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November 14, 2014

**PROCUREMENT CIRCULAR NO. 2014-16(A)**

TO: Office of the Governor, Chief of Staff;  
Office of the Lieutenant Governor, Chief of Staff;  
Chief Procurement Officers;  
Executive Department Heads;  
Hawaii State Public Library System, State Librarian

FROM: Sarah Allen, State Procurement Office Administrator 

SUBJECT: Guidance to Conducting Professional Services Method of Procurement

This Circular replaces Procurement Circular No. 2014-09 dated July 17, 2014, and Procurement Circular No. 2014-16 dated November 10, 2014, and provides guidance for conducting Professional Services method of procurement pursuant to Hawaii Revised Statutes (HRS) §103D-304.

*Note: The clerical amendments included in this Procurement Circular 2014-16(A) replaces Procurement Circular 2014-16, posted November 10, 2013, in its entirety.*

**REPEAL OF HAR § 3-122-66**

The Procurement Policy Board repealed Hawaii Administrative Rules (HAR) §3-122-66, *Waiver to requirement for procurement of professional services*, through interim rulemaking authorized by HRS §103D-202.<sup>1</sup> This repeal was to clarify that the rule was recently invalidated by a Hawaii Supreme Court case on February 14, 2014.<sup>2</sup>

- The repeal of HAR § 3-122-66 is effective as of November 10, 2014.
- See Procurement Directive No. 2015-02.
- Copies of the rules may be downloaded from the State Procurement Office (SPO) website at <http://spo.hawaii.gov/references/har/goods/>.

**KEY ISSUES IN THIS CIRCULAR:**

- A. When To Use Professional Services Method of Procurement**
- B. What Information Is Required To Be Included in the Public Notice**
- C. Who Can Serve on a Review or Selection Committee**
- D. What Can Be Listed as the Fourth Evaluation Criteria**
- E. What Are the Options When There Are Less Than the Minimum Three Qualified Persons**

<sup>1</sup> Procurement Policy Board amended HAR §3-122-66 on October 10, 2014; Pursuant to HRS §103D-202, interim rules were filed with the Lieutenant Governor's Office on October 31, 2014, and became effective ten (10) days later; Procurement Directive No. 2015-01 announced the interim rule change.

<sup>2</sup> *Asato v. Procurement Policy Board* (Haw. 2014).

**A. WHEN TO USE PROFESSIONAL SERVICES METHOD OF PROCUREMENT**

Professional services method of procurement is one of the six (6) methods of procurement pursuant to Chapter 103D, Hawaii Revised Statutes (HRS). Procuring personnel have the responsibility to select the appropriate method to purchase their necessities and adhere to the mandatory requirements within each method. If more than one method may be utilized, select the best method. The chart below notates when the Professional Services method **shall** be used and when the method **may** be used. For purchases that do not fulfill the requirements within the “Optional” bullets below, select another method of procurement.

MANDATORY	OPTIONAL
<p>➤ Procurement of <b>design professional services</b><sup>3</sup> furnished by licensees under HRS Chapter 464 (professional engineers, architects, surveyors and landscape architects) <b>shall</b> be conducted through one of two procurement methods:</p> <ul style="list-style-type: none"> <li>• <b>Professional Services</b> method of procurement pursuant to HRS §103D-304; or</li> <li>• <b>Emergency Procurement</b>, when applicable, pursuant to HRS §103D-307.</li> </ul>	<p>➤ Procurement of <b>professional services</b> (other than design professionals listed in HRS chapter 464) <b>may</b> utilize the following procurement methods:</p> <ol style="list-style-type: none"> <li>1) <b>Professional Services</b> pursuant to HRS §103D-304;</li> <li>2) <b>Competitive Sealed Bid</b> pursuant to HRS §103D-302;</li> <li>3) <b>Competitive Sealed Proposal</b> pursuant to HRS §103D-303;</li> <li>4) <b>Small Purchases</b> pursuant to HRS §103D-305;</li> <li>5) <b>Sole Source</b> pursuant to HRS §103D-306;</li> <li>6) <b>Emergency</b> pursuant to HRS §103D-307.</li> </ol> <p>➤ “Professional services” as defined in HRS §103D-104 includes:</p> <ol style="list-style-type: none"> <li>A. [<i>Chapter 464 professions are included in the chapter definition, however professional engineers, architects, surveyors and landscape architects are not available for other methods of procurement listed here</i>] real property appraisal, law, medicine, accounting, dentistry, public finance bond underwriting, public finance bond investment banking; or</li> <li>B. Any other practice defined as professional by the laws of this State             <ul style="list-style-type: none"> <li>• HRS chapter 415A-2 "Professional service" means any service which lawfully may be rendered only by persons licensed under chapters 442, 448, 453, 455, 457, 459, 461, 463E, 465, 466, 471, and 605, and section 554-2; or</li> </ul> </li> <li>C. The professional and scientific occupation series contained the United States Office of Personnel Management’s Qualifications Standards Handbook. Link to handbook for a list of Professional and Scientific positions is as follows: <a href="http://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=GS-PROF-OCCUPATIONS">http://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=GS-PROF-OCCUPATIONS</a></li> </ol>

<sup>3</sup> The Professional Services method of procurement for design professionals mirrors the Qualifications-Based Selection (QBS) method, which is a procurement process established by the United States Congress as a part of the *Brooks Act* as a process for public agencies to use for the selection of architectural and engineering services for public construction projects. It is a competitive process whereby consulting firms submit qualifications to a procuring entity. The procuring entity then evaluates and selects the most qualified firm, and then negotiates the project scope of work, schedule, budget, and consultant fee. Price is not considered until the most qualified firm is selected.

**B. WHAT INFORMATION IS REQUIRED TO BE INCLUDED IN THE PUBLIC NOTICE**

At minimum, before the beginning of each fiscal year, the head of the purchasing agency (HOPA) shall publish a notice inviting persons engaged in providing professional services which the agency anticipates needing in the next fiscal year, to submit current statements of qualifications and expressions of interest to the agency. Additional notices may be published as necessary. The chart below identifies what information must be included in a public notice for professional services.

MANDATORY	RECOMMENDED
<p>➤ Identification of the professional class or category as specified in Statutes or Rules or listed in The Professional and Scientific Occupation Series contained in the United States Office of Personnel Management's Qualifications Standards Handbook.</p> <p><b>Examples:</b></p> <ul style="list-style-type: none"> <li>○ Applicants for professional services within the scope of public finance bond investment banking</li> <li>○ Psychologists licensed under HRS chapter 465</li> <li>○ Notice to Prospective Applicants for Professional Services for the following:               <ul style="list-style-type: none"> <li>- Architects</li> <li>- Landscape Architects</li> <li>- Engineers</li> <li>- Surveyors</li> </ul> </li> <li>○ Applicants able to respond to positions within Zoology Series, 0410 as listed in the United States Office of Personnel Management Qualifications Standards Handbook</li> <li>○ Interested applicants for Professional Services – GS-142 Workforce Development as listed in the United States Office of Personnel Management Qualifications Standards Handbook</li> </ul>	<p>➤ Where and when the solicitation will be available;</p> <p>➤ How long the solicitation will be available;</p> <p>➤ Duration term the list will be used;</p> <p>➤ When and where submittals are to be received;</p> <p>➤ Minimum qualification requirements;</p> <p>➤ Mandatory evaluation criteria;</p> <p>➤ Period of performance;</p> <p>➤ Relevant and recent past performance references.</p>
	<p style="text-align: center;"><b>OPTIONAL</b></p> <p><i>[Pursuant to HAR §3-122-16.3]</i> the public notice shall invite persons to submit <b>Statements of Qualifications</b> that may include but not be limited to:</p> <ul style="list-style-type: none"> <li>• The name of the firm or person, the principal place of business, and location of all of its offices;</li> <li>• The age of the firm and its average number of employees over the past years;</li> <li>• The education, training, and qualifications of key members of the firm;</li> <li>• The names and phone numbers of up to five clients who may be contacted, including two for whom services were rendered during the preceding year;</li> <li>• Any promotional or descriptive literature which the firm desires to submit;</li> <li>• Any other information specific to the project that would aid in qualifying applicants.</li> </ul>

**C. WHO CAN SERVE ON A REVIEW OR SELECTION COMMITTEE**

The HOPA shall designate review committee and selection committee members as those individuals with sufficient education, training, and license or credentials for each type of professional service being procured. Personnel should not sit on a review or selection committee which may cause undue influence on the other members of the committee(s). Any concerns regarding conflict of interest or one person taking advantage of a position of power over another person should be raised to the appropriate level of management to ensure a fair procurement. HRS §103D-101 requires ethical public procurement and HAR §3-131-1.02 provides guidance in a procurement code of ethics. Pursuant to HAR §3-122-69(b), deputy directors or equivalent appointed positions shall not serve on review or selection committees.

ALLOWABLE REVIEW OR SELECTION COMMITTEE MEMBERS	HOPA OR ADVISOR ROLE
<ul style="list-style-type: none"> <li>• Government employee</li> <li>• Non-government employee</li> </ul> <p><i>Note: A committee member does not need to be employed within the department conducting the procurement.</i></p>	<ul style="list-style-type: none"> <li>• Deputy Director</li> <li>• Executive Director of an attached agency—serves as HOPA</li> <li>• Supervisor to other committee member(s)</li> <li>• Procurement Officer responsible for the procurement.</li> </ul>

**D. WHAT CAN BE LISTED AS ADDITIONAL EVALUATION CRITERIA (4<sup>TH</sup> CRITERION IN DESCENDING ORDER OF IMPORTANCE) TO RANK OFFERORS?**

Purchasing personnel have the obligation to conduct thorough acquisition planning to determine specific needs that are reasonable within the industry. Market research and price analyses are examples of what should be considered while developing the selection criteria for the solicitation. The selection criteria utilized to rank applicants shall be in descending order of importance as 1) Experience and professional qualifications relevant to the project type; 2) Past performance on projects of similar scope for public agencies or private industry; 3) Capacity to accomplish the work in the required time; and 4) Any additional criteria relevant to the purchasing agency’s needs or other conditions required to determine the applicant qualified to provide needed services. The fourth criteria shall not include items that would be part of the contract negotiations conducted by the HOPA, such as the rate of compensation, which is based on the estimated value, scope, complexity and nature of the services that are to be received. The chart below provides examples of allowable criteria in ranking applicants during the Professional Services procurement.

ALLOWABLE 4 <sup>TH</sup> CRITERION	ITEMS <u>ONLY</u> NEGOTIATED BY HOPA
<ul style="list-style-type: none"> <li>• Location and number of offices</li> <li>• Affiliation with professional organizations within the industry</li> <li>• Age of the firm, average number of employees</li> <li>• Education, training, and qualifications of key members of the firm</li> <li>• Awards, accolades, recognition within the industry</li> </ul>	<ul style="list-style-type: none"> <li>• Rate of compensation</li> <li>• Price (consultant fee)</li> <li>• Proposal to fulfill scope of work</li> <li>• Schedule or timeline</li> <li>• Budget</li> </ul>

**E. WHAT ARE THE OPTIONS WHEN THE SELECTION COMMITTEE CANNOT PROVIDE A LIST OF A MINIMUM THREE PERSONS\* TO THE HOPA TO CONDUCT NEGOTIATIONS**

\*Pursuant to HAR §3-120-2 Definitions, "Persons" means individuals, partnerships, corporations, associations, or public or private organizations or any character other than a governmental body.

When deciding what to do if the minimum three persons cannot be ranked, purchasing personnel must put out another notice if:

- 1) The response to the initial notice is inadequate,
- 2) The response to the initial notice does not result in adequate representation of available source; or
- 3) New needs for the professional services arise.

If, after releasing a proper public notice(s), **the minimum three persons cannot be obtained**, the following options are allowed:

ALLOWABLE OPTIONS	NOT ALLOWED
<ul style="list-style-type: none"> <li>• Select another method of procurement (exception for purchases of design services)</li> <li>• Broaden scope of work</li> <li>• Re-solicit</li> </ul>	<ul style="list-style-type: none"> <li>• HAR § 3-122-66, Alternative method of procurement for design services (repealed)</li> <li>• Request for Procurement Exemption from HRS 103D</li> </ul>

Questions may be directed to the State Procurement Office (SPO) staff listed below, or you may contact me directly at [Sarah.Allen@hawaii.gov](mailto:Sarah.Allen@hawaii.gov) or phone at 587-4700.

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