viewed as circumventing the Code.

Additionally, SPO price and vendor list contracts, conducted in accordance with the Code and using cooperative agreements provisions, will not be available to the UH during the effective period of the Act.

ACT 107 – (SB 2831, SD1, HD1, CD1)

RELATING TO THE PROCUREMENT CODE.

Application: Requirement for HRS §103-32.1, Contract provision for retainage; subcontractors.

Requirement: Makes permanent the requirements for withholding payment to a subcontractor effectuated by Act 175, SLH 2009.

Effective date: 7/1/2010

The bill amendment makes the changes of §103-32.1 permanent, as amended by Act 175, SLH 2009 which included a sunset provision. The amendment to §103-32.1 deleted unnecessary language, and clarified contract provisions for subcontractor retainage to provide written notice to subcontractor. When applicable, the provision shall be included in the solicitation for applicability to the resulting contract.

ACT 140 – (SB 506, SD1, HD3, CD1)

RELATING TO PROCUREMENT.

Application: Amends HRS §103D-309, contract not binding unless funds available, for highway construction affecting relocation of utilities (HRS §264-33) involving state or county funds, including funds from a utility company.

Requirement: State or county purchasing agency may certify sufficient funds for the utility portion of the contract price in the amount that a utility is obligated to pay under a legal agreement between the utility and the State or county for services on relocation of utilities.

Effective date: 7/1/2010

Amendment to HRS §103D-309 adds a new subsection applicable to Department of Transportation (DOT) highway construction work limited to HRS §264-33, relocation of utility facilities. The DOT or county may certify sufficient funds for the utility (i.e. electric or water services) portion of the contract price, as provided in the agreement (i.e. MOA or MOU) between all affected parties that includes parties share and terms of payment, allows progress payments or final payment, and late payment costs.

ACT 207 – (HB 2283, HD2, SD1, CD1)

RELATING TO PUBLIC PROCUREMENT.

Application: Amending HRS §103D-101 on ethical public procurement, which addresses public employees and any actual or prospective bidder, offeror, contractor, or business taking part in public procurement.

Requirement: Requires public employees, and actual or prospective bidders, offerors, contractors, businesses or other interested parties, when participating in public procurements, to do so in an ethical manner; and provides for specific ethical standards.

Effective Date: 7/6/2010

Hawaii Administrative Rules (HAR) chapter 3-131 on Compliance currently provides parallel provisions for '*procurement code of ethics*' for procurement personnel and private sector entities doing business with the government, to act in good faith and practice purchasing ethics.

Copies of the above referenced ACTs are available on the State Procurement Office webpage at http://www4.hawaii.gov/spo/procapps/procurement_circulars.cfm?&ShowAll=Yes for your reference; under the "Quick Links" menu, click on "*Procurement Circulars*" for "2010-02 ACTs".

Your staff may contact the following individuals should they have any questions or concerns:

Bonnie Kahakui	587-4702	bonnie.a.kahakui@hawaii.gov
Kevin Takaesu	586-0568	kevin.s.takaesu@hawaii.gov
Donn Tsuruda-Kashiwabara	586-0565	donna.tsuruda-kashiwabara@hawaii.gov
Corinne Higa (HRS chapter 103F)	587-4706	corinne.y.higa@hawaii.gov

or you may call me at 587-4700.