

# CONSTRUCTION PROCUREMENT WORKSHOP # 130 – Part 1

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## Slide: Title page

Hello, my name is Paula Youngling and I am the Assistant Administrator for the State Procurement Office. Welcome to the SPO Workshop # 130, Construction Procurement, Part 1. In Part 1 of this training, we will be covering various topics associated with Solicitation Planning all the way through Contract Execution. SPO Workshop #130 Part 1 is required training in order to participate in procuring construction services and receiving the associated procurement delegation.

## Slide: Construction Procurement Lifecycle

This is the Acquisition Lifecycle, which has been modified to reflect the lifecycle for a construction procurement and to demonstrate that construction procurement does not begin with a notion of “let’s go buy this thing or these services”.

Probably more than other types of procurements, procuring construction services involves many steps prior to issuing the solicitation and many steps that follow the actual contract award.

There are many stages in the Construction Procurement Lifecycle where inclusion of your procurement personnel can be critical to a successful acquisition and resulting contract.

1. As you know the planning occurs far in advance of the solicitation and depending on your project may occur before even the designer is selected. Many important decisions must be made early in your project. At this stage an agency must determine –, how they intend to deliver the project, that is, whether it will be a design, bid, build (DBB) or design build (DB) project; what method of procurement will be utilized to solicit the bids, whether it will be a low bid or best value (request for Proposals or RFP) solicitation, and, what contract type is best suited for this project, for instance, firm fixed price/lump sum. Your procurement personnel can aid in many important decisions that must be made at the planning stage and provide you guidance on how these decisions affect your solicitation, contract award and contract management.
2. Part of planning activities include conducting market research to ensure you know the available resources in the industry qualified to perform your specific project. This is particularly necessary where your project involves unique or highly specialized construction activities. You conduct market

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research to identify the various markets that you may want to post your solicitation documents in to ensure the most competition possible. Market research may even provide you information concerning what other agencies/jurisdictions have paid for similar construction projects to aid in budgeting.

3. The law and rules associated with construction procurement in Hawaii are quite unique and certain provisions and requirements must be included in solicitations for construction and vary depending on the dollar threshold. The goal of the solicitation and award phase is to ensure your bid package contains all of the information necessary for a bidder to clearly understand your requirements and to propose a price free of unnecessary costs for risk.
4. Management of the contract post award is critical to the success of a project, especially on firm-fixed price contracts. Enforcement of contract terms and conditions is critical to a successful project that concludes with a quality project completed on time and on budget. Change order management goes hand and hand with contract enforcement by ensuring only work that falls within the contractual definitions for change result in possible changes to the contract time, scope or price.
5. Activities associated with closeout of a construction contract include resolving punch-list items, issuing certificates of substantial completion, receipt of numerous contract deliverables including, inspections, testing, manuals and warranties. These closeout activities are critical to ensuring the project is closed properly allowing issuance of final payment.

### **Slide: Construction Procurement Methods**

One of the key decisions that needs to be made during the early stages of your project is what method of procurement will be used to solicit for the construction services. The HI public procurement code offers numerous procurement methods that can be utilized to solicit construction services.

1. Competitive Sealed Bidding is by far the most common procurement method used for soliciting bids for construction services. This method can also be called an Invitation for Bid or Low Bid method. This method is governed by HRS 103D-302 and associated rules in HAR 3-122 Subchapter five. In the construction context this method is most commonly associated with a construction project

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where the project team is using a design, bid, build (DBB) project approach. This method is utilized when you have a clearly defined scope of work along with 100% plans and specifications. In this method of procurement a bidder must meet minimum qualifications, such as licensing, and once met the contract award will be made to the responsive, responsible bidder offering the lowest price. Since this is the most common method used for construction services we will be primarily focused on the detailed requirements of this method later in the workshop.

2. Multi-step sealed bidding is authorized under HAR 3-122-16 and HAR 3-122 Subchapter 6.5. Multi-step sealed bidding combines the flexibility of a Request for Proposal (RFP) with the price economy of an Invitation for Bid. In step one for this method, the government can pre-qualify the bidders based on objectively measurable qualification criteria prior to requesting price proposals. Then, only the prequalified bidders will be requested to submit price proposals in step two. This method of procurement can be useful in projects where specialized expertise or qualifications will be required beyond the normal minimum qualifications required in standard construction projects. At step two the award will be made to the responsive, responsible prequalified bidder offering the lowest price.

3. Competitive Sealed proposals is a method of procurement used when the construction project is not as clearly defined or the project is of a nature where discussions may be necessary to ensure a clear understanding of bidder's proposals. It is also an appropriate method to use when certain other evaluation factors are more important than cost/price. HRS 103D-303 also provides for solicitations for Design-Build construction projects. This section requires the pre-qualification of offerors and the requirement to establish a short-list of no more than 3 responsible offerors. As you know it is very expensive for bidders to prepare proposal on a design build project primarily because the solicitation usually requires submission of a conceptual design and initial specifications. To aid in defraying some of those costs and to encourage maximum competition, this method of procurement allows on construction projects greater than \$1M, the payment of a stipend to offerors that submit technically responsive proposals who are not subsequently selected for award. The contract award will be based on the responsible bidder whose offer is most advantageous to the State.

### **Slide: Construction Procurement Methods (cont.)**

Other methods of procurement include:

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1. The small purchase method of procurement is allowed for construction services and we will discuss the expedited small purchase method in the next slide. For now I want to briefly discuss two other methods of procurement that may be utilized to procure construction but only in exceptional circumstances.
2. The first is the sole source method of procurement. This method may only be used when a justification is approved showing that all the statutory requirements of a sole source have been met. In essence, in order to use a sole source method there must be only one source that can provide the construction services you require. The justification prepared must be posted on the public notification site for 7 days to provide the public the right to object to the proposed contract. Only after no objection is received can the award be made. The Procurement Policy Board has established a list of pre-approved sole source requirements and these can be found in the appendix at the end of HAR 3-122.
3. The next method of procurement is the Emergency procurement method. Emergency procurement of construction services is only allowed if the occurrence meets the very stringent requirements of the statute. The situation must be urgent and create a threat to life, public health, welfare or safety by reason of an occurrence such as a natural disaster or riot, and this situation must be so immediate that the normal procurement methods will not meet this need and without the services the continuing functioning of government, preservation of property, or the health and safety of any person is threatened. Even in the emergency the code does require that agencies use as much competition as possible. Please note, lapsing funds is not considered an emergency.

### **Slide: Small Purchase Method of Procurement**

As previously stated, the small purchase method is allowed to be used to acquire construction services. This slide is a good depiction of the level of competition and other requirements in procuring construction at different dollar thresholds.

- In summary, for construction less than \$5,000 - Adequate and reasonable competition recommended.
- For construction of \$5,000 to less than \$15,000 – A Minimum of three (3) quotes are required.
- For construction between \$15,000 to less than \$25,000

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- A Minimum three (3) written quotes are required for the following jurisdictions: UH, DOE, HHSC, OHA, and County jurisdictions.
- But, for the Executive Branch they must use an electronic procurement system.
- For construction between \$15,000 to less than \$250,000 – agencies must use the Hawaii Electronic Procurement System (HiePRO), except as noted above for written quotes - \$15,000 to less than \$25,000.

Note many construction related requirements still might be required even though you are using the small purchase method. For example, bid bonds, performance and payment bonds will still be required on construction \$50,000 or greater. The Hawaii procurement code does not allow agencies to parcel or divide their work or projects in order to evade the requirements of other procurement methods or in order to meet only the small purchase dollar thresholds.

As such, do not artificially divide or parcel work to evade procurement requirements.

Please refer to Procurement Circulars 2012-04 and -05 for further guidance for both the Executive Branch and other Chief Procurement Officer jurisdictions.

For more in depth information on all methods of procurement please check out the on-demand training on the SPO website.

### **Slide: Competitive Sealed Bids (IFB/Low Bid) Process**

The remainder of this workshop we will focus on the steps listed in this slide and the requirements needed at each step of the competitive sealed bid solicitation.

### **Slide: Prior to Advertising Solicitation**

Let's start with the procurement requirements that need to be met prior to posting the solicitation. Depending on the construction delivery model the agency selected, the construction procurement can start as early as the planning and design stage. It is at the planning stage that many decisions will have already been discussed that will drive the ultimate procurement of construction services. For example, usually during the planning stage the project delivery model will be established for the project, either a design, bid, build, a design-build, or even a design, build, operate, maintain. Depending on the delivery model selected for the project different procurement considerations will be triggered. Therefore, project staff are advised to include your procurement personnel at this early stage in order

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to ensure proper considerations are given to procurement-related issues at the early stages.

Subject matter experts working closely with the designer will be responsible for developing a very clear scope of work and specific project schedule. Utilizing market research, construction cost estimates from your A/E and your own independent estimate establish a project budget. While scope, schedule and budget are established early on they checked and re-checked at all phases of the project.

### **Slide: Prior to Advertising Solicitation – Procurement Method**

Along with Scope schedule and budget the agency will need to determine the method of procurement to be used. The IFB method is the most commonly used and as stated before usually aligns well with the design bid build construction delivery method because you have 100% bid ready plans and specifications and as long as the bidder meets the minimum qualifications of the solicitation the lowest price wins.

### **Slide: Prior to Advertising Solicitation – Contract Type**

Another consideration that goes hand in hand with the agencies selected project delivery model and method of procurement is the determination of the contract type to be utilized.

Unlike the project delivery model that tells you how you are going to deliver the project or the method of procurement that tells you how you are going to solicit bids for the project, the contract type will tell you how the bidders will price the work and the contracting environment that will govern the contractual relationship between the State and the Contractor post contract award.

The HI procurement code allows for number contract types including everything from a firm-fixed price or lump sum contract to a time and materials contract. The key factor that drives what contract type should be used on any given project is the level of project risk.

### **Slide: Prior to Advertising Solicitation – Contract Type Risk Continuum**

This Contract Risks chart shows a continuum of Contract types and the associated risk to either the State or the Contractor. This chart shows where the risk of loss falls depending on the contract type.



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A FFP contract represents full payment for the work and the price is not subject to adjustment regardless of the contractor's actual costs to perform the work. The firm fixed price will be the price proposed by the winning contractor. Exceeding the fixed price to perform the promised work is solely at the contractor's expense. Therefore, with this type of contract the maximum risk to lose money and incentive to control costs is placed on the contractor. The contractor bears all responsibility for any profit/ loss resulting from his activities. A FFP contract is the most commonly used for construction services contracts.

A FFP contract type is best suited when the agency has a very specific scope of work with clearly defined deliverables, 100% plans and specifications, a history of prior purchases of similar construction services and other factors that the contractors can understand and easily price into their bids. If you have a vague scope, unclear specifications etc., use of a FFP contract will surely lead to the bidder pricing in contingency costs to cover the risk created by the uncertainty since they will ultimately be held to perform for their proposed price.

A Fixed Price w/Economic Price Adjustment contract may be considered in situations where there are volatile markets associated with either materials or other project costs. This contract type can be very effective in a construction contract because it strikes a balance in shared risk for those specific identified elements. Good examples are the price of steel or cement where it is very hard for a bidder to accurately price these items well into the future without taking on too much risk. In order to avoid having the bidder price that contingency into their bid, utilization of this type of contract would allow the bidder to seek reimbursement if the price of an item rises above the contract specified amount and the Government to seek a credit if the price falls below the contract specified amount. Usually the price of the item will be tracked against indices that are standard for the industry associated with that material or commodity throughout the life of the contract. In order for this type of contract to be effective the agency should have flexibility in budget and also sufficient project management staff to take on the added administrative burden.

Based on this continuum it is easy to see why a FFP contract is so highly used for construction work since we usually have clear requirements that are easy to price and the risk of loss falls primarily on the contractor and not the State.

**Slide: Prior to Advertising Solicitation – Alternates, Liquidated Damages and Small Business Set-Asides**

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Also prior to posting the solicitation the agency must determine whether they will accept and consider bid alternates, either additive or deductive.

An alternate is a defined portion of the Work that is priced separately and may be added or deducted from the proposed price depending on what the State decides. Alternates provide the State with a choice between different products or can define the addition or deletion of a portion of the Work. On **design-bid-build projects**, alternates allow the State to adjust price and the extent of the Work, after the Project is bid (but usually before the Contract Documents are executed), based on the alternates bid and the State's budget and priorities. As a result, alternates are a means for the State to defer certain decisions on the scope of the Project until after pricing is obtained from prospective contractors to ensure the Project can be constructed with the budget available. If you intend to use either additive or deductive bid alternates that will need to be clearly explained in the instructions to bidders and also in the portion of the solicitation describing how bids will be evaluated. The actual bid sheet will also need to be structured to ensure the alternates are priced separately and can easily be added or deducted from the proposed price.

Liquidated damages can be used in a construction contract to protect the State from a contractor's failure to perform or failure to perform within a specified time. Liquidated damages are appropriate when it is difficult to determine with reasonable accuracy damage to the State that would result due to delays caused by late contractor performance or nonperformance. Liquidated damages must not be arbitrary or punitive and must be tied to a reasonable basis for the amount specified.

In your spare time you may have run across a requirement in the procurement code concerning Small business set asides or subcontracting plans for certain procurements. Please note that all interim rules that defined the use of this provision have expired and there are no current rules to implement this provision of the code.

### **Slide: Prior to Advertising Solicitation – Specifications**

Since we are assuming the procurement we are describing is a competitive sealed bid or IFB and a design bid build project it is more than likely that the designer of record will be preparing 100% bid-ready plans and specifications to include in the bid package. Even if the State has contracted out for these services, preparation of



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the scope of the solicitation and the specifications for the project must still be guided by the requirements of the procurement code set forth in HRS 103D-401 to 405 and HAR 3-122 Subchapter 3.

The overriding principles of this section of the code is the promotion of competition that allows bidders a fair and equal opportunity to compete for State projects. As such, specifications shall not be unduly restrictive such that it unnecessarily limits competition. Therefore, highly specialized or unique requirements should not be the norm and should only be used when justified in exceptional situations.

### **Slide: Prior to Advertising Solicitation -- Specifications**

A specification is the basis for procuring construction services that are adequate and suitable for the State's needs in a cost effective manner.

- (1) A Design specification sets the requirements for the product, detailing the characteristics that the item must possess or how the item is to be manufactured;
- (2) Performance specifications describe the capabilities that the product must meet, and use of test or criteria are developed to measure the item's ability to perform as required;
- (3) Brand name specifications commonly referred to as restrictive specifications, may be used upon approval of the chief procurement officer after the purchasing agency makes a written determination that only the identified brand name item will satisfy the State's needs, and it is not practicable to use a less restrictive specification.
- (4) A Brand name or equal specification cites one or more brand names, model numbers, or other designations that identify the specific products as having the characteristics of the item desired
- (5) A Qualified or pre-approved products list is a list of goods, services, or construction items, which, prior to the opening of the competitive solicitation, are examined, tested, and determined to meet the applicable specification.

A restrictive specification may only be used when it is justified as necessary to meet the State's requirements and the CPO approves the use of the specification prior to posting the solicitation. A restrictive specification may use a brand name or certain performance criteria that only one brand of the item may provide. The restrictive specification may, or may not have, multiple sources of supply. Agencies may use SPO Form 014 to evidence the CPO approval for the contract file.

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### **Slide: Prior to Advertising Solicitation – Subcontractor Listing and Bid Acceptance Period**

Along with the scope, plans and specifications the following slides will discuss other requirements to be included in the bid package.

First, somewhere in the bid package you must tell the bidders the validity period that you want them to hold their bids open for prior to acceptance. This validity period will be project specific and depend on the complexity and the magnitude of the project. For example, DAGS PW usually specifies a 60 day validity period from the time of bid opening until award.

In accordance with the procurement code the bid package shall also require that all bidders include in their bids the name of each person or firm to be engaged by the bidder as a subcontractor or joint contractor in the performance of the work. Along with the name the bidder is also required to provide the nature and the scope of the work the joint or subcontractor will provide.

Please refer to HRS Chapter 444 and HAR Title 16-77 that govern, among other things, the licensing of Contractors.

### **Slide: Prior to Advertising Solicitation – Preferences**

The next items that need to be considered for inclusion in your bid package consist of certain preferences that may allow for a bid adjustment to reduce a bidder's price for certain items during the lowest price bidder evaluation process.

The HI administrative rules chapter 3-124 provides rules for the administration of numerous State preference programs.

The first preference that will need to be considered as part of your construction solicitation is the recycled product preference. The purpose of this preference is to promote the use of recycled products. The recycled product preference is applicable to all Competitive sealed bids, when it is required or so stated in the solicitation. Recycled products must be registered. IF applicable, your solicitation must contain information that states a price preference will be given for the use of recycled products. The solicitation must also specify the percentage of recycled content required to qualify for the price preference. The price preference will need to be at least 5% of the price of the recycled item and will be used for evaluation of price only. For example, the 5% was be deducted from the proposed

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price for the item and utilized when solely evaluating who is the lowest price bidder. The actual contract award price would be at the proposed price.

Next, the Hawaii products preference is set forth under HRS 103D-1002 and HAR 3-124 Subchapter 1. The purpose of this preference is to promote the use of products mined, excavated, produced, manufactured, raised, or grown in Hawaii. This preference is applicable in Competitive Sealed Bids and Proposals when a registered HI product is available and where the product is required on the project. To be listed in a solicitation the Hawaii product must be registered with the SPO and the solicitation must also inform prospective bidders of the Hawaiian product and its class that meets the requirements of the bids being solicited. The preference percentage is dependent on the product classification and applies as a percentage reduction taken against the proposed Hawaii product price. The requirements of the HI product preference are quite detailed and you will need help from your engineers and possibly A/E's in determining applicability and availability of HI products. A list of all approved Hawaiian products can be found on the SPO website.

Unlike the previous preferences that were established under HRS 103D, the legislature has also established another preference under HRS 103 that allows a preference to be applied to the total proposed contract price when the contractor participates in apprenticeship programs. The apprenticeship agreement preference is applicable to public works contracts having an estimated value of \$250K or more. Bidders seeking the preference must provide proof that they participate in an apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the solicited public works project. Bidders will need to provide proof of their participation with their bid. If the bidder meets these requirements then the procurement officer will apply the preference and reduce the total bid cost by 5% for that bidder. The apprenticeship preference is quite complicated so please ensure you understand the requirements of HRS 103-55.6 along with any agency specific guidance established to implement this preference, such as the Comptroller's memorandum listed on the slide.

For further information on this preference, the SPO has developed supplemental, on-demand training specific to the requirements and processes associated with the apprenticeship preference. This training can be found on the SPO website.

### **Slide: Prior to Advertising Solicitation – Other Requirements**

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There are certain prohibitions that must be included in your solicitation and certain certifications that a bidder must make when submitting their bid. These requirements have been established by the legislature to address certain concerns either with the integrity of the bidding process or public safety during performance of the construction project.

First, the campaign contribution clause must be included in both your solicitation and ultimate contract award. This clause makes it unlawful for any contractor who enters into any contract with the State, at any time between the execution of the contract through the completion of the contract, to:

- (1) Directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or non-candidate committee, or to any candidate or to any person for any political purpose or use; or
- (2) Knowingly solicit any contribution from any person for any purpose during any period.

Next, Bidders must provide certification with their bid that their price was determined independently and without collusion. Usually agencies have certain forms that are posted with the bid package that provide for this certification and the bidder must sign and return this form as part of the bid. The laws purpose is to ensure there is no price fixing in government bids.

In bids in excess of \$100K, bidders must also provide a certification that a project-specific, written Health and Safety plan for the job will be available and implemented by the notice to proceed date of the project.

All bidders must be in compliance with 103D-310 and be incorporated or organized under State law or be registered to do business in the State of Hawaii upon award. But note, for construction projects DLIR has interpreted that contractor licensing requirements must be in place prior to placing a bid.

### **Slide: Prior to Advertising Solicitation – Employment of State Residents**

Hawaii has a unique requirement established under HRS 103B that requires the contractor employ not less than 80% Hawaii residents to perform work on the contract. This requirement must be stated in the bid package and the comptroller's memorandum referenced on the slide provides guidance on the specific provisions that must be included in the bid package and along with how agencies should implement this program post contract award.

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This requirement does not apply to professional services contract or contracts established using small purchase procedures under HRS 103D-305.

If your project includes funding from the federal government, please check with your grants administrator on whether this clause complies with or would violate your grant agreement.

### **Slide: Prior to Advertising Solicitation – Labor and Wages**

There are certain requirements that must be included in the bid package that the legislators established to protect the labor work force. HRS section 104 sets forth certain minimum wage requirements that must be met on state funded public works projects.

Chapter 104 is very far reaching and applies to every public works construction project over \$2,000, regardless of the method of procurement or financing method (purchase order, voucher, bid, contract, lease arrangement, warranty).

This statute sets forth numerous requirements to include

- Minimum rates of pay that are established by the Department of Labor and Industrial Relations
- Standard schedule for when workers are paid
- Overtime definitions and how it is calculated
- A Contractor requirement to submit weekly certified payrolls evidencing compliance

The most recent prevailing wage rates should be included in the bid package and a link to the website for the most recent wages is included on this slide.

If your project includes federal funds then the requirements of the Davis Bacon act **and** Chapter 104 will apply.

The Davis Bacon Act requires payment of prevailing wages on federally funded or assisted construction projects and contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.

The DBA mandates that Contractors and subcontractors must pay laborers and mechanics employed directly upon the site of the work at least the locally

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prevailing wages (including fringe benefits), listed in the Davis-Bacon wage determination in the contract, for the work performed. Davis-Bacon labor standards clauses and current prevailing wage rate determinations must be included in covered project solicitations and contracts.

Inclusion of the current wage determination is critical and it is the **responsibility of the agency** to ensure that the appropriate **up-to-date** wage determination is included in the bid or RFP documents, and that **modifications** are included up to the time of award. Section 1.6 of Regulations, 29 C.F.R. Part 1 sets forth, in detail, the requirements regarding inclusion of **up-to-date** wage determinations in bid/contract documents:

◇ As a **general rule**, the most up-to-date wage determination(s) issued at the time of **contract award** must be incorporated into Davis Bacon covered contracts. 29 C.F.R. § 1.6(c)(2)(i).

◇ For contracts entered into pursuant to competitive bidding procedures, wage determination updates issued less than **10 days** before the opening of bids shall be effective unless there is not a reasonable time still available before bid opening to notify bidders of the up-date, and a report of the finding to that effect is inserted in the contract file. 29 C.F.R. § 1.6(a)(2)(i)(A).

The SPO offers additional on-demand training on the labor requirements for construction contracts and it can be found on the SPO website under “Training”.

Davis Bacon prevailing wage rates can be found at the web link provided on the slide.

### **Slide: Prior to Advertising Solicitation – Bid Bonds**

So far we have discussed many requirements that must be included in the bid package that promote certain products or participation in certain programs and even ones that protect workers and public safety. Now we are going to discuss bid package requirements designed to protect the project itself and the State in general.

The State has numerous tools it can use to help them manage the risks that are inherent in any project, especially construction projects. Tools such as requiring the contractor provide insurance, agree to an indemnification clause, and holding retainage amounts on all payments are just a few of the mechanisms the State can



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use to help mitigate project risk. The next couple of slide we will discuss other risk mitigation tools that must be included in your construction bid packages.

The first is a requirement designed to ensure that a bidder that puts in a bid who is ultimately determined to be the winning bid will stand behind their promise and not pull out of the project prior to contract award. The harm to the State of such an occurrence is the cost of re-procuring the project. This cost can play out as an administrative burden but also can delay the project start date possibly resulting in increased bids due to inflation or shortages in labor markets that were not factors during the original bid period.

In order to address this concern the legislature has required a BID BOND or SECURITY be provided with all bids on construction projects greater than \$25K under HRS 103D-302, sealed bids, and HRS 103D-303, sealed proposals. Note, some agencies may set the bid bond requirement at lower thresholds. The bid bond shall be provided with the bid and the penal sum of the bond is calculated to be at least 5% of the base bid and any additive alternate amounts.

This requirement ensures that bidders are serious about performing the work and actually have “skin in the game” at the bid phase. Also, the State is protected against the risks I previously discussed by having an avenue to recover the costs of re-procurement by making a claim against the bid bond.

If your project has federal funding please check with your grants administrator on what is required to comply with your grant.

### **Slide: Prior to Advertising Solicitation – Performance and Payment Bonds**

Just like the bid bond requirement protects the State against certain risks prior to contract award, the requirement for performance and payment bonds similarly protects the State post contract award. All bonds are essentially guarantees provided by a third party.

For all construction contracts acquired using the small purchase method, bidders must provide performance and payment bonds at contract execution, for contracts that are \$50K and greater.

But on all other construction contracts awarded under HRS 103D-302, sealed bidding, and HRS 103D-303, sealed proposals, bidders must provide performance and payment bonds at contract execution for contracts of \$25K and greater.

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These bonds protect the State against two powerful risks that can occur on a construction project.

Payment bonds address the risk to the State that could result if the Contractor does not pay its subcontractors, suppliers or vendors – if not paid, these suppliers could place a lien against the project. These bonds are posted by the Contractor to guarantee that his subcontractors and material suppliers on the project will be paid. If the occurrence arises where suppliers are not paid a claim can be placed against the bond ensuring payment to subs and keeping the project lien-free.

A performance bond ensures payment of a certain sum of money in the case where the contractor fails to fully perform the contract. Some bonds also allow the guarantor the ability to step into the shoes of the failing contractor and complete performance. Some performance bonds may allow variations of both. For HI construction the bidder must provide both performance and payment bonds in the penal sum of 100% of the total contract amount and must be submitted with the executed contract.

Bond amounts may only be reduced with the approval of the CPO and the reduction is limited to not less than 50% of the contract amount.

Again, if your project includes federal funding please check with your grants administrator before reducing any bond amount to ensure this is not in violation of your grant requirements.

### **Slide: Prior to Advertising Solicitation – General Conditions**

Another very powerful mechanism that governs and also protects the rights of both the State and the Contractor are the terms and conditions of the contract document itself.

For an IFB, DBB FFP project include the actual terms and conditions of the contract in the bid package. A number of provisions contained in the terms and conditions will have a pricing impact on the contractor's bid. So in order to avoid any possible confusion as to what is required, for example insurance, etc., the agency needs to provide this information to the bidders to ensure an accurate price and to put the contractor on notice of their duties required under the contract.

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Most agencies will have a set of standard terms and conditions, or General Conditions, that have been vetted by either their AG or COR to ensure compliance with the law and enforceability in the case of a dispute. DAGS PWD has placed a copy of their General Conditions on their website so bidders can easily access and download them as part of bid packages. But, depending on the complexity and unique nature of some construction projects these general term and conditions may need to be supplemented or changed by way of Special Provisions.

Special provisions are contractual terms that supersede the general conditions in applicability and are usually created to address situations or requirements that are unique to that project or type of construction. For example, while many general conditions will mandate payment be made on a monthly basis, a project may want to vary that term and provide for payment only upon the completion of construction performance milestones. This type of situation would then be accommodated by way of special provisions. As with General conditions any special provisions must also be included in the bid package.

### **Slide: Prior to Advertising Solicitation – Put it all together**

So now that we have discussed all of the various items that need to go into your bid package it's now time to put it all together.

For construction projects you will need to ensure the project manager or an assigned project engineer makes a final check of the plans and specifications and bid documents submitted by the A/E to ensure accuracy and completeness.

The project manager will also need to provide you the contractor's license that will be required by bidders in order to perform the work. Also, based on the size and complexity of the project, the project manager should set a time limit between when the solicitation is posted and the bid due date.

Once everything is put together the solicitation needs to be posted publicly on either the State or a county specific notice system.

### **Slide: Bid Period**

As stated before, the minimum statutory length of time that the solicitation must stay on the street before bids are due in an IFB is ten 10 days. But the actual time will depend on the size and complexity of the construction project.

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In construction projects over \$500K for IFBs and over \$100K for Design build RFP projects a pre-bid meeting is required.

For most construction projects a time limit of 4 weeks is sufficient time to allow the bidders to obtain the bid packages, review the plans and specifications and begin gathering quotes from subcontractors, vendors and suppliers in order to prepare their bids. But on complex projects it might be more appropriate to allow even months to ensure the bidders have sufficient time to prepare meaningful and accurate bids.

### **Slide: Bid Period**

Here is the website address for the States solicitation notice site. Jurisdictions may have their own sites that they use to publicly advertise their solicitations.

In order to advertise your solicitation on a notice website you will need to provide prospective bidders sufficient information so they can determine their interest in the project. When entering the information to advertise your solicitation you will need to provide a brief description of the work, where or how the bid documents can be obtained.

For a pre-bid conference you will need to provide the date, time and location. You will also need to provide the bid due date and time along with the location for bid submission and bid opening.

Some agencies will provide additional information in the initial pages of the posting to include: a rough order of magnitude for the estimated construction cost. This is ideally expressed in terms of a range, for example between \$500k - \$1M. Usually on these initial pages of the posting the agency will also include what contractor's license will be required in order to bid.

### **Slide: Public Notice**

In solicitations for goods and services it is quite typical to also include the other bid documents on the notices page via attachments. But as many of you know the files associated with construction projects are quite large and many systems may not have the storage space or capacity to accommodate large attachments. Agencies and Departments differ on how they get the full bid packages to potential bidders. Some may require registration on their notification site in order to obtain the full bid package. This can be beneficial for bidders because usually by being

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registered they can also receive any updates or addendums to the solicitation. Other offices will burn all the bid documents to DVDs and make them available for pickup at their office locations.

All these methods are acceptable ways to ensure bidders can obtain the bid packages, but please ensure you include instructions on how bidders can obtain the bid documents in your solicitation notice.

### **Slide: Pre-Bid Meetings IAW (HAR 3-122-16.05)**

As mentioned previously, on projects with an estimated value of \$500K or more the procurement code requires the agency to conduct a pre-bid meeting at least 15 days prior to the bid opening date. For design build construction projects the dollar threshold for the required pre-bid meeting is \$100K or more. Agencies can also conduct a pre-bid meeting on projects whose estimated value is less than the dollar thresholds. Again, your solicitation must provide information concerning the pre-bid meeting.

### **Slide: Pre-Bid Meetings (cont.)**

The purpose of the pre-bid meeting is to explain the construction project along with the procurement requirements. The pre-bid meeting also provides prospective bidders the opportunity to ask questions.

Many issues can come up during the pre-bid meeting that may affect the requirements set forth in your solicitation documents. It is important that your bid documents and the pre-bid conference stresses to the bidders that only changes to the bid package issued via written addendum will be considered binding.

As such, take care during the bid conference and ensure that if clarifications to the solicitation need to be made to issue the clarifications, changes via addendum. Some agencies issue the pre-bid conference slides as part of the addendum but take care to ensure that the pre-bid slides strictly conform to your bid documents to avoid conflicting requirements and potential protest.

Attendance at the pre-bid meeting is not mandatory and bidders are allowed to bid even if they do not attend the meeting.

### **Slide: Other Requirements and Deadlines**

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Some agencies will require bidders to provide information prior to submission of the formal bid. The HRS allows agencies to request qualification information that can be kept on file prior to submission of the bid. The SPO has a standard form that can be used to gather this information. Obtaining this information prior to the bid opening or with the bid can aid in the post-bid submission review and due diligence on the bidders.

Some agencies will also require bidders to submit an intention to bid prior to the bid opening date. Again this can help the agency determine the number of interested bidders and the level of competition in the community.

If questions and answers will be entertained then ensure you time your due date for all clarification requests to align with any final addendum to be issued on the solicitation.

### **Slide: Public Bid Opening HAR 3-122-30; Receipt, Opening and Recording Bids**

After all of this hard work it is now the bid due date. For IFBs the submission and receipt of bids is a formal and highly documented process. For offers submitted manually, this is, not on eProcurement, as bids are received each bid must be date and time stamped but not opened. If a bid is received prior to the due date/time the bid must be stored in a secure location and held until the date and time set for opening.

All sealed bids must be publicly opened in the presence of one or more witnesses and read aloud. Usually bidders will attend the opening. As part of the opening the name of each bidder, the bid price, and any other pertinent information will be read aloud and recorded for the contract file. The formal witnesses will also need to provide their names for the procurement file. After the bids are opened and publicly announced the bids must be made available for public inspection. Be prepared because this public inspection process can be hectic and confusing. Ensure that you have support from staff to monitor the inspections to keep order from the bidders reviewing the bids to ensure no bids or pages of bids go missing.

At times a bid may have a mistake but the procurement code provides guidance for these situations by providing that obvious mistakes may be corrected or withdrawn by the bidders as long as it is not contrary to public interest and does not result in unfair treatment to other bidders. Please refer to the HAR for guidance on how to deal with mistakes in bids.



### **Slide: Bid Evaluation and Award (HAR 3-122-33)**

After the bid is publicly opened the solicitation then moves into the bid evaluation and award stage of the process. At the opening it will be known to all parties the contractor that is the “apparent low bidder” in the solicitation. You will note that I am not saying that this is the winning bid. That is because after bid opening certain review, evaluation and due diligence must be performed prior to award.

First any objectively measurable criteria set forth in the solicitation must be verified as well as the application of any preferences and / or additive or deductive alternates. The agency will also need to ensure that the bidder has not been suspended or debarred from State procurement along with whether the bidder has the current contractor’s license required to perform the work. After performing this due diligence then the award can be made to the responsive responsible bidder offering the lowest price based on the solicitation criteria.

Once award has been made it must be publicly posted on the State’s awards notification website within seven days of the notice of award.

### **Slide: Bid Evaluation and Award (HAR 3-122-33) (cont.)**

At times the due diligence required after bid opening can be a lengthy process. Therefore we suggest you provide in your bid documents that bidders provide a price that can remain valid for a certain amount of time to allow for this review and evaluation.

The length of the bid validity period is dependent on the size and complexity of the project and bid. For very complex bids with numerous bidders and associated subcontractors a longer validity period may be needed.

For example, some Agencies may request that bidders price their bids to be valid for a period of 60 days after bid opening. If the evaluation or date of funds availability exceeds the validity period set forth in the solicitation then the State may request the successful bidder extend the time of validity for their bid. The bidder does not have to accept this and is free at that time to withdraw their bid w/o penalty. If so, then the State may make a similar request to the next lowest responsive responsible bidder.

### **Slide: Bid Evaluation and Award**

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Once the bids have been evaluated and the winning bidder is determined Agencies should send an Award letter to the winning bidder along with the contract documents and performance and payment bond forms for execution.

Note, some agencies will send a letter to the non-winning bidders to inform them they did not win the bid. Please note, this is strictly optional and not required under the code but some agencies view this as a courtesy to the other bidders. If your agency chooses to do this please keep in mind that the formal posting of the award announcement on the public award notice system is the formal notification that triggers the start of the protest period of the solicitation process.

### **Slide: Protest Period**

The HI procurement code allows bidders and prospective bidders to protest both the solicitation and award of a contract. The rules surrounding protests are quite strict. So any time you receive a protest ensure you immediately engage your AG or Corporation Counsel (COR) to seek guidance on how to proceed.

The code provides that to be valid, a protest must be filed in writing:

- Within 5 working days after the aggrieved party knows or should have known of the facts giving rise to the protest, or
- Within 5 working days after the posting of the contract award (formal posting), or
- Within 5 working days after a debriefing (if provided).

A prospective bidder cannot protest the contents of a solicitation, for example the specifications, after the bid due date and time have passed.

If a protest is received all solicitation and award activities must immediately be ceased until the protest is resolved.

The procurement code provides the rules that govern the protest – but reliance solely on the code will not be sufficient to aid you in understanding all of the case law associated with protests that have gone to the DCCA Office of Administrative Hearings for review. For this reason, engaging your AG or COR at the early stage of a protest is critical to ensure you understand how the Hearings Officers' have ruled on certain solicitation and award issues that have been protested before.

### **Slide: Procurement Protest Statistics**

All state and county agencies are required to provide protest information to the State Procurement Office concerning all protests received. The SPO has created the SPO Form 43 to aid in reporting this data.

The report of the protest must be submitted to the SPO within 10 days after the procurement officer's determination on the protest.

On a yearly basis the SPO is then required to provide a report to the legislature concerning the data gathered on protest activities.

Please note that if the protestor does not agree with the procurement officer's determination they have the right to appeal to the DCCA Office of Administrative hearings for a review of the determination.

### **Slide: Contract Execution**

After the contractor receives the notice of award and contract documents they will need to sign the contract and provide the performance and payment bonds at time of award.

Under the procurement code any contract exceeding \$2,500 cannot be awarded unless the bidder is compliant with all laws governing entities doing business in Hawaii. The Bidder must provide proof of compliance with the state and federal tax laws, labor laws, etc. which can be obtained via the Hawaii Compliance Express. Proof of compliance must be provided at the time of contract award. If the bidder cannot provide proof of compliance, or if the bidder comes up as non-compliant in Hawaii Compliance Express, then an award cannot be made to that bidder until it is resolved. Buyers should print out the results of the HCE proof of compliance and place a copy in the contract file evidencing this was checked prior to award.

Note, compliance must also be verified prior to issuance of final payment.

### **Slide: Contract Execution (cont.)**

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Upon receipt of the executed contract, performance and payment bonds, insurance certificates, and proof of compliance then the procurement officer can sign the contract and funds can be encumbered into the fully executed contract.

This executed contract is the goal of the procurement process. But note, your job is not finished. Now the agency must administer the contract post award. Construction contract administration and closeout will be the subjects of Part 2 of the SPO Workshop #130.

### **Slide: Closing Slide**

Thank you for attending this SPO training on the procurement of construction services. Please do not hesitate to contact the SPO if you have any questions. For additional information and references to statute, rules, circulars, memorandums, and other guidance please refer to the SPO website “on-demand training” and “procurement manual” tabs.