

**PROCUREMENT POLICY BOARD**  
1151 Punchbowl Street, Conference Room 410  
Honolulu, Hawaii 96813

Regular Meeting  
May 21, 2009  
1:00 pm

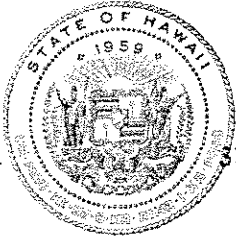
AGENDA  
(Amended)

- I. Call to Order.
- II. Approval of Minutes – Meeting of April 16, 2009.
- III. Board’s request to discuss the process on how items are to be included on the agenda.
- IV. Communication dated May 7, 2009 from the Small Business Utilization Council regarding the nomination of Ms. Wendale Imamura as the alternate Council member to Mr. Rix Maurer, III, City and County of Honolulu.
- V. Request by Member Darryl Bardusch to:
  - a) Modify two rules (3-126-7a and 3-121-16) on protests; and
  - b) Replacing existing rules on conducting protest with new rules (3-126-42 thru 3-126-74.)
- VI. Request by Lance Inouye, General Contractors Association, regarding proposed change to HAR Section 3-125-13 (Addition to the Price Adjustment Clause in Construction Contracts).
- VII. Communication dated May 13, 2009 from the Small Business Utilization Council – HAR Chapter 3-124, Small Business Preference Rules Targeted Area for Set-Aside and/or Subcontracting – Alternate Energy
- VIII. Executive Session:
  - a) To consult with the Board’s attorney on powers, immunities, and liabilities pursuant to HRS section 92-5(a)(4); regarding two appeals of the PPB’s Declaratory Order, in the Circuit Court of the First Circuit by Olelo Community Television and in the Circuit Court of the Second Circuit by Akaku: Maui Community Television; and
  - b) To discuss personnel matters in the recruitment for Administrator, State Procurement Office.
- IX. Announcements.
- X. Adjournment.

Agenda 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 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, May 19, 2009. Testimonies received after the May 19, 2009 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 provided 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 pm, May 18, 2009 to discuss accommodation arrangements.

# Agenda Item IV



09 MAY -7 12:29

**DEPARTMENT OF BUSINESS,  
ECONOMIC DEVELOPMENT & TOURISM**

LINDA LINGLE  
GOVERNOR  
THEODORE E. LIU  
DIRECTOR  
MARK K. ANDERSON  
DEPUTY DIRECTOR

STATE PROCUREMENT OFFICE

No. 100 Fish Market Building, 250 South Hotel Street, 5th Floor, Honolulu, Hawaii 96813

Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804

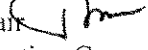
Web site: [www.hawaii.gov/obed](http://www.hawaii.gov/obed)

Telephone: (808) 586-2355  
Fax: (808) 586-2377

May 7, 2009

To: Procurement Policy Board

Thru: Aaron Fujioka, Administrator  
State Procurement Office

From: Theodore E. Liu, Chair   
Small Business Utilization Council

Re: Nomination of Alternate Member to the Small Business Utilization Council

On behalf of the Small Business Utilization Council, I am respectfully recommending to the Procurement Policy Board the nomination of Ms. Wendale Imamura as the alternate Council member to Mr. Rix Maurer, III. Ms. Imamura is the Central Purchasing and Contracts Administrator of the Department of Budget and Fiscal Services at the City and County of Honolulu.

Thank you very much for your consideration.

# Agenda Item V



"Bardusch, Darryl W Mr CIV  
USA USARPAC"  
<darryl.bardusch@us.army.m  
il>

To <procurement.policy.board@hawaii.gov>  
cc  
bcc

05/11/2009 02:42 PM

Subject RE: Next Procurement Policy Board Meeting

History: This message has been forwarded.

Sir,

I will attend I would like two items added to the agenda. 1 modifying two rules(3-126-7a & 3-121-16 on protests see attachment. And one item replacing existing rules on conducting protests with new rules. Attached .replace rules 3-126-42thru 3-126-74

Thank you

Darryl

-----Original Message-----

From: aaron.fujioka@hawaii.gov [mailto:aaron.fujioka@hawaii.gov] On Behalf Of procurement.policy.board@hawaii.gov  
Sent: Friday, May 08, 2009 4:57 PM  
To: dah@pacifichalthinc.com; lchinen@queens.org; pamelatorres@hawaii.rr.com; kmatsumoto@msn.com; Bardusch, Darryl W Mr CIV USA USARPAC; Russ.K.Saito@hawaii.gov  
Cc: Patricia.T.Ohara@hawaii.gov; GGreen@hawaii.gov; ruth.yamaguchi@hawaii.gov; cheryl.s.cho@hawaii.gov  
Subject: Next Procurement Policy Board Meeting

To PPB Members:

Below is the proposed agenda for Thursday, May 21st, 1:00 pm meeting. If you have any adjustments to the proposed agenda, please let me know by no later than close of business on Tuesday, May 12th. Due to limited resources at this time, we would appreciate your timely response.

If you are unable to attend please let us know, thanks,

Aaron

(See attached file: Agenda for May 21, 2009 draft.doc)



protest rule changes.doc new hl protest rules.doc

# Agenda Item Va

Modifications of Existing rules:

1. 3-126-7(a) is modified by adding: "(the designee shall not be the official conducting the procurement or an official who participated substantially in the procurement)" after "designee" and before "as"
2. 3-121-16 is modified by adding: "except the power to decide a protest cannot be delegated to the official who conducted the procurement or an official who participated substantially in the procurement" after "jurisdiction".

# Agenda Item Vb



**§ 3-126-42 Filing a protest.**

(a) An interested party may protest a solicitation or other request by a State agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.

(b) Protests must be in writing and addressed as follows: (insert DCCA address)

(c) A protest filed with DCCA shall:

(1) Include the name, street address, electronic mail address, and telephone and facsimile numbers of the protester,

(2) Be signed by the protester or its representative,

(3) Identify the contracting agency and the solicitation and/or contract number,

(4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,

(5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest, ????? is this needed?

(6) Set forth all information establishing the timeliness of the protest,

(7) Specifically request a ruling by DCCA , and

(8) State the form of relief requested.

(d) In addition, a protest filed with DCCA may:

(1) Request a protective order,

(2) Request specific documents, explaining the relevancy of the documents to the protest grounds, and

(3) Request a hearing, explaining the reasons that a hearing is needed to resolve the protest.

(e) The protester shall furnish a complete copy of the protest, including all attachments, to the individual or location designated by the contracting agency in the solicitation for receipt of protests, or if there is no designation, to the contracting officer. The designated individual or location (or, if applicable, the contracting officer) must receive a

complete copy of the protest and all attachments not later than 1 day after the protest is filed with DCCA. The protest document must indicate that a complete copy of the protest and all attachments are being furnished within 1 day to the appropriate individual or location.

(f) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and should clearly state legally sufficient grounds of protest. Protests of different procurements should be separately filed.

(g) Unless precluded by law, DCCA will not withhold material submitted by a protester from any party outside the government. If the protester believes that the protest contains information which should be withheld, a statement advising of this fact must be on the front page of the submission. This information must be identified wherever it appears, and the protester must file a redacted copy of the protest which omits the information with DCCA and the agency within 1 day after the filing of its protest with DCCA.

(h) A protest may be dismissed for failure to comply with any of the requirements of this section, except for the items in paragraph (d) of this section. In addition, a protest shall not be dismissed for failure to comply with paragraph (e) of this section where the contracting officer has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

#### **§ 3-126-43 Time for filing.**

(a) Protests must be filed within seven days of the receipt of the denial of the protest by the respective state agency

(b) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest.

(c) DCCA, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.

#### **§ 3-126-44 Notice of protest, submission of agency report, and time for filing of comments on report.**

(a) DCCA shall notify the contracting agency by telephone within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly send a written confirmation to the contracting agency and an acknowledgment to the protester. The contracting agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The contracting agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with DCCA. All parties shall furnish copies of all protest communications to the contracting agency and to other participating parties. All protest communications shall be sent by means reasonably calculated to effect expeditious delivery.

(b) A contracting agency or intervenor which believes that the protest or specific protest allegations should be dismissed before submission of an agency report should file a request for dismissal as soon as practicable.

(c) The contracting agency shall file a report on the protest with DCCA within 30 days after the telephone notice of the protest from DCCA. The report provided to the parties need not contain documents which the agency has previously furnished or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and DCCA a list of those documents, or portions of documents, which the agency has released to the protester or intends to produce in its report, and of the documents which the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with DCCA and the other parties within 2 days of receipt of this list.

(d) The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, the contracting agency may request that the protester produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Subject to any protective order issued in the protest pursuant to § 3-126-45, the contracting agency shall simultaneously furnish a copy of the report to the protester and any intervenors. The copy of the report filed with DCCA shall list the parties who have been furnished copies of the report. Where a protester does not have counsel admitted

to a protective order and documents are withheld from the protester in accordance with this part, the agency shall provide documents adequate to inform the protester of the basis of the agency's position.

(f) The contracting agency may request an extension of time for the submission of the list of documents to be provided by the agency pursuant to § 3-126-44(c) or for the submission of the agency report. Extensions will be granted on a case-by-case basis

(g) The protester may request additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by DCCA, any request for additional documents must be filed with DCCA and the contracting agency not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The contracting agency shall provide the requested documents, or portions of documents, and a list to DCCA and the other parties within 2 days or explain why it is not required to produce the documents.

(h) Upon the request of a party, DCCA will decide whether the contracting agency must provide any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless DCCA determines that an extension is appropriate.

(i) Comments on the agency report shall be filed with DCCA within 10 days after receipt of the report, with a copy provided to the contracting agency and other participating parties. The protest shall be dismissed unless the protester files comments within the 10-day period, except where DCCA has granted an extension or has established a shorter period in accordance with § 3-126-4\_(e). Extensions will be granted on a case-by-case basis. Unless otherwise advised by the protester, DCCA will assume the protester received the agency report by the due date specified in the acknowledgment of protest furnished by DCCA.

(j) DCCA may request or permit the submission of additional statements by the parties and by other parties not participating in the protest as may be necessary for the fair resolution of the protest. The agency and other parties shall not submit any additional statements unless the statements are specifically requested by DCCA or submitted after permission has been granted by DCCA.

### **§ 3-126-45 Protective orders.**

(a) At the request of a party or on its own initiative, DCCA may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more

firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

(b) If no protective order has been issued, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order. DCCA will review in camera all information not released to the parties. Where a protective order has been issued, documents may be filed by electronic means (other than facsimile transmission) only when specifically authorized by DCCA.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to DCCA, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although DCCA may consider objections raised after that time.

(d) Any violation of the terms of a protective order may result in the imposition of such sanctions as DCCA deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before DCCA.

**§ 3-126-46 Protest issues not for consideration.**

A protest or specific protest allegations may be dismissed any time sufficient information is obtained by DCCA warranting dismissal. Where an entire protest is dismissed, no agency report need be filed; where specific protest allegations are dismissed, an agency report shall be filed on the remaining allegations. (do we need this?)

**§ 3-126-47 Withholding of award and suspension of contract performance.**

Where a protest is filed with DCCA, the contracting agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in \_\_\_\_\_

**§ 3-126-48 Hearings.**

(a) At the request of a party or on its own initiative, DCCA may conduct a hearing in connection with a protest. The request shall set forth the reasons why a hearing is needed to resolve the protest.

(b) Prior to the hearing, DCCA may hold a pre-hearing conference to discuss and resolve matters such as the procedures to be followed, the issues to be considered, and the witnesses who will testify.

(c) Hearings generally will be conducted as soon as practicable after receipt by the parties of the agency report and relevant documents. Although hearings ordinarily will be conducted at DCCA, hearings may, at the discretion of DCCA, be conducted at other locations, or by telephone or other electronic means.

(d) All parties participating in the protest shall be invited to attend the hearing. Others may be permitted to attend as observers and may participate as allowed by DCCA's hearing official. In order to prevent the improper disclosure of protected information at the hearing, DCCA's hearing official may restrict attendance during all or part of the proceeding.

(e) Hearings shall normally be recorded and/or transcribed. If a recording and/or transcript is made, any party may obtain copies at its own expense.

(f) If a witness whose attendance has been requested by DCCA fails to attend the hearing or fails to answer a relevant question, DCCA may draw an inference unfavorable to the party for whom the witness would have testified.

(g) If a hearing is held, each party shall file comments with DCCA within 5 days after the hearing was held or as specified by DCCA. If the protester has not filed comments by the due date, DCCA shall dismiss the protest.

(h) In post-hearing comments, the parties should reference all testimony and admissions in the hearing record that they consider relevant, providing specific citations to the testimony and admissions referenced.

### **§ 3-126-49 Remedies.**

(a) If DCCA determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it shall recommend that the contracting agency implement any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Terminate the contract;

- (3) Recompete the contract;
- (4) Issue a new solicitation;
- (5) Award a contract consistent with statute and regulation; or
- (6) Such other recommendation(s) as DCCA determines necessary to promote compliance.

(b) In determining the appropriate recommendation(s), DCCA shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the contracting agency's mission.

(c) If the head of the procuring activity determines that performance of the contract notwithstanding a pending protest is in the government's best interest, DCCA shall make its recommendation(s) under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(d) If DCCA determines that a solicitation, proposed award, or award does not comply with statute or regulation, it may recommend that the contracting agency pay the protester the costs of:

- (1) Filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and
- (2) Bid and proposal preparation.

(e) If the contracting agency decides to take corrective action in response to a protest, DCCA may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that DCCA recommend that costs be paid within 15 days of the date on which the protester learned (or should have learned, if that is earlier) that DCCA had closed the protest based on the agency's decision to take corrective action. The protester shall furnish a copy of its request to the contracting agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

(f)(1) If DCCA recommends that the contracting agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and

the agency shall attempt to reach agreement on the amount of costs. The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of DCCA's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(2) The contracting agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed. If the protester and the contracting agency cannot reach agreement within a reasonable time, DCCA may, upon request of the protester, recommend the amount of costs the agency should pay in accordance with \_\_\_\_\_. In such cases, DCCA may also recommend that the contracting agency pay the protester the costs of pursuing the claim for costs before DCCA.

(3) The contracting agency shall notify DCCA within 60 days after DCCA recommends the amount of costs the agency should pay the protester of the action taken by the agency in response to the recommendation.

**§ 3-126-50 Time for decision by DCCA.**

(a) DCCA shall issue a decision on a protest within 100 days after it is filed.

(b) DCCA, to the maximum extent practicable, shall resolve a timely supplemental protest adding one or more new grounds to an existing protest, or a timely amended protest, within the time limit established in paragraph (a) of this section for decision on the initial protest. If a supplemental or an amended protest cannot be resolved within that time limit, DCCA may resolve the supplemental or amended protest using the express option procedures in § 3-126-51.

**§ 3-126-51 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.**

(a) At the request of a party or on its own initiative, DCCA may decide a protest using an express option.

(b) The express option will be adopted at the discretion of DCCA and only in those cases suitable for resolution within 65 days.

(c) Requests for the express option shall be in writing and received in DCCA not later than 5 days after the protest or supplemental/amended protest is filed. DCCA will promptly notify the parties whether the case will be handled using the express option.



(d) When the express option is used, the following schedule applies instead of those deadlines in §§ **3-126-44** and **3-126-48**:

(1) The contracting agency shall file a complete report with DCCA and the parties within 20 days after it receives notice from DCCA that the express option will be used.

(2) Comments on the agency report shall be filed with DCCA and the other parties within 5 days after receipt of the report.

(3) Where circumstances demonstrate that a case is no longer suitable for resolution using the express option, DCCA shall establish a new schedule for submissions by the parties.

(e) DCCA, on its own initiative or upon request by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.

(f) DCCA may conduct status and other conferences by telephone or in person with all parties participating in a protest to promote the expeditious development and resolution of the protest.

**§ 3-126-52 Distribution of decisions.**

(a) Unless it contains protected information, a copy of a decision shall be provided to the protester, any intervenors, the head of the contracting activity responsible for the protested procurement, and the senior procurement executive of each Federal agency involved; a copy shall also be made available to the public. A copy of a decision containing protected information shall be provided only to the contracting agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible.

(b) Decisions may be distributed to the parties, and are available from DCCA, by electronic means.


# Agenda Item VI



"Lance Inouye"  
<lance@rsinouye.com>  
05/12/2009 08:45 AM

To <aaron.fujioka@hawaii.gov>  
cc  
bcc

Subject Proposed Change to HAR Sec 3-125-13

History:  This message has been forwarded.

Hi Aaron,

Thanks for the call last evening reminding us of the need to submit our proposed rule changes for consideration by the PPB next week. Attached is another draft that I tried to whip up as fast as I could (needless to say, I didn't get it done by last night as I hoped due to prior personal commitments). I am off to a set of meetings but will have my cell phone on (Cell: [REDACTED]). Please feel free to call me on my cell with any questions whatsoever...as always, your suggestions/comments on the draft are certainly welcome. If I don't answer my cell because I am in a meeting, please leave a message and I will return your call at the next break.

Again, thanks a lot for your continued assistance in the process.

Lance Inouye



090512.Proposed Act 291 Addition to Price Adj Clause-PPB w-just.doc

Proposed Act 291 Addition to the Price Adjustment Clause in Construction Contracts, HAR §3-125-13  
05-12-2009

**Proposed Change:** Add the following within the "Price Adjustment Clause" of HAR §3-125-13:

*"(3) Determining the cost or credit. In determining the cost or credit to the State resulting from a change, it will not be considered unreasonable to apply the following allowances for all overhead, including extended overhead resulting from adjustments to contract time (including home office and branch office overhead) and profit combined:*

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

*Not more than three markup allowance line item additions including the percentages shown above will be allowed for profit and overhead, regardless of the number of tier subcontractors.*

*This section shall not be construed to impair the right of a contractor and government agency from mutually agreeing to a price adjustment as specified in section (1)."*

**Justification:** A few State agencies are **requiring** Contractors to submit change order proposals for **negotiating** a fixed price using the pre-Act 291 15% markup for self-perform work, and 7% on top of subcontractor change proposals (hereinafter referred to as the 15%/7% markups). The GCA and BIA respectfully feel that this is contrary to the spirit and intent of Act 291, Section 4 (effective July 1, 2007) and will have a detrimental effect on the orderly delivery of construction services in the State. The proposed change would permit State agencies and Contractors the latitude to negotiate a fixed price change order in good faith without dictating a format ahead of time.

**Discussion:** Prior to Act 291, both the Hawaii Administrative Rules (HAR §3-125-13) and the DAGS Interim General Conditions of Contract 1999 (IGC) dictated the 15%/7% markups. During legislative deliberations of Act 291, construction industry groups noted that the 15%/7% markups were, in many cases, insufficient to compensate them for change orders requested by the State. In fact, many years ago before those markups were specified in the HAR and IGC, corresponding markups of 20%/10% were permitted and considered the norm. We (GCA/BIA) respectfully maintain that the intent of Act 291 was to restore the 20%/10% markups that more fairly compensate Contractors and Subcontractors for change order work. Accordingly, Act 291 increased change order markups to 20%/10% respectively, but only when no fixed price agreement can be reached and the default force account (for values not exceeding \$50K) or unilateral change order (for values exceeding \$50K) method is implemented

Although, technically, Act 291 does not **require** use of the 20%/10% markups when **negotiating** a fixed price change order, it also does not **require** use of a lesser set of 15%/7% markups nor does it require use of a greater set, such as 25%/12% markups. Because the applicable amended section of Act

291 provides great latitude in coming to a fixed price agreement on the price of change orders<sup>1</sup>, we feel it is against the spirit and intent of the new law for State agencies to *dictate* the markup percentages for negotiating a fixed price agreement.

Moreover, those agencies insisting on having Contractors negotiate using the outdated 15%/7% markups are creating logjams for the orderly progress of construction projects. This is because the Contractor's primary recourse is to disagree and apply the force account/unilateral change order provisions of Act 291 which require using the 20%/10% markups. Defaulting to the force account method of proceeding could be both inefficient and costly for both parties and detrimental to the overall success of the project. For the State, it would require costly close monitoring of the activities associated with the change to ensure the charges are appropriate as well as potential claims of extended overhead due to long negotiations to settle the change. For the Contractor, it would require more paperwork to keep track of the time and materials associated with the change. (Some say certain Contractors prefer the force account method as an opportunity to assign the least efficient workers on the force account work.) Those additional costs incurred and time spent by both sides to monitor and track force accounts are of no real benefit or value to the project's overall success.

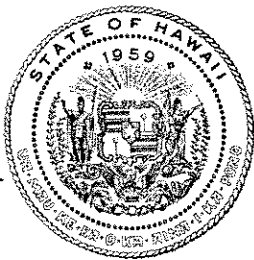
The proposed addition to the "Price Adjustment Clause" would give all applicable agencies the comfort level that negotiating change order proposals using the 20%/10% markups would not be unreasonable and many change orders could be amicably negotiated to a fixed price amount. It would still permit both parties to negotiate amicably to a fixed price by lower or higher percentages depending on the circumstances. For example, some have negotiated using reduced percentages due to a tight budget amount or an amount remaining in the project.

It is hoped that the proposed addition would streamline the delivery of a construction project to the benefit of both the State and the Contractors.

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<sup>1</sup> HRS §103D-501(b) provides four methods of negotiating a fixed price change order, the last of which reads: "(4) In any other manner as the contracting parties may mutually agree upon before commencement of the pertinent performance..."

# Agenda Item VII



## DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

LINDA LINGLE  
GOVERNOR  
THEODORE E. LIU  
DIRECTOR  
MARK K. ANDERSON  
DEPUTY DIRECTOR

No. 1 Capitol District Building, 250 South Hotel Street, 5th Floor, Honolulu, Hawaii 96813  
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804  
Web site: [www.hawaii.gov/dbedt](http://www.hawaii.gov/dbedt)


Telephone: (808) 586-2355  
Fax: (808) 586-2377

May 13, 2009

To: Procurement Policy Board

Thru: Aaron Fujioka, Administrator  
State Procurement Office

14MAY'09 PM 4:56 SPO-

From: Theodore E. Liu, Chair   
Small Business Utilization Council

Re: HAR Chapter 3-124, Small Business Preference Rules  
Targeted Area for Set-Aside and/or Subcontracting – Alternate Energy

The purpose of this memorandum is to provide some guidance on the appropriate North American Industry Classification System (NAICS) codes for alternative energy and energy efficiency activities and businesses for State procurement purposes. Section 46-19, Hawaii Revised Statutes (HRS) defines alternate energy as geothermal, solar, wind, ocean power, biomass and solid wastes. Energy Efficiency is defined in HRS, Section 196, as efficient use of a commodity and resource. NAICS is defined as the standard used by Federal statistical agencies for classifying business establishments by type of economic activity for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. Under the current NAICS, alternative energy and energy efficiency activities are not assigned in any specific industry code, although there are initiatives to update NAICS, tentatively scheduled for 2012, to classify energy-related industries such as "green" industries.

Based on discussions with the State of Hawaii Department of Labor and Industrial Relations, Research and Statistics Office, which is responsible for NAICS coding of Hawaii businesses, and based on review of the industries definitions included in NAICS, companies specializing in alternative energy and energy efficiency are consolidated under broader NAICS industry codes regardless of whether their focus is on alternative energy or energy efficiency. Companies are classified under NAICS codes based on their major business activity. Further, NAICS codes are not distinguished by size and would apply to both large and small businesses.

Procurement Policy Board  
May 13, 2009  
Page 2

The identified NAICS codes relating to alternative energy and energy efficiency are shown in the attached Tables 1 and 2. Table 1 lists three primary NAICS codes for alternative energy and energy efficiency for industries covering plumbing, HVAC contractors and engineering services. Table 2 lists twenty-two additional codes which are considered possible codes for alternative energy and energy efficiency projects. The range of industries under Table 2 include construction, wholesale trade, retail trade, professional, scientific and technical services, remediation services and commercial and industrial machinery and equipment repair and maintenance. The NAICS code for Other Electric Power Generation (221119) is excluded from both tables based on the discussion during the May 4, 2009, Small Business Utilization Council meeting. NAICS codes and definitions by industry can be found at: [www.census.gov/naics](http://www.census.gov/naics).

In summary, a total of twenty-five codes have been identified for use in classifying energy savings or efficient technology equipment goods or services. These identified codes are considered an interim classification until the upcoming update of NAICS when a more streamlined list will be available. We hope this is helpful in your efforts in identifying the appropriate NAICS codes for alternate energy and energy efficiency activities and business for procurement purposes.

Thank you.

Attachment



## NAICS Codes for Alternative Energy (Including Energy Efficiency)

### Primary NAICS Codes for Alternative Energy (Including Energy Efficiency)

**Table 1**

No	NAICS	Category included in NAICS <sup>1</sup>	NAICS source <sup>2</sup>
<b>Construction</b>			
1	238221	Residential Plumbing and HVAC Contractors	HI Dept. of Labor
2	238222	Non-Residential Plumbing and HVAC Contractors	HI Dept. of Labor
<b>Professional, Scientific and Technical Services</b>			
3	541330	Engineering Services	U.S. Census Bureau, HI UI database

### Additional NAICS Codes for Alternative Energy (including Energy Efficiency)

**Table 2**

No	NAICS	Category included in NAICS	NAICS source
<b>Construction</b>			
1	238151	Residential Glass and Glazing Contractors	HI Dept. of Labor
2	238152	Non-Residential Glass and Glazing Contractors	HI Dept. of Labor
3	238161	Residential Roofing Contractors	HI Dept. of Labor
4	238162	Non-Residential Roofing Contractors	HI Dept. of Labor
5	238211	Residential Electrical Contractors and Other Wiring Installation Contractors	HI Dept. of Labor
6	238212	Non-Residential Electrical Contractors and Other Wiring Contractors	HI Dept. of Labor
7	238311	Residential Drywall and Insulation Contractors	HI Dept. of Labor
8	238312	Non-Residential Drywall and Insulation Contractors	HI Dept. of Labor
9	238911	Residential Site Preparation Contractors	HI Dept. of Labor
10	238912	Non-Residential Site Preparation Contractors	HI Dept. of Labor
<b>Wholesale Trade</b>			
11	423450	Merchant Wholesalers (Medical, hospital equipment)	HI UI database, U.S. Census Bureau
12	423330	Roofing, siding, and insulation material, solar reflective film merchant wholesalers	U.S. Census Bureau
13	423720	Plumbing and heating equipment supplies merchant wholesalers	U.S. Census Bureau
14	423730	Air Conditioning Supplies merchant wholesalers	U.S. Census Bureau
15	423740	Refrigeration equipment and supplies merchant wholesalers	U.S. Census Bureau
16	423830	Industrial Machinery and equipment merchant wholesalers	U.S. Census Bureau
17	423840	Industrial Supplies merchant wholesalers	U.S. Census Bureau
<b>Retail Trade</b>			
18	444190	Other Building Material Dealers	HI UI database
<b>Professional, Scientific and Technical Services</b>			
19	541310	Architectural Services	U.S. Census Bureau
20	541611	Consulting Services	HI UI database
<b>Administrative and Support and Waste Management and Remediation Services</b>			
21	562910	Remediation Services	HI UI database
<b>Other Services</b>			
22	811310	Commercial and Industrial Machinery and Equipment (except Auto and Electronic) Repair and Maintenance	HI UI database

<sup>1</sup> List of codes excludes Other Electric Power Generation (221119)

<sup>2</sup> HI UI database Information provided by the Research Division