

PROCUREMENT POLICY BOARD (PPB)
1151 Punchbowl Street, Conference Room 410
Honolulu, Hawaii 96813

Regular Meeting
February 2, 2012
1:00 pm

AGENDA

- I. Call to Order.
- II. Approval of Minutes - Meeting of March 17, 2011.
- III. Election of Officers.
- IV. Orientation for Board members.
- V. Information on Public Hearing for interim Hawaii Administrative Rules (HAR) §3-120-4, Procurements exempt from chapter 103D, HRS; chapter 3-120, Exhibit A, Procurements Exempt from chapter 103D, HRS; chapter 3-124, subchapter 1, Hawaii Products; §3-125-13, Price adjustment in construction contracts.
- VI. Announcements.
- VII. Adjournment.

Agenda and available agenda items may be viewed at <http://hawaii.gov/spo/procurement-policy-board-minutes-of-meeting>. Individuals may present testimony on matters on the Procurement Policy Board's agenda when the agenda item is taken up 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 or faxed to (808) 587-4703 until 1:00 pm, January 31, 2012. Testimonies received after the January 31, 2012 deadline will be forwarded to the board as time permits. 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 30, 2012 to discuss accommodation arrangements.

Agenda Item IV

CHAPTER 103D
HAWAII PUBLIC PROCUREMENT CODE

Part I. General Provisions

Section

- 103D-101 Requirements of ethical public procurement
- 103D-102 Application of this chapter
- 103D-103 Retention of written determinations
- 103D-104 Definitions
- 103D-104.5 Agricultural products subject to this chapter
- 103D-105 Public access to procurement information
- 103D-106 Penalties
- 103D-107 Compliance audit unit; establishment and purpose
- 103D-108 Compliance audit unit; duties and responsibilities
- 103D-109 Compliance audit unit; government officers and employees to cooperate
- 103D-110 Education and training
- 103D-111 Applicability of chapter 103

Part II. Procurement Organization

- 103D-201 Creation and membership of the procurement policy board
- 103D-202 Authority and duties of the policy board
- 103D-203 Chief procurement officers
- 103D-204 Establishment of the state procurement office; administrator
- 103D-205 Authority and duties of the chief procurement officer
- 103D-206 Additional duties of the administrator of the procurement office
- 103D-207 Centralization of procurement authority
- 103D-208 Delegation of authority by the chief procurement officer
- 103D-209 Authority to contract for certain services
- 103D-210 Repealed
- 103D-211 Procurement rules
- 103D-212 Collection of data concerning public procurement
- 103D-213 Procurement advisory groups
- 103D-214 Repealed

Part III. Source Selection and Contract Formation

- 103D-301 Methods of source selection
- 103D-302 Competitive sealed bidding
- 103D-303 Competitive sealed proposals
- 103D-303.5 Pre-bid conference
- 103D-304 Procurement of professional services
- 103D-305 Small purchases; prohibition against parceling
- 103D-306 Sole source procurement
- 103D-307 Emergency procurements
- 103D-308 Cancellation of invitations for bids or requests

for proposals

- 103D-309 Contract not binding unless funds available
- 103D-310 Responsibility of offerors
- 103D-311 Prequalification of suppliers
- 103D-312 Cost or pricing data
- 103D-313 Types of contracts
- 103D-314 Approval of accounting system
- 103D-315 Multi-term contracts
- 103D-316 Right to inspect plant
- 103D-317 Right to audit records
- 103D-318 Finality of determinations
- 103D-319 Reporting of anticompetitive practices
- 103D-320 Retention of procurement records
- 103D-321 Repealed
- 103D-322 Multiple awards
- 103D-323 Bid security
- 103D-324 Contract performance and payment bonds
- 103D-325 Bond forms and copies
- 103D-326 Fiscal responsibility
- 103D-327 Safety and health programs for construction
- 103D-328 Tax clearances; setoff for due and unpaid taxes

Part IV. Specifications

- 103D-401 Duties of the policy board
- 103D-402 Duties of the chief procurement officer
- 103D-403 Exempted items
- 103D-404 Relationship with using agencies
- 103D-405 Maximum practicable competition
- 103D-406 Specifications prepared by architects and engineers
- 103D-407 Construction projects, roadway materials; recycled glass content requirements
- 103D-408 Indigenous and Polynesian introduced plants; use in public landscaping
- 103D-409 Provisions for pollution control
- 103D-410 Energy efficiency through life-cycle costing
- 103D-411 Value engineering clauses
- 103D-412 Light-duty motor vehicle requirements

Part V. Modification and Termination of Contracts

- 103D-501 Contract clauses and their administration

Part VI. Cost Principles

- 103D-601 Cost principles rules required

Part VII. Legal and Contractual Remedies

- 103D-701 Authority to resolve protested solicitations and awards
- 103D-702 Authority to debar or suspend
- 103D-703 Authority to resolve contract and breach of contract

controversies

- 103D-703.5 Settlement of default by contractor
- 103D-704 Exclusivity of remedies
- 103D-705 Solicitations or awards in violation of law
- 103D-706 Remedies prior to an award
- 103D-707 Remedies after an award
- 103D-708 Interest
- 103D-709 Administrative proceedings for review
- 103D-710 Judicial review
- 103D-711 Judicial action
- 103D-712 Time limitations on actions
- 103D-713 Defense of a governmental body

Part VIII. Governmental Relations and
Cooperative Purchasing

- 103D-801 Definitions
- 103D-802 Cooperative purchasing authorized
- 103D-803 Sale, acquisition, or use of goods by a public procurement unit
- 103D-804 Cooperative use of goods or services
- 103D-805 Joint use of facilities
- 103D-806 Supply of personnel, information, and technical services
- 103D-807 Use of payments received by a supplying public procurement unit
- 103D-808 Public procurement units in compliance with requirements of this chapter
- 103D-809 Review of procurement requirements
- 103D-810 Contract controversies

Part IX. Assistance to Small Businesses

- 103D-901 Definitions
- 103D-902 Small business assistance
- 103D-903 Duties of the chief procurement officer
- 103D-904 Geographic bidding
- 103D-905 Repealed
- 103D-906 Preference for small businesses; set-asides; use as subcontractors

Part X. Preferences

- 103D-1001 Definitions
- 103D-1001.5 Application of this part
- 103D-1002 Hawaii products
- 103D-1002.5 Failure to adequately verify, deliver, or supply Hawaii products
- 103D-1003 Printing, binding, and stationery work
- 103D-1004 Reciprocity
- 103D-1005 Recycled products
- 103D-1006 Software development businesses
- 103D-1007 Repealed

- 103D-1008 Taxpayer preference
- 103D-1009 Preference for qualified community rehabilitation programs
- 103D-1010 Purchases from qualified community rehabilitation programs
- 103D-1011 Qualified community rehabilitation program; proposal to provide goods and services
- 103D-1012 Biofuel preference

Part XI. Federal and State Surplus Property

- 103D-1101 Definitions
- 103D-1102 State agency for surplus property
- 103D-1103 Authority and duties
- 103D-1104 Delegation of authority; bond
- 103D-1105 Authorized donee representatives
- 103D-1106 Transfer charges
- 103D-1107 Revolving fund

Part XII. Inventory Management; State and County Property

- 103D-1201 Definitions
- 103D-1202 Rules
- 103D-1203 Administrator of the state procurement office; duties
- 103D-1204 Others' responsibilities
- 103D-1205 Internal control
- 103D-1206 Annual inventory reporting by state officers
- 103D-1207 Annual inventory reporting by county mayors to administrator of the state procurement office
- 103D-1208 Annual inventory reporting by county officers to council
- 103D-1209 Authority to withhold salary
- 103D-1210 Penalty; jurisdiction
- 103D-1211 Forms for annual inventory return
- 103D-1212 Duties of the State and county
- 103D-1213 Sale of produce, etc.; disposition of proceeds; exceptions
- 103D-1214 Proceeds

Part XIII. Preference for Oil Products with Greater Recycled Content

- 103D-1301 Short title
- 103D-1302 Definitions
- 103D-1303 Preference for oil products with greater recycled content
- 103D-1304 Affirmative program for procuring oils with recycled content

Note

Expedited procedures for programs using American Recovery and Reinvestment Act of 2009 funds; oversight commission (repealed June 30, 2011). L 2009, c 150.

Procurement statistics on protests (repealed July 1, 2011). L 2009, c 175, §7.

Cross References

Access Hawaii Committee (management of State's internet portal), see chapter 27G.

Employment of state residents on construction procurement contracts, see chapter 103B.

International trade agreements, approval of procurement provisions, see chapter 489M.

Parental preference in government contract and services, see §577-7.5.

Attorney General Opinions

The Code did not apply to board of trustees of deferred compensation plan's current administrator and investment-product-provider contracts because they were entered into before the Code's July 1, 1994 effective date. The Code would apply to contracts entered into after that date if "public funds" are used to fund them. Att. Gen. Op. 94-4.

Law Journals and Reviews

Emerging Trends in International, Federal, and State and Local Government Procurement in an Era of Global Economic Stimulus Funding. 32 UH L. Rev. 29.

Case Notes

Procurement code was not relevant to employer's claim for breach of duty of loyalty. 338 F.3d 1082.

Where plaintiffs had no standing, as a labor union and subcontractor, to invoke the provisions of this code because they were neither contractors nor bidders for the contract in question, and neither this code nor chapter 444 authorized the circuit court to grant the remedies plaintiffs sought, and the court was presented with no other basis for granting the requested relief, the court correctly dismissed the suit. 121 H. 182 (App.), 216 P.3d 108.

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HAWAII ADMINISTRATIVE RULES
TITLE 3
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
SUBTITLE 11
PROCUREMENT POLICY BOARD
<http://hawaii.gov/spo/statutes-and-rules>

CHAPTER 120
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- §3-120-1 Purpose
- §3-120-2 Definitions
- §3-120-3 Applicability
- §3-120-4 Procurements exempt from chapter 103D, HRS
- §3-120-5 Procedures for requesting exemption and amendment
- §3-120-6 Repealed

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- §3-121-1 Duties and advisor
- §3-121-1.01 Meetings
- §3-121-2 Procurement directives
- §3-121-3 Exceptions
- §3-121-4 Repealed

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- §3-121-5 Chief procurement officers identified
- §3-121-6 Authority and duties
- §3-121-7 Additional duties of the administrator of the state procurement office
- §3-121-8 Centralization of procurement authority
- §3-121-9 Repealed
- §§3-121-10 to 3-121-15 (Reserved)

Subchapter 3 Delegation of Chief Procurement Officers' Authority and Duties

- §3-121-16 Delegation of authority
- §3-121-17 Limits to delegation of authority
- §3-121-18 Repealed
- §§3-121-19 to 3-121-24 (Reserved)

Subchapter 4 Procurement Advisory Council and Other Advisory Groups

- §3-121-25 Procurement advisory council
- §3-121-26 Other advisory groups
- §3-121-27 Reimbursement of expenses
- §3-121-28 Repealed
- §3-121-29 to 3-121-30 Reserved.

Subchapter 5 Rulemaking Proceeding and Declaratory Rulings

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- §3-122-7 Determination of contractual terms and conditions
- §3-122-8 Purchase of items separately from construction contract
- §3-122-9 Use of facsimile machines, electronic mail, or electronic procurement systems
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- §3-122-11 Authority to prepare specifications
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 - §3-122-16.01 Procurement dollar thresholds
 - §3-122-16.02 Preparation time for offer
 - §3-122-16.03 Public notice
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- §3-122-21 Preparing a competitive sealed bid
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§103D-201 Creation and membership of the procurement policy board. (a)

There is hereby created an autonomous state procurement policy board. The policy board shall be assigned, for administrative purposes only, to the department of accounting and general services.

(b) The policy board shall consist of seven members. Notwithstanding the limitations of section 78-4, the members of the board shall include:

- (1) The comptroller;
- (2) A county employee with significant high-level procurement experience; and
- (3) Five persons who shall not otherwise be full-time employees of the State or any county; provided that at least one member shall be a certified professional in the field of procurement, at least one member shall have significant high-level, federal procurement experience, and at least two members shall have significant experience in the field of health and human services.

Each appointed member shall have demonstrated sufficient business or professional experience to discharge the functions of the policy board. The initial and subsequent members of the policy board, other than the comptroller, shall be appointed by the governor from a list of three individuals for each vacant position, submitted by a nominating committee composed of four individuals chosen as follows: two persons appointed by the governor; one person appointed by the president of the senate; and one person appointed by the speaker of the house. Except as provided in this section, the selection and terms of the policy board members shall be subject to the requirements of section 26-34. No member of the policy board shall act concurrently as a chief procurement officer. The members of the policy board shall devote such time to their duties as may be necessary for the proper discharge thereof.

(c) The policy board shall be assisted by employees of the department of accounting and general services, which shall provide at least one full-time support staff and funding necessary to support the policy board.

(d) Members of the policy board shall be reimbursed for any expenses, including travel expenses, reasonably incurred in the performance of their duties.

(e) The chairperson of the policy board shall be elected annually by a majority of its members from among all of its members; provided that the state comptroller shall not be eligible to serve as the chairperson. [L Sp 1993, c 8, pt of §2; am L 1997, c 190, §4 and c 352, §4; am L 1999, c 149, §13; am L 2002, c 148, §7]

§103D-202 Authority and duties of the policy board. Except as otherwise provided in this chapter, the policy board shall have the authority and responsibility to adopt rules, consistent with this chapter, governing the procurement, management, control, and disposal of any and all goods, services, and construction. All rules shall be adopted in accordance with chapter 91; provided that the policy board shall have the power to issue interim rules by procurement directives, which shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91. The interim rules shall be effective for not more than eighteen months. The policy board shall consider and decide matters of policy within the scope of this chapter including those referred to it by a chief procurement officer. The policy board shall have the power to audit and monitor the implementation of its rules and the requirements of this chapter, but shall not exercise authority over the award or administration of any particular contract, or over any dispute, claim, or litigation pertaining thereto. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §4; am L 1997, c 352, §23]

§103F-106 Authority of the procurement policy board. The policy board established under section 103D-201 shall adopt all rules necessary to implement this chapter. All rules shall be adopted in accordance with chapter 91. The policy board shall consider and decide matters of policy within the scope of this chapter including those referred to it by chief procurement officers. The policy board may audit and monitor implementation of its rules and the requirements of this chapter, but shall not exercise authority over the award or administration of any particular contract, or over any dispute or claim arising from a contract. [L 1997, c 190, pt of §2; am L 1998, c 267, §1]

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Contact Information

Kalanimoku Bldg.
1151 Punchbowl St.
Honolulu HI 96813
PO Box 119
Honolulu HI 96810-0119
Ph: 808 587-4700
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For procurements of health and human services, the SPO website provides information relating to the procurement of health and human services:

- Statutes and rules,
- Procurement forms and procedures for purchasing agencies and providers
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Agenda Item V

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment to Chapter 3-120
Hawaii Administrative Rules

Adoption date

Historical Note. This amendment of section 3-120-4, Hawaii Administrative Rules, replaces interim rules effective 03/28/11 (file no. 2961).

1. Section 3-120-4, Hawaii Administrative Rules, is amended to read as follows:

"§3-120-4 Procurements exempt from chapter 103D, HRS. (a) Notwithstanding the intent of chapter 103D, HRS, to require governmental bodies to procure their goods and services through competitive bidding, it is acknowledged that there may be situations where procurement by competitive means is either not practicable or not advantageous to the State.

(b) Exhibit A titled "Procurements Exempt From Chapter 103D, HRS" dated [07/17/08] 03/17/2011, is located at the end of this chapter. This exhibit provides a list of goods and services which the procurement policy board has determined to be exempt from chapter 103D, HRS, because although such goods and services may be available from multiple sources, their procurement by competitive means would be either not practicable or not advantageous to the State.

(c) Chief procurement officers may request periodic reports from the heads of purchasing agencies of procurements made pursuant to subsection (b). The heads of purchasing agencies may be required to include in their reports, descriptions of the process or procedures the agency used to select the vendor ensuring maximum fair and open competition whenever practicable.

(d) Chief procurement officers may request that

additional exemptions be added to Exhibit A[-] entitled "Procurements Exempt From Chapter 103D, HRS" dated 03/17/2011, located at the end of this chapter.

(e) The procurement policy board shall review Exhibit A titled "Procurements Exempt From Chapter 103D, HRS" dated [~~07/17/08~~] 03/17/2011, located at the end of this chapter, annually or more frequently as needed for amendments.

(f) Purchasing agencies making procurements which are exempt from chapter 103D, HRS, are nevertheless encouraged to adopt and use provisions of the chapter and its implementing rules as appropriate; provided that the use of one or more provisions shall not terminate the exemption and subject the procurement of the purchasing agency to any other provision of the chapter.

(g) Purchasing agencies shall cite on the purchase order or on the contract, the authority waiver as "Exempt From Chapter 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number from Exhibit A titled "Procurements Exempt From Chapter 103D, HRS" dated [~~07/17/08~~] 03/17/2011, located at the end of this chapter), Hawaii Administrative Rules".
[Eff 12/15/95; am and comp 11/17/97; am and comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; am and comp 8/24/09; am
] (Auth: HRS §§103D-102, 103D-202)
(Imp: HRS §103D-102)

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

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

4. These amendments to chapter 3-120, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the office of the Lieutenant Governor.

KEITH T. MATSUMOTO
Chairperson
Procurement Policy Board

BRUCE A. COPPA
State Comptroller

APPROVED AS TO FORM:



Deputy Attorney General

"EXHIBIT A"

HAR Chapter 3-120
PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS
[7/17/08] 03/17/2011

The following list of exemptions, pursuant to HAR §3-120-4, has been determined to be exempt from HRS [Chapter] chapter 103D by the procurement policy board:

<u>Exemption Number</u>	<u>Exemption</u>
1.	Research, reference, and educational materials including books, maps, periodicals, and pamphlets, which are published or available in print, video, audio, magnetic, or electronic form, <u>including web-based databases, and costs associated with publication of articles in scholarly journals;</u>
2.	Services of printers, rating agencies, support facility providers, fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
3.	Services of lecturers, speakers, trainers, facilitators and scriptwriters, when the provider possess specialized training methods, techniques or expertise in the subject matter;
4.	Services of legal counsel, guardian ad litem, psychiatrists, psychologists, receivers and masters when required by court order;
5.	Fresh meats and produce;

Exemption
Number

Exemption

- ~~[6.]~~ 5. Insurance to include insurance broker services;
- ~~[7.]~~ ~~Animals and plants;~~
- ~~[8.]~~ 6. New or used items which are advantageous and available on short notice through an auction, bankruptcy, foreclosure, etc.;
- ~~[9.]~~ 7. Food and fodder for animals;
- ~~[10.]~~ 8. Facility costs for conferences, meetings, and training sessions;
- ~~[11.]~~ 9. Advertisements in specialized publications, such as in ethnic or foreign language publications, trade publications, or professional publications;
- ~~[12.]~~ 10. Arbitrator and mediator services;
- ~~[13.]~~ 11. Interpreter services;
- ~~[14.]~~ 12. Procurement of repair services when dismantling is required to assess the extent of repairs;
- ~~[15.]~~ 13. Burial services consisting of mortuary, crematory, cemetery, and other essential services for deceased indigent persons or unclaimed corpses;
- ~~[16.]~~ 14. Radio and television airtime when selection of station is based on the targeted audience (i.e. ethnic or age group, gender, etc);
- ~~[17.]~~ 15. Subscription costs and registration or workshop fees for conferences or training; and

Exemption
Number

Exemption

[~~18-~~]16. Court reporter services.

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to Chapter 3-124
Hawaii Administrative Rules

Adoption date

Historical Note. This amendment of Chapter 3-124, Hawaii Administrative Rules, Subchapter 1, replaces interim rules effective 12/13/10 (file no. 2959).

1. Chapter 3-124, Hawaii Administrative Rules entitled "Preferences", is amended by amending Subchapter 1, entitled "Hawaii Products", to read as follows:

"SUBCHAPTER 1

HAWAII PRODUCTS

§3-124-1 Purpose. The purpose of this subchapter is to provide procedures for qualifying and registering products on the Hawaii products list and for ~~[the application of preferences thereof.]~~ applying preferences to those products. The objective is to promote the use of Hawaii products, as defined in section 103D-1001, HRS, by state purchasing agencies. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp 5/20/04; am] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-1.01 Applicability. (a) These rules shall apply to all solicitations made pursuant to sections 103D-302 and 103D-303, HRS, issued by a ~~[purchasing agency]~~ procurement officer when a registered and qualified Hawaii product is available ~~[where the product is required].~~

(b) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff and comp 11/17/97; comp 11/25/02; am and comp 5/20/04; am] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-2 Definitions. Definitions are in section

103D-1001, HRS. The following definitions also apply to this ~~[chapter]~~ subchapter:

~~["Hawaii input" means that part of the cost of a product attributable to production, manufacturing, or other expenses arising within the State. "Hawaii input" includes but is not limited to:~~

- ~~(1) The cost to mine, excavate, produce, manufacture, raise, or grow the materials in Hawaii;~~
- ~~(2) The added value of that portion of the cost of imported materials that is incurred after landing in Hawaii;~~
- ~~(3) The cost of labor, variable overhead, utilities, and services incurred in the production and manufacturing of materials or products in the State;~~
- ~~(4) Fixed overhead cost and amortization or depreciation cost, if any, for buildings, tools and equipment situated and located in the State and utilized in the production or manufacturing of a product.]~~

"Hawaii products list" means the list ~~[published]~~ compiled by the administrator ~~[itemizing those]~~ of products ~~[that have been found qualified]~~ approved as Hawaii products, the names and addresses of the manufacturers, the classes and preference percentages ~~[that]~~ the products will be allocated ~~[if they]~~ to meet the requirements for which offers are solicited.

"Non-Hawaii product" means a product that is not registered or qualified ~~[on the]~~ as a Hawaii ~~[products list]~~ product.

"Registered Hawaii product" means a Hawaii product ~~[that is registered on the]~~ approved by the administrator as a Hawaii ~~[products list]~~ product and included on the Hawaii product list.

"Qualified Hawaii product" means a product that has been reviewed, qualified, and approved by the procurement officer of a specific solicitation. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp 5/20/04; am] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-3 Qualification procedure. (a) A Hawaii product requires over fifty per cent Hawaii input towards the total cost of the product for:

- (1) Class I products mined, excavated, produced, manufactured, in the State; or

- (2) Class II products are agricultural, aquacultural, horticultural, silvicultural, floricultural, or livestock product raised, grown, or harvested in the State.

(b) The responsibility for obtaining qualification shall rest upon the person desiring the preference by submitting an application either to the administrator or to the procurement officer of a specific solicitation. Any person desiring a preference pursuant to this subchapter, ~~must~~ shall have the product(s) qualified and registered on the Hawaii products list~~[-]~~ as follows:

- (1) An application for Hawaii product preference may be submitted to the procurement officer at the time a solicitation is issued, provided the product meets the solicitation requirements or any other criteria, prior to the due date specified in the solicitation. An addendum, if applicable, shall be issued to notify potential offerors of a qualified Hawaii product for the solicitation which the approval was requested; or
- (2) ~~[The responsibility for qualification shall rest upon the person desiring the preference. The product(s) shall be found qualified and on the Hawaii products list before a preference may be granted.]~~ Persons desiring to qualify their product(s) by registering with the state procurement office shall complete ~~[an application according to instructions]~~ the application and file with the administrator.

(c) Financial information submitted ~~[to the administrator pursuant to these rules]~~ for the purpose of determining classification of a product shall be treated as confidential ~~[when a person has made a written request for confidentiality]~~. In accordance with chapter 92F, HRS, the administrator or the procurement officer shall properly safeguard ~~[such]~~ the information and shall not make it available to the public.

~~[(b) A single application may be submitted for more than one product; however, separate data sheets~~

~~shall be submitted for each product for which registration is requested. Further, it is necessary that each]~~ (d) Each product shall be specified clearly and not by broad category of product.

~~[(+)]~~(e) Cost data for each product shall reflect the product's actual total production cost per unit. ~~[for the most recent full accounting period. If a product has not been in production during the full accounting period, approval may be granted based on cost data representing that shorter period.]~~

~~[(+)]~~(f) ~~[If upon]~~ Upon completion of the review as whether a product is a qualified Hawaii product, if the ~~[administrator]~~ procurement officer finds that a product has qualified as a Hawaii product, the ~~[administrator]~~ procurement officer shall ~~[so]~~ notify the approved applicant in writing of the qualified Hawaii product(s), and submit the approved application to the state procurement office within five working days of the approved date. Within five working days of receiving the approved application from the procurement officer, the administrator shall list the qualified Hawaii product on the Hawaii products list as a registered Hawaii product~~[,]~~ with its effective date, unless upon further review by the administrator the product is determined not qualified ~~[and notify the chief procurement officers and heads of purchasing agencies or designees of the decision]~~. Applicants whose products do not qualify as a Hawaii product for a solicitation or for the Hawaii products list shall be notified in writing of the decision and the reasons ~~[therefor]~~.

(g) Non-approved applicants may appeal the decision of the administrator or the procurement officer:

- (1) ~~[Any applicant whose product was determined not to qualify for registration on the Hawaii products list or who contests the classification may resubmit their application within thirty days addressing the reasons therefore]~~ The applicant shall file a written request for reexamination of facts to the administrator within five working days of the notification date. The administrator shall respond to the applicant within thirty days and shall have the sole discretion in determining qualification for the preference ~~[,]~~; or
- (2) The applicant shall file a written request for reexamination of facts to the procurement

officer for a specific solicitation within five working days of the notification date. The procurement officer shall respond to the applicant within five working days and shall have the sole discretion in determining the preference qualification.

~~[(e)]~~ (h) Should the administrator receive a ~~[protest]~~ request challenging the validity of the qualification, classification, or reexamination of a Hawaii product, the administrator may request an audit of the information provided should the need arise to determine if the ~~[proper classification of the]~~ product is qualified as defined under Hawaii product in section 103D-1002, HRS. A request for audit shall be sent to the person having requested registration of the product on the Hawaii products list, and the person shall bear the cost of the audit. The administrator or procurement officer may also request any additional information determined necessary in order to qualify or determine proper classification. ~~[The administrator shall approve or reject the classification for each Hawaii product and advise the applicant or contractor within thirty days after receipt of information.]~~

(i) Should the procurement officer receive a request to challenge the validity of the qualification, classification, or reexamination of a Hawaii product, the request shall be received not later than five working days after the issuance of the written notification, and shall contain a specific statement of the factual grounds upon which reversal is sought. The determination required by this section shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law.

~~[(f)]~~ (j) Application, renewal, and other forms required shall be provided by the administrator. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; comp 5/20/04; am] (Auth: HRS §103D-202) (Imp: HRS §§92F-14, 103D-1002)

§3-124-4 Solicitation procedure. (a) Solicitations to which this preference is applicable shall refer to this subchapter and shall also contain a notice ~~[referring to the place]~~ where the Hawaii products list ~~[may be examined]~~ is available.

(b) To be eligible for preference, a product shall be qualified and registered on the Hawaii products list.

(1) [The] A Hawaii product approved by the state

procurement office shall have an effective date of ~~[when a product is determined to be qualified and registered on the Hawaii products list is]~~ one month after the product has been approved ~~[by the state procurement office]~~.

- (2) The procurement officer shall specify in the public notice and solicitation the application due date and instructions for submittal. The due date shall be at least five working days after the public notice release date for bids pursuant to section 103D-302, HRS, and at least ten working days after the public notice release date for proposals pursuant to section 103D-303, HRS. The procurement officer shall issue addenda of new qualified Hawaii product(s).

(c) To be listed in a solicitation, the effective date when a product was qualified and registered on the Hawaii products list shall be no later than the date a solicitation is first publicly advertised.

~~[(d) The classification of a registered Hawaii product on the date a solicitation is first publicly advertised shall determine the preference allowed the product.]~~

~~[(e)]~~(d) Prospective offerors shall be informed of the registered Hawaii product and its established class that meets the requirements for which offers are being solicited.

- (1) When more than one registered Hawaii product meeting minimum requirements is available, a schedule describing all registered Hawaii products and their established classes shall be included in the solicitation.
- (2) ~~[Purchasing agencies]~~ The procurement officer shall provide in the solicitation appropriate space(s) for offerors to indicate selection of the Hawaii products preference and to list the Hawaii product and its price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp 5/20/04; am

] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-5 Evaluation procedure and contract award.

- (a) ~~[In any expenditure of public funds resulting~~

~~from a contract award, a purchasing agency shall purchase any required product from the Hawaii products list where the registered Hawaii product is available, provided the product meets the specifications and the selling price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax and does not exceed the lowest delivered price in Hawaii f.o.b. jobsite, unloaded, including applicable general excise tax and use tax, of a similar non-Hawaii product by more than three per cent, where class I registered Hawaii products are involved, or five per cent where class II registered Hawaii products are involved, or ten per cent where class III registered Hawaii products are involved.] An application submitted with the offer shall be accepted by the procurement officer for determination review as prescribed in section 3-124-3.~~

(b) For evaluation purposes, no preference shall be considered when only registered Hawaii products are offered.

(c) Where offers include both registered Hawaii products and non-Hawaii products, for the purpose of determining the lowest evaluated offer, the offer for the Hawaii product shall be decreased by its applicable [three per cent, five per cent, or] ten per cent or fifteen per cent classification preference.

(d) The contract amount shall be the amount of the price offered, exclusive of any preference.

(e) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
- (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
- (4) Recycled products, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
- (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003,

HRS;

- (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.

(f) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical total prices, award shall be made to the offeror offering a registered Hawaii product in preference to a non-Hawaii product.

(g) For proposals submitted pursuant to section 103D-303, HRS, and after taking into consideration all applicable preferences, the procurement officer shall award the contract pursuant to section 3-122-57. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp 5/20/04; am] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-6 Change in class status. (a) A person whose product is on the Hawaii products list shall be responsible for informing the administrator of:

- (1) A change to the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of the product(s), which could affect the product(s) classification;
- (2) The discontinuation of product; or
- (3) [any] Any change affecting the classification or qualification of the product [within sixty days of the change].

(b) [If, since the original application, there has been a] Any [change] changes affecting [in] either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of the product(s), which could affect the product(s) classification, a new application [must] shall be submitted to the administrator within [sixty] five working days of the change. The administrator shall make a determination within fifteen working days of submittal of new application of product classification.

(c) Any change on a product application submitted as part of an offer that materially alters the offeror's ability to supply the Hawaii product:

- (1) The offeror shall notify the procurement officer of the change no later than five working days from when the offeror knows of the change by submitting a letter to the procurement officer, explaining why the Hawaii product is not available, the

estimated date it will be available, and if applicable, attach a confirmation letter from the manufacturer or producer of the Hawaii product.

- (2) The procurement officer shall notify the administrator within five working days of the receipt of the offeror's letter indicating the discontinuation of the Hawaii product or its availability. Upon receipt of the offeror's letter, the administrator shall review the letter and update the Hawaii product list accordingly. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp 5/20/04; am] (Auth: HRS §103D-202)
(Imp: HRS §103D-1002)

~~§3-124-7 [Biennial renewal. (a) All persons whose product(s) is registered on the Hawaii products list will be notified by the State thirty days prior to the date for biennial renewal or if a new application is required. A sixty day grace period is allowed for both the renewal and the new application after the preference expiration date which normally will be the end of an accounting period.~~

~~(b) An affidavit for renewal shall be submitted if, since the filing of the original application, there has been no change in either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost affecting the product classification. Provided the administrator is satisfied that the classification of a registered Hawaii product is not changed, the administrator shall renew the registration and classification of the product.~~

~~(c) Failure to complete the biennial renewal or to provide any further information requested by the administrator shall be grounds for rejecting an application or for disqualification of the product.~~

~~(d) Any person receiving a notice for renewal for Hawaii products list qualification shall advise the administrator immediately if there is any reason why the person cannot comply within the sixty day grace period.]~~ [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp 5/20/04; R] (Auth: HRS §103D-202)
(Imp: HRS §103D-1002)

§3-124-8 Termination. If change of status is not

reported as required in section 3-124-6 [~~, or if the biennial renewal is not provided as required by section 3-124-7~~], the administrator shall terminate the registration of the product [~~effective at the end of the sixty day grace period allowed~~]. Any person terminated that desires to be reinstated on the Hawaii products list shall submit a new application. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp 5/20/04; am] (Auth: HRS §103D-202)
(Imp: HRS §103D-1002)

§3-124-9 (Reserved)."

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 of chapter 3-124, Hawaii Administrative Rules, 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 by the Procurement Policy Board and filed with the Office of the Lieutenant Governor.

KEITH T. MATSUMOTO
Chairperson
Procurement Policy Board

BRUCE A. COPPA
State Comptroller

APPROVED AS TO FORM:

A handwritten signature in cursive script, appearing to read "R. A. ...", is written above a horizontal line.

Deputy Attorney General

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment to Chapter 3-125
Hawaii Administrative Rules

Adoption date

Historical Note. This amendment of section 3-125-13, Hawaii Administrative Rules, replaces interim rules effective 03/28/11 (file no. 2962).

1. Section 3-125-13, Hawaii Administrative Rules, is amended to read as follows:

"§3-125-13 Price adjustment in construction contracts. The following paragraph or similar statement expressing the intent of ~~[this]~~ the paragraph, shall be included in all construction contracts for which price adjustments will be allowed:

"Price Adjustment Clause

- (1) Price adjustment methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
 - (A) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - (B) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (C) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (D) In any other manner as the parties may mutually agree upon before commencement of the pertinent performance; or
 - (E) In the absence of agreement between the parties the provisions of section 103D-501(b)(5), HRS, shall apply.
- (2) Submission of cost or pricing data. The contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 103D-312, HRS. The submission of any cost or pricing data shall be made subject to the provisions of subchapter 15, chapter 3-122. A fully executed change order or other document

permitting billing for the adjustment in price under any method listed in paragraph (1)(A) through (1)(D) shall be issued within ten days after agreement on the method of adjustment.

- (3) Determining Adjustments in Price. In determining the adjustment in price to the government resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office and branch office overhead) and profit combined shall not exceed the percentages set forth below:

- (A) For the contractor, for any work performed by its own forces, twenty per cent (20%) of the cost;
- (B) For each subcontractor involved, for any work performed by its own forces, twenty per cent (20%) of the cost;
- (C) For the contractor or any subcontractor, for work performed by their subcontractors, ten per cent (10%) of the amount due the performing subcontractor.

Not more than three line item percentages for fee and overhead, not to exceed the maximum percentages shown above, will be allowed regardless of the number of tier subcontractors.

- (4) The government in determining an adjustment in price using any of the methods listed in paragraph (1)(A) through (1)(D) above may not mandate that the contractor submit its proposal for a price adjustment at a specified percentage that it unilaterally considers to be acceptable.
- (5) Paragraphs (3) and (4) shall not be construed to impair the right of a contractor and government from mutually agreeing to a price adjustment under any method listed in paragraphs (1)(A) through (1)(D) above." [Eff 12/15/95; am and comp NOV 17 1997; am 10/3/08; am 8/24/09; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-501, 103D-601, 103D-703)

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

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

4. These amendments to chapter 3-125, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the office of the Lieutenant Governor.

KEITH T. MATSUMOTO
Chairperson
Procurement Policy Board

BRUCE A. COPPA
State Comptroller

APPROVED AS TO FORM:



Deputy Attorney General