STATE OF HAWAII

STATE PROCUREMENT OFFICE
FINDINGS AND RECOMMENDATIONS RELATING TO THE STATE PROCUREMENT OFFICE'S REVIEW OF HAWAII'S PROCUREMENT LAWS IN COMPARISON WITH FEDERAL PROCUREMENT LAWS
AS REQUIRED BY HR 142, SLH 2016

JANUARY 2020

This report may also be viewed electronically on the
SPO's website at http://spo.hawaii.gov
Click on "References" then "Reports."

SUBMITTED TO

THE THIRTIETH STATE LEGISLATURE

IN RESPONSE TO HR 142, SLH 2016

Hawaii State Procurement Office

Prologue

Construction Procurement Policy Review Findings and Recommendations Report,

Ikaso Consulting, December 18, 2019

Enclosed you will find an in-depth, thoughtful analysis of the differences between the Hawaii and the Federal procurement code, with recommendations on whether Hawaii should adopt any Federal codes from a best practice perspective.

The State Procurement Office (SPO) expressly states that there has been no redacting or tainting of analysis or recommendations. The SPO desires this report to be considered as an un-biased, third-party report, with the SPO interviewed along with all the other stakeholders. The SPO did review the draft for formatting errors and any content that seemed vague and required more clarification.

I am especially pleased at the effort the Ikaso Contractor made on this report. They considered the most important sub-areas in each Chapter, incorporated sound reasoning and data points to substantiate their recommendations, and used a mature outlook on whether it is value-added to make each change. In addition, they submitted the statute and rule change verbiage which will be immensely helpful going forward.

We thank all the interviewees for their time and thoughtful responses, our Governor's vision for doing things the right way, and to the Legislature for its consistent interest in improving construction procurement in Hawaii.

This legislative session, SPO and the Department of Accounting and General Services, Public Works Division (DAGS-PWD), are recommending a partnership to improve and advise on construction procurement policy and training state-wide, as well as to actively assist any department or agency with an innovative construction projects that may include services.

This new section will engage those resources to review this report and implement the recommended changes to our construction guidance. I am excited to see the building of a trusted conduit that will enhance construction communication between siloed agencies and departments and bring a focused attention to improving construction procurement as a whole.

Sarah Allen
Administrator
State Procurement Office

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Construction Procurement Policy Review Findings and Recommendations Report

Ikaso Consulting

December 18, 2019

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Executive Summary

Introduction

The construction procurement methods of the State of Hawaii (the State) and those of the Federal Government (as articulated in Federal Acquisition Regulations ("FAR") 36) are similar. This conclusion is based on a detailed document review, interviews representing diverse stakeholder perspectives, and a thorough analysis. The differences, and similarities, between the two bodies of law are analyzed in this Report – some of these differences have material impacts (*e.g.* the Section on Subcontractor Listing) while others have no discernable effects on construction procurement in the State.

In instances where closer alignment with Federal practices would benefit the State, this Report makes a recommendation to that effect. In all, across the 59 subtopics analyzed in this Report there are 16 recommendations for closer alignment. In addition to formal recommendations that fit the definition of closer alignment with Federal practices, the Report also discusses a handful of possible improvements which do not constitute closer alignment with Federal practices – these instances are not presented as formal recommendations. For each recommendation, this Report estimates effort and cost required to implement.

The majority of these recommendations are minor adjustments to existing statutes or regulations to better align the State with best practices from the FAR in a manner that constitutes little or no disruption to present operations. Large adjustments were not suggested because, for the most part, the State's current practices do not significantly differ from Federal practices.

Report Origin

House Resolution (HR) 142 of the 2016 Regular Legislative Session directed the State Procurement Office ("SPO") to prepare a comprehensive analysis and review comparing the State's construction procurement laws with the analog laws of the Federal government. This Resolution was intended to build upon the findings of a Task Force convened by Senate Concurrent Resolution 92, Senate Draft 2 of the 2013 Regular Legislation Session (hereinafter the "Task Force") which issued a report of its findings (the "Task Force Report") in 2015.

Pursuant to the resolutions discussed above, the SPO issued Request for Proposals ("RFP") number 19-005-O to engage a consultant to perform this State and Federal comparison. Ikaso Consulting, LLC ("Ikaso") was the vendor selected and the project commenced in July 2019.

Ikaso reviewed the State's applicable laws and compared them with those of the Federal government. (A complete list of written materials reviewed can be found in Appendix 3.) In order to

gain a better understanding of the State's actual practices, and to discuss potential impacts of theoretical changes or adjustments, Ikaso also interviewed individuals throughout the State, its agencies, and other governmental authorities who must follow the State's procurement law. For a complete picture, Ikaso also conducted interviews with general contractors, architects, engineers, and multiple representatives of different subcontractor professions and associations. In all, 40 people were interviewed (a complete list of interview subjects can be found in Appendix 4).

With this information, Ikaso prepared the below analysis and recommendations.

Comparison of State and Federal Construction Law, Recommendations, and Recommendation Analysis Summary – by Section

Section I – Acquisition of Design Professionals

The State and the Federal government procure the services of Design Professionals (architects, engineers and other similar professions) in a very similar manner. In fact, almost every state follows the same Quality Based Selection ("QBS") process. Under a QBS process, a Design Professional (whose licensure and qualifications have been approved by the government) is selected based purely on their capabilities, experience and other subjective factors. Cost is specifically not considered until the government begins negotiating with their preferred Design Professional.

This Report makes four recommended changes for greater Federal alignment in this area:

- **Recommendation I-1- Committee Conflict Prevention** – The Federal system expressly prohibits Design Professionals from winning contracts if employees of the same firm are evaluating the proposals submitted to the government. The State informally observes this practice. This recommendation proposes the formalization of this prohibition in rule.
- **Recommendation I-2 – Design Professional Selection Criteria** – While the Federal and State systems use functionally the same criteria when evaluating which Design Professionals it wants to select, the State's statute ranks these criteria by importance while the Federal rule does not. This ranking has purportedly caused some agencies to keep awarding to the same firms repeatedly at the expense of new entrants that may be equally qualified. This recommendation proposes to align with the Federal practice by eliminating the statute language that ranks the criteria's importance.
- **Recommendation I-3 – Training for Negotiations with Design Professionals** – The Federal system has more robust practices regarding negotiations with Design Professionals than is reportedly conducted by many State negotiators, including the practice of estimating Design

Professional costs as part of a negotiation. This recommendation proposes to develop and deliver training to all individuals who negotiate with Design Professionals, allowing them to conduct these negotiations in a manner that is more aligned with Federal practices.

- **Recommendation I-4 – Certified Cost and Price Data** – Part of negotiations with Design Professionals at the State and Federal level involves asking the Design Professionals to submit certified cost and price data. The Federal standard allows the request to come earlier in the negotiations process when it might be more useful to the government. This recommendation proposes to amend the State rule to allow (but not specifically require) this earlier request, more closely aligning with Federal practices.

Section II – Construction Procurement

The State and the Federal government purchase construction services in a substantively similar manner. Both typically issue Invitations for Bids ("IFB") to obtain sealed bids from potential contractors, and the construction project is typically awarded to the contractor with the lowest bid. The mechanics of each respective government's IFB process is materially similar.

This Report makes three recommendations regarding these processes to ensure the State is operating under best practices followed at the Federal level:

- **Recommendation II-1** – **Cost and Price Estimate Training** – The Federal government requires an internal estimate of anticipated construction costs be prepared prior to the receipt of any bids. The State often has these estimates on hand (as the Design Professionals prepare them as part of their work) but does not appear to have a standard method by which they are developed, referenced or used. This recommendation encourages the State to develop and deliver training regarding construction cost and price estimation best practices to improve and standardize this practice.
- **Recommendation II-2 - Past Performance Vendor Database** – The Federal government routinely captures vendor (including contractor) performance in a structured and uniform way. This information can be accessed and utilized when future procurements need to assess a vendor's responsibility. The State does not have this standardized system. This recommendation is to develop a vendor performance tracking system to align with Federal practices more closely. Please note: these efforts have already begun thanks to the present efforts of another contractor engaged by the State: Sine Cera Consulting, LLC.
- **Recommendation II-3 – Negotiations with Low Bidder** – The State allows negotiations with a low-bidding contractor if their low bid is still higher than the amount of funds available for the

project. The Federal government allows negotiating with a low-bidding contractor if the amount of the bid is higher than the government thinks it should be based on their internal estimate. This recommendation is to expand when negotiations could occur for construction bids to include the Federal practice of allowing negotiations on prices that are not in line with the State's estimates.

Section III – Subcontractor Listing

The State requires that, in bids for construction projects, general contractors disclose the subcontractors they intend to use on the project. The intent of this requirement is to deter bid shopping – the practice of low-bidding general contractors unethically extracting lower prices from subcontractors under threat of replacement. All parties agree the present statute accomplishes this goal. The Federal government does not have this disclosure requirement, nor do the majority of states. In fact, as described in detail in this Section, only six states have an equivalent practice.[1]

An unintended impact of this requirement is an increase in the number and complexity of construction protests. As analyzed herein, despite accounting for only approximately 20% of the solicitations, construction procurement protests account for approximately 75% of the protests the State receives, and the majority of those protests allege issues stemming from the subcontractor listing requirement.

This Report does not recommend the complete repeal of this requirement. It has persisted for years, evincing a public policy that bid shopping is a sufficiently undesirable practice and that its deterrence is worth the present cost and inconvenience. However, this Report does make two recommendations to mitigate the protests driven by this requirement:

- **Recommendation III-1 – Limit Subcontractor Information to What is Required** – Eliminate the practice of asking for more subcontractor information in a bid response than is required by statute. The more information solicited, the greater chance of error, and thus the greater chance of protest.
- **Recommendation III-2 – Reduce What Subcontractor Information is Required** – Amend the statute to eliminate the requirement to disclose what the subcontractors will do, limiting it only to the subcontractors' identity. This will substantially reduce the present protest practice of claiming the proposed subcontractor maintains the wrong license for their proposed work (a complicated issue which often consumes time from individuals from the Department of Commerce and Consumer Affairs ("DCCA") as well as the SPO).

[1] The six states are California, Idaho, Nevada, New Mexico, South Carolina, and Wisconsin. *See* Section III.

Both of these recommendations, by requiring less information, align closer to the Federal standard of requiring no information.

Section IV – Evaluation Preferences

The State maintains three evaluation preferences which allow a price submitted by a bidder to be evaluated at a lower figure if certain requirements are met. These preferences do not exist at the Federal level. The Task Force Report recommended that all three of these preferences be eliminated – a suggestion which was met with near unanimous agreement and support by all stakeholders interviewed (including contractors who stood to benefit from the preferences.) Accordingly, this Report recommends closer alignment to the Federal practice of not having these preferences, specifically:

- **Recommendation IV-1 – Eliminate Hawaii Products Preference** – Eliminate application of the Hawaii Products Preference to construction via statute and rule amendment.
- **Recommendation IV-2 – Eliminate Apprenticeship Program Preference** – Eliminate the Apprenticeship Program Preference (which only applies to construction) via statute repeal.
- **Recommendation IV-3 – Eliminate Recycled Products Preference** – Eliminate the application of the Recycled Products Preference to construction via statute and rule amendment.

Section V – Design Build ("Two-Phase") Procurement[2]

Both the State and Federal systems allow construction and Design Professional services to be procured at the same time through a single solicitation and single contract. This method, known as "design-build" or "two-phase construction procurement" is substantively similar at the State and Federal level. Where the two systems are different is in the level of detail provided: the Federal system provides more guidance and instruction on when and how to conduct a "design-build" than the State's lone statute. This Report makes the following recommendation to closer align with the best practices seen in the FAR:

- **Recommendation V-1 – Provide Guidance on When to Use Two-Phase Method -** Amend rules to include the same guidance as the FAR on factors to weigh when considering the design-build method.
- **Recommendation V-2 – Provide Guidance on Short List Development** – Amend rules to include a description of the evaluation criteria the State should consider when preparing a short list of design-build teams to closer align with Federal criteria.

[2] For the purposes of this report, the terms "design-build" and "two-phase" shall be used interchangeably when describing the type of solicitation defined as "design-build" in both State and Federal law.

- **Recommendation V-3 – Provide Guidance on Selecting a Contractor from the Short List** – Amend rules to include a description of the evaluation criteria for the State to consider when picking its winning design-build team from the short-listed candidates.

Section VI – Required Contract Clauses

FAR 36 includes 27 contract clauses which must be included in Design Professional or construction contract clauses. Of these, 26 have comparable State analogues or are obviated by State practices. This Report makes one recommendation regarding the 27th contract clause which has no analog at the State:

- **Recommendation VI-1 – Utilities During Construction Clause** – Add a clause to the boilerplate contract which clarifies which party is responsible for the cost of utilities consumed during a construction project, as well as the cost of any temporary hook-ups to convey utilities to the job site.

Section VII – Other

The final Report Section addresses a number of miscellaneous topics. These include where construction procurement is regulated (the FAR maintains a single subpart whereas construction is regulated throughout the State's procurement code); the definition of construction (the State's definition is broader as it includes routine maintenance); the methods by which the State and Federal governments procure low-dollar Design Professional or construction contracts (which are similar enough that no change is warranted); and two unique State requirements for construction related to recycled glass and the use of native plants in landscaping. None of these areas have recommended changes to closer align with the FAR.

Introduction and Methodology

Senate Concurrent Resolution 92, Senate Draft 2 of the 2013 Regular Legislation Session, requested the Comptroller to establish a Task Force to study the State's procurement code and to identify amendments that would increase economy, efficiency, effectiveness, and impartiality in the procurement of public works construction projects. That Task Force was convened with membership from the State, other government and quasi-governmental entities, and with representatives of the prime and subcontracting industries. The Task Force met to discuss and vote upon several potential recommended actions and issued its Final Report on April 14, 2015.

House Concurrent Resolution 196 of the 2016 Regular Legislative Session directed the SPO to prepare a comprehensive analysis and review comparing the State's construction procurement laws with the analog laws of the Federal government. This analysis was also required to include recommendations of where the State would benefit with closer alignment to Federal requirements.

Pursuant to this task, on January 31, 2019, the SPO issued RFP 19-005-O (the RFP). The RFP sought:

(1) An examination of the issues raised in the Task Force's Final Report;

(2) A review of Federal procurement laws, in particular FAR 36, and a comparison of the similarities and differences between them and the State's procurement laws as applied to construction;

(3) An analysis of whether closer alignment with Federal procurement law would benefit the State;[3]

(4) An estimate of the length of time and effort required to implement recommended areas of greater Federal alignment; and

(5) An estimate of the cost the State may incur to implement recommended areas of greater Federal alignment.

Ikaso was selected by the SPO pursuant to the RFP to undertake this analysis. This Report is the submission of this analysis for the State's consideration and review.

The first step in Ikaso's performance of its duties was to work with the SPO to develop a project Framework. The Framework was intended to establish a set of mutually agreed upon project goals and State priorities which would help Ikaso best understand what the State considered beneficial (which

[3] Accordingly, all formal recommendations in this Report are limited to suggestions that fit the definition of closer alignment with Federal practices. In a few instances the Report discusses possible improvements which do not constitute closer alignment with Federal practices, so these instances are not couched as formal recommendations.

understanding would then be applied in determining whether greater Federal alignment is beneficial). This Framework is produced below:

Framework Criteria	Key Components
1. Application of Best Practices	• Alignment with the Federal Acquisition Regulations (FAR) while taking into account local considerations, priorities, and business needs • Contracts are optimized to include meaningful performance management tools • Appropriate oversight of contract performance and intervention capabilities • Process and tool optimization to mitigate protest risk
2. Thoughtful Contractor (& Subcontractor) Selection Process	• Maximize competition while supporting local goals • Balance between decentralized execution and centralized oversight for subcontractor evaluation and management • Solicitations are evaluated by capable, objective individuals • Evaluation of cost and quality appropriately balanced • Contracts that meet end-user needs, in terms of both quality and cost
3. Process Transparency & Integrity	• Appropriate information is readily available to citizens and stakeholders • Procurement and contracting decisions adhere to established procedures
4. Consistent & Efficient Processes	• Uniform and fair public procurement processes adopted • Consistent, efficient, and predictable practices utilized • Appropriate procurement methods and contract structures selected • Procurements launched and completed on schedule

The above four criteria graphics from the Framework appear above the recommendations at the end of each section. The grid of recommendations includes a check mark in each graphic's column indicating which Framework goal(s) are furthered by the specific recommendation:

Rec. #	Details				
I-1	Adopt, in rule, a prohibition on the award of contracts to Design Professionals who serve on Selection Committees, or to firms where that member is employed.	✓		✓	

With the Framework established, Ikaso began the comparison and analysis required by the RFP items (2) through (5) above. A large effort towards the comparison of State and Federal law required by RFP item (3) was comprised of a comprehensive review and comparison of written materials identified by the State and supplemented through Ikaso research. A complete list of the written materials reviewed and cited throughout this Report can be found in Appendix 3. Ikaso also conducted a number of stakeholder interviews to better understand the construction procurement practices observed throughout

the State (as this understanding was essential to better inform the impact of any closer Federal alignment). A list of the interview subjects may be found in Appendix 4.

Finally, Ikaso worked with the SPO to agree upon a methodology and model used to estimate the time, effort, complexity, and cost of all Report recommendations. This may be found as Exhibit 1 to this Report. The time, effort, complexity and cost of each recommendation is also described in each section below. As many recommendations involve passing a statute or rule, a more thorough estimation of the time, effort and expense associated with these measures are estimated in Exhibits 2 (statute) and 3 (rule). Notably, Exhibit 3 also includes salary research used to calculate a composite SPO, SPO supervisor, and Attorney General hourly rate used in some of other recommendation cost estimates in this report.

Ikaso wishes to mention that everyone at the State has been forthcoming, engaged, and supportive of this project. In particular, the SPO and all interviewees were generous with their time, information and perspective. We would like to thank the State for this opportunity.

Comparison of State and Federal Construction Law, Recommendations, and Recommendation Analysis

This section compares the Federal and State construction laws and practices. Specifically, it compares the Federal practices required by FAR 36 (and other FAR sections cited therein) with State law. A complete list of written materials reviewed in this analysis can be found in Appendix 3. In addition to this written review, Ikaso conducted the interviews listed in Appendix 4, whose findings are accounted for below and have been factored in the analysis and recommendations sections.

Ikaso's analysis, recommendations and estimations are all found in the "Comparison of State and Federal Construction Law, Recommendations, and Recommendations Analysis" portion of this Report. This portion of the Report is divided into seven sections:

I. Acquisition of Design Professionals
II. Construction Procurement
III. Subcontractor Listing
IV. Evaluation Preferences
V. Design Build ("Two-Phase") Procurement
VI. Required Contract Clauses
VII. Other

These seven topics either roughly track the subchapters of FAR 36 (which is the case for the sections I, II, V and VI), or are about construction-specific topics unique to the State (*i.e.* there is no federal analog - sections III and IV). There is also a catch all "Other" section VII for discrete topics worth analyzing but not worth their own dedicated section.

At the beginning of each Section there is a "Section Summary." This summary previews the topics covered and the recommendations made in that section. There is also a table summarizing the analysis more thoroughly described in that Section.

Each Section is divided into a number of subtopics. In each subtopic there is a thorough explanation of State law and FAR requirements, an account of interview findings, an analysis of the differences of State and Federal Law, the consequences of these differences (if any), and any recommendations of greater Federal alignment where it appears to be in the best interest of the State. In Subsection III there is also a survey of how the Subcontractor listing requirement is handled across the country and a discussion of possible solutions which do not involve greater Federal alignment.

At the end of each Section the recommendations from that Section are restated. If those recommendations require statute or rule changes, proposed language is suggested, and then the time, effort, complexity and cost of each recommendation is estimated.

I. Acquisition of Design Professionals

Section Summary:

This section will analyze:

- Definition of Design Professionals – which professions meet the definition
- Evaluation Bodies – the convening of groups to qualify Design Professionals and then select them for particular contracts
- Selection Factors – the selection of Design Professionals is based on qualitative criteria like experience and licensure while specifically *not* considering cost
- Evaluation Body Output – the production, by the selecting body, of a ranked list of preferred Design Professionals
- Disputing Rankings – a mechanism for the purchasing agency to disagree with or dispute the selection body's ranking
- Negotiation with Ranked Vendors – the method by which the purchasing agency negotiates with the ranked vendors
- Fair and Reasonable Price – the methods by which negotiators aim to secure a "fair and reasonable price" in negotiations
- Announcement of Award – the different ways in which the State or Federal system requires or permits the announcement of winning Design Professional vendors
- Environmental Considerations – how environmental considerations like energy conservation and sustainable methods factor into decision making regarding Design Professionals
- Design Professional Liability – the rights of the government to pursue a Design Professional if their designs cause problems later
- Debriefing Unsuccessful Design Professionals – the right of unsuccessful (*i.e.* non-winning) Design Professionals to seek a debriefing about their submission

The method by which Design Professionals (architects and engineers) are procured under State law and Federal regulation are substantively similar. The Federal government is required to pursue this

"Quality Based Selection" ("QBS") method under the Brooks Act of 1972, and 46 states,[4] including Hawaii, have analog QBS Design Professional selection methods.

However, there are a few subtle differences between the QBS of FAR 36 and that of the State that have meaningful impacts. The Federal evaluation body more clearly prohibits conflicts of interest while State agencies have instituted effective but informal solutions to the same end. While both the Federal and State QBS evaluation bodies consider the same criteria, some interviewees believe the State's explicit ordering of importance of these criteria (which ordering is not present in FAR 36) has constrained the State's ability to engage new Design Professionals by overprioritizing firms with previous State contracts. Additionally, while both the Federal and State method task those negotiating to reach a "fair and reasonable price" with the top ranked Design Professional, some State procurement personnel do not use all of the options available to them under rule and statute. Federal negotiators also receive certification about pricing accuracy from the vendors during negotiations while State negotiators cannot receive these certifications until after negotiations are complete.

Section I Summary Analysis Table

Subtopic	HI Law	FAR 36	Analysis	Recommendation
Definition of Design Professional	A Design Professional is someone who requires a class of State-issued licenses.	A Design Professional is defined as either maintaining a State license or qualitatively by the work they do.	There is no meaningful difference, the FAR cannot exclusively cite State licensing laws as a basis of Design Professional qualifications because it operates across the country and internationally.	*No change*
Evaluation Bodies	Two bodies: a Review Committee to qualify candidates and a Selection Committee to select firms for specific projects.	Flexibility to convene one or two Evaluation Boards. Board(s) qualify candidates, then select for projects.	State system always convenes two bodies, Federal system sometimes convenes two bodies, but always two phases. Substantively similar.	*No change*
Evaluation Bodies	Membership of Committees reserved for qualified professionals. They can be State employees or private	Membership of Board reserved for qualified professionals. They can be government employees or private	Evaluation body composition is similar, but the Federal system maintains more formal protections	**Recommendation I-1 – Committee Conflict Prevention:** Adopt a prohibition on award to firms with a principal or

[4] According to a 2013 survey by the American Council of Engineering Companies (ACEC), the only states without a QBS selection method for Design Professionals were New Hampshire, Wisconsin, Iowa, and South Dakota.

Subtopic	HI Law	FAR 36	Analysis	Recommendation
	citizens. If private citizens are engaged, affidavits are collected to protect against conflicts of interest.	citizens. If private citizens are engaged, no award can be given to a firm they are associated with.	against the potential for private citizen self-dealing.	associate on the Selection or Review Committees.
Evaluation Bodies	*No State analog*	Evaluation Boards must have a chairperson, who must be a government employee.	The State does not require a chairperson for any Committee, and thus, does not restrict this role to State employees.	*No change*
Evaluation Bodies	An annual form is collected from interested Design Professionals for review by the Review Committee in determining qualifications.	An annual form is collected from interested Design Professionals for review by the Evaluation Board in determining qualifications.	No meaningful difference. In fact, some State agencies even accept the Federal form.	*No change*
Selection Factors	The Selection Committee may only make award recommendations for firms deemed "qualified" by the Review Committee.	An Evaluation Board may only make award recommendations to firms deemed "qualified."	No difference	*No change*
Selection Factors	The Selection Committee may review any materials available to it, including the ability to conduct "confidential discussions" with qualified firms.	The Evaluation Board may consider data available to it and responses to public notices. It is required to conduct environmentally focused discussions with at least three firms.	The materials the bodies review are substantively similar. The State may conduct discussions while the Federal analog must conduct them. Design competitions, expressly permitted by the FAR, are not precluded by State statute.	*No change*
Selection Factors	In making award decisions, the Selection Committee must consider, in descending order of importance, experience, professional qualifications, past performance on	In making award decisions, the Evaluation Board must consider professional qualifications, experience, capacity, past performance on similar projects,	The State dictates the relative importance of factors while the Federal government does not. The Federal government must also consider the location of firm (more of a concern with projects of	**Recommendation I-2 – Design Professional Selection Criteria:** Eliminate the "descending order of importance" language from 103D-304(e) to afford Selection

Subtopic	HI Law	FAR 36	Analysis	Recommendation
	similar projects, capacity, and other relevant criteria. Cost is not considered.	firm's location, and other relevant criteria. Cost is not considered.	national and international scope).	Committees the same flexibility given to their Federal counterparts.
Evaluation Body Output	The Selection Committee produces a ranking of at least three firms and a contract file containing a summary of those firms' qualifications to the head of the purchasing agency. If more than one firm is equally qualified, the Selection Committee ranks them in a manner to ensure equal distribution of contracts.	The Evaluation Board sends, to the purchasing agency, a selection report with at least three ranked vendors and a description of their evaluations and discussions.	Substantively similar materials are sent to the equivalent body. The only noteworthy difference is the State's provision for equal distribution of work among multiple comparable vendors – a valuable option given the Selection Committee's capability to award multiple projects simultaneously.	*No change*
Disputing Rankings	A purchasing agency many only overturn a Selection Committee's rankings with "due cause."	In the event a purchasing agency departs from an Evaluation Board's rankings, it must prepare written documentation explaining the departure for the contract file.	The State's bar to disregard rankings (due cause) appears higher than the Federal requirement (reason documentation). However, no one can explain what constituted "due cause" in this context as that determination has never been needed.	*No change*
Negotiating with Ranked Vendors	The purchasing agency negotiates with the top ranked Design Professional. If a contract cannot be reached, it is documented in the file and negotiations begin with the second ranked vendor, and so on down the rankings until a contract is formed.	The contracting officer negotiates with the top ranked Design Professional. If a contract cannot be reached, a final offer is obtained from the vendor before negotiations move to number two, and so on. The contracting officer is required to address subcontracting and certain CAD fees.	The negotiations requirements are substantively similar. While the Federal system requires negotiations to address certain CAD and subcontractor issues, the CAD issue is obsolete and the subcontractor issue is redundant with the State's General Terms and Conditions.	*No change*

Subtopic	HI Law	FAR 36	Analysis	Recommendation
Fair and Reasonable Price	An independent government estimate of projected Design Professional costs is optional.	An independent government estimate of projected Design Professional costs is required for all expenditures expected to be above the simplified acquisition threshold.	The Federal system requires an estimate while the State system does not require one (but one is allowed and encouraged in training materials).	*No change*
Fair and Reasonable Price	Negotiators are afforded (in rule and statute) a range of cost and price analysis tools to help negotiate a fair and reasonable price.	Negotiators are afforded a range of cost and price analysis tools to help negotiate a fair and reasonable price.	While the State and Federal systems afford similar tools to negotiators, many State personnel do not report using them.	**Recommendation I-3 – Training for Negotiations with Design Professionals:** Develop and deliver training to individuals who negotiate with Design Professionals.
Fair and Reasonable Price	Certified price data, an attestation of the price's accuracy, is obtained after negotiations are completed.	Certified price data, a disclosure of information germane to negotiations, and an attestation of price accuracy, is obtained during negotiations.	Federal certified price data includes a disclosure requirement and is obtained earlier in the process than at the State.	**Recommendation I-4 – Certified Cost and Price Data**: Amend HAR § 3-122-125 to allow a procurement officer to request that cost or pricing data be certified upon initial submission (and not exclusively after negotiations).
Fair and Reasonable Price	There is no cap on Design Professional fees.	There is a cap on Design Professional fees at 6% of the estimated project cost (with some fees not covered by this cap).	The 6% cap only exists in the Federal system. Adding this requirement would not serve any discernable benefit to the State.	*No change*
Announcement of Award	For contracts over $5K,[5] the State must post certain award and procurement information online.	A contracting officer may release information identifying only the firm with whom a contract will be negotiated. The	The State requires the posting of award and procurement information. By contrast, the Federal system does not require posting and	*No change*

[5] Departments of the Executive Branch CPO Jurisdiction are required to post award notices and other relevant materials for all contracts over $2,500 pursuant to Procurement Circular No. 2019-05, *available here*: https://spo.hawaii.gov/wp-content/uploads/2018/10/PC2019-05-and-Quick-Reference-Guide-rev-10-2018.pdf

Subtopic	HI Law	FAR 36	Analysis	Recommendation
		contemplated work may only be described in general terms.	limits what can be posted. The State's transparency is a best practice.	
Environmental Considerations	All State agencies are encouraged to design buildings with environmental best practices. Design Professionals are engaged with these practices in mind.	The scope of work for Design Professionals must specify the consideration of environmental best practices.	There is no substantive difference at the State and Federal level.	*No change*
Design Professional Liability	Design Professionals are held contractually liable for breaches of professional standards. There is no rule specifically requiring contract officers to weigh (and document) a decision to pursue Design Professional Liability for all construction cost overruns. The concept appears at least partially covered in training and it occurs in practice.	Design Professionals are held contractually liable for breaches of professional standards. In the event of construction cost overruns, contracting officers must make (and document) a determination whether or not to pursue Design Professionals for damages.	The same liability exists, but this is a contract management issue at the State level. Existing Public Works Division (PWD) Department of Accounting and General Services ("DAGS") "Act 241" training[6] at least partially addresses the issue and could be slightly adjusted to fully standardize the practice.	*No change*
Debriefing Unsuccessful Design Professionals	Unsuccessful (*i.e.* non-awarded) Design Professionals may seek a debriefing regarding their submission.	Unsuccessful (*i.e.* non-awarded) Design Professionals may seek a debriefing regarding their submission.	No material differences at the State and Federal level.	*No change*

Comparison and Analysis:

[6] *See* DAGS Act 241 Training slides, *available here* http://pwd.hawaii.gov/act241/, slide 91.

Subtopic – Definition of Design Professional

State Law Treatment

Design Professionals who are to be procured pursuant to HRS § 103D-304 are those individuals who are furnished a license pursuant to HRS § 464. *See* HRS § 103D-304(a). These professions include architects, engineers, land surveyors and landscape architects. *See* HRS § 464.

Treatment under FAR 36 and Other Incorporated Federal Sources

The Design Professional (or "architect-engineer services") contemplated by FAR 36.6 are described qualitatively as "professional services of an architectural or engineering nature, as defined by applicable State law, which the State law requires to be performed or approved by a registered architect or engineer" as well as other surveying, mapping, and design services. *See* FAR 36.601-4(a).

Interview Findings

- This Subtopic was not discussed in interviews.

Analysis of Differences, Consequences, and Benefits of Alignment

Even though the State statutorily defines Design Professionals and the FAR qualitatively defines Design Professionals, there is no meaningful difference between the two. First, the FAR defaults to the local State's licensing standards as a definition of the services procured under this part. But the FAR, which must function outside of the United States in countries with different licensing paradigms, also provides qualitative descriptions of these services to supplement a default to State law.

As the State maintains a robust licensing regime, and because the State is not procuring services outside of the State, defining Design Professionals with respect to professions licensed by the State is sufficient and no change is needed.

Subtopic - Evaluation Bodies

State Law Treatment

The State's Public Procurement Code HRS § 103D-304 provides the statutory basis for the procurement of Design Professionals. HRS § 103D-304 contemplates two different types of evaluation bodies: a "Review Committee" and a "Selection Committee." *See* HRS § 103D-304(c) and (d). Each committee serves a different function.

The Review Committee evaluates an annual, non-project-specific statement of qualifications submitted by Design Professionals interested in State work. *See* HRS § 103D-304(b) and (c). Each fiscal year, the head of each purchasing agency publishes a notice inviting Design Professionals to submit their qualifications and expression of interest. For most State agencies, interested Design Professionals submit

a standard form: DPW-120.[7] The information collected through this annual process is evaluated by the Review Committee, and the Review Committee determines whether each applicant is "qualified" to do work for the State. *See* HRS § 103D-304(b) and (c).

The "Selection Committee" is engaged in the event that an agency needs to hire a Design Professional. The Selection Committee is engaged to select a Design Professional from among those determined to be "qualified" by the Review Committee. (Please see the next subject, Selection Criteria, for a discussion on this topic.) *Id.*

Membership on either the Review Committee or Selection Committee is subject to the same statutory requirement: the committee shall be at least three persons in size and have sufficient education, training, licensure and credentials in the area of the services required." *Id.* HAR 3-122-69 allows for non-government employees to serve on these committees, so long as that individual has sufficient professional qualifications and the individual signs an affidavit:

(A) Attesting to having no personal, business, or any other relationship that will influence their decision in the review or selection process;

(B) Agreeing not to disclose any information from the review or selection process; and

(C) Agreeing that their names will become public information upon award of the contract.

Treatment under FAR 36 and Other Incorporated Federal Sources

Under FAR 36.602, Federal agencies convene "Evaluation Boards." Federal agencies have the flexibility to collapse this into a single "Evaluation Board" or to convene two separate boards, one for qualification and one for project selection.

Membership on a Federal Evaluation Board requires "highly qualified professional employees of the agency or other agencies, and if authorized by agency procedure, private practitioners of architecture, engineering, or related professions." *Id.* Evaluation Boards have chairpersons, who must be a government employee.

Interested Design Professionals submit a standard form (Form SF 330) to express their interest for government projects. *Id.*

No firm evaluated by an Evaluation Board may be awarded a contract "during the period in which any of its principals or associates are participating as members of the awarding agency's evaluation board." *Id.*

[7] *See, e.g.* the DAGS-PWD website instructing Design Professionals to submit this form, *available at* http://pwd.hawaii.gov/for-consultants/.

Interview Findings

- An interviewed agency collapses its "Review" and "Selection" Committees into a single committee membership-wise, but still maintains the separate "qualification" determination followed by a ranked order selection. This practice does not appear to violate the State's requirements.
- According to interviews, membership on either Review or Selection Committees is almost always reserved exclusively for government employees. In addition to the affidavit requirements noted in HAR § 3-122-69 above, many interviewees noted that they further require private evaluators to attest to the same ethical standards of government employees required by HAR § 3-131-102(c), which standards include refraining from any activity that would create a conflict of interest between the evaluator and the State.
- Some interviewed agencies also accept the Federal SF-330 form in addition to, or in lieu of, form DPW-120. The Design Professionals interviewed were in favor of wider adoption of State acceptance of the Federal form. At least one State agency does not use a form, but is planning to adopt form DPW-120 for the next annual posting.

Analysis of Differences, Consequences, and Benefits of Alignment

The State requires the convening of two separate committees with different purposes while the Federal analog allows for two committees or one committee serving both purposes. Interviews revealed that this is a distinction without a difference as at least one State agency convenes a single committee but observes the two separate duties and, barring any requirement for different committee membership, such practice is permissible.

Membership of the State committees and Federal boards are also substantively similar. Both require applicable professional competency and both afford an option for non-government membership. While the Federal Evaluation Board has a government chairperson and the State's committees have no chairperson, this chairperson has no role outside of the simplified acquisition process discussed in Section VII below.

The difference with the most potential meaning is how the Federal and State systems differ in controlling for a conflict of interest for private sector evaluators. The FAR explicitly prevents award to firms with a principal or associate serving on the Evaluation Board. By contrast, HAR § 3-122-69 requires an affidavit that intends to prevent *influence* in the decision making (functionally bias), but does not expressly prevent private evaluators from selecting their own firms. Put another way – a private

sector Selection Committee member could theoretically claim that their employment at Firm X was not a factor in selecting Firm X.

Many interviewees plugged this potential gap by also requiring affidavits to apply the State employee procurement ethics standards in HAR § 3-131-102(c) to private evaluators, but there does not appear to be an explicit requirement to follow this best practice. Accordingly, **Recommendation I-1 – Committee Conflict Prevention** detailed below seeks to present a more permanent solution to prevent conflicts of interest by adopting a rule that aligns with the Federal award prohibition.

It bears noting that we heard of no allegations or accounts of there being any actual or perceived conflicts of interest in the rare occasion of private committee membership. This may be due to the informal additional precautions observed by procurement officials throughout the State. However, given that such prudence should not be assumed indefinitely, the State would benefit from an explicit award prohibition similar to that of FAR 36.602-2(b) so that it no longer needs to rely on the affidavit best practices that have developed.

Subtopic - Selection Factors

State Law Treatment

Under HRS § 103D-304(f), a Selection Committee may only make award recommendations to Design Professionals deemed qualified by the Review Committee. In making its determinations, the Selection Committee may review the submissions provided to the Review Committee and other pertinent information "available to the agency." The Selection Committee is also permitted to conduct "confidential discussions" with any person deemed qualified by the Review Committee.

Per HRS § 103D-304(e), when evaluating this material for a potential award, the Selection Committee considers the following "criteria in descending order of importance: [*emphasis added*]

(1) Experience and professional qualifications relevant to the project type;

(2) Past performance on projects of similar scope for public agencies or private industry, including corrective actions and other responses to notices of deficiencies;

(3) Capacity to accomplish the work in the required time; and

(4) Any additional criteria determined in writing by the [S]election [C]ommittee to be relevant to the purchasing agency's need or necessary and appropriate to ensure full, open, and fair competition for professional services contracts."

The cost of candidate Design Professionals is not considered.

Treatment under FAR 36 and Other Incorporated Federal Sources

Under FAR 36-602-3, a Federal Evaluation Board may consider the current data on eligible Design Professionals and their responses to public notices. The Evaluation Board shall also hold discussions with at least three vendors considered the most highly qualified "regarding concepts and the relative utility of alternative methods of furnishing the required services." FAR 36.602-1(b) also specifically allows agencies to hold design competitions to aid in an Evaluation Board's decision making, where appropriate.

Per FAR 36-602-1(a), when evaluating this material for a potential award, the Evaluation Board considers the following criteria about each candidate vendor:

(1) Professional qualification necessary for satisfactory performance of required services;
(2) Specialized experience and technical competence in the type of work required, including, where appropriate, experience in energy conservation, pollution prevention, waste reduction, and the use of recovered materials;
(3) Capacity to accomplish the work in the required time;
(4) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules;
(5) Location in the general geographical area of the project and knowledge of the locality of the project, provided that the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and
(6) Acceptability under other appropriate evaluation criteria.

The cost of candidate Design Professionals is not considered.

Interview Findings

- For larger projects, the Selection Committee often reviews the submission to the Review Committee (the annual submission) as well as any other materials collected in response posting about the project itself issued to qualified vendors. For smaller projects, sometimes only the Review Committee materials are reviewed and the Selection Committee does not solicit any further information.
- Outside of the Two-Phase method (see Section V below), no one could recall a design competition. Likewise, no one had conducted the expressly permitted "confidential discussions."
- Multiple interviewees expressed frustration that the State's evaluation criteria included an ordered priority. They noted that, by prioritizing a track record of State project experience, this forced their hand to continue awarding contracts to the same vendors time and time again, often

with new, smaller firms functionally "locked out" of their first State project. Some interviewees remarked that the firms "locked out" were often minority or women owned businesses.

Analysis of Differences, Consequences, and Benefits of Alignment

The differences in what materials a State Selection Committee or Federal Evaluation Board reviews in making award recommendation do not warrant a change in State law to align more closely with Federal practices. Both bodies review the materials submitted for the qualification determination and both bodies have the option to solicit and review project specific information. While the FAR expressly allows convening design competitions, the wide latitude afforded to the Selection Committee to review any available information would include a request for design competitions, so there is functionally no difference between State and Federal options.

The only notable difference in this regard involves discussions with potential vendors. The Federal Evaluation Board must conduct conversations while the State Selection Committee conducts them at their discretion. The Federal discussions must be geared towards environmental considerations, but the State's optional discussions are not about a pre-defined topic. There is no clear value to be gained for the State by forcing these discussions, especially in light of the fact that these environmental considerations are factored elsewhere (see Subtopic - Environmental Factors below.) Adoption of the Federal requirement would add more steps to the process with no clear additional benefit while also forcing the discussions to cover particular topics which may not always be applicable but are otherwise accounted for in State law.

However, there is value in a slight modification to the State's evaluation criteria section to closer align with the FAR. For the most part, the State and Federal criteria are the same. Both consider experience, professional qualification, past performance, capacity, and have a catch-all for the body to identify other applicable criteria. The Federal criteria also expressly include environmental considerations among experience (*e.g.* energy conservation and pollution control) where appropriate, but the State is already directed to review these subjects elsewhere in law in all relevant procurement settings.[8] The Federal geographic (*i.e.* location) consideration is also of limited utility to the State: FAR 36 needs to apply on a national and international basis while HRS § 103D-304 only applies in State.

The key difference between State and Federal considerations is the State expressly orders the importance of its criteria while the Federal criteria has no ordering of importance. As noted above, interviewees felt constrained to overvalue vendors' past State experience given this ordered preference.

[8] *See* HRS § 196-9 directing all agencies to consider environmental considerations in building design. Also please see the Subtopic – Environmental Considerations below.

The result, per these interviewees, was functionally locking out new firms from winning State business – and these locked out firms were reportedly often smaller firms or ones with woman or minority ownership which were historically under-utilized.

Recommendation I-2 – Design Professional Selection Criteria proposes to eliminate the phrase "in descending order of importance" from HRS § 103D-304(e), thus aligning it more with its Federal analog. This will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.

Subtopic – Evaluation Body Output

State Law Treatment

The Selection Committee produces a ranking of at least three Design Professionals which is sent to the head of the purchasing agency. *See* HRS § 103D-304(g). Along with this ranking is a contract file containing a summary of the qualifications for the ranking of each person. *Id.* If more than one person holds the same qualifications, the Selection Committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

The Evaluation Board sends a selection report to the purchasing agency. *See* FAR 36.602.3. This report ranks at least the three most qualified persons and includes a description of the discussions and evaluations conducted by the Evaluation Board. *Id.*

Interview Findings

- The most common complaint about Design Professional procurement throughout all interviews, by both government and non-government employees, was the non-waivable requirement to advance no fewer than three persons out of a Selection Committee. Interviewees said that, in some specialized fields, it is not possible to find three qualified candidates.
- While the State once maintained a rule allowing for a Selection Committee to advance fewer than three Design Professionals (HAR § 3-122-66) this rule was deemed *ultra vires* by the State's Supreme Court in 2014 in *Asato v. Procurement Policy Board* (resulting in the invalidation of the rule).

Analysis of Differences, Consequences, and Benefits of Alignment

There is not an appreciable difference between the Federal and State systems. The State maintains language for what appears to be more equitable distribution of work for closely qualified firms – a potentially helpful clause because Selection Committees are often convened to award multiple projects simultaneously.

Unfortunately, the Federal System does not provide the solution to the interviewees' complaint about the requirement to advance at least three firms out of a Selection Committee.[9] Both the State and Federal systems require the advancement of three persons without an accommodation in instances when fewer than three candidates are possible. Notably, ranking fewer than three firms at the Federal level may violate the Brooks Act.[10] Accordingly, there is no recommendation to make for greater Federal alignment as there is already Federal alignment, and said alignment is a source of frustration.

Subtopic – Disputing Rankings

State Law Treatment

The rankings provided by the Selection Committee to a purchasing agency can only be overturned with "due cause." *See* HRS § 103D-304(g).

Treatment under FAR 36 and Other Incorporated Federal Sources

A purchasing agency may elect to list, as most preferred, a firm different than the firm ranked as most qualified by the Evaluation Board. *See* FAR 36.602-4(b). In the event the purchasing agency arrives at a different top vendor than the Evaluation Board, written documentation regarding the reasons for the departure is required for the contract file. *Id.*

Interview Findings

- Aside from sending the rankings and contract files back to a Selection Committee to remedy procedural errors or mistakes (*e.g.* the Selection Committee made an arithmetic error in totaling

[9] While this Report does not entail making recommendations which are not also instances of greater FAR alignment, it may benefit the State to revise HRS § 103D-304(g) to allow a ranking of fewer than three vendors with approval of the relevant procurement authority. Unlike the Federal system, which has a potentially national vendor pool to draw from, the State's strong but local Design Professional community cannot always field three qualified candidates for every specialized project. Presently, interviewees noted that the firm requirement to always rank three firms has required the State to inflate or expand project scope in a manner detrimental to the State in order to secure broader interest.

[10] *See* U.S. Army Corps of Engineers, *Architect-Engineer Contract Usage*, EP 715-1-7, February 29, 2012, *available at* https://www.publications.usace.army.mil/Portals/76/Publications/EngineerPamphlets/EP_715-1-7.pdf, page 3-10 (noting that, if fewer than three firms can be advanced, that the Brooks Act requires amending the scope of the services to allow for greater competition).

points to arrive at the rankings) no interviewed party could recall a purchasing agency disagreeing with a Selection Committee's rankings.

- Accordingly, no interviewed party could provide an interpretation of the "due cause" statutorily required.

Analysis of Differences, Consequences, and Benefits of Alignment

While, textually, there may be a different standard for how a purchasing agency's head disputes the ranking of a Selection Committee in the State context and an Evaluation Board in the Federal context, given that no interviewed party at the State can recall this actually ever occurring, it is impossible to note whether there is a difference in practice. Regardless of any differences in practice, process probity is better served with a higher bar to an individual overturning the output of a qualified Selection Committee, and "due cause" is most likely a higher bar than written documentation. Accordingly, no clear benefit can be gleaned by changing the standard and no recommendation is made in this regard.

Subtopic – Negotiating with Ranked Vendors

State Law Treatment

The head of the purchasing agency (or their designee) negotiates with the top ranked Design Professional. *See* HRS § 103D-304(h). If a "satisfactory" contract cannot be negotiated with the top ranked Design Professional, negotiations with that vendor are formally terminated and negotiations with the second ranked Design Professional shall commence, and so on down the ranked list (*i.e.* if negotiations with number two fail, they are undertaken with number three.) *Id.* In the event that a contract cannot be negotiated with any ranked Design Professional, the head of the purchasing agency may return to the Selection Committee for more ranked Design Professionals. *Id.*

If the Design Professional contracted is not the one ranked first by the Selection Committee, the contract file shall include documentation to explain the outcome (*i.e.* why negotiations with number one were terminated). *Id.* Negotiations are conducted confidentially. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

The contracting officer shall commence negotiations with the Design Professional ranked the highest by the Evaluation Board. *See* FAR 36.606(a). In the event that that a contract cannot be reached, and the final offer (a "final proposal") from the top ranked Design Professional has been received and documented, negotiations may be terminated with the top ranked vendor and commenced with the second ranked vendor, and so on down the rankings. *See* FAR 36.606(f). In the event that no contract

may be reached with a ranked Design Professional on the list furnished by the Evaluation Board, the contracting officer may return to the Evaluation Board for more ranked Design Professionals. *Id.*

During negotiations, in addition to reaching a "fair and reasonable price" discussed below, the contracting officer is encouraged to seek "advance agreement" on computer aided design ("CAD") charges. *See* FAR 36.606(d).[11] The FAR also specifically charges contracting officers to negotiate and agree on any subcontracting. *See* FAR 36.606(e).

Interview Findings

- Interviewees noted that only rarely did negotiations need to proceed past the top ranked Design Professional.
- Those interviewed said the main task of negotiations is reaching a "fair and reasonable price" (see next Subtopic).

Analysis of Differences, Consequences, and Benefits of Alignment

The State and Federal systems are substantively similar. Both require the commencement of negotiations with the top ranked vendor and the official termination of those negotiations before they are undertaken with the second ranked vendor, and so on. Both systems allow the contracting official to seek additional ranked vendors from the selection body in the event that all ranked vendors have been exhausted with no contract.

While there are a few small differences between the processes, none warrant changes for greater Federal alignment. First, the Federal system requires an official "final offer" be submitted by the vendor before negotiations can be terminated. By contrast, there is no express State requirement to mark the final offer of a vendor. That said, State statutes do require formal termination of negotiations and documentation thereof to support an award to a vendor other than the top ranked one. Thus, implicit in this requirement is the obligation to document why negotiations with the top ranked vendor were discontinued, which would necessarily include a documentation of that vendor's final position. Accordingly, while the statute could be more explicit, it does not appear that such explicitness would necessarily effect a change in practice.

Next, the Federal system has two additional obligations in negotiations - 1) to seek advance agreement on CAD system charges, and 2) to explicitly agree, in advance, on the topic of subcontracting. These provisions are not necessary for the State. Neither warrant formal adoption by the State.

[11] Per FAR 31.109, an advance agreement is a written agreement about the allowability/treatment of certain costs formed before costs are incurred.

The CAD provision is largely obsolete. The Federal requirement to seek advance agreement on computer-aided design stems a historical practice of some firms to separately amortize their CAD systems instead of including it within its overhead costs.[12] Apparently, these costs would appear on Federal invoices as a surprise to Federal contract managers – prompting the adoption of a FAR clause noting these fees are only payable if agreed to during contracting. The use of CAD is now commonplace and required by both the State[13] and Federal[14] governments for material projects. Accordingly, it is typically factored into the overhead expense of a design firm. Notwithstanding this practice, no fee is payable under contract unless specifically memorialized in the contract, so this Federal clause only ever served as a notice to vendors regarding this practice.

The subcontracting provision, if applied to the State, would be redundant. Clause 6 of the General Conditions specifically requires vendors to obtain written approval from the State in order to subcontract any portion of the work contracted out. Thus, the boilerplate contract used today necessitates the subcontractor discussion already. Adding a rule or statute forcing these discussions would be redundant.

Subtopic – Fair and Reasonable Price

State Law Treatment

When negotiating with ranked Design Professionals, the head of the purchasing agency (or designee) is tasked with negotiating a price "which is fair and reasonable, established in writing, and based upon the estimated value, scope, complexity, and nature of the services to be rendered." *See* HRS § 103D-304(h). Subchapter 15 of the State's Administrative Rules provide guidance on cost and price principles, what to collect, and how to analyze it. These are not mandatory procedures for negotiating with Design Professionals, but instead offer different "tools" for use as applicable. *See* HAR § 3-122-123 noting that cost and pricing data "*may* be require[d] for professional services."

Under HAR § 3-122-122, "cost or pricing data" are "all facts that can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs

[12] *See* https://media.defense.gov/1994/Oct/19/2001714982/-1/-1/1/95-012.pdf page 10, Inspector General audit report of the DOD discussing improper amortization of design software absent an advance agreement; *see also* https://www.transit.dot.gov/funding/procurement/third-party-procurement/cost-accounting (discussing CAD as a typical overhead cost vs. a separate fee in Design Professional invoicing).
[13] Electronic CAD design documents are required by the State. See clause 4 S. "CADD Documents" on page 3 of the "Revisions to the Policies and Procedures Governing Design Consultant Contracts dated November 1981".
[14] *See* "GSA Project Planning Guide," *available at* gsa.gov/real-estate/design-construction/engineering-and-architecture/architecture-engineering-library

already incurred." A procurement officer obtains these data from the vendor with which they are negotiating and then has, available to them, a number of analytical techniques outlined in Subchapter 15, including:

- Cost analysis techniques used to evaluate the reasonableness, realism, and direct and indirect elements of cost and pricing data; *See* HAR § 3-122-128
- Price analysis techniques used to verify and analyze the overall price in the context of benchmarked and market figures; *See* HAR § 3-122-129
- Comparison to a State generated estimate, or other available information; *See* HAR § 3-122-129

As soon as practicable after an agreement is reached on price, the vendor certifies that the price information is "accurate, complete, and current." *See* HAR § 3-122-125.

Treatment under FAR 36 and Other Incorporated Federal Sources

Unless the expenditure is anticipated to be below the simplified acquisition threshold (*See* Section VII below), a formal independent government estimate is required prior to the commencement of negotiations. *See* FAR 36.605. This estimate is prepared on the basis of a detailed analysis as if the government was itself submitting a proposal. *Id.* The estimate is kept confidential – only disclosing it to government employees who require knowledge of the estimate for the performance of their duties. *See* FAR 36.605(b).

When negotiating with ranked Design Professionals, the contracting officer is tasked with negotiating a "fair and reasonable" price. *See* FAR 36.601; FAR 36.606. In determining whether a proposed price is "fair and reasonable," the FAR outlines a number of analytical techniques a contracting officer may employ singly or in combination. *See* FAR 15.404. Under FAR 15.404 these include:

- A cost analysis used to evaluate the reasonableness, realism, and direct and indirect elements of cost and pricing;
- Price analysis techniques used to verify and analyze the overall price in the context of benchmarked and market figures;
- The review of the independent government estimate;
- The advice and assistance of industry experts; or
- The review of certified cost and price data, if required.

FAR 15.404 also directs readers to a multi-volume reference jointly prepared by the Air Force Institute of Technology and the Federal Acquisition Institute on how to apply price policies. *See* FAR 15.404(a)(7).[15]

Unless the contracting officer determines that an exception[16] applies, a contracting officer must also obtain "certified cost pricing data" if the expected contract is valued at over $750,000.[17] *See* FAR 15.403-4(a)(1). Certified price and cost data require vendors to disclose all facts that "would reasonably [be] expect[ed] to affect price negotiations significantly" and "can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred." *See* FAR 2.101. When certified data are required, Design Professionals must complete official documents attesting accuracy, completeness, and currentness of the proposed pricing. *See* FAR 15.406-2.

Importantly, there is also a cap on the amount the Federal Government will pay a Design Professional: "the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees." *See* FAR 15.404-4(c)(4)(i)(B). This cap has its origins in the Brooks Act, and what is considered within the cap varies from agency to agency.[18]

Interview Findings

- While State law contemplates an analysis of both cost and price, the majority of State personnel interviewed indicated that they used methods to determine a "fair and reasonable" price which were essentially only a price analysis. In other words, most interviewees determined if a price was fair by comparing it to similar projects or their own experience (a "price analysis") but typically did not perform an analysis constructing their own estimated price based on the components and attributes of the project (a "cost analysis"). Accordingly, it appears that few State personnel are using their discretionary authority granted in Subchapter 15 of the Administrative Rules. Virtually no one who was interviewed on this subject was aware of SPO training or resources on the topic.

[15] That multi-volume work is available here: https://www.acq.osd.mil/dpap/cpic/cp/contract_pricing_reference_guides.html
[16] Exceptions include procurement where there is adequate price competition, prices are set by regulation or law, a waiver is granted, or other situations also likely not applicable to the solicitation of Design Professionals. *See* FAR 15.403-1(b).
[17] Some agencies have elected to set a higher threshold for requiring certified cost pricing data. *See* Memorandum re: "Class Deviation – Threshold for Obtaining Certified Cost Pricing Data" dated April 13, 2018 from the Office of the Under Secretary of Defense *available here:* https://www.acq.osd.mil/dpap/policy/policyvault/USA000864-18-DPAP.pdf
[18] *See* "Report of the AIA Federal Architecture Task Group on the Federal Statutory Fee Limitation," December 2015, *available here*: http://content.aia.org/sites/default/files/2016-04/FederalRelations_StatutoryFeeCapReport.pdf.

- Of the agencies which performed cost estimation analyses, many indicated that they relied on DAGS information, in particular the published professional hourly rates.[19] These rates were used to develop cost analyses akin to an independent government estimate.
- Design Professionals express frustration with the Federal 6% cap, noting that it devalues increasingly complex work and is inconsistently applied. This position is consistent with national impressions and the lobbying efforts of the Design Professional industry.[20] Design Professionals also noted that this cap caused difficulty when the underlying estimates were off or did not accurately predict aspects of the project.
- While there is no State 6% Design Professional fee cap, many interviewees bore this figure in mind when determining the fairness or reasonableness of a quoted price.
- The SPO has developed and deployed "Procurement Pricing" [21] training to help State personnel better understand and use the cost and pricing development tactics available to them. This training specifically addresses how to determine if a price is "fair and reasonable" as well as best practices employed in the State and at the Federal level. The training encourages the development of independent government estimates and provides numerous valuable tools in performing cost and price analyses for and beyond construction procurement. However, a more specialized training pertaining to Design Professional cost and price estimation may be beneficial.

Analysis of Differences, Consequences, and Benefits of Alignment

On the subject of reaching a fair and reasonable price through negotiations, the State and Federal systems give similar tools and options to the negotiators, but the State's personnel tend to use fewer of these tools. Both systems give a range of cost and price analyses tools to negotiators and both systems encourage the use of the rights tools when applicable.

To promote State practices that better align with Federal ones, **Recommendation I-3 – Training for Negotiations with Design Professionals** suggests the SPO develop a training course for individuals involved with Design Professional negotiations. This recommendation does not modify any statutes or regulations but is intended to modify State personnel behavior. Specifically, this training would address best practices in Design Professional cost estimation and help negotiators understand best practices and

[19] *Available here*: https://pwd.hawaii.gov/wp-content/uploads/2019/10/DAGS-Max-Hourly-Rates-2019-to-2022.pdf
[20] *See* the AIA Task force report cited above.
[21] The "Procurement Pricing" training materials are *available here*: https://spo.hawaii.gov/wp-content/uploads/2017/09/SPO-183-Reference.pdf

options already afforded to them by rule and statute. Such training could integrate many of the DAGS tools available on this subject, including the Design Professional rate schedule.

One Federal practice this Report does *not* recommend porting to the State is the 6% Design Professional fee cap. This cap is inconsistently administered on the Federal level from agency to agency, a source of frustration and concern in the Design Professional community, and is dependent on the accuracy of a construction estimate which the State may not be equipped to prepare (given the relatively few interviewees which engage in similar cost analyses presently). Design Professionals do not like the cap, feel it is obsolete, and claim that it puts the Federal contract managers in a bind regarding changes to the project. Additionally, many in the State often reference this percentage as a rough gauge of "fair and reasonable," so the State functionally has this point of reference to control Design Professional costs already.

This Report does recommend amending State rule to better track its Federal analog: **Recommendation I-4 – Certified Cost and Price Data** suggests that the State modify HAR § 3-122-125(c) to add the option for a procurement officer to request certified cost or pricing data earlier in the process. "Cost and price data" under both State and Federal system requires a vendor's disclosure of facts and considerations bearing on the accuracy, completeness, and currentness of a vendor's price. Both systems ask vendors to attest to this information, but the Federal system asks for a certification at the time of the information's submission while the State does not request attestation until negotiations are complete. This Report recommends that procurement officers requesting certification of cost and price data have the option to request it earlier in the process as this disconnect between submission and certification (and thus, a disconnect between the submission of data and a promise that it is complete and accurate) does not benefit the State.

Please Note: The rules related to cost and pricing data and their certification requirements are not limited to Design Professional negotiations. Such data are required, for example, in most large competitive sealed proposals. Thus, this recommended alteration to the rule is intended to afford additional flexibility to contracting offers while maintaining the availability of any of today's practices so as not to cause any disruption or change to procurement practices outside of Design Professional procurement.

Subtopic - Announcement of Award

State Law Treatment

Under HRS § 103D-304(i), for contracts over $5,000, [22] within seven days of the contract award the procurement officer (or designee) shall post the following information electronically, ensuring such information remains accessible for a year:

- The names of persons submitted on the Selection Committee's ranking list;
- The name of the winning Design Professional;
- The dollar amount of the contract;
- The name of the agency head/designee making the award; and
- Any relationship of the principals at the winning firm to the official making the award.

HAR § 3-122-63 further expands the reviewed materials open to public review to include, among other things, the criteria used by the Selection Committee and the qualifications reviewed.

Treatment under FAR 36 and Other Incorporated Federal Sources

Under FAR 36.607, the contracting officer *may* [emphasis added] release information identifying only the firm with which a contract will be negotiated for certain work. The work should be described in any release only in general terms, unless information relating to the work is classified (in which case no description should be provided). *Id.* After award, a contracting officer *may* release award information. *See* FAR 36.607(a).

Interview Findings

- No interviews touched on this subject specifically.

Analysis of Differences, Consequences, and Benefits of Alignment

The State system requires disclosure of award information by a certain time, posted electronically, and containing certain data elements. By contrast, the Federal system is optional, prohibits certain details, and does not even require the disclosure exclusively after contract negotiations are complete (*i.e.* "award" disclosure could precede the award). Making the Federal disclosure optional makes sense in certain classified or military Federal construction settings – but the State has no intelligence or military construction analog.

While the State system does place more responsibilities regarding the publication of award and process information, the publishing of awards is an important aspect of public procurement.

[22] Departments of the Executive Branch CPO Jurisdiction are required to post award notices and other relevant materials for all contracts over $2,500 pursuant to Procurement Circular No. 2019-05. See footnote 5 above.

Accordingly, this Report does not recommend closer alignment with the Federal practice of giving agencies discretion about publishing award information.

Subtopic – Environmental Considerations

State Law Treatment

HRS § 196-9 directs all State agencies, to the extent possible, to design its buildings to meet with the Leadership in Energy and Environmental Design ("LEED") standards, incorporate energy efficient standards in its building design, install solar energy solutions, implement water an energy efficiency practices, and other environmental best practices.

In construction procurement, this requirement is articulated in the annual posting for Design Professionals. The DAGS annual posting[23] states the following in the furtherance of these goals:

> In accordance with HRS 196-9, Energy Efficiency and Environmental Standards for State Facilities, Motor Vehicles, and Transportation Fuel: To the extent possible, DAGS intends to design and construct buildings meeting the Leadership in Energy and Environmental Design (LEED) silver or two green globes rating system or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, except when the guideline, standard, or system interferes or conflicts with the use of the building or facility as an emergency shelter.

There are no specific obligations related to hazardous materials disclosure in the procurement rules, but the jobs related to hazardous materials reduction or removal were so flagged in the annual DAGS posting quoted above.

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36.601(a)(1) requires that, for the design of facilities, the scope of work engaging Design Professionals shall specify the government's wishes to maximize the use of recycled materials, maximize energy efficiency, prevent pollution, reduce waste.

FAR 36.601(a)(2) creates design obligations for Design Professionals related to the disclosure of potential hazardous materials risks.

Interview Findings

- No interviews touched on this subject specifically.

[23] Available here: http://pwd.hawaii.gov/wp-content/uploads/2019/06/Prof-Svcs-Ad-FY2019-2020.pdf

Analysis of Differences, Consequences, and Benefits of Alignment

These two standards are substantively similar. Both the Federal and State systems encourage environmental considerations in design. Both the Federal and State systems disclose hazardous materials considerations in describing projects. Accordingly, there is no recommendation for greater alignment given the similarity between systems.

Subtopic – Design Professional Liability

State Law Treatment

The contract with Design Professionals holds the vendors to "reasonable professional standards" and holds the professional "liable" for damages the State may sustain as a result of a failure to uphold those standards. *See* "Policies and Procedures Governing Design Professional Contracts," page II-2. Accordingly, Design Professionals are liable for design deficiencies as a matter of contract.

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36.608 specifically charges contracting officers, when faced with modifications to construction contracts which result in increased cost to the government, to determine if the liability for those increases should be borne by the Design Professional who made the original designs. The contracting officer is tasked with pursuing that liability if the amount recoverable would exceed the cost of recovery. *Id.* The contract file should include a written statement regarding the determination to recover or not to recover, when applicable. *Id.*

Interview Findings

- Interviewees discussed the prospect of holding Design Professionals liable for insufficient designs as a responsibility of contract managers and not in the domain of procurement.
- A common reason cited for the Two-Phase method was that it removed the tricky calculus of determining if the Design Professional, Construction Contractor, State or other party was responsible for construction cost overruns.

Analysis of Differences, Consequences, and Benefits of Alignment

A Design Professional's liability for a breach of professional standards is the same in the State and Federal System (notwithstanding any differences of State and Federal law regarding what constitutes a standard of professionalism for Design Professionals).

What is different between the State and Federal system is the Federal system's explicit requirement, in the procurement rules, for the contracting officer to perform, and document, an analysis of whether a Design Professional should be pursued for construction cost overruns when said overrun

occurs. This is not, however, a procurement issue but is instead within the domain of contract management. In fact, the DAGS-PWD's Capital Improvement Projects Training's ("Act 241 Training") construction management module directs the State's contract managers to consider design errors or omissions as a cause of change orders.

The State's "Act 241" training does not explicitly provide guidance that the contract manager should pursue damages from the Design Professional where a breach of professional standards is the cause, but interviews indicated that it is an analysis at least some contract managers perform. That said, DAGS-PWD could ensure that the practice of contract change order driven damage recovery for Design Professional errors or omissions is standardized by adding this concept to the existing "Act 241" training. As this is not a procurement recommendation, it is not an official recommendation of this Report, but it would potentially require only the addition of one slide to an existing "Act 241" training program which is already delivered periodically to the right people.

Subtopic – Debriefing Unsuccessful Design Professionals

State Law Treatment

Non-selected Design Professionals may submit a request for a debrief to the chief procurement officer or designee within three working days after the posting of the award. *See* HRS §103D-304(k) and HAR § 3-122-70. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with debriefing rules. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

Debriefings of successful and unsuccessful Design Professionals will be held after final selection has taken place and will be conducted, to the extent practicable, in accordance with the general FAR requirements about debriefings. *See* FAR 36.607(b).

Interview Findings

- This topic was not covered in interviews.

Analysis of Differences, Consequences, and Benefits of Alignment

There is no appreciable difference between the State and Federal system regarding the rights of non-winning Design Professionals to seek a debriefing.

Recommendation(s) Based on FAR Alignment Analysis:

Rec. #	Details				
I-1	Adopt, in rule, a prohibition on the award of contracts to Design Professionals who serve on Selection Committees, or to firms where that member is employed.	✓		✓	
I-2	Remove language in HRS § 103D-304(e) which dictates the relative importance of Design Professional selection criteria.	✓	✓		
I-3	Develop and deliver training pertaining to cost and price estimation of Design Professional services to better align actual State practices with Federal practices.	✓	✓		✓
I-4	Amend the rule related to cost and price data certification to allow (but not require) procurement officers to request certification before negotiations are completed.	✓			

Key:

Application of Best Practices		Thoughtful Contractor (& Subcontractor) Selection Process	
Process Transparency & Integrity		Consistent & Efficient Processes	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation I-2 – Design Professional Selection Criteria**, amend HRS § 103D-304(e):

  "(e) The selection criteria employed ~~in descending order of importance~~ shall be:"

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation I-1 – Committee Conflict Prevention**, add the following to HAR § 3-122-69:

  > "*(c) In the event that a member of a Selection Committee is not an employee of a governmental body, no contract shall be awarded to that member or a firm or company with which that member is employed.*"

- Per **Recommendation I-4 – Certified Cost and Price Data**, amend the following to HAR § 3-122-125(c) as follows:

  > "(c) The offeror or contractor shall certify ~~as soon as practicable after agreement is reached on price~~ that the cost or pricing data submitted are accurate, complete, and current ~~as of the date~~ ~~of reaching agreement on price~~. *The procurement officer may request this certification at the time the data are submitted. If no previous request for certification is made, the offeror or contractor shall certify as soon as practicable after agreement is reached on price. In certifying that the data are "current," the certifying offeror or contractor shall certify currentness as of the date of the procurement officer's request or after agreement is reached, as applicable."*

Effort and Complexity to Implement Recommendation(s):

Recommendation I-1 – Committee Conflict Prevention:

There is no effort involved with implementing this recommendation beyond preparing and promulgating the associated rule change, available in Exhibit 3. As discussed in the Analysis of Differences, Consequences, and Benefits of Alignment, this practice is already observed and this recommendation seeks to formalize that. The rule can be effective immediately.

Recommendation I-2 – Design Professional Selection Criteria:

There is no effort involved with implementing this recommendation beyond preparing and the associated bill, available in Exhibit 2. As discussed in the Analysis of Differences, Consequences, and Benefits of Alignment, this change removes a complexity in the qualitative assessment of Design Professionals. It should not add any time or difficulty to the evaluation process.

Recommendation I-3 – Training for Negotiations with Design Professionals:

The effort and complexity to develop and deliver a new training program is not extensive. The State has an existing contract to procure training development services and can utilize this contract to develop the suggested training.

The amount of time needed to receive the new training depends on the length of training and whether these individuals are already scheduled to receive it.

Thereafter, the time and effort associated with this work is the time it takes the trained individual to prepare their own cost and price estimates for the contemplated Design Professional work. This should not be a material burden beyond their existing negotiations preparations – the training is intended to add structure and best practices to an existing exercise.

Recommendation I-4 – Certified Cost and Price Data:

There is no effort involved with implementing this recommendation beyond preparing and promulgating the associated rule change, available in Exhibit 3. As discussed in the Analysis of Differences, Consequences, and Benefits of Alignment, this gives a new option for the timing of the request for certified cost or price data, something that is already done but later in the process. This change of sequence (for reasons discussed above) should not have a discernable timing impact.

Estimated Cost to Implement Recommendation(s):

Recommendation I-1 – Committee Conflict Prevention:

The estimated cost of this recommendation is the cost of a rule per Exhibit 3: $6,977.31. For the reasons described in the Effort and Complexity section above, there are no additional costs required to implement the recommended changes beyond the preparation and promulgation of the rule.

Recommendation I-2 – Design Professional Selection Criteria:

The estimated cost of this recommendation is the cost of a statute per Exhibit 2: $6,773.44. For the reasons described in the Effort and Complexity section above, there are no additional costs required to implement the recommended changes beyond the preparation of the statute.

Recommendation I-3 – Training for Negotiations with Design Professionals:

The estimated cost of this recommendation is $59,207.40.

The current hourly labor rate for training development services obtained through RFP 18-009 is $130. As this likely constitutes an Advanced training under SPO guidance, the estimated number of hours needed to develop the training is 450. Thus, the cost of developing the training is $58,500.

Beyond that, assuming 20 individuals (from the SPO or at an equivalently compensated position in other agencies) need to attend this session, and the session lasts approximately eight hours, this is an additional cost of $707.40.

Finally, there should be no additional cost related to preparing the future estimates themselves. Individuals tasked with negotiating with Design Professionals area already doing work to prepare for these sessions. This training is intended to add structure to an existing exercise, not to make a new task.

Recommendation I-4 – Certified Cost and Price Data:

The estimated cost of this recommendation is the cost of a rule per Exhibit 3: $6,977.31. For the reasons described in the Effort and Complexity section above, there are no additional costs required to implement the recommended changes beyond the preparation and promulgation of the rule.

II. Construction Procurement

Section Summary:

This section will analyze:

- Cost Estimates and Limits – disclosure of the magnitude of the construction project in terms of physical characteristics and estimated price range and creation of a government cost estimate
- Solicitation Method – determining what solicitation method to use to procure a construction project
- Pre-solicitation Notice – informing potential vendors and the public of an upcoming construction solicitation before it has been released
- Vendor Outreach – conducting public outreach for a released construction solicitation
- Pre-bid Conference and Site Visit – holding a pre-bid conference and site visit to explain project and procurement requirements for interested vendors
- Information Included in the IFB – information to be included with or requested from responding vendors in an Invitation for Bids ("IFB")
- IFB Response Time – the time required for interested vendors to respond to an IFB
- Final Review of IFB – requirement to conduct a final, thorough review of an IFB before release
- Facsimile and Electronic Bids – requirements regarding accepting facsimile and electronic bids
- Contract Form – contract format to be included with an IFB
- Master Solicitation / Records – requirements regarding overseeing the master solicitation and records on the solicitation
- Changes and Addendums – making changes and addendums to solicitations following release
- Modifications, Withdrawals, and Mistakes in Bids – modifying or withdrawing submitted bids due to mistakes or other issues
- Cancellation of IFB – cancelling an IFB following release
- Bid Submission – requirements regarding how bids are submitted by vendors and stored until bid opening

- Late Bids – requirements regarding how to handle bids that are submitted late
- Opening Bids – the process of publicly opening submitted bids and announcing and releasing bid information to the public
- Evaluating Bids – the process for evaluating submitted bids to determine a winning vendor that is most advantageous considering only price and requirements set forth in the IFBs
- Responsiveness and Responsibility – determining the responsiveness of a submitted bid and the responsibility of the bidder
- Past Performance of Bidders – incorporating past performance with the State in determining the responsibility of bidders
- Canceling an IFB After Opening Bids – the process for canceling and not awarding a solicitation after submitted bids have been opened
- Equal Low Bids – evaluating multiple bids that have submitted the same lowest price
- Contract Award and Notice – the process for awarding a contract from the solicitation and announcing the award decision
- Prohibition of Construction Awards to Design Firms – the prohibition of awarding a construction contract to the same firm which did the construction designs (not including design-build procurements discussed in Section V)
- Notice to Unsuccessful Bidders – how unsuccessful bidders learn of the award decision
- Negotiation – undergoing negotiation with the awarded vendor before the contract has been finalized
- Two-Step Sealed Bidding – the combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available

Similar to the procuring of Design Professionals at both the State and Federal level, the method by which contracts for construction services are procured under State law and Federal regulation are substantively similar. Although multiple methods are allowed in varying circumstances, the default solicitation method for procuring construction services is through a competitive sealed bidding process in which an Invitation for Bids ("IFB") is issued to obtain bids from potential contractors. In both the Federal and State setting, the law that governs construction sealed bidding (HRS § 103D-302 for the State and FAR Part 14 for the Federal Government) also applies to sealed bidding for other goods and

services, though both the FAR and State law have some construction-specific considerations (most notably through FAR having Part 36 specifically for Construction and Architect-Engineer Contracts).

While the competitive sealed bidding processes that use IFBs for construction procurements are similar at the State and Federal level, there are a few minor differences between the State and Federal systems which have meaningful impacts. Some of the existing differences are advantageous to the State's operations and should not be changed to closer align with the FAR's policies, including the mandatory requirement that pre-bid conferences are held for construction solicitations above $500,000. However, other differences would benefit the State if adopted. Specifically, **Recommendation II-1 Cost and Price Estimate Training, Recommendation II-2 – Past Performance Vendor Database,** and **Recommendation II-3 – Negotiations with Low Bidder** encourage the State to adopt Federal practices as they relate to construction cost estimate generation, the formalized collection and use of vendor performance information, and negotiations.

Section II Summary Analysis Table

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Cost Estimates and Limits	Cost estimates are informally conducted and an estimated cost range is occasionally included in IFB.	Cost estimates are required to be conducted and the range must be included in IFB.	Estimates are conducted in both settings, but it is a more formalized and structured process at the Federal level.	**Recommendation II-1 – Cost and Price Estimate Training**: Encourage procurement officers through training to conduct or utilize an internal price estimation for construction procurements.
Solicitation Method	Most commonly use competitive sealed bidding for construction procurement, but allow for other methods like competitive sealed proposals if most practicable or advantageous.	Most commonly use sealed bidding and outline circumstances where bids are required to be used, but do have a competitive proposals method.	Both most commonly use competitive sealed bidding, but allow for another method like competitive proposals to be used if appropriate conditions are met.	*No change*

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Pre-solicitation Notice	Required to issue public notice for solicitations that include items like where and when solicitation will be available and when the pre-bid conference is held.	Required to issue pre-solicitation notices in advance of solicitation release that include items like estimated price range.	Both required to post public notice on their webpage, provide IFBs to vendors when requested, and can optionally create list of potential vendors.	*No change*
Vendor Outreach	Required to give adequate public notice of IFB, to give reasonable response time, and to post IFB on agency webpage.	Required to publicize IFB on GPE webpage a sufficient time before bid opening to enable bid preparation.	Both require vendor outreach sufficiently before bid opening on relevant webpages, and optionally on other mediums like newspapers.	*No change*
Pre-bid Conference and Site Visit	Pre-bid conferences are required for construction projects of $500,000 and above at least 15 days before bid opening.	Pre-bid conferences are optional but commonly used in complex acquisitions.	Both hold pre-bid conferences to discuss requirements and questions with prospective bidders, but they are only mandatory for larger construction projects in the State.	*No change*
Information Included in the IFB	IFB must include purchase description, all contractual terms, evaluation criteria, and subcontractor listing requirement.	IFB must clearly include the bid requirements and evaluation criteria, disclose the project cost magnitude, and be prepared on Standard Form 1442 with standard contract terms.	Both request general information and provide contract terms, but only the State requires subcontractor listing and only FAR requires cost magnitude to be included.	*No change*
IFB Response Time	Required 15 calendar days from pre-bid conference and recommended 4 weeks from date of public notice.	Required to provide sufficient time and take construction specific timing considerations into account, at least 30 calendar days from the date the IFB is distributed.	Both require sufficient time for bid preparation but define the specific timing in different ways.	*No change*
Final Review of IFB	Does not require a final review to check for mistakes, but still can conduct one.	Requires a final review to detect and correct discrepancies or ambiguities.	Only the FAR requires a final check of the IFB before release.	*No change*

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Facsimile and Electronic Bids	Facsimile and electronic bids are accepted if specifically allowed in IFB and still requires original offers with signatures.	Facsimile and electronic bids are accepted if allowed in IFB once key factors have been considered.	Both allow for the procurement officer to choose if facsimile and electronic bids are accepted, but original offers are only also required at the State.	*No change*
Contract Form	IFB must contain all contractual terms and conditions and define the contract payment type (commonly fixed-price contract).	IFB must contain contract term requirements and outline contract payment type (commonly firm-fixed-price contract).	Both require contract terms and contract payment type to be included in IFB.	*No change*
Master Solicitation / Records	Bid and bidder information and witnesses at bid opening must be recorded.	Must keep a master solicitation and record of each issued IFB, bid abstract, and information on prospective bidders not originally included on the solicitation list.	Both are required to keep procurement files and records of received bids, but FAR requires records on new prospective bidders and encourages referencing old records when creating solicitations.	*No change*
Changes and Addendums	Changes are issued through an addendum containing amendment or clarification that must be distributed within a reasonable time.	Changes are issued through amendment using Standard Form 30, and extending the deadline must be considered.	Both use amendments to make and circulate IFB changes with sufficient time before bids are submitted.	*No change*
Modifications, Withdrawals, and Mistakes in Bids	Bids must be accepted without alteration unless an exception is met to correct an obvious mistake.	Bids may be modified by any authorized method and minor mistakes corrected.	Both can correct mistakes when submitted or verified by the bidder, but the State also allows the procurement officer to correct mistakes attributable to an arithmetical error.	*No change*
Cancellation of IFB	IFB can be canceled when in the best interest of the issuing government body.	IFB can be canceled when clearly in the public interest.	Both allow for cancellations but define the reasoning a bit differently.	*No change*
Bid Submission	Bids must be submitted to the	Bids must be submitted to the	Both follow the same process of keeping	*No change*

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	purchasing agency, time-stamped, and stored securely until bid opening.	purchasing office, time-stamped, and stored in a locked bid box or safe and accessed on a need to know basis.	bids secure and sealed until opening, but FAR outlines more specific security requirements.	
Late Bids	No late bids or modifications are accepted unless the delay is the government's fault.	No late bids accepted unless the delay is the government's fault, but allows late modifications of already successful bid to make more advantageous to the government.	Both do not accept late bids for construction procurement unless it was due to the government's fault.	*No change*
Opening Bids	Bids opened publicly at time and place designed in IFB with one or more witnesses and bid information recorded.	Bids opened publicly at time and place designated in IFB and bid abstract created using Standard Form 1419.	Both open bids publicly and allow for public inspection, but FAR provides additional details on circumstances like emergencies.	*No change*
Evaluating Bids	Responsible and responsive construction bids evaluated on meeting IFB requirements, lowest price, and preferences.	Responsible and responsive construction bids evaluated on meeting IFB requirements and lowest price.	Both award construction bids to the lowest responsive, responsible bidder meeting all IFB requirements, but State takes additional items into account, such as preferences.	*No change*
Responsiveness and Responsibility	Must be deemed responsive by meeting IFB requirements and responsible by demonstrating capacity, ability, stability and integrity.	Must be deemed responsive by meeting IFB requirements and responsible by demonstrating capacity, ability, stability, integrity, and satisfactory past performance for government.	Responsiveness is similarly determined. Responsibility at the Federal level reviews past performance and leverages a common database, both of which are discussed in the Past Performance Subsection.	*No change*
Past Performance of Bidders	Considering past performance of bidders could occur when determining bidder responsibility, but does not have a	Considering past performance of bidders could occur when determining bidder responsibility and annual vendor	Both have ability to consider past performance with responsibility, but the recording and use of past performance is	**Recommendation II-2 – Past Performance Vendor Database:** Develop system for the structured

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	structured analog for the collection and sharing of State performance.	performance evaluation conducted and published.	more structured at the Federal level.	collection and dissemination of vendor past performance (*note: this is already underway*)
Canceling an IFB After Openings Bids	Cancellation after bid opening can occur when it is in the best interest of the government body issuing the invitation or when only one bid with an unreasonable price was received.	Cancellation after bid opening can occur when issues with the IFB were found, no bids met specifications, or all bids have unreasonable prices.	Both can cancel IFBs even after bid opening and allow for securing construction service through alternative methods instead like direct negotiation.	*No change*
Equal Low Bids	Will break a bid tie through State preferences or drawing lots.	Will break a bid tie through small business priorities or drawing lots.	Bid ties can be broken through specific preference criteria.	*No change*
Contract Award and Notice	Construction contracts awarded to lowest responsive and responsible bidder meeting all IFB requirements through posting award notice on Procurement Notice System.	Construction contracts awarded to lowest responsive and responsible bidder meeting all IFB requirements in writing or electronically.	Both must notify winning vendors of contract award in response to an IFB and all items needed for contracting must be collected.	*No change*
Prohibition of Construction Awards to Design Firms	Private companies paid to prepare specifications for solicitations may not submit an offer in response to the solicitation.	Outside of a two-phase solicitation, a Design Professional is prohibited from winning a construction contract for a project they designed.	There is functionally no difference between these rules.	*No change*
Notice to Unsuccessful Bidders	Unsuccessful bidders may deduce that they did not win by viewing publicly available award information. They are also often actively notified.	Unsuccessful bidders are actively notified of award outcomes.	Unsuccessful bidders directly or indirectly learn the outcome of solicitations.	*No change*
Negotiation	Price negotiations can only occur when all bids exceed available funds and	Price negotiations occur for construction bids when winning bid	FAR allows contract officers to utilize their cost preparation research to engage in	**Recommendation II-3 – Negotiations with Low Bidder**: Give head of

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	where a re-solicitation with revised scope is not possible.	differs from government estimate and require contract officers to create pre-negotiation objectives for the negotiation goal.	negotiations if reasonable and realistic price is not achieved with submitted bid.	purchasing agency the option to negotiate an adjustment of an otherwise successful bid for construction procurements to closer align with an internal project price estimation.
Two-Step Sealed Bidding	Multi-step process exists with two phases for use when special criteria are met, where non-priced technical proposals are submitted followed by bids.	Two-step process exists for use when special criteria are met, where non-priced technical proposals are submitted followed by bids.	Both could utilize two-step sealed bidding for complex solicitations where a technical proposal is first needed to determine conformity with solicitation requirements.	*No change*

Comparison and Analysis:

Subtopic – Cost Estimates and Limits

State Law Treatment

There is an implied expectation to estimate the cost of a construction project prior to its solicitation because there are certain requirements dependent on that estimate. For example, HRS § 103D-303.5 creates an obligation to hold a pre-bid conference if the "total estimated contract value" is more than $500,000. Additionally, SPO Construction Procurements Training (Workshop No. SPO 130 Part 1) notes that some agencies elect to include a cost range or estimate in their IFBs, demonstrating that this inclusion is optional. However, while there are implicit requirements for an estimate, there are no explicit requirements. That is to say, there is no statute specifically directing a procurement officer to generate a construction cost estimate.

As a consequence, it appears that both State personnel and the State's Design Professionals develop some estimation. Design Professionals, as part of their work, prepare construction cost estimates for the State, as described in the Policies and Procedures Governing Design Consultant Contracts manual. This is a good practice, but not one that can be used universally because not all construction projects engage Design Professionals.

Regarding cost limits, the only cost limit that exists at the State level is when all bids exceed available funds as certified by the appropriate fiscal officer as described in HRS § 103D-302(h). If this

occurs, the head of the purchasing agency is authorized to negotiate an adjustment of the bid price and bid scope to bring the bid within the amount of available funds. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

Conducting a cost estimate is mandatory in the construction procurement process at the Federal level. Under FAR 36.203, an "independent Government estimate of construction costs" is prepared for the contracting officer "at the earliest practicable time" for each proposed contract (or contract modification) that is anticipated to exceed the simplified acquisition threshold. For "two step" sealed bidding, the estimate is "prepared when the contract requirements are definitized." *Id*.

Access to the estimate is limited to Government personnel whose official duties require knowledge of the estimate. However, this estimate is critical during contract negotiations when preparing pre-negotiation objectives: "An exception to this rule may be made during contract negotiations[[24]] to allow the contracting officer to identify a specialized task and disclose the associated cost breakdown figures in the government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price." *See* FAR 36.203. Furthermore, advance notices and solicitations, including the IFB, are required to disclose the magnitude of the requirements in terms of physical characteristics and estimated price range[25] (but not disclose the official estimate). *See* FAR 36.204.

FAR Part 36 also discusses cost limits related to construction procurement. FAR 36.205(a) notes that the Government cannot award a construction contract that is in excess of statutory cost limitation (unless said limits are waivable and waived), or which exceed any statutory authorizations (allowing for Government-imposed contingencies and overhead). FAR 36.205(b) provides that solicitations containing one or more items subject to statutory cost limitations shall state the applicable cost limitation for each affected item in a separate schedule, that an offer which does not contain separately-priced schedules will not be considered, and that the price on each schedule shall include an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit. Additionally, FAR 36.205(c)(d) notes that the Government shall reject an offer which exceed the limits or reject an offer if its prices are within the limits, but only because its "materially unbalanced," meaning the prices are significantly lower for some work and overstated for other work.

[24] More information on how the cost estimate is utilized in negotiations can be found in the Subtopic – Negotiations.
[25] The price range bands are: less than $25,000; between $25,000 and $100,000; between $100,000 and $250,000; between $250,000 and $500,000; between $500,000 and $1,000,000; between $1,000,000 and $5,000,000; between $5,000,000 and $10,000,000; and more than $10,000,000.

Interview Findings

- Some interviews noted conducting and utilizing cost estimates as well as including a range in their IFBs. However, they note that this process is optional, done informally, and not all procurement officers choose to do it.

Analysis of Differences, Consequences, and Benefits of Alignment

While cost estimates are occurring at both the State and Federal levels, there are differences of formality and effect. Most importantly, cost estimates are conducted informally and at the option of State procurement officers and can be, but are not required to be, included in an IFB as a range. By contrast, the FAR outlines a clear process requiring contracting officers to create a cost estimate and publishing a range in the IFB.

A quality, informed estimate is a useful tool in the subsequent conduct of a procurement. A construction cost estimate provides context for whether the prices received via solicitation are reasonable and realistic. This information could also be used later in negotiations with the low bidding vendor (*See* Subtopic - Negotiations). It also helps inform the State about the level of resources needed for a project. Accordingly, more should be done to routinize this otherwise informal and implied process.

Recommendation II-1 – Cost and Price Estimate Training is to encourage procurement officers, through training, to institute consistent construction cost estimation best practices. Specifically, this recommendation proposes that the State develop a training program to promote best practices in construction cost and price estimation development and utilization.

In instances where a Design Professional team furnishes the State with a cost estimate for a construction project as a component of their design work, this estimate may be the best-informed estimate available to the State. This recommendation does not suggest to discontinue this practice. In instances where there is a Design Professional team, the State should still consider generating its own cost estimate for comparison purposes. In instances where there is no Design Professional engaged, the State should consistently generate its own estimates.

In the interest of maintaining flexibility, this Report does not recommend the adoption of the Federal practice of requiring a formal, thorough cost estimate in all construction projects.[26] A reason we

[26] Of note, among the interviewees interviewed for this report were a number of individuals who had direct experience working for the Federal government and the FAR. Each noted that the main difference between the State and Federal procurement system was not one of options but one of resources: the Federal system invested heavily in training and development. This heavy investment is why the FAR can require formal estimations uniformly – it has appropriated the resources

do not make this suggestion is the breadth of the definition of "construction" at the State level to include routine and minor maintenance projects.[27] These projects may be sufficiently small that the effort involved in a formal estimate may be misspent. Accordingly, this Report suggests the enhancement of this practice through training but not the universal and nonwaivable requirement of this practice through statute or rule.

By contrast, the above-described effect of cost limits is similar in the State and Federal system. Neither the State nor Federal government can purchase construction services in excess of any appropriation or statutory limit unless otherwise and specifically authorized to do so. There is a State path to negotiation in the event that bids exceed authorization – but this is analyzed in the Subtopic - Negotiations below.

Subtopic – Solicitation Method

State Law Treatment

In the State, the default solicitation method for construction procurement is through competitive sealed bidding. This is demonstrated through the statement in HRS §103D-302(a) that "contracts shall be awarded by competitive sealed bidding except as otherwise provided in section 103D-301." The alternative methods discussed in HRS §103D-301 that construction procurements could technically be awarded through include competitive sealed proposals, small purchases,[28] and emergency procurements.

HRS § 103D-303(a) states that "competitive sealed proposals may be used to procure goods, services, or construction that are either not practicable or not advantageous to the State to procure by competitive sealed bidding."

HAR § 3-122-43 provides additional detail around what is meant by the terms "not practicable" and "not advantageous" in 103D-303(a). This guidance includes the statement that competitive sealed bidding is not practicable or advantageous "unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids." *Id.* Under State law, competitive sealed proposals may be used if competitive sealed bidding is not practicable, even though advantageous, and vice versa.

Furthermore, HAR § 3-122-43(b) details six factors which demonstrate that competitive sealed bidding is not practicable, including:

[27] *See* Subtopic – Definition of Construction in Section VII below.
[28] For an analysis of small purchase construction, please see Subtopic – Small Purchases Construction in Section VII below.

(1) Whether the primary consideration in determining award may not be price;

(2) Whether the contract needs to be other than a fixed-price type;

(3) Whether the specifications for the goods, services, or construction, or delivery requirements cannot be sufficiently described in the invitation for bids;

(4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;

(5) Whether offerors may need to be afforded the opportunity to revise their proposals, including price; and

(6) Whether award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.

Similarly, HAR § 3-122-43(c) details two factors which demonstrate that competitive sealed bidding is not advantageous, including:

(1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and

(2) Whether the factors listed in subsection (b) (4) through (b) (6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous.

Emergency construction procurement is governed by HRS § 103D-307. Through an emergency procurement, the head of a purchasing agency may obtain construction (or goods or services) essential to meet an emergency by means other than specified in this chapter when the following conditions exist:

(1) A situation of an unusual or compelling urgency creates a threat to life, public health, welfare, or safety by reason of major natural disaster, epidemic, riot, fire, or such other reason as may be determined by the head of that purchasing agency;

(2) The emergency condition generates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods and the government would be seriously injured if the purchasing agency is not permitted to employ the means it proposes to use to obtain the goods, services, or construction; and

(3) Without the needed good, service, or construction, the continued functioning of government, the preservation or protection of irreplaceable property, or the health and safety of any person will be seriously threatened.

HAR § 3-122-88 provides additional clarifying information on emergency construction procurement including that emergency procurement actions may be utilized to purchase only the immediate needs for the emergency, not subsequent non-emergency requirements, and that the potential loss of funds at the end of a fiscal year is not an emergency. For an emergency procurement to be authorized, HAR § 3-122-90 states that the head of the purchasing agency must prepare written determination requesting approval from the chief procurement officer which describes the nature of the emergency and reason for selecting the contractor. Although not required, HAR § 3-122-90 recommends competition being obtained "to assure that the required good, service, or construction item is procured in time to meet the emergency." HAR § 3-122-90 also specifies that a purchase order must be prepared with emergency procurements to confirm any agreements, including price, made orally with the contractor.

Treatment under FAR 36 and Other Incorporated Federal Sources

At the Federal level, the default solicitation method for construction procurement is through competitive sealed bidding. FAR 36.103(a) states that the contracting officer shall use sealed bid procedures for a construction contract if the conditions in FAR 6.401(a) apply. FAR 6.401(a) describes when to solicit sealed bids instead of competitive proposals. Contracting officers are required to solicit sealed bids if:

- Time permits the solicitation, submission, and evaluation of sealed bids;
- The award will be made on the basis of price and other price-related factors;
- It is not necessary to conduct discussions with the responding offerors about their bids; and
- There is a reasonable expectation of receiving more than one sealed bid.

Furthermore, FAR 36.213 reinforces that contracting officers shall follow the procedures for sealed bidding in Part 14 for construction procurements (when conducted through sealed bidding).

Emergency procurement is not referenced or discussed in FAR 36. Similarly, the term "construction" is not referenced or discussed in FAR Part 18, which governs emergency procurements.

Interview Findings

- Interviews noted that competitive sealed bidding was the method used most commonly for construction procurement.
- Interviews acknowledged that other methods were used on occasion for construction procurement, including competitive sealed proposals.

- One agency noted that competitive sealed proposals were used for construction procurement, but this was to do job order contracting where additional cost competition on a job by job basis was conducted later.

Analysis of Differences, Consequences, and Benefits of Alignment

At both the State and Federal level, the default procurement method for construction is competitive sealed bidding. Both systems have a path to the use of sealed proposals for construction, but both systems require the satisfaction of similar conditions. The FAR does not contain language that would improve the State's policies regarding what procurement method to use for construction in what circumstance. Additionally, interviews did not indicate that stakeholders are unhappy with the default to utilize competitive sealed bidding. Thus, no change to align closer with the FAR regarding solicitation method is needed.

It bears noting that the State maintains the concept of emergency construction procurements while the FAR does not. Thus, closer alignment in this regard would entail the elimination of emergency construction procurements. This is not advisable. As noted in Subtopic – Definition of Construction in Section VII, the State's definition of construction includes maintenance and repair work while the Federal definition does not. Repair and maintenance, unlike the erection of new structures, can be foreseeably required under emergency circumstances to preserve life or property. Given this definition, it is prudent for the State to continue to maintain the concept of emergency construction procurements.

Subtopic – Pre-Solicitation/Pre-Bid Notice

State Law Treatment

State law does not specifically contemplate vendor outreach before the solicitation as "pre-solicitation notices,"[29] but the rules do require public notice for solicitations for the purpose of securing competition. HAR § 3-122-16.03 requires outreach to vendors to include "where and when the solicitation will be available and a phone number or e-mail address where interested parties may request a copy" before a solicitation is released. In the public notice, HAR § 3-122-16.03 also requires a brief description of the construction desired, how long the solicitation will be available and the deadline for responses, and other appropriate information like a notice of intention to offer or the time, date, and location of the pre-bid conference. HAR § 3-122-16.03 also establishes the requirements for publicizing the public notice, and states that the notices are required to be publicized on a purchasing agency or

[29] The FAR does not contain a hyphen in the word pre-solicitation. However, a hyphen is used in this Report to comport with the State's practices of using a hyphen in the word "pre-bid."

provider internet site. Newspaper publication, notice by mail, electronic mail, facsimile transmission to persons on any applicable bidders mailing list, or an alternative method deemed effective by the procurement officer are all optional methods of publicizing the public notice.

State rules also discuss the optional process of compiling a list of potentially interested vendors for the procurement officer. HAR§ 3-122-16.04 outlines that this list may be created, but clarifies that "inclusion of the name of a business is discretionary and does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract; nor does it guarantee notification of each solicitation." It also adds the caveat that businesses that fail to respond to solicitations may be removed from the list and that names and addresses on the list are required to be available for public inspection. *Id.*

Training given by the SPO provides additional details on conducting public outreach on construction solicitations. Specifically, Workshop No. SPO 130 Part 1 "Construction Procurement Training" notes that projects are advertised and posted on the State/County Procurement Notices website. It also confirms that a brief or general description of the work, where or how solicitation documents can be obtained, the pre-bid conference date, time, and location, and the bid due date, time, and location are to be included in the notice. Workshop No. SPO 130 Part 1 "Construction Procurement Training" also provides examples of other items agencies have the option to include in their public notice including a range of the estimated construction cost or specifics on the Contractor's required license to be eligible to bid.

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36.213-2 outlines the requirement for the contracting officer to issue "presolicitation notices" "sufficiently in advance of the invitation for bids to stimulate the interest of the greatest number of prospective bidders." Unless the requirement is waived by the head of the contracting activity or a designee, pre-solicitation notices are required "when the proposed contract is expected to exceed the simplified acquisition threshold" and is optional when "the proposed contract is not expected to exceed the simplified acquisition threshold." *Id.*

FAR 36.231-2 also outlines what information the pre-solicitation notices must contain, including describing the proposed work in sufficient detail (which includes disclosing the physical characteristics and estimate price range for the project), the location of the work, tentative dates for issuing invitations, opening bids, and completing contract performance, the location of where plans will be available for inspection without charge, the date by which requests for the invitations for bids should be submitted, whether the award is restricted to small businesses, and any amount to be charged for solicitation

documents. It also requires the pre-solicitation notices to be publicized through the Governmentwide point of entry website. *Id.*

The pre-solicitation notice is also an opportunity for vendors to request the IFB when it is released. FAR 36.213-3 states that "the contracting officer shall send invitations for bids to prospective bidders who requested them in response to the pre-solicitation notice, and should send them to other prospective bidders upon their specific request."

Interview Findings

- Interviewees did not note or discuss any issues, problems or improvements for how potential bidders receive notice of solicitations.

Analysis of Differences, Consequences, and Benefits of Alignment

The Federal system distinguishes between pre and post-solicitation issuance outreach as different measures while the State system lumps all vendor outreach into a single effort. That said, in practice there appears to be little difference between the two systems. Both may post public notice on their relevant webpages, only require IFBs to be sent to interested vendors when specifically requested, and provide the option to create a list of potentially interested vendors to send pre-solicitation notices. While the FAR has a more specific process for use before solicitations are issued, requires a bit more information to be released with pre-solicitation notices (including requiring including the estimated price range), and uses the term "presolicitation" notice, nothing discussed in the FAR regarding pre-solicitation notices cannot be conducted under the State's current laws and rules. Additionally, no interviews demonstrated that vendors have difficulty finding out about construction procurements or obtaining the procurement materials.

For the scope and vendor pool of the State's construction procurements, the current statute, rules, and policies are comprehensive in ensuring awareness of construction solicitations before they are released. Accordingly, greater alignment to the Federal standard would likely have no worthwhile impact.

Subtopic – Vendor Outreach

State Law Treatment

The State's approach to vendor outreach after the publication of a solicitation is discussed above in the section on pre-solicitation notices, as the State's statute and rules do not distinguish between pre- and post-solicitation issuance outreach.

Treatment under FAR 36 and Other Incorporated Federal Sources

In addition to the vendor outreach that occurs during the pre-solicitation notices, FAR Part 14 outlines other processes for vendor outreach after solicitation issuance. FAR 14.101 discusses publicizing the invitation for bids, distribution of IFBs to prospective bidders, posting IFBs in public places, and such other means as may be appropriate. It also states that "publicizing must occur a sufficient time before public opening of bids to enable prospective bidders to prepare and submit bids." FAR 14.203-2, which references FAR 5.101 and Subpart 5.2, outlines that invitations for bids are required to be publicized on the Government Point-of-Entry ("GPE") webpage, and can optionally be publicized in a newspaper or other advertisement media.

Finally, FAR 14.211 discusses how to conduct conversations with prospective bidders regarding released solicitations if necessary. It states that these discussions with prospective bidders can only be conducted by the contracting officer or superiors having contractual authority or by others specifically authorized. It notes that the Federal personnel cannot provide any prospective bidder with information that could afford an advantage over others but that general information that would not provide an advantage over other prospective bidders can be provided upon request, like an "explanation of a particular contract clause or a particular condition of the schedule in the invitation for bids."

Interview Findings

- Interviewees did not note any issues with receiving notice of IFBs for construction when they were released.

Analysis of Differences, Consequences, and Benefits of Alignment

Similar to the analysis of the pre-solicitation notices processes, the process for conducting vendor outreach once a solicitation has been released is very similar at both the Federal and State level despite the State not making a distinction between pre-and post-solicitation issuance timing. Both entities note the importance of conducting vendor outreach with enough time before bid opening to reach interested vendors and enable them to prepare and submit bids. Both entities also only require posting public notice on their respective webpages and allow for publicizing the solicitations through other mediums like the newspaper to be optional. Nothing discussed in the FAR is missing from the State's law and rules to allow the State to adequately conduct vendor outreach before bid opening.

Additionally, as stated in the pre-solicitation notices section, no interviews demonstrated that vendors have difficulty finding out about construction procurements or obtaining the procurement materials. It is not necessary or advantageous for the State to adopt FAR policies towards conducting

vendor outreach as they would not make an appreciable difference nor remedy any existing issues or problems. Accordingly, no recommendation is made in this section.

Subtopic – Pre-bid Conference and Site Visit

State Law Treatment

State law outlines the requirement to hold pre-bid conferences for construction procurements. HRS §103D-303.5(a) states that a pre-bid conference is required to be held by the head of the purchasing agency at least fifteen days prior to submission of bids for a construction project with a total estimated contract value of $500,000 or more and that all potential interested bidders, offerors, subcontractors, and union representatives must be invited to attend. HAR § 3-122-16.02 also discusses the fifteen-calendar day minimum between the date of the pre-bid conference and the date set for receipt of offers for construction projects.

The requirements of a bid-bid conference are comprehensively discussed in HAR § 3-122-16.05. Part (a) of the rule notes the purpose of a pre-bid conference is to "explain the procurement requirements and allow potential offerors [the opportunity] to ask questions." This rule also states that agencies have the option to require attendance by all prospective bidders as a condition for submitting a bid for solicitations with special or unusual requirements like requiring physical inspection. *Id.* This rule goes on to state in (b) that if conference attendance is mandatory for submission of an offer, this requirement must be stated in the public notice and prominently in the solicitation. Additionally, (c) of the rule states that a pre-bid conference must be announced to all prospective offerors in the public notice and the solicitation as well. Next, (d) clarifies that the pre-bid conference should be held long enough after the solicitation has been issued to allow offerors to become familiar with the solicitation. It also discusses needing sufficient time before the deadline to allow consideration of the conference results in preparing bids, but State law defines the minimum of fifteen days for construction procurements. This rule also discusses the process for changes discussed in the pre-bid conference. Part (e) states that nothing stated at the pre-bid conference shall change the solicitation unless a change is made by written addendum. Finally, part (f) requires a summary of the conference to be issued by addendum as well and that all addendums are required to be supplied sufficiently before the bid deadline to allow consideration of the summary results and changes to prospective offerors.

Training given by the SPO discusses the State's pre-bid conference policy as well. Workshop No. SPO 130 Part 1 "Construction Procurement Training" provides much of the same information included from the rules above, and also clarifies that the purpose of a pre-bid conference is to explain

the project and procurement requirements and to allow potential offerors to ask questions. Additionally, attendance is not mandatory, and nothing stated at the pre-bid conference shall change the solicitation or be binding without a written addendum.

Treatment under FAR 36 and Other Incorporated Federal Sources

While pre-bid conferences are not directly discussed in FAR Part 36, they are discussed in FAR Part 14 and FAR Part 15 which are referenced within FAR Part 36. The purpose of pre-bid conferences is described in FAR 14.207. This rule states that "a pre-bid conference may be used, generally in a complex acquisition, as a means of briefing prospective bidders and explaining complicated specifications and requirements to them as early as possible after the invitation has been issued and before the bids are opened." It also specifies that pre-bid conferences "shall never be used as a substitute for amending a defective or ambiguous invitation." *Id.*

The procedures relating to optional pre-bid conferences are described in FAR 15.201. It states that pre-bid conferences and site visits are ways to promote exchanges of information with interested parties. FAR 15.201 also notes the importance of a level playing field and provides that no information about solicitations may be released to give certain potential offerors an unfair competitive advantage and that the contracting officer must be the focal point of any exchanges with potential offerors. As part of this, all materials distributed at the conference should be made available to all potential offerors upon request. With regard to implementing changes from the pre-bid conference, FAR 14.208 states that any changes mentioned at pre-bid conferences still require amendments to be implemented.

Interview Findings

- Interviews confirmed that pre-bid conferences always occur and site visits are optional but must be held when included in the IFB.
- Some interviews noted that site visits have low turnout.
- No concerns regarding pre-bid conferences were expressed in interviews.

Analysis of Differences, Consequences, and Benefits of Alignment

At a high level, the State more consistently requires pre-bid conferences, but since these conferences are a procurement best practice, there is no recommendation to relax these standards in deference to greater Federal alignment. Additionally, the State appears to have more and better detail around the practice than the Federal system.

The approach to and intent of pre-bid conferences at the Federal and State levels are fairly similar. Both entities discuss pre-bid conferences in their governing laws, share similar purposes for the conferences (an opportunity for vendor education), and neither require interested bidders to attend the

conference to be able to submit a bid unless otherwise expressly noted. Both entities announce details on scheduled pre-bid conferences to prospective vendors and have similar processes for updating solicitations after pre-bid conferences with any changes discussed, as both entities share the sentiment that changes contemplated at a pre-bid conference need to be updated in the solicitation with a formal addendum/amendment. Additionally, both Federal and State policies have site visits as an optional event to be decided on by the procurement officer, as supported by the FAR language and State interview responses.

However, a few key differences exist between the FAR and State law that impact pre-bid conferences. The most significant difference is that the FAR allows for pre-bid conferences to be optionally held at the contracting officer's preference, while State law and rules specifically require pre-bid conferences to be held for construction solicitations over $500,000. Although it may be more work for State employees to always hold pre-bid conferences for these construction solicitations, it is likely the State ultimately experiences more accurate and thoughtful bids as a result of the pre-bid conferences. It may work against the State's procurement goals to allow pre-bid conferences to be optional for these construction solicitations. Pre-bid conferences play an important role in ensuring a wide range of competitive bids from varying types of vendors and provide a forum for potential prime and subcontractor networking. Reducing the occurrence of pre-bid conferences could limit the types and quality of bids received, and thus aligning with the FAR concept of optional pre-bid does not appear to be advantageous to the State.

A few additional differences exist between the FAR and State law regarding pre-bid conferences. There is a slight difference with the required timelines between IFB releases, pre-bid conferences, and bid openings. Only the State allows for the option to require prospective bidders to attend the pre-bid conference when deemed important, but this does not appear to happen frequently. Finally, the State's policy requires a summary of the pre-bid conference to always be supplied while materials from Federal pre-bid conference are only made available upon request.

The State does not appear to be limited in any way by having these different policies from the FAR. Instead, the State's policies are more comprehensive and include thoughtful requirements to ensure vendors are best prepared to submit bids. Interviewees did not express concerns regarding pre-bid conferences including these additional components. Thus, the State's current pre-bid conference policies appear adequate do not need to be modified with different language from the FAR.

Subtopic – Information Included in the IFB

State Law Treatment

HRS § 103D-302(b) provides that an IFB shall include "a purchase description and all contractual terms and conditions applicable to the procurement."[30] HAR § 3-122-21 specifies that IFBs must include:

- Instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids;
- The address of the office to which bids are to be delivered or if bid submittal is required through an electronic procurement system;
- The maximum time for bid acceptance by the procurement officer issuing the bid;
- Any other special information, such as any requirement of intention to bid, if required, or the time, date, and location of the pre-bid conference;
- The purchase description or specifications;
- Evaluation factors;
- Delivery or performance schedule; and
- Any inspection and acceptance requirements not included in the purchase description.

An IFB also includes a bid form which provides space for, but is not limited to, bid price, brand name and model number and packaging for goods, and information on applicable preferences, and a statement that bidders shall designate confidential portions of their offer separately. *Id.* Bidders are required to sign the bid form in ink and submit the bid form with the original signature included in the offer. *Id.*

HAR § 3-122-33 reinforces that the IFB must set forth any evaluation criterion to be used in determining product acceptability (*e.g.* requiring samples, descriptive literature, technical data, or product examinations to verify product acceptability). In the SPO Construction Procurements Workshop No. SPO 130 Part 1 "Construction Procurement Training," additional details on required bid bond and performance bonds are provided. These are outlined as being required when the bid offer is greater than $25,000.

[30] HRS § 103D-302(b) also requires that, if bids are submitted for construction, that certain intended subcontractors be listed. This requirement and its impact are discussed at length in Section III.

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36 outlines items for inclusion in a construction IFB. FAR 36.213-3 states that IFBs shall be prepared in accordance with Subpart 14.2 and using the forms prescribed in Part 53 (which requires Standard Form 1442 for construction solicitations.) Under 36.213-3 each IFB should include, when applicable:

- Information on the appropriate wage determination of the Secretary of Labor or a notice that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the invitation for bids before the opening date for bids;
- The Performance of Work by the Contractor clause;
- The magnitude of the proposed construction project (see Subtopic - Cost Estimates and Limits Section);
- The period of performance;
- Arrangements made for bidders to inspect the site and examine the data concerning performance of the work;
- Information concerning any facilities, such as utilities, office space, and warehouse space, to be furnished during construction;
- Information concerning the pre-bid conference;
- Any special qualifications or experience requirements that will be considered in determining the responsibility of bidders;
- Any special instructions concerning bids, alternate bids, and award; and
- Any instructions concerning reporting requirements.

FAR Part 14 includes additional requirements for IFBs beyond those set forth in FAR 36. FAR 14.101(a) reinforces that IFBs must describe the requirements of the Government clearly, accurately, and completely. Unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders cannot be included. The invitation must include all documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding. FAR 14.201-5 outlines that representations, certifications, or the submission of other information by bidders that are required must be included. Additionally, IFBs shall include the time and place for bid openings, and shall advise bidders that bids will be evaluated without discussions. *Id.* IFBs must also identify the price related factors other than the bid price that will be considered in evaluating bids and awarding the contract and include all solicitation provisions required. *Id.*

FAR 14.201-6 discusses that for construction work, bids must be submitted on the correct forms, include as many bid prices as requested, and be manually signed. FAR 14.202-4 discusses bid samples and how they are not required unless there are characteristics of the product that cannot be described adequately in the specification.

Interview Findings

- Interviewees did not note any issues with the information included in the IFB.

Analysis of Differences, Consequences, and Benefits of Alignment

The Federal and State requirements for information included in IFBs are substantively similar. Although there may be some minor variances in the specific information included and requested in a State and Federal IFB (such as precise forms utilized by each respective government), both share the same intent to have everything needed for a successful bid clearly disclosed. Both systems' IFBs must outline all requirements specific to the project and the evaluation criteria of the bids, as this is critical in determining if bids are responsive. Interviews with vendors and State employees did not demonstrate any issues with the information included or requested in IFBs.[31] Due to this large overlap, and the fact that the present system appears to work without issue, there is no benefit for the State to adopt language to closer align with the FAR.

Subtopic – IFB Response Time

State Law Treatment

For construction procurements, the State sets specific response time guidelines from the date of the pre-bid conference. HAR § 3-122-16.02(b) requires a minimum of 15 calendar days between the date of the pre-bid conference and the due date for bid packages. Additional guidance on the response time for construction IFBs is provided by the SPO through training. Workshop No. SPO 130 Part 1 "Construction Procurement Training" specifies that for IFBs a minimum of ten calendar days between first public notice date and the bid open date is required. It also states that this time must be longer when pre-bid meetings are required, so this applies to construction procurements. The training recommends four weeks from the date of public notice for the solicitation unless the project requires more or less time.

[31] Notwithstanding the requirement to list subcontractors in bids as discussed in Section III.

Treatment under FAR 36 and Other Incorporated Federal Sources

The FAR sets general guidelines to ensure adequate time is given to allow for responsive bids to be submitted for construction projects. FAR 36.213-3 requires that "sufficient time for bid preparation" between the date IFBs are issued and bids are opened. It also specifies that processes and requirements related to construction projects should be taken into account when setting the IFB response time, including "giving due regard to the construction season and the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work, and prepare estimates based on plans and specifications." *Id.*

Additional Federal guidelines for IFB response time is set in Part 14. FAR 14.202-1 requires at least 30 calendar days when synopsis is required by Subpart 5.2. FAR 5.203 provides that this 30-calendar day requirement applies to construction procurements that are expected to exceed the simplified acquisition threshold. FAR 14.202-1 also specifies considerations when establishing a reasonable bidding time "to avoid unduly restricting competition or paying higher-than-necessary prices," including degree of urgency, complexity of requirement, anticipated extent of subcontracting, pre-solicitation notices, geographic distribution of bidders, and normal transmittal time for both IFBs and bids.

Interview Findings

- Interviewees did not note any issues with the response time they have experienced for completing bids.

Analysis of Differences, Consequences, and Benefits of Alignment

Both State and Federal laws share the same core intent to allow for sufficient time to submit responsive bids. Both entities provide minimum time requirements but allow for flexibility to adapt based on the needs of the project and highlight that construction solicitations may require more time due to their complexity and associated additional components.

A few differences exist between State law and the FAR, but none of these variances result in any negative consequences that hinder the process in the State. The State defines its minimum required IFB response time of 15 calendar days from the pre-bid conference date while the FAR defines it as 30 calendar days from the date invitations are distributed. While the FAR's minimum required bidding time is a bit longer than the State's, the State has no restrictions against making its bidding time 30 days if the procurement officer feels this is appropriate and may naturally fall on this minimum time if the pre-bid conference is held 15 days after the solicitation is issued. Also, SPO training recommends four weeks which is approximately the same as 30 calendar days, so the Federal standard is actively encouraged.

Additionally, no interviews with vendors or State staff noted any issues with the typical response times being too quick or hindering the ability for responsive bids to be submitted. This overall response suggests that procurement officers are selecting appropriate bidding times already and no changes in the rules to require a longer period of time are needed.

Since the way the State's rules are written already allow any of the Federal timelines to be followed if the procurement officer found the timing to be appropriate for the project, and given that a timeline similar to the Federal timeline is encouraged in SPO training, more strict alignment with Federal standard is unnecessary.

Subtopic – Final Review of IFB

State Law Treatment

There is no explicit requirement or encouragement of a final review of the IFB before it is issued.

Treatment under FAR 36 and Other Incorporated Federal Sources

While FAR 36 does not explicitly discuss a final review of the IFB, FAR 36 references Part 14 as applying to all construction solicitations and FAR 14.202-6 requires each IFB to be thoroughly reviewed by the contracting officer before issuance "to detect and correct discrepancies or ambiguities that could limit competition or result in the receipt of nonresponsive bids."

Interview Findings

- Interviewees did not note any issues with mistakes arising in IFBs due to not conducting a final review.

Analysis of Differences, Consequences, and Benefits of Alignment

Although the State does not have a specific requirement to conduct a final check for accuracy before releasing an IFB, nothing in the State's current laws, rules, and policies would prohibit the procurement officer from taking this beneficial action. While conducting a final thorough review of an IFB before release is a best practice that should always be followed, there is no indication that this review is not already occurring in the State. The interviews did not provide any reason to believe issues are commonly occurring in IFBs that could have been prevented by mandating a final check before release.

It bears noting this Federal requirement may be construed as unnecessarily obvious – the equivalent of setting a rule encouraging IFB drafters to not make mistakes when it is clear that no one *wants* to make mistakes in solicitation documents. For all the above reasons greater Federal alignment to include a rule that encourages an obvious best practice is unnecessary.

Subtopic – Facsimile and Electronic Bids

State Law Treatment

HAR § 3-122-9 states that officers can be accepted via fax machine, e-mail, or through an electronic procurement system (*i.e.* HIePRO) when specifically allowed in the IFB. If fax or electronically submitted bids are acceptable, the bid must meet the bid deadline and include the IFB identification number, price, all pages of the offer requiring an original signature, and a signed statement that the offeror agrees to all the terms, conditions, and provisions of the IFB with the submitted bid. *Id.* HAR § 3-122-9 also requires the offeror with the lowest responsive bid to submit the complete original offer to be received within five working days from the notification of intent to award if the bid was submitted via fax or electronically. Otherwise, unless specified as not needed in the solicitation, the procurement officer could reject the facsimile or electronically submitted offer.

Treatment under FAR 36 and Other Incorporated Federal Sources

As noted earlier, FAR Part 36 requires adherence to FAR Part 14 when conducting IFBs. FAR 14.202-7 allows contracting officers to authorize facsimile bids, unless prohibited by agency procedures. It also outlines factors that should be considered when determining whether to authorize facsimile bids, including anticipated bid size and volume, urgency of the requirement, frequency of price changes, availability and reliability of the receiving facsimile equipment, and the adequacy of administrative procedures to ensure timely delivery to the bids opening location. *Id.* It also allows, but not requires, contracting officers to request the apparently successful offeror with a facsimile bid to provide the complete, original signed bid.

FAR 14.202-8 allows contracting officers to authorize bid submission through electronic commerce. The contracting officer must specify the electronic commerce method(s) if electronic bids are authorized. FAR 14.406 outlines policies to follow if an electronic bid is unreadable and conformance to the essential IFB requirements cannot be determined. The contracting officer must immediately notify the bidder that the bid will be rejected unless the bidder providers clear and convincing evidence of the content of the bid as originally submitted and that the unreadable condition of the bid was caused by Government error. *Id.*

Interview Findings

- Interviewees did not express any issues with the State's facsimile and electronic bids policy.

Analysis of Differences, Consequences, and Benefits of Alignment

The approach towards accepting facsimile and electronic bids is the same at both the Federal and State level. Both entities allow for the procurement officer to choose if facsimile and electronic bids will

be accepted as well as defining factors to consider in accepting these types of bids. The State rules have a few different specifics, as importance is placed on obtaining required signatures and original offers are required to be submitted for winning facsimile and electronic bids while original offers are not required to be submitted in the FAR unless otherwise directed.

No interviews commented on issues with the State's facsimile and electronic bids policy, and there is no language in the FAR that is missing from the State's procedure regarding these bids. Close alignment to the FAR would require the State to relax its requirement of requiring physical, written offers from winners who submitted their bids electronically or via fax. This State requirement may be driven by the State's statute of frauds in combination with what constitutes a signature. *See* HRS Title 27, Section 490:2-201 (discussing the requirements of enforceable contracts under the State's adoption of the Uniform Commercial Code). Accordingly, elimination of this State requirement to better align with the FAR is not recommended.

Subtopic – Contract Form

State Law Treatment

HRS §103D-302(b) states that an IFB must include a purchase description and all contractual terms and conditions applicable to the procurement. HAR § 3-122-21 discusses the contract terms and conditions to be always included in an IFB, including laws governing entities doing business in the State, warranty requirements, security requirements, and contract extension provisions.[32] SPO training on Construction Procurements (Workshop No. SPO 130 Part 1 "Construction Procurement Training") states that a fixed-price contract is most commonly used for construction projects, but different factors can impact what type of contract is used.

Treatment under FAR 36 and Other Incorporated Federal Sources

In addition to terms required in FAR 36 discussed in Section III of this Report, FAR Part 14 outlines contract term requirements that must be included in IFBs. These terms are included through the use of a standard form. Additionally, the payment type of the contract must be included in the IFB as well. As defined in FAR 14.104, firm-fixed-price contracts are used when the procurement method is sealed bidding unless another type can be justified and authorized.

Interview Findings

- Interviewees did not express any issues with the State's contract form.

[32] See also Subtopic – Required Clauses Construction in Section VI.

Analysis of Differences, Consequences, and Benefits of Alignment

At both the State and Federal level, all required contract terms and conditions must be included in the IFB. Additionally, both entities allow for contracts to have different payment structures based on what is most advantageous to the government for that project, but maintain a default preference to firm fixed-price contracts. Since both entities share these same principles, there is no change needed to closer align with the FAR as no benefit would arise from a change.

Subtopic – Master Solicitation / Records

State Law Treatment

HAR § 3-122-30 requires the name of each bidder, their address if practicable, the bid price(s), and other information to be recorded at the bid opening. HAR § 3-122-16 discusses documents that must be added to the procurement file, including addendum or modification documents, records of late offers, records of late modifications, and records of late withdrawal (excluding the actual late offer or late modification). Finally, HAR § 3-122-34 requires records to be made of any tie bids received with the IFB including the list of all bidders and the prices submitted.

Treatment under FAR 36 and Other Incorporated Federal Sources

The FAR, through Part 14, contains general language about keeping records for solicitations. FAR 14.203-3 describes the master solicitation, which must be kept updated with any changes and be available for copies on request. FAR 14.204 requires each contracting office to retain a record of each issued IFB and each abstract or record of bids. Additionally, contracting officers are required to review and utilize the information available in connection with subsequent acquisitions of same or similar items. *Id.* Additionally, the names and addresses of prospective bidders who requested the invitations and were not included on the original solicitation list shall be added to the list and made a part of the record. Finally, FAR 14.404-2 requires the originals of all rejected bids, and any written findings with respect to such rejections, to be kept.

Interview Findings

- Interviewees did not express any issues with the State's recordkeeping policy.

Analysis of Differences, Consequences, and Benefits of Alignment

The Federal and State requirements regarding solicitation records maintenance are substantively similar. Both systems keep procurement files and records of all the bids received. That said, the Federal system is more explicit in the things required in that record: it requires a record of vendor outreach activities while the State has no express requirement. The Federal system also explicitly tasks review of

these maintained records for applicable future solicitations. However, nothing in the State's rules prohibit records on outreach or interested vendors from being recorded or from old records from being reviewed when preparing for new related solicitations. Additionally, no interviews with stakeholders noted issues in the construction procurement process that arise from lacking records or utilization of records.

Accordingly, greater adherence to the Federal standard would only make explicit something the State can do already. As there have been no issues identified in relation to this area, there appears to be no problem to solve and no recommendation is made in this regard.

Subtopic – Changes and Addendums

State Law Treatment

HAR § 3-122-21 specifies that the terms, requirements, and conditions of an IFB can only be amended by a written addendum issued by the procurement officer. HAR §3-122-16.06 requires an addendum to be issued for amendments and clarifications to a solicitation prior to submission of offers. Addenda are issued to correct minor defects or ambiguities, provide any information given to one offeror that could assist in submitting offers to all offerors, and provide any clarification to the solicitation that will result in fair competition. HAR § 3-122-16.06 requires addenda to be issued to all prospective offerors known to have received a solicitation or submitted a notice of intention to offer. Additionally, the option exists to require offerors to acknowledge receipt of issued addenda. *Id.*

HAR § 3-122-16.06 outlines that addenda for amendments must be distributed "within a reasonable time to allow prospective offerors to consider them in preparing their offers." It also requires to the extent possible the bid due date to be extended if there will not be adequate time for bid preparation following an amendment. For clarifications, addenda "may be issued any time up to the scheduled deadline for receipt of offers." *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR Part 14 discusses the procedures for IFB changes. FAR 14.208 states that when changes in quantity, specifications, delivery schedules, opening dates, or other similar items are needed, or when a correction to a defective or ambiguous invitation is needed, an amendment of the IFB will occur using Standard Form 30, Amendment of Solicitation/Modification of Contract. Amendments are required to be sent before bid opening to all vendors that were issued invitations and displayed in the bid room. FAR 14.208 also requires the contracting officer to consider the period of time remaining until bid opening and if extending this period is needed before making the amendment. Additionally, amendments are

used to promptly provide information that is given to one prospective bidder to all other prospective bidders. *Id.*

Interview Findings

- Interviewees did not express any issues with the States changes and addendums requirements or practices.

Analysis of Differences, Consequences, and Benefits of Alignment

The State and Federal practices are materially identical. At both the State and Federal level, addenda/amendments are used to make and circulate changes to an IFB before bids are submitted. Both entities allow for the IFB response time to be extended if there is not adequate time to submit a responsive bid after the addenda has been issued. The State may not have a Stanford Form to use in all addenda like the FAR, but the State has a clear and comprehensive policy to ensure any changes are circulated to all interested parties and enough time is given after changes through an addendum to allow for responsive bids to still be submitted. Only the State provides the option to require offerors to acknowledge receipt of issued addenda – a useful tool in the event that an addendum introduces a significant change.

As the current State system closely resembles the Federal system, and given that only the State system gives procurement officers the option to require receipt of an addendum, there is no upside to adoption of a Federal standard. Accordingly, no recommendation is made.

Subtopic – Modifications, Withdrawals, and Mistakes in Bids

State Law Treatment

HRS §103D-302(e) states that, unless specifically authorized in HRS or HAR,[33] bids shall be unconditionally accepted without alteration or correction. HRS § 103D-302(g) permits correction or withdrawal of "inadvertently erroneous bids" before or after award, or cancellation of IFBs based on such bid mistakes. However, after bid opening no modifications in bid prices or other provisions of bids are permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the chief procurement officer or head of a purchasing agency. *Id.*

[33] While not an official recommendation of this Report as it does not constitute close Federal alignment, a potential expansion of this post-submission bid modification concept as applied to the subcontractor listing requirement of HRS § 103D-302(b) is discussed in Section III below.

State rules outline additional requirements around modifications, withdrawals, and correcting mistakes in bids. HAR § 3-122-16.07 describes that, for the modification or withdrawal of a bid, a written notice of the modification or withdrawal must be submitted to the office designated in the solicitation. For correcting mistakes, HAR § 3-122-31 states that an obvious mistake in a bid may be corrected or withdrawn, or waived by the offeror to the extent it is not contrary to the best interest of the purchasing agency or to the fair treatment of other bidders. The rule further clarifies that a mistake discovered before the bid deadline may be corrected or withdrawn. *Id.* However, if a mistake is discovered after the deadline but prior to award, it can only be corrected or waived in the following circumstances:

- If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake
- If the mistake is a minor informality, the procurement officer may waive the informalities or allow the bidder to request correction by submitting documentation that demonstrates a mistake was made.

Overall, the procurement officer may correct or waive an obvious mistake (if in the best interest of the purchasing agency and is fair to other bidders). *Id.*

For withdrawal, the bidder requests withdrawal by submitting documentation that demonstrates a mistake was made and the procurement officer prepares a written approval or denial in response. *Id.* A mistake in a bid discovered after award of contract may be corrected or withdrawn if the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn. *Id.*

SPO training discusses correcting or withdrawing mistakes. Workshop No. SPO 130 Part 1 "Construction Procurement Training" on construction procurement verifies that an obvious mistake in the bid may be corrected or withdrawn, or waived by the bidder to the extent it is not contrary to the best interest of the procuring agency or to the fair treatment of other bidders.

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR Part 14 discusses the Federal policy regarding modifications and withdrawals of bids and correcting mistakes. FAR 14.303 states that bids may be modified or withdrawn by any method authorized by the solicitation, if notice is received in the office designated in the solicitation not later than the exact time set for opening of bids. Furthermore, a bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for opening of bids, the identity of the persons requesting withdrawal is established and that person signs a receipt for the bid. FAR 14.304

reinforces this policy by stating that bids may be withdrawn by written notice received at any time before the exact time set for receipt of bids.

FAR 14.405 outlines correcting minor informalities or irregularities. It defines these are a mistake that is "merely a matter of form and not of substance." These can also pertain to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. Additionally, it also defines the defect or variation as being immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. *Id.* The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government. *Id.*

FAR 14.407 clarifies how to approach correcting mistakes after the opening of bids. Contracting officers shall examine all bids for mistakes following opening. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake, before award. *Id.* In this circumstance, the contracting officer shall advise the bidder to make a written request to withdraw or modify the bid. *Id.* Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. *Id.* The contracting officer first shall obtain from the bidder a verification of the bid intended. *Id.* However, the authority to permit correction of bids is limited to bids that, as submitted, are responsive to the invitation and may not be used to permit correction of bids to make them responsive. *Id.* If a bidder requests permission to correct a mistake and clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, the agency head may make a determination permitting the bidder to correct the mistake. *Id.* However, if this correction would result in displacing one or more lower bids, such a determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. *Id.*

Interview Findings

- Interviewees did not express any issues with the State's bid modification and withdrawal policy.

Analysis of Differences, Consequences, and Benefits of Alignment

In general, the procedures for handling modifications, withdrawals, and correcting of mistakes at the State and Federal levels are very similar. Both entities share the same intent to allow corrections to obvious mistakes to occur and have processes set up to correct these in a fair and transparent way. Both

entities do not want to punish bidders for mistakes, but want to encourage bids that are in the best interest of the government even if that means allowing a modification. Additionally, both entities require bidders to notify the office running the procurement of the modification or withdrawal, and that these can be accepted at any time before bid opening. Both entities also stress the importance of not being prejudicial to other bidders when correcting mistakes.

Accordingly, it is not clear that the present system can be more aligned to the Federal system in any meaningful way. Therefore, no recommendation is made.

Subtopic – Cancellation of IFB

State Law Treatment

HRS §103D-308 states that an IFB may be canceled, or any or all bids may be rejected, "when it is in the best interests of the governmental body which issued the invitation." It specifies that the reasons for this decision must be made part of the contract file.

State rules provide example reasons for cancelling an IFB and outline the process for sending cancellation notices. HAR § 3-122-96(a) lists possible reasons for cancelling an IFB prior to bid opening, including no longer requiring the construction, no longer being able to fund the procurement, amendments to the invitation would be so large that a new invitation is desirable, or it is determined by the chief procurement officer that a cancellation is in the public interest. HAR § 3-122-96(b) requires a notice of cancellation to be sent to all businesses solicited announcing the identity of the solicitation, a brief explanation of the reason(s) for cancellation, and that an opportunity will be given to compete on any future procurements of similar construction if appropriate. Documentation on the reason(s) for cancellation is also required to be added to the procurement file (discussed in the earlier section on Master Solicitation / Records) and made available for public inspection. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR Part 14 outlines the procedures and needed justification for cancelling an IFB. FAR 14.209 says IFB cancellation should only occur when it is "clearly in the public interest" as "the cancellation of an invitation for bids usually involves a loss of time, effort, and money spent by the Government and bidders." Examples for when cancelling an IFB would be clearly in the public interest are also provided in the FAR, including when there is no longer a requirement for the supplies or services or when amendments to the invitation would be so large that a new invitation is desirable. *Id.*

FAR 14.209 also outlines the process for sending cancellation notices and discusses the differences for electronic and non-electronic invitations. It requires the notice of cancellation to identify

the IFB by number and short title or subject matter, briefly explain the reason the invitation is being cancelled, assure prospective bidders that they will be given an opportunity to bid on any re-solicitation of bids where appropriate, and be recorded with the solicitation records. *Id.* Furthermore, FAR 14.403 requires a recording of the number of bids invited and the number of bids received if the IFB is cancelled before the time set for bid opening. For cancelled invitations issued electronically, FAR 14.209 requires a general cancellation notice to be posted electronically, that the bids received not be viewed, and any received bids be purged from primary and backup data storage systems. *Id.* For all other invitations that are cancelled, bids that have been received shall be returned unopened to the bidders and notice of cancellation shall be sent to all prospective bidders that were issued invitations. *Id.*

Interview Findings

- Interviewees did not express any issues with the State's bid cancellation policy.

Analysis of Differences, Consequences, and Benefits of Alignment

The practice of canceling IFBs is inherently the same at the Federal and State level, as the laws provide similar methods and mechanisms for cancellation. Much of the same language on this topic is already shared between the State rules and the FAR, as both entities share the same core requirements and processes. Both entities also provide similar examples for justifications to cancel an IFB and outline requirement for issuing a cancelation notice.

In the justification for cancelation, one minor variance between the language in State law and the FAR can be seen. State law discusses cancelling IFBs when it is in the government's best interest or the public's best interest, while the FAR only discusses cancelling IFBs when it is in the public's best interest. This variance, although small, does give the State more flexibility to enact a cancellation when needed as it, arguably, gives more discretion to the State (as it need only assess its own interests as opposed to a broader analysis of public impact). That said, as a government serves the public, it is arguable that the government's interest and the public's interest are the same and that this is a distinction without a difference. Finally, no interview indicated any problems, abuse or issues with solicitation cancelation.

Accordingly, as the Federal system is significantly similar and adoption thereof would appear to confer no benefits on the State, no recommendation is made.

Subtopic – Bid Submission

State Law Treatment

IFBs define the time, date, place and format of bid submission and opening. *See* HAR § 3-122-21. HAR § 3-122-30 provides that, upon receipt, each bid is shall be time-stamped, but not opened, and stored in a secure place by the procurement officer until bid opening. Purchasing agencies have the flexibility under this rule to use other methods of receipt when approved by the procurement officer. *Id.* Additionally, SPO training through Workshop No. SPO 130 Part 1 "Construction Procurement Training" also describes the bid submission practice as time stamping received bids and storing them in a secured place until bid opening. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 14.302 specifies that bids must be received in the office designated in the IFB no later than the exact time set for opening of bids. FAR 14.304 specifies that bidders are responsible for submitting bids and ensuring they reach the Government office designated in the IFB by the time specified in the IFB. The IFB will authorize the transmission methods that are acceptable to be used. FAR 14.304 also establishes a general time for receipt as 4:30 p.m., local time, for the designated Government office on the date that bids are due if no time is specified in the IFB.

Time of receipt at the Government office must be established through evidence, as stated in FAR 14.304. This evidence includes "the time/date stamp of such installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel." FAR 14.304 also identifies what procedure to follow if an emergency or unanticipated event prohibits bids from being received at the appropriate office by the deadline. If the event interrupts normal Government processes and urgent Government requirements preclude amendment of the bid opening date, the date will be extended to the first work day on which normal Government processes resume. *Id.*

FAR 14.401 describes the procedures for keeping submitted bids secure before opening. Received bids are required to be kept in a locked bid box, a safe, or in a restricted-access electronic bid box and not opened or viewed until bid opening. The language specifically requires necessary precautions to be taken to ensure the security of the bid box or safe, including handing the bids with sufficient care and only making information concerning the identity and number of bids received available to Government employees on a "need to know" basis before bid opening. If a sealed bid is opened by mistake, the envelope shall be signed by the opener and resealed.

Interview Findings

- Interviewees did not express any issues with the State's bid submission process.

Analysis of Differences, Consequences, and Benefits of Alignment

The differences between the State and Federal bid receipt and safeguard protocols are ones of detail but not outcome. Both systems require the timestamping of bids, their being kept sealed until official opening, and their safeguard to ensure their seal and the integrity of the process. The Federal system goes into detail about what constitutes effective safeguard measures (*i.e.* the type of box), how to handle a bid accidentally opened, and what to do if an emergency closes the Federal office receiving the bid at a time when it is too late to post an addendum. The State's decision to not specify this level of detail does not mean that bids are stored recklessly – no interviewees indicated any bid storage problems in their discussions. The absence of State requirements regarding a natural disaster causing a delay for a submitted bid affords the State flexibility in handling disasters as is appropriate for the circumstances. Finally, neither the State nor Federal government is permitted to open bids early (and in the case of bids received through HIePRO, the system prevents bids from even being accessed prior to the stated opening time). Accordingly, no recommendations for changes are made regarding this section.

Subtopic – Late Bids

State Law Treatment

HAR § 3-122-16.08 states that bids are deemed late when received at the place designated for receipt after the established due date. Bids are not considered late if they are delayed due to procurement personnel actions or inactions and are still received before contract award. *Id.* Late bids or late modifications will not be considered for award and are required to be returned unopened to the offeror as soon as practicable. *Id.* A returned late bid must include a letter from the procurement activity stating the reason for the return. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 14.304 states that bids are deemed late when received at the Government office designated in the IFB after the exact time specified for receipt of bids. Late bids or modifications will not be considered and must be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids. However, a late bid may still be accepted if it is received before award is made, is determined by the contracting officer to not delay the acquisition, and there is acceptable evidence to show it was received and under the Government's control prior to the time set for receipt of bids.

FAR 14.304 does allow late modifications to be considered at any time when the bid is already successful and the modification makes its terms more favorable to the Government.

Interview Findings

- Interviewees did not express any issues with the State's late bid process.

Analysis of Differences, Consequences, and Benefits of Alignment

The underlying policy to not accept late bids for construction procurement, unless it was due to the purchasing agency's fault, is shared in both the State's rules and the FAR. One small difference between the two practices is the State is required to returned unopened bids to the offeror "as soon as practicable" while the FAR requires unopened bids to be returned after the award decision with the other unsuccessful bids. Updating the State's rules regarding when to return late bids to closer align with the FAR would provide no benefit as there is no chance for these bids to ever be accepted with more time and vendors have indicated in interviews they like to know as soon as possible if their bid is unsuccessful for whatever reason. The current State language allows for flexibility to return the late bids on a timeline that works best for the procurement officer's schedule without prohibiting the procurement officer to wait until after award to return the late bids anyway if that was the most practicable time.

The most significant difference between the State's rules and the FAR is that the FAR supports more flexibility to benefit the Government by allowing late modifications from the already winning vendor that make the bid more advantageous to the Government. Under the State's rules, late modifications cannot be accepted in any circumstances even if it would make the winning bid better for the State. A consequence that could exist from this current policy is if missing this language negatively impacts the State's ability to receive the lowest bid or best terms for a contract. However, no interviews indicated that successful vendors are trying to submit modifications late or that winning bids are struggling to be modified further under current policy, so it appears this action happens rarely, if at all. Additionally, it would require the State to be responsible for determining what is a favorable change that should be accepted late, which could result in protest or other risks. Furthermore, contracts can already be amended to accommodate for favorable changes, and especially if negotiations are undertaken (see Subtopic - Negotiation), so the State is not missing out on the ability to secure the best bid even if modifications are not accepted late. Thus, no change to closer align with this FAR language would add benefits for the State.

Subtopic – Opening Bids

State Law Treatment

HRS §103D-302(d) requires bids to be opened publicly in the presence of one or more witnesses at the time and place designated in the IFB. HAR § 3-122-21 clarifies that the bid opening is required to be held at the time, date, and location of the receipt of bids. At the opening, HAR § 3-122-30 requires the name of each bidder, the bid price(s), and any other pertinent information to be read aloud or otherwise made available. The bids are available for public inspection at the time of opening (though trade secrets or other proprietary data may remain confidential.) *Id.*

HRS §103D-302(d) also requires the name of each bidder, the amount of each bid, and other relevant information to be recorded. HAR § 3-122-30 also requires the name(s) and address(es) of the required witnesses to be recorded at the opening.

Once opened, bids shall be unconditionally accepted without alteration or correction. Training from the SPO, specifically Workshop No. SPO 130 Part 1 "Construction Procurement Training", reinforces the laws and rules described above and clarifies that opened bids shall be made available for public inspection to the extent permitted.

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36 does not define special procedures for bid opening for construction procurements, but instead references the general bid opening guidelines provided for competitive sealed biding in Part 14. FAR 14.101 provides that sealed bids will be opened at the time and place stated in the solicitation for the public opening of bids. Under FAR 14.402, at the time set for opening bids the bid opening officer or a delegated assistant will publicly open all bids received, read the bids aloud if practical, and have the bids recorded and abstract created through Standard Form 1419[34] for construction specifically as discussed in FAR 14.403. The Standard Form shall be completed by the bid opening officer as soon after bid opening as practicable, and the abstracts for unclassified acquisitions shall be available for public inspection.

FAR 14.402 also allows examinations of bids by interested persons to take place if it does not interfere with the conduct of Government business. However, original bids are not allowed to pass out of the hands of a Government official unless a duplicate bid is not available for public inspection. *Id.* If an original bid is examined by the pubic, it must be under the immediate supervision of a Government

[34] Available here: https://www.gsa.gov/cdnstatic/OF%201419.pdf?forceDownload=1

official and under conditions that preclude possibility of a substitution, addition, deletion, or alteration in the bid. *Id.*

FAR 14.402 also specifies unique policies for special bid opening circumstances. It clarifies that bid openings, including bid prices, for classified acquisitions may not be attended by or made available to the general public without appropriate security clearances. Additionally, it explains that bid openings may be postponed for an emergency or when it is believed that an important segment of bidders has been delayed. *Id.* If the bid opening gets postponed, it must be posted publicly and communicated to prospective bidders. *Id.* If the bid opening is postponed, the time of actual bid opening is the time set for the purpose of determining late bids. *Id.*

Interview Findings

- Interviewees did not express any issues with the State's bid opening policies or practices.

Analysis of Differences, Consequences, and Benefits of Alignment

The requirements surrounding bid opening at the State and Federal level are generally the same. Bid opening is done publicly, pertinent information is read aloud, there are rights to inspect the submissions, protection for confidential (or in the case of Federal procurements, classified) information from inspection, and an abstract or log of the bids is contemporaneously prepared and subsequently made available.

Differences between the two systems are slight. The FAR's bid abstract/log is prepared using a standard form (with a specific one for use in construction) whereas the State prepares its bid abstract through the collection of standard information fields but not a form specifically (nor specific to construction). This is not a meaningful distinction because the "construction specific" form generally obtains the same information required by the State's rules about what information together in a bid abstract. The FAR makes a distinction between bid copies and bid originals in the case of inspections while the State does not. It is not clear why this distinction is drawn or what benefit accrues to the Federal government as a consequence. Finally, the FAR outlines specified procedures to follow in unconditional circumstances, like postponing bid opening for an emergency which is not discussed in State rules. The absence of this information in State law is not detrimental to the State as the State is free to define its own emergency procedures that befit the specifics of the emergency.

Accordingly, greater alignment with the FAR could appear to confer no material benefits to the State and so no recommendation is made in this regard.

Subtopic – Evaluating Bids

State Law Treatment

HRS and HAR outline procedures for evaluating bids, including construction bids, received in response to an IFB. HRS § 103D-302(f) establishes that bids are evaluated "based on the requirements set forth in the invitation for bids." No criteria may be used in bid evaluation that are not set forth in the IFB. *Id.* These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose (though it is not clear that these criteria are ever deployed in construction IFBs). *Id.* Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. *Id.*

HAR provides additional requirements surrounding the bid evaluation process. HAR § 3-122-33 reinforces that "the award shall be made to the lowest responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids." HAR § 3-122-97 outlines that during evaluations, a bid could be rejected for reasons including the bidder is not responsible.[35] State evaluation preferences are also factored during the evaluation process.[36]

Additionally, if the offeror tries to limit the acceptance of an offer in a manner not provided for by the solicitation, the offer will be rejected (and written notice is required explaining the basis of the rejection). *See* HAR § 3-122-97.

Treatment under FAR 36 and Other Incorporated Federal Sources

The process for evaluating bids is outlined in FAR Part 14. FAR 14.101(d) specifies that bids shall be evaluated without discussions. FAR 14.101(e) states that after bids are publicly opened, the evaluation process will result in an award being made with reasonable promptness to the responsible bidder whose bid, conforming to the IFB, will be most advantageous to the Government, considering only price and price-related factors included in the invitation. FAR 14.201-8 provides examples of other price related factors applicable in evaluation of bids including foreseeable costs or delays to the Government resulting from such factors as differences in inspection, locations of supplies, and transportation. FAR 14.408-2 provides additional details on the evaluation process, stating that the contracting officer must determine that a prospective contractor is responsible, responsive, and that the prices offered are reasonable before awarding the contract. FAR 14.404-1 establishes that unless there is

[35] *See* the next Subtopic – Responsiveness and Responsibility
[36] For a discussion about evaluation preferences please see Section IV of this Report.

a compelling reason to reject all bids and cancel the IFB (discussed in further detail in the Subsection - Cancellation of IFB after Bid Opening), award must be made to the responsible bidder who submitted the lowest responsive bid.

FAR 14.404-2 outlines different instances when bids should be rejected during the evaluation process. It specifies that any bid that fails to conform to the essential requirements or specifications of the IFB shall be rejected. Additionally, a bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government. A bid may also be rejected if the contracting officer determines in writing that it is unreasonable as to price. FAR 14.404-3 requires the contracting officer to notify a bidder of the reason for rejection.

Interview Findings

- Interviewees did not express any issues with the State's bid evaluation policies or practices outside of discussions related to past performance and evaluation preferences (each discussed in different, subsequent sections).

Analysis of Differences, Consequences, and Benefits of Alignment

Aside from the evaluation of past performance and the State's specific evaluation preferences (which are analyzed in separate sections below), the State and Federal systems evaluate bids in substantively similar ways. Both review a bid's responsiveness and bidders' responsibility (analyzed in the next Subsection), both have a parameter to reject non-conforming bids, and both systems work to identify the lowest bid for award while allowing the evaluator to consider other cost factors so long as they are published in the solicitation. Given the similarity in these respects closer Federal alignment would make no discernable impact.

Subtopic – Responsiveness and Responsibility

State Law Treatment

In order to earn a contract with the State through an IFB, a low bidder must meet all requirements of the IFB and be deemed both "responsible and responsive." *See* HRS § 103D-302.

A responsive bidder under HRS § 103D-302 and HAR § 3-120-2 is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids." The standard for determining the responsiveness of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. *Id.* Bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening. *See* HAR § 3-122-33. Finally,

through SPO training, specifically Workshop No. SPO 130 Part 1 "Construction Procurement Training", the responsibility is placed on the procuring agency to verify whether or not a company is suspended or debarred, which would impact responsiveness.

In determining the responsibility of a bidder, HRS § 103D-310 requires an assessment of the prospective offeror's financial ability, resources, skills, capability, and business integrity necessary to perform the work. Responsibility is a yes/no determination: a vendor either is or is not judged responsible. Prospective offerors may be required to submit answers to a questionnaire asking for additional items within two working days (or longer at the discretion of the procurement officer) to help the procurement officer determine if the offeror is fully qualified and able to perform the intended work. *See* HAR § 3-122-109. In some instances, part of a responsibility determination factors whether a bidder submitted this information prior to the bid submission, if required by the State. *See* HAR § 3-122-108. If it is determined an offeror or prospective offeror is not responsible, the head of the purchasing agency is required to make a written determination and notify the offeror.

HAR § 3-122-108 also clarifies that the determination of responsibility can be challenged by the bidder via administrative hearing.

HAR § 3-122-112 outlines what is required to be provided by the offeror upon award of a contract as proof of responsibility and compliance with all laws governing entities doing business in the State. Required documents include a tax clearance certification, a certificate of compliance from the department of labor and industrial relations, and a certificate of good standing from the business registration division of the department of commerce and consumer affairs, all current within six months of issuance date.

Treatment under FAR 36 and Other Incorporated Federal Sources

There are no construction-specific processes or requirements in FAR 36 for determining bid responsiveness or offeror responsibility for construction procurements, but Part 14 discusses determining responsiveness in competitive sealed bidding and Subpart 9.1 discusses determining responsibility.

FAR 14.301 outlines the process and factors for determining the responsiveness of bids – namely that bids must comply in all material aspects with the IFBs to be deemed responsive. It also notes that bids should be filled out, executed, and submitted in accordance with the instructions in the invitation, including using and supplying all information asked about in the required Federal Standard Form. *Id.* Using a bidder's own bid form or a letter to submit a bid is allowed, but only if the bidder accepts all the

terms and conditions of the invitation. Additionally, FAR 14.202-4 allows for bid samples to be required if needed to determine responsiveness through meeting the characteristics listed in the invitation.

Under FAR 9.103(b), no contract award may be made unless the contracting officer makes an affirmative determination of an offeror's responsibility. The standards to determine responsibility are set forth in FAR 9.104 and 9.105, and they include whether the vendor has adequate financial resources to perform the contract; the vendor's ability to comply with the performance schedule; that the vendor has a satisfactory performance record;[37] that vendor has a satisfactory record of integrity and ethics; that the vendor has the necessary organization, experience, accounting and operational controls; that the vendor has the appropriate facilities and/or equipment; and that the vendor is "otherwise qualified." If this information is already on hand for the government (*e.g.* from a recent procurement or contract, or in the FAPIIS or Federal Awardee Performance and Integrity Information System) it may be consulted, or the government may request this information via survey prior to award. *See* FAR 9.106. Responsibility is a yes/no determination. A contracting officer's signing of a contract constitutes their determination that the vendor is responsible. FAR 9.105-2(a)(1). If the contracting officer determines a vendor is not responsible, that determination (and supporting documentation) is documented in the file and in FAPIIS. FAR 9.105-2(a)-(b). A determination of non-responsibility is among the issues an aggrieved vendor may protest. *See generally* 4 CFR Part 21.

Interview Findings

- Interviewees did not express any issues with the State's process of determining responsiveness and responsibility for bids, outside of a discussion about the State's inability to "weed out bad contractors" as discussed in Subsection – Past Performance of Bidders.

Analysis of Differences, Consequences, and Benefits of Alignment

At both the Federal and State level, bids must be deemed responsive and bidders responsible in order for an award to be made. The responsiveness determination is functionally the same at both the State and Federal level: it is a determination of whether the offer (bid) complied with the solicitation document (IFB). However, the determination of responsiveness is materially similar with a few notable differences.

For the most part, the State and Federal responsibility determination methods are the same. Both conceive of responsibility in yes/no deters (*i.e.* there is not a range of responsibility determinations). Both consider the vendor's solvency, financial stability, resources, skills, capability and integrity. Both

[37] For a greater discussion on this subject, please see Subsection – Past Performance of Bidders.

have the ability to actively solicit this information via questionnaire or survey. Both must make express findings if the vendor is determined not responsible. And both systems allow a vendor determined to be not responsible to appeal this decision. Accordingly, no recommendation stems from these areas.

There are two main differences between the State and Federal responsibilities determinations: the Federal system maintains a database of vendor information that can be accessed in responsibility determinations and the Federal system expressly contemplates review of a vendor's past performance for the Government. Both these two concepts are discussed in the below Subsection – Past Performance of Bidders.

Subtopic – Past Performance of Bidders

State Law Treatment

The State does not have a formal system for the collection of vendor performance information, nor does it have a standard means by which this information can be accessed. *See* Task Force Report pages 14-16. Accordingly, past performance is not expressly contemplated as a factor in determining vendor responsibility (though it is arguably implied through a review of a vendor's integrity).[38]

Treatment under FAR 36 and Other Incorporated Federal Sources

At the Federal level, past performance is examined when considering responsibility of bidders as discussed in FAR 36.201 and FAR 42.1502(e). *See* also FAR 9.104-1(c) (noting the requirement for a "satisfactory performance record" in responsibility determinations).

Throughout the life of a contract, Federal contract managers are tasked with filing periodic vendor performance reports in the Contract Performance Assessment Reporting System (CPARS), a component of the FAPIIS system.[39] Specifically, on construction projects valued at or above $700K these reports must be made at least annually, at the conclusion of a construction project, if a vendor is terminated for default, or at the discretion of a contracting officer. *See* FAR 36.201 and FAR 42.1502(e). These reviews are put on the CPARS website where they are viewable by everyone and contractors have the opportunity to comment on, concur with, or refute past performance evaluations.[40]

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[38] The State does maintain a system to suspend and debar vendors. *See generally* HAR §§ 3-126-11 to 3-126-18. This is, technically, a means by which poor performing vendors can be prevented from obtaining future business. At the time of this Report's submission, there is one suspended vendor and one debarred one. *See* https://spo.hawaii.gov/for-state-county-personnel/programs/debarment/.

[39] CPARS is a component of FAPIIS. *See* https://www.cpars.gov/pdfs/FAPIIS_Overview.pdf

[40] *See generally* https://www.cpars.gov (explaining the different vendor rights and uses of the website).

Interview Findings

- Many State interviewees noted that they were unable to identify "bad contractors" (those who are prone to miss deadlines, drive up expenses, or engage in other unsatisfactory practices due in no part to State action).
- Many State interviewees noted that they made construction awards to contractors with which they had bad experiences because the contractor submitted the low price "and there was nothing [the State] could do about it."
- Many interviewees requested a standardized way of capturing vendor performance information, a standardized way to share it, and a standardized way to use it.

Analysis of Differences, Consequences, and Benefits of Alignment

The Federal Government has a clear, structured system for how past performance is recorded and evaluated on Federal contracts, while the State has no equivalent. Many of the concerns discussed in the Task Force Report related to the identification of "bad contractors" (namely those grounded in concern for Due Process for vendors) are addressed through the Federal system: vendor performance reports are routinely prepared in a structured way, they do not contain information submitted by third parties trying to thwart particular vendors, and vendors themselves have an opportunity to review and rebut the reports.

Recommendation II-2 – Past Performance Vendor Database is that the State should develop and institute a structured system for the collection, availability, and use of vendor performance information. That said, the State has already begun working towards implementing this recommendation by engaging Sine Cerra LLC to develop a system to collect, share, and weigh past performance.[41] Accordingly, there is no additional cost or time consideration associated with this recommendation as the State has already undertaken it.

Subtopic – Canceling an IFB After Openings Bids

State Law Treatment

Under HRS § 103D-308, an IFB may be canceled, or any or all bids may be rejected in whole or in part, when it is in the best interests of the governmental body which issued the invitation. The reasons for cancellation need to be made part of the contract file. *Id.*

[41] As part of the research for this Report, informal conversations were held with Sine Cera. In this conversations Sine Cera noted that it was preparing to assist the State in the development of a structured performance data collection pilot program and accompanying interim rule on how to factor past performance information in responsibility determinations.

HAR § 3-122-35 provides additional requirements around this cancellation process once bids have been opened. Two such contemplated cancelation purposes would be if the IFB received no bids or only one bid. *Id.* Receiving one bid does not require cancellation: as long as the procurement officer determines in writing that the price submitted is fair and reasonable and that other prospective bidders had reasonable opportunity to respond (or there is not adequate time for another solicitation) then an award may be made to a lone bidder. *See* HAR § 3-122-35(a). Alternatively, HAR § 3-122-35(a)(4) permits a procurement officer to pursue alternative procurement methods such as direct negotiations with a sole bidder and, if these negotiations fail, with other contractors or vendors under permitted circumstances.

If no bids are received or if there are no responsive and responsible bidders, HAR § 3-122-35(b) states that the procurement officer may conduct a re-solicitation or determine that it is neither practicable nor advantageous to the State to issue a new solicitation. If this is determined, an alternative procurement method like direct negotiations may be allowed if approved by the chief procurement officer. *Id.*

HAR § 3-122-96 outlines other events where cancellation after opening but prior to award may be required. These include:

- when the construction being procured is no longer required;
- ambiguous or otherwise inadequate specifications were part of the solicitation;
- the solicitation did not provide for consideration of all factors of significance to the agency;
- prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- all otherwise acceptable offers received are at clearly unreasonable prices;
- there is reason to believe that the offers may not have been independently arrived at in open competition or may have been submitted in bad faith; or
- a determination by the chief procurement officer or a designee that a cancellation is in the public interest.

Treatment under FAR 36 and Other Incorporated Federal Sources

Under FAR 14.408-1, if less than three bids have been received, the contracting officer shall examine the situation to ascertain the reasons for the small number of responses. Award shall still be made, but the contracting officer may need to initiative correction action to increase competition in future solicitations for similar items.

FAR 14.404-1 outlines other circumstances which may warrant post bid opening IFB cancellation:

- When it is determining in writing that inadequate or ambiguous specifications were cited in the invitation;
- Specifications have been revised;
- The supplies or services being contracted for are no longer required;
- The invitation did not provide for consideration of all factors of cost to the Government;
- Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;
- All otherwise acceptable bids received are at unreasonable prices or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price;
- The bids were not independently arrived at in open competition or were submitted in bad faith;
- No responsive bid has been received from a responsible bidder;
- A cost comparison shows that performance by the Government is more economical; or
- Cancellation is clearly in the public's interest.

However, after the opening of bids, FAR 14.404-1 states that an invitation generally should not be cancelled and resolicited due solely to increased requirements for the items being acquired. Instead, award should be made on the initial IFB and the additional quantity should be treated as a new acquisition.

FAR 14.404-1 outlines that once the agency head has determined that an IFB will be canceled and that the alternative method of negotiation is in the Government's best interest, the contracting officer may negotiate and make award without issuing a new solicitation. Through this process, each responsible bidder from the sealed bid acquisition must be given the opportunity to participate in negotiations and the award must be made to the responsible bidder offering the lowest negotiated price.

Interview Findings

- Interviewees did not express any issues with the State's bid cancellation after opening policies or practices.

Analysis of Differences, Consequences, and Benefits of Alignment

The State and Federal systems have similar processes for and reasoning behind cancelling an IFB after bid opening. Both entities outline appropriate situations to cancel an IFB including when there was ambiguity in the solicitation, the construction is no longer needed, the bids were submitted in bad faith,

or it is in the public interest. Both entities also outline alternative methods for securing the construction services if the IFB is cancelled, including direct negotiation.

One small distinction may be drawn in instances of low participation. The State system requires enhanced scrutiny if only one bid is received, while the Federal system requires it if three or fewer are received. Both measures are rooted in the concept that the buying entity should be cautious to ensure that a healthy competitive process was fostered (as low participation may be evidence that it was not). However, one bidder seems the appropriate level at which low competition concerns should be addressed as two or three bids still provides market context suitable to determine if submitted prices are reasonable.

Ultimately, the language included in the FAR would not improve the current process occurring in the State. Additionally, from the interviews there is no indication that there are any issues or consequences from the current process in the State. Thus, there are no benefits to altering State law or rules to closer align with the FAR and there is no recommendation in this regard.

Subtopic – Equal Low Bids

State Law Treatment

HAR § 3-122-34 outlines the process for handling tied low bids during competitive sealed bidding at the State. Tied low bids are defined as "bids from responsive, responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids." *Id.* Ties may be resolved, at the discretion of the procurement officer, by awarding the contract to the vendor who:

- Provides goods produced or manufactured in State;
- Has a place of business in the State; or
- Previously received a State award. *Id.*

If a written determination is made that none of these methods can be applied, then the award may be made by drawing lots. *Id.* Records are required on any tie bids to be made a part of the procurement file. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 14.408-6 outlines the process for handling tied low bids during competitive sealed bidding. First, ties are resolved in favor of small business concerns that are also labor surplus area concerns; second, ties are resolved in favor of small business concerns; third, ties are resolved in favor of "other business concerns." *Id.* If two or more bidders still remain equally eligible after going through the three

priorities, award shall be made by a drawing by lot limited to those bidders. The drawing shall be witnessed by at least three persons, including the bidders being invited if time permits, and the contract file shall contain the names and addresses of the witnesses and the person supervising the drawing.

If an award is made through using one of the three priorities when two or more low bids are received, the contracting officer shall include a written agreement in the contract that the contractor will perform, or cause to be performed, the contract in accordance with the circumstances justifying the priority used to break the tie or select bids for a drawing by lot. *Id.*

Interview Findings

- Interviewees did not express any issues with the State's equal low bids policy.

Analysis of Differences, Consequences, and Benefits of Alignment

The State and Federal tie breaking algorithms are initially different. The State prioritizes in-State economic impact while the Federal system prioritizes small businesses. The Federal tie-breaking methods are not better but, instead, a reflection of its prioritization of small businesses. The State system instead prioritizes local concerns, a valid alternative approach reflective of the State's values. Additionally, the State's tie breaking solutions are not ordinally prescribed like the Federal ones, allowing the procurement officer to exercise their best judgment in cost-neutral situations. Accordingly, it is not in the State's best interest to align with the FAR and replace its initial tie-breaking protocol as this would serve no clear benefit.

Also, the State and Federal government share the same final (and definitive) tie breaking solution through the drawing of lots.

Subtopic – Contract Award and Notice

State Law Treatment

The State's rules and SPO training provide guidance on contract awards and contract award notice. HAR § 3-122-33(e) provides that the award notice must be publicly posted for five working days.

SPO Construction Procurements Workshop No. SPO 130 Part 1 "Construction Procurement Training" clarifies it is DAGS-Public Works Division ("PWD") policy to post the award decision within 60 calendar days from the time of bid opening. If the contract is not awarded within the 60 calendar days, DAGS may request the successful bidder to extend the time for acceptance of its bid. *Id.* Additionally, the training specifies that posting of awards on the Procurement Notice System is required

within seven days of the notice of award. *Id.* The award letter/transmittal is sent with Performance Bond and Labor and Material Payment Bond forms for execution. *Id.*

To execute the contract, the SPO training specifies that the contractor must submit performance bond, labor and material payment bond, and proof of compliance at the time of award including the Hawaii Compliance Express for proof of compliance, State and Federal tax clearance, DLIR Certificate of Compliance, and DCCA Certificate of Good Standing. *Id.* After receipt of bonds and compliance certificates, the procurement officer will sign the contract and funds are encumbered into the contract to become a fully executed contract. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36.213-4 contemplates a notice of award for construction contracts to be done "in writing or electronically" and to contain identifying information on the IFB, contractor's bid, award price, and the date of commencement of work. *Id.* The award notice must also advise the contractor that any payment and performance bonds must be promptly executed and returned to the contracting officer. Notably, this award notice is contemplated as being directly provided to the vendor.

FAR Part 14 outlines more specifics regarding information that is required with award notices. FAR 14.408 specifies that the contract award must be made by the contracting officer, must be made by written or electronic notice within the time for acceptance specified in the IFB, and must be awarded to the responsible bidder whose bid meets all IFB requirements and will be most advantageous to the Government considering only price and price-related factors. *Id.* Additionally, FAR 14.408 specifies that awards are made by mailing or otherwise furnishing the executed award document to the successful bidder. Once a notice of award is issued, the formal award shall follow it as soon as possible. *Id.* Additionally, separate award documents that are numbered and executed are required for IFBs with more than one award. *Id.* FAR 14.408 also notes that the award document must contain all provisions of the IFB, including any approved additions or changes from the bidder.

FAR 14.408 describes the award as serving as an acceptance of the bid and the bid and the award as constituting the contract. At the Federal level, the contract award is generally made using the Award portion of the appropriate Standard Form. For construction contracts, the award potion of Standard Form 1442 is used. Use of this Standard Form does not preclude the additional use of informal documents, including electronic communications, as notices of awards.

Interview Findings

- Interviewees (including both State and vendor interviewees) did not note any issues with the provision of award notice.

Analysis of Differences, Consequences, and Benefits of Alignment

At both the State and Federal level, winning vendors must be notified of contract award in response to an IFB and all items needed for contracting must be collected. There are small variances in the policies of each entity, but nothing in the State's current policy stops the procurement agency from being able to carry out any of the actions supported by the FAR for any variance applicable to the State. Also, the State makes this notice public (which is preferable to the Federal standard which does not expressly require notice to be public). Since no interviewees noted any issues with discovering they were awarded or not awarded a contract through the State's current policy, and there are no consequences to offset or benefits to adopt, so closer alignment with the FAR is not needed.

Subtopic – Prohibition of Construction Awards to Designing Firm

State Law Treatment

While not specific to Design Professionals, HAR § 3-122-13(e) provides that "a contractor paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation." Accordingly, since IFBs for construction contain the design work done by Design Professionals (where such design work is required), HAR § 3-122-13(e) would preclude a Design Professional from bidding on the construction project solicited through the IFB.

Treatment under FAR 36 and Other Incorporated Federal Sources

Under FAR 36.606(c), the Design Professional firm which prepared design specifications for a construction procurement cannot also be awarded the contract for the construction (not withstanding Two-Phase solicitations discussed in Section V below).

Interview Findings

- This subject was not raised as a concern in interviews.

Analysis of Differences, Consequences, and Benefits of Alignment

The State rule has the same effect as the FAR language. No change is needed.

Subtopic – Notice to Unsuccessful Bidders

State Law Treatment

State statutes or rules do not clearly create an obligation to affirmatively notify unsuccessful bidders in a procurement. However, a vendor (and the general public) is always free to discover award

outcomes online or by attending a public bid opening (though awards are not final at the time of bid opening).

The State offers debriefing with non-selected vendors to provide details on the basis for the contract award decision. HAR § 3-122-60 outlines the policies for a debriefing session, including noting that they should be held by the procurement officer or designee within seven working days in either individual or combined environments. Non-selected offerors must submit a written request within three working days after the contract award posting to receive a debriefing. *Id.* Non-selected offerors are able to file a protest of the procurement within five working days following a debriefing. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR Part 14 defines procedures for notifying unsuccessful bidders of an award decision during competitive sealed bidding. FAR 14.409 requires contracting officers to, at a minimum, notify each unsuccessful bidder that its bid was not accepted in writing or electronically within three calendar days after contract award. In the notice, they must also extend appreciation to the unsuccessful bidder for interest in the IFB and state the reason for rejection. *Id.* Unsuccessful bidders can request information on the winning bid including the dollar amount, name, and address of the successful bidder. *Id.*

Interview Findings

- Interviewees did not note any issues finding out about not being awarded a contract through the State's current policy.
- As a general practice, unsuccessful companies are often actively notified of procurement results.

Analysis of Differences, Consequences, and Benefits of Alignment

At its core, unsuccessful bidders are informed of award outcomes at both the State and Federal level. The main difference is one of requiring active vs. passive notification: the State posts award information and allows vendors to deduce their fate while the Federal government (who does not uniformly publicly post award information) must actively notify unsuccessful bidders. That said, per interviews, the State often actively notifies unsuccessful vendors as a matter of course despite there being no explicit requirement. Accordingly, no changes are needed.

Subtopic – Negotiation

State Law Treatment

Negotiations are not typically utilized during the competitive sealed bidding process in the State. HRS § 103D-302(a) specifically notes that negotiations with bidders after the receipt and opening of bids is not included in the competitive sealed bidding process. HRS § 103D-302(h) outlines the one

exception: negotiations are allowed if all bids exceed available funds for the project. In this circumstance, and only if time and economic considerations do not allow a re-solicitation of the project with a reduced scope, the head of the purchasing agency for the procurement is authorized to "negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsible and responsive bidder, in order to bring the bid within the amount of available funds." HAR § 3-122-33(f) reinforces that negotiations for competitive sealed bidding only applies "in the event all bids exceed available funds."

Treatment under FAR 36 and Other Incorporated Federal Sources

Construction procurement at the Federal level allows for negotiations to be utilized in some circumstances to ensure a reasonable price is secured. FAR 36.214 also outlines procedures to negotiate construction bids when the lowest bid departs from the official Government estimate. Specifically, the contracting officer can engage in negotiations or request the offeror to submit cost information if any element of proposed cost differs significantly from the Government estimate,[42] including for example wage rates, significant materials, equipment allowances, and subcontractor costs. *Id.* Furthermore, the contracting officer is empowered to use additional pricing tools to inform negotiations when appropriate, like comparing proposed prices to current prices for similar types of work. *Id.* Under FAR 36.214, agencies are also instructed to follow the policies and procedures in Part 15 when negotiating prices for construction.[43]

Interview Findings

- Interviewees did not discuss engaging in negotiations during competitive sealed bidding.

Analysis of Differences, Consequences, and Benefits of Alignment

The approach to negotiations is very different at the State and Federal level. The current State process for negotiating during competitive sealed bidding is limited to instances where all bids are over the available funds, and even then, only limited to circumstances where a re-solicitation with revised scope is not possible. By contrast, the FAR allows negotiations with the low bidder where there is reason to believe the government can either improve pricing or verify the accuracy of pricing when it is perceived to be too low – both in terms of the project's official estimate.

[42] This comparison to the official estimate is also performed to ensure price reasonability: if a proposed price is significantly lower than the Government estimate, the contracting officer shall make sure both the offeror and the Government estimator completely understand the scope of the work. See FAR 36.214.

[43] For a discussion of some of these concepts from FAR part 15, please see the Subtopic – Negotiating with Ranked Vendors in Section I.

If the State already has an estimate in hand (either from the project's Design Professionals or developed in house, *See* Subtopic - Cost Estimates and Cost Limits Section), adopting language from the FAR to allow for negotiations when the lowest bid significantly varies from these estimates may benefit the State. Such adoption would give the procuring agency the ability to push for a lower price where applicable or remedy a defective price if presented (bearing in mind a remedied price might raise the bid amount and displace the apparent low-bidder).

Recommendation II-3 – Negotiations with Low Bidder proposes to amend portions of HRS § 103D-302 to allow for negotiations to occur following the award of construction contracts from sealed bidding to include negotiations towards a more reasonable and realistic price with the lowest responsible and responsive bidder when the bid amount varies significantly from the estimated price for the project, where such estimate was created prior to the opening of submitted bids.

Unlike negotiations with Design Professionals where there is a protocol for moving to lower ranked vendors if initial negotiations with the top ranked vendor are unsuccessful, negotiations with a low bidder would not contain this option (notwithstanding any changes that result in the low bidder raising their price and no longer being the low bidder). This prevents any unscrupulous actor from using the guise of failed negotiations with the "low bidder" to advance to a higher bidder for whom that individual maintains a subjective preference.

Subtopic – Two-Step Sealed Bidding

State Law Treatment

While the most common process for competitive sealed bidding is to issue a single IFB containing all required information, HRS allows for a multi-step sealed bidding process as well. HRS § 103D-302(i) allows for this multi-step sealed bidding process "when it is not practicable to initially prepare a purchase description to support an award based on price." Through this process, an IFB which requests the submission of unpriced offers is initially released, followed by an IFB for priced offers limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation. If this process is used, the notice and the IFB must identify and describe each step to be used in soliciting, evaluating, and selecting unpriced offers.

HAR § 3-122-61.05 further clarifies that this process should be used "when it is determined that award to the lowest responsive, responsible bidder is desired, but it is not practical to initially prepare a definitive purchase description which will be suitable to permit an award based on price." Accordingly,

the two-step bidding process is likely inapplicable to construction as construction procurements typically contain detailed specifications required to prepare bids.[44]

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR Part 14 discusses the ability to utilize a two-step sealed bidding process which combines competitive procedures when adequate specifications are not available. FAR 14.5 outlines the two steps of the bidding process and discusses when utilizing this method could be beneficial – a technical assessment of offerors followed by an evaluation of price.

FAR 15.502 limits the use of two-step bidding. It requires, *inter alia*, that "[a]vailable specifications or purchase descriptions are not definite or complete or may be too restrictive without technical evaluation[.]" As construction solicitations outside of the Design-Build method de facto contain specifications which are complete and require no further technical evaluation, this solicitation method is not generally available.

Interview Findings

- Interviewees did not discuss using two-step sealed bidding.

Analysis of Differences, Consequences, and Benefits of Alignment

Both the State and Federal procurement agencies may utilize the two-step sealed bidding process with more complex solicitations where a technical proposal is needed to determine conformity with the requirements of the solicitation. However, both the State and Federal systems restrict access to these methods in a manner that would preclude its use for construction. No change is recommended.

[44] The exceptions to this are two-phase Design-Build solicitations covered in Section V and job order contracting discussed earlier in this section.

Recommendation(s) Based on FAR Alignment Analysis:

Rec. #	Details				
II-1	Encourage procurement officers through training to conduct and utilize an internal price estimation for construction procurements.	✓	✓		
II-2	Develop and institute a structured system for the collection, availability, and use of vendor performance information.	✓	✓	✓	✓
II-3	Amend HRS § 103D-302 to allow negations of construction contracts resulting from competitive sealed bidding to include negotiations with the lowest responsible and responsive bidder when the bid amount varies significantly from the estimated price for the project, where such estimate was created prior to the opening of submitted bids.	✓	✓	✓	✓

Key:

Application of Best Practices		Thoughtful Contractor (& Subcontractor) Selection Process	
Process Transparency & Integrity		Consistent & Efficient Processes	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation II-3 – Negotiations with Low Bidder**, add the following to HRS § 103D-302(a):

  "Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids, *except for construction procurement that meets the criteria provided in section 103D-302(h)(2)*."

- Per **Recommendation II-3 – Negotiations with Low Bidder**, add the following to HRS § 103D-302(h):

  "*(2) In the event the lowest responsive and responsible bid for construction procurement significantly differs from the amounted estimated by the State for that project, and such estimated amount was developed prior to the opening of any bids for that project, the head of the purchasing agency may engage in negotiations with the low bidder to ensure*

the bid amount is reasonable and realistic for the scope of the construction project. Such negotiations may include the reduction of the bid amount or the increase to align with the State's estimate, provided the increase does not raise the low bidders' bid to an amount that makes it no longer the low bid. If negotiations with the low bidder do not result in any change to the bid amount, the original bid amount shall continue to be used."

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- N/A

Effort and Complexity to Implement Recommendation(s):

Recommendation II-1 – Cost and Price Estimate Training:

The effort and complexity to implement a recommendation to encourage procurement officers through training to conduct or utilize an internal price estimation for construction procurements is not extensive. The State has an existing contract to procure training development services and can utilize this contract to develop the suggested training. This training would then need to be delivered to all applicable procurement officers (*i.e.* those who would perform construction cost and price estimates).

Creating a cost estimation may require additional effort and complexity if the procurement officer is not already doing so – a few days of additional effort total to create and revise the estimate. However, if the construction project's Design Professional has already created the cost estimate as part of their design work, no additional effort is required. Given that this leaves only smaller projects without Design Professionals where an estimate is required, the amount of time needed to prepare this estimate is minimal. This practice can begin immediately.

Recommendation II-2 – Past Performance Vendor Database:

As this recommendation is already underway with the work of Sine Cera, LLC no further analysis may be done. As the precise nature of the recommendation (*e.g.* whether the program will be piloted with one agency, multiple agencies) is unknown, an estimate is not possible

Recommendation II-3 – Negotiations with Low Bidder:

The time required for this recommendation to be effective is the time needed to pass a bill. This is detailed in Exhibit 2. The option to negotiate becomes effective immediately thereafter.

Additional time and effort depend on the frequency with which negotiations are conducted. As noted above, this recommendation only makes negotiations an option when the lowest bid is

significantly above the estimated cost. This should not be a common occurrence. Accordingly, negotiations in this regard should be infrequent and limited in scope. The actual time they take to conduct should be *de minimis* – likely fewer than a few additional hours of work on a fraction of the construction solicitations.

Estimated Cost to Implement Recommendation(s):

Recommendation II-1 – Cost and Price Estimate Training:

Cost of Developing and Receiving the Training

The estimated cost of this recommendation is $61,329.60.

The current hourly labor rate for training development services obtained through RFP 18-009 is $130. As this likely constitutes an Advanced training under SPO guidance, the estimated number of hours needed to develop the training is 450. Thus, the cost of developing the training is $58,500.

Regarding the cost of receiving the training, this Report assumes this training is delivered to 40 individuals and that it will last approximately 2 hours. At $35.37 dollars an hour (the average hourly rate for SPO time), this would yield a cost of $2,829.60.

Cost of Preparing Estimates

The estimated annual cost of estimate preparation and review is $93,384.00.

The estimated annual cost for preparing construction cost estimates is $56,592.00. It bears noting that, for any construction procurement which involves a Design Professional, the Design Professional will prepare an estimated cost as part of their work which may be used as the State's estimate. Design Professionals are engaged for many projects (and all complicated or larger projects). Using the 2018 figure of 970 construction projects, this estimate assumes that the State need only develop an estimate without a Design Professional for 200 of them, and these tend to be smaller projects. Erring on the side of a higher estimate, we presume that a full cost estimate performed by a procurement official will require a full day's (eight hours) of work. Accordingly, this effort will require 1,600 hours annually. At an hourly rate of $35.37 this yields a total annual cost of $56,592.00.

In addition to the work of the procurement official, review of the estimate by their supervisor or other individual may be required. A conservative estimate for review time is four hours of review. At an hourly rate of $45.99[45] for 200 projects this yields a total annual cost of $36,792.00.

[45] This hourly estimate was calculated by average the annual salaries of over seven SPO supervisor staff positions provided through the State's 2019 salary schedule ($91,977.43) divided by the estimated number of annual hours worked (2,000).

Recommendation II-2 – Past Performance Vendor Database:

As this recommendation is already underway with the work of Sine Cera, LLC no further analysis is practical.

Recommendation II-3 – Negotiations with Low Bidder:

The estimated cost of adding the option to negotiate with low-bidding contractors on construction projects is the cost of passing the bill needed to make this a viable option, plus the cost for the time related to additional negotiations.

Please see Exhibit 2 for an explanation of the cost to amend a statute, which is a one-time cost of $6,773.44.

Regarding the cost of conducting negotiations, in 2018 there were 970 construction awards. If one assumes that the low bid is above the internal estimate on 10% of those awards, this would warrant negotiation on 97 construction contracts. If each negotiation takes four hours of work at the standard SPO rate of $35.37, this represents an annual cost of $13,723.56. Please note, this figure does not factor any savings which the State may obtain. Also, the State could elect to not pursue a negotiation (and not expend the resources to do so) if the amount to be saved is not worth the cost and effort of the negotiation.

III. Subcontractor Listing

Section Summary:

This section will analyze the State's requirement to disclose subcontractor information in construction bids. It will compare it to the Federal practice of not requiring disclosure and the practices of the other 49 states. Hawaii is among only a handful of States which require the disclosure of subcontractor information, and only one of three which requires the disclosure of what those subcontractors will do as part of a bid.

The intention of the statute is to deter bid shopping: a practice where the awarded general contractor tries to secure a lower price from a subcontractor (or replacement subcontractor) after the general contractor knows it has won the work. Often this lower price is extracted by divulging the subcontractor's quoted price to a number of competitors, offering to replace the subcontractor they originally planned to use with a subcontractor who can offer the lowest price. Any price concessions are not passed onto the buyer (in this case the State). This practice is considered legal, albeit unethical, as the general contractor is free to replace its subcontractors while the subcontractors whose offers were relied upon by the general contractor in preparing its bid are held to those original offers. However, the disclosure of the intended subcontractors in a bid "locks" a general contractor into using those subcontractors, effectively stopping their ability to bid shop.

This disclosure requirement was the single largest topic of conversation across all interviews. It has both fierce defenders and critics. All agree the statute is effective at deterring bid shopping, but, as analyzed below, it causes a disproportionate percentage of the State's procurement protests. **Recommendation III-1 – Limit Subcontractor Information to What is Required** proposes a reduction of the information informally gathered while **Recommendation III-2 – Reduce What Subcontractor Information is Required** proposes a reduction in the information requested by the statute (thus aligning close to the Federal standard of requesting nothing) without sacrificing the bid shopping deterrence. These reductions in information solicited should reduce the number of protests received. For reasons discussed herein, full repeal of the statute is not a recommendation.

Section III Summary Analysis Table

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Subcontractor listing in Bids	A contractor is required to disclose, in a construction bid, the subcontractors it plans to use and the	There is no subcontractor disclosure requirement.	The State's disclosure requirement effectively stops bid shopping but causes a high volume of the	**Recommendation III-1 – Limit Subcontractor Information to What is Required**:

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	nature and scope of their role.		State's procurement protests.	Stop the informal practice of asking for any subcontractor information not explicitly required by the statute. **Recommendation III-2 – Reduce What Subcontractor Information is Required:** Reduce protest risk by eliminating the "nature and scope" aspect of the disclosure from statute.

Subtopic – Subcontractor Listing in Bids

State Law Treatment

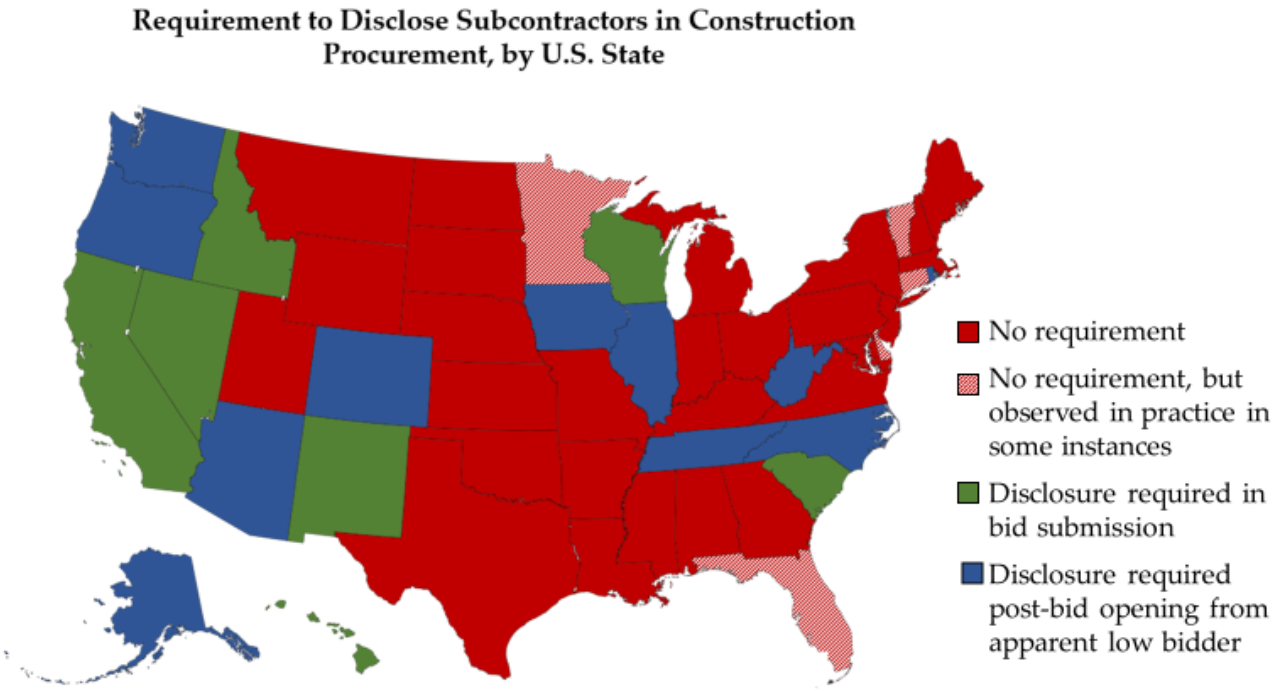
The submission of a bid for a construction project requires the general contractor to specify "the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each." HRS §103D-302(b). Thus, by statute, two things are to be solicited 1) the name of the subcontractor, 2) what they are going to do.

"Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount." *Id*. This would appear to provide a materiality standard – the prospect that subcontractors whose payment amounts to less than 1% of a total bid need not be listed. In reality, given that only the State may determine what is in the State's "best interest," general contractors indicated that they err on the side of caution and list all subcontractors.

Treatment under FAR 36 and Other Incorporated Federal Sources

Part 19.7 of the FAR requires information about subcontractors insofar as those subcontractors are offered in furtherance of a project's small business utilization goals (*See* Section IV below). Notwithstanding this specialized request, there is no Federal requirement for construction bids to include subcontractor information.

Nationwide Practices



Source: Ikaso state research

Hawaii is not unique, but it is in the company of only a handful of states in its requirement to disclose subcontractor information in construction bids. As noted in the map above, 32 states are like the Federal government in that they do not require any subcontractor disclosure as part of construction procurement. Of these 32 states, Ikaso observed that five have posted construction IFBs which, despite no official statute or rule requiring it, have requested subcontractor information as part of the bid.

11 states request subcontractor information only from the apparent winning vendor after the bids are opened and analyzed. The timing of this information's submission ranges from a matter of hours to a matter of weeks.

The remaining seven states (including Hawaii) have some variation on requiring the submission of some subcontractor information in a construction bid. A listing practice similar to that of Hawaii exists in two other states. New Mexico requires the name of the subcontractor as well as the "category" of the work that subcontractor will perform. *See* New Mexico Statutes § 13-4-34. Wisconsin also requires "the bidder [to] … submit a list of the subcontractors the bidder proposes to contract with and the class of work to be performed by each." *See* Wisconsin Statutes § 66.0901 (7).

California requires less information than Hawaii and directly addresses a protest concern (discussed below). California Public Contract Code Chapter 4100 details the requirement to list information about intended subcontractors, including name and licensure (but leaving open the nature of their anticipated work). Notably, California's law provides for a formal correction process for errors which might otherwise be the source of protests:

> "An inadvertent error in listing the California contractor license number or public works contractor registration number provided . . . shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive if the corrected contractor's license number is submitted to the public entity by the prime contractor within 24 hours after the bid opening and provided the corrected contractor's license number corresponds to the submitted name and location for that subcontractor."

Id. § 404(a)(2).

Two States, Idaho and Nevada, roughly track "Recommendation III-2 – Reduce What Subcontractor Information is Required" below in that only identifying information about the subcontractor is required but not the nature of their proposed work. Idaho's subcontractor disclosure requirement (which also applies only to certain trades) requires the disclosure of name and address of the subcontractor, but not what they will do. *See* Idaho Statutes § 67-2310. Similarly, Nevada's statute requires the disclosure of certain subcontractor's names, and then only under certain circumstances in a bid (and sometimes even after bid opening). *See* Nevada Revised Statutes § 338.141.

Finally, South Carolina's subcontractor bid listing requirement formalizes a practice sometimes informally undertaken by some agencies in Hawaii to stave off bid protests. South Carolina requires, in its IFBs, the listing by the drafters of the IFB, of all the work in a given project where a subcontractor is expected (*e.g.* listing a "plumbing" section where bidders are expected to list their plumbing subcontractors). *See* South Carolina Code of Laws § 11-35-2020. Notably, this component of the IFB (the listing of areas requiring subcontractors as determined by the State's IFB drafters) is not a protest-able component of the solicitation documents. *Id.* The information included in a bid is limited only to the intended subcontractor's name, though such name is associated with the work identified by the State as requiring a subcontractor (*i.e.* listing a plumber on the "plumber" line) functionally identifying that subcontractor's intended role. *Id.*

Interview Findings

State Difficulties Stemming from 302(b)

- With one exception, no one interviewed from an agency of the State supported the continuation of the subcontractor disclosure requirement. These individuals observed that the statute only

created a protest risk (see below discussion of protests) without any real benefit to the State. It put individuals who fielded protests in the uncomfortable position of having to decide the merits of some protests on the basis of specialized license suitability determination, necessitating the creation of informal and formal channels to the DCCA to leverage that department's licensure expertise.

  - The one exception individual noted that they liked the subcontractor listing requirement because it gave them visibility into the subcontractors that the general contractor was intending to use which, in turn, was a way to see if the general contractor properly understood the scope of the project. This interviewee was not clear on how this information was used

Differing State Practices Implementing 302(b)

- Different parts of the State require different information about subcontractors. While the statute only requires name and nature of work, some agencies require licensure information (class and number), address, or other information not specifically required by the statute.
- Some State agencies try to predict what types of subcontractors (and license types) will be needed and put that in the solicitation, similar to the South Carolina practice described above. This is not a common practice and the analysis is often incomplete and the source of more trouble than benefit.

General Contractor Perspective

- The general contractors interviewed expressed frustration with this requirement. While they admitted its effectiveness as a deterrent to bid shopping, and that bid shopping as a practice was unethical, they posited that the State sees no benefit in stopping bid shopping.
- The general contractors observed that, because subcontractors wait until the very last minute to provide their bids and information to general contractors, this "frenzy" before bid submission leads to unintentional errors such as the listing of the wrong license number or company name. They report that it also gives general contractors insufficient time to validate more substantive things, like the validity of the subcontractor's license. These errors, per the general contractors, are a source of protests.
- The general contractors also observed that the risk of protest that a given subcontractor lacks the correct license (see the discussion below about "suitability protests") is compounded by their

belief that Hawaii issues more numerous and varied types of subcontractor licenses than most other states in the country.

- Some general contractors claim the market is capable of self-correction on the matter of bid shopping. If a general contractor is known to bid shop, subcontractors can refrain from doing business with them. Subcontractors counter that this is not a realistic claim, that bid shopping has always occurred, and thus there is no evidence that the market is capable of self-correction.

Subcontractor Perspective

- Subcontractors fiercely defend this subcontractor listing requirement. They observe that it is effective in deterring bid shopping. They posit that the State experiences indirect benefits from this deterrent in two forms: 1) more subcontractors compete for State work given this protection (and, thus, the State indirectly benefits from this increased competition), and 2) subcontractors who might otherwise "pad" (inflate) their bids because they expect to be "bid shopped" (and asked to lower their bid later on) are otherwise inclined to submit their truly best price when the project is a State project.
- Subcontractors observe that, as an industry, they are less inclined to compete for Federal work given the lack of bid shopping protections.
- Subcontractors uniformly report that the Task Force Report "proved" that the subcontractor listing statute was not a material source of procurement protests.
- At least one subcontractor observed that the secondary enforcement regime discussed in the Analysis section below was a positive aspect of this law because "the State [contract managers and DCCA] does not do a good job in policing this kind of stuff."
- One subcontractor noted that their industry group has encouraged the use of a standard, certified form for State business which will help ameliorate some of the unforced errors associated with the last minute "frenzy" of collecting subcontractor offers to form a general contractor bid. This form would include an attestation of accuracy of the information submitted.
- One subcontractor noted that the listing requirement helped unions ensure that the proper wages were paid to workers, but noted that this information need not be in a bid to serve this purpose.
- Both the general contractors and subcontractors note that the legislature has considered and rejected numerous modifications to the disclosure requirement in various sessions over the past several years.

Analysis of Differences, Consequences, and Benefits of Alignment

Bid Shopping Overview

In preparing a construction bid, a general contractor requests offers (bids) from different subcontractors it might use, combining what it perceives to be the most favorable bids with its own planned work to form the offer (bid) submitted to the construction buyer. Generally speaking, "bid shopping" occurs when a general contractor,[46] upon the acceptance of its offer to the buyer (*i.e.* they are the "low bidder"), uses the subcontractor offers it received in preparing its own offer to try to extract lower prices from either the subcontractor it intended to use in generating its bid or their competitors. Specifically, the general contractor either 1) asks the intended subcontractor to lower its price or risk losing its role on the project, and/or 2) asks other contractors to beat the intended subcontractor's price and replace the intended subcontractor's role on the project. This is allowable because the intended subcontractor, whose offer was relied upon by the general contractor in the submission of its offer, cannot revoke their original offer, while the general contractor is not obligated to use any particular subcontractor and is thus free to try to extract a better price through competition. *See*, *e.g. Drennan vs. Star Paving Co.*51 Cal. 2d 409 (1958). Given the inequitable position of subcontractors and general contractors in this situation (the subcontractors unable to walk away but the general contractors free to replace them), the practice of bid shopping is considered legal but unethical.[47][48]

If a buyer wishes to prevent bid shopping on their construction project, it can do so by requiring the general contractor to identify, in its bid, the subcontractors it intends to use if it is awarded the project. By including these names in the bid, the identity of the subcontractors becomes part of the general contractor's offer, and if this offer is accepted, the general contractor is no longer allowed to replace subcontractors without changing the terms of its offer. Bound to use particular subcontractors,

[46] As noted by general contractors in interviews, bid shopping can also occur when subcontractors themselves subcontract out portions of work to sub-subcontractors, or by pitting suppliers against each other as well.

[47] On this point of ethics, even general contractors agree with subcontractors. *See* https://www.agc.org/industry-priorities/procurement/bid-shopping "The Associated General Contractors of America is resolutely opposed to the practice of bid shopping." However, despite these public declarations, both general and subcontractors confirm the practice occurs in the State if not otherwise checked. Also, the above quote comes from the AGCA's position opposing listing requirements like the one of the State.

[48] Some subcontractors posited that "bid shopping" also included the leveraging of subcontractors' offers to negotiate better prices prior to a bid's submission. As a subcontractor is free to revoke or modify its offer prior to the general contractor's reliance thereon (in the submission of its bid based on those offers), this is not "bid shopping" but is, instead, the practice of negotiating with subcontractors by using prices obtained from one competitor against one another at a point when all parties can walk away from the deal. This practice is why subcontractors wait "until the last minute" to provide their offers to the general contractors. Notably, HRS § 103D-302(b) does not (and cannot) address this practice.

the general contractor cannot extract price reductions from a subcontractor with the threat of replacement or by replacing them outright.[49]

HRS § 103D-302(b) and its Role Preventing Bid Shopping

It is against this backdrop that the State enacted HRS § 103D-302(b). By requiring the disclosure of subcontractors, the law prevents bid shopping on State projects by binding the general contractors to use their listed subcontractors. No one who was interviewed disputes the effectiveness of this statute in this regard.

The law, however, requires more information than the names of the subcontractor – it also requires the "nature and scope of work" that the subcontractor will perform. *Id.* As discussed above, the inclusion of a subcontractor's name binds the low bidding general contractor to use that subcontractor – preventing that general contractor from shopping for replacement subcontractors not contemplated as part of its bid. The inclusion of the "nature and scope" further binds *how* that general contractor will use that subcontractor.[50]

The Unintended Consequences of HRS § 103D-302(b) – Protest Risk and Secondary Licensure Enforcement

In addition to curbing bid shopping, section HRS § 103D-302(b) has had an outsized and unintended effect: it causes a disproportionate number of procurement protests. Based on a review of 2018 protest and award data,[51] construction projects account for approximately 20% of all contract awards. Although construction projects only represent 20% of the contract awards in 2018, construction protests represent around 75% of all protests received that year. Furthermore, within the construction

[49] It is theoretically possible to conduct a diluted version of bid shopping by shifting work between subcontractors who a general contractor is bound to use. See a discussion on this matter below in footnote 50.

[50] Absent the inclusion of the "nature and scope" of each subcontractor's intended use, a general contractor would, in theory, be able to perform a diluted version of "bid shopping" whereby it extracted price concessions through the threat of shifting work among the subcontractors it listed in a manner that 1) ensured that each subcontractor was still used in some capacity, and 2) ensured that subcontractors were only used in a manner for which they were licensed. This threat is premised on the theory that the threat of "less vs. more" work would be impactful in the same way that "some vs. no" work would be in a traditional "bid shopping" environment, and that the license types maintained by subcontractors are sufficiently numerous that shifted work can be performed legally (*i.e.* both subcontractors have the right license). Notably, the theoretical risk of "diluted bid shopping" is already present in the current construction of 302(b). There is no formal guidance on what level of detail is required in describing the "nature and scope" to be disclosed today, and subcontractors admit that this form of "diluted bid shopping" through work shifting is already possible given a sufficiently vague description of nature and scope.

[51] The precise breakdown of 2018 data from the Protest Log maintained by SPO and the Hawaii Awards & Notices Data System ("HANDS") is as follows:

- 4707 total awards, 970 are construction (=20.6%)
- 58 total protests, 44 are construction (=75.9%)
- 44 total construction protests, 27 are subcontractor list (=61.4%)
- 58 total protests, 27 are subcontractor list (=46.6%)
- 27 total subcontractor list protests, 10 objective protests (37.0%), 17 subjective protests (63.0%)

protests the State received in 2018, subcontractor listing is a claim in the majority of construction protests (over 60%) and nearly half of all protests (approximately 45%) - both construction and non-construction - for the entire year. This bears repeating: 45% of all protests the State received (including all protests related to non-construction) alleged a defect in the listing of subcontractors for a construction project.

A common theme among subcontractors interviewed was that the Task Force report "proved" that the subcontractor listing requirement did not drive protests. They anecdotally referenced a "1%" figure from the report as evidence of this concept. The referenced 1% figured referred to the frequency of projects where the low bidding vendor was replaced due to a subcontractor listing problem.[52] Thus, what this 1% figure instead proves is that the protests are not frequently successful. If anything, this is evidence that the subcontractor listing requirement poses an especially high risk of *unnecessary* protests.

Some of these protests stem from objective errors (*e.g.* listing a wrong license number, listing a subcontractor who is out of business), while some stem from more subjective issues (*e.g.* is the subcontractor proposed for the identified work properly licensed – a "suitability" protest). Approximately one-third of the subcontractor listing related protests can be categorized as stemming from objective errors whereas two-thirds can be categorized as stemming from subjective issues.

Protests Rooted in an Objective Error

With any information solicited in a bid comes the risk that this information will be erroneous. To the extent that the information is required, errors or gaps in this information affect whether a bid is "responsive" and, if it is not, the State should reject the bid. *See* HAR § 3-122-97. If a losing bidder, via protest, can demonstrate that the apparent low bidder's bid was nonresponsive then that low bidder's bid is rejected.

A common complaint of general contractors is that their subcontractor listing information is frequently subjected to protests of this nature. Reportedly these protests range from innocuous typos (*e.g.* the transposition of digits in a license number, misspelling of a subcontractor's name) to legitimate issues (*e.g.* the listed subcontractor was out of business). General contractors claim that these errors (both the innocuous and substantive ones) are the result of being forced to compile subcontractor bids at the last minute (which practice stems from subcontractors not wanting to disclose their bids earlier and

[52] The text reads: "The subcontractor listing requirement has also resulted in increased construction costs when the apparent low bidder is displaced due to an error or omission in the subcontractor listing. This occurred for approximately 1% of construction projects awarded in each of fiscal years 2013 and 2014."

be subjected to further negotiation).[53] Subcontractors respond by noting that they have previously proposed standardized forms for this information collection process which would help expedite general contractor review and increase their confidence in the collection of this information.[54]

Another way this risk can be mitigated is to ask for less information. The statute only requires a name and "nature and scope of work" but some agencies ask for license type, license number, address and other types of information. Each additional piece of information requested increases the risk of an error being made, and none of this information is necessary to deter bid shopping: only the subcontractor's name is needed to have the intended effect. **Recommendation III-1 – Limit Subcontractor Information to What is Required** is that agencies that request any information not explicitly required by HRS § 103D-302(b) should stop requesting that extra information. It is not necessary to affect the statute's purpose but it increases the risk of error (and, as discussed below, actually facilitates "suitability" protests).

Protests Rooted in a Subcontractor's Suitability for their Intended Role

The second type of protest alleges that the proposed subcontractor is not properly licensed for the work with which it is associated. Alternatively, these kinds of protests may also allege that there is work required on the project that requires a subcontractor for which no subcontractor is proposed.[55] Unlike the "objective error" protest which is clearly determined, whether a given subcontractor's licensure is suitable for a specific task is often an ambiguous and fact-dependent decision requiring a specialized expertise. As a result, some procurement officers who field these "suitability" protests have developed informal relationships with the DCCA whereby their guidance is sought for initial protest determinations, while a formal, statutory path for DCCA hearings related to protest appeals provides a second, official forum to determine especially difficult suitability analyses (and, as a result, dictate the outcome of procurement protests).

Put another way, by allowing a procurement-protest-driven licensure review process, HRS § 103D-302(b) has functionally created a duplicative and ill-equipped enforcement forum for State licensure laws. If there were no disclosure requirement in HRS § 103D-302(b), the suitability of a subcontractor to do work would be handled in the way is it for private sector and Federal projects: 1) the general contractor would be contractually obligated to field subcontractors licensed to do work, which

[53] *See* footnote 48 above.
[54] While this is not a practice of the State, nor an example of Federal alignment, it may behoove the general contractor and subcontractor communities to agree upon such a standard form to reduce errors.
[55] This was the type of protest found in *Okada Trucking Co. v. Board of Water Supply*, 97 Haw. 450, 40 P.3d 73 (2002), the State Supreme Court case known for, *inter alia*, the unintended impact 302(b) has had on the practices of the Contractor Licensing Board.

requirement would be enforced by the contract manager 2) State law would require work be done with the proper licensure, and 3) the DCCA would maintain its policing power to investigate any violations of licensing law (and provide a forum to opine on licensure requirements before the commencement of work). This entire infrastructure still exists for State projects, but it effectively fades into the background because a second system of losing bidder-driven protests has created the need to make licensure determinations as part of a procurement protest process. As a result, those determinations are often being made by procurement officers who are not trained to be the arbiters of these issues instead of the DCCA – the intended policing body.

The risk of these protests can be reduced. First, **Recommendation III-2 – Reduce What Subcontractor Information is Required** is that HRS § 103D-302(b) be amended to remove the requirement to disclose the "nature and scope" of the work performed by each proposed subcontractor. If a bid says "subcontractor A will do task Z" then the suitability of subcontractor A to do task Z is a question of responsiveness. If a bid simply says "A" is among the contemplated subcontractors, then the non-suitability of all listed contractors for task Z must be proven before a contractor is judged nonresponsive.

Second, **Recommendation III-1 – Limit Subcontractor Information to What is Required** above suggests the elimination of asking for any information not statutorily required. The elimination of extraneous information will lead to extra work for any would-be protester. There is still a risk that losers will look at the list of subcontractors, pull all their licenses, identify what licenses are there, identify gaps relative to the entire license array, and protest on the grounds that no listed subcontractor possesses the license necessary to perform a particular type of specialized work. That said, this is a higher bar than the current one: seeing if a proposed subcontractor, who is often listed as having a certain license, is properly licensed for the work specifically associated with them.

Suggestions which are not Examples of Federal Alignment

While not an example of greater Federal alignment (and, thus, not eligible as an official Recommendation in this Report), it bears noting that the State's protest-related risks could be greatly mitigated by adopting a variation and expansion of California's post-bid correction process outlined in its subcontractor disclosure statute. California's statute contemplates innocuous errors and specifically builds in a controlled correction period where typos can be corrected after bid opening. *See* California Public Contract Code Chapter 4100.

As an alternative to the Recommendations discussed above, the State could create a similar path to rectify bids with "responsiveness" defects, mitigating the protest risk created by HRS § 103D-302(b).

As noted above, the defects take two forms: Objective Errors and Suitability. Objective Error protest risk could be mitigated by allowing a post-bid correction process like California's. The statute could classify a range of post-bid corrections that a General Contractor could submit as a matter of right: things like license number typos or subcontractor name misspelling. The statute would specify a window by which these errors must be corrected before they become a "responsiveness" issue. This would help cut-down on Objective Error protests.

The post-bid correction process statute could be further expanded to address issues of subcontractor suitability. Specifically, the statute could allow for the replacement of a subcontractor listed in a bid if 1) the prime contractor is held to its original bid amount, and 2) the listed subcontractor consents to its own replacement. The statute would further need to retroactively deem such replacement a component of the original bid in satisfaction of the disclosure requirements of HRS § 103D-302(b) - thus eliminating the listing of a replaced subcontractor as an issue of "responsiveness." This would allow general contractors to replace listed subcontractors who are ultimately determined to have a non-suitable license (or are otherwise not permitted to do business). If subcontractor suitability issues can be rectified without disqualifying a bid as non-responsive, this largely eliminates the motivation for losing bidders to protest them. By requiring subcontractor consent[56] for replacement, this eliminates the risk that a general contractor will replace a subcontractor for bid shopping purposes.

Full Repeal of HRS § 103D-302(b)'s Disclosure Requirement

There is no Federal analog to HRS § 103D-302(b), so the closest possible form of Federal alignment would be the complete repeal of subcontractor disclosure. This Report does not make that recommendation.

Hawaii is one of only seven states with statutes requiring subcontractor disclosure in bids as a means to stopping bid shopping. This sufficiently shows that the statute's enactment is deliberate and not a vestigial piece of unrelated legislation. This disclosure requirement is several years old, and despite nearly annual attempts to eliminate it, the disclosure requirement persists. This evinces a belief held by a sufficient quorum of the State's elected representatives (and in turn, the citizens of the State) that bid shopping is an unethical and undesirable practice that should be curbed in State construction projects.

[56] That said, a subcontractor could theoretically withhold consent after they are determined to be inappropriately licensed – or the subcontractor could dissolve leaving no entity existing to provide consent. Thus, this replacement process does not completely eliminate the risk of suitability protest.

While the benefits of full repeal are clear to the procurement process (fewer protests), it is not obvious that this benefit outweighs what appears to be a strong public policy position against bid shopping. Accordingly, the recommendations in this section seek to mitigate the protest risks without sacrificing any of the anti-bid shopping benefits which appear to be a priority to the State at large.

Requiring Subcontractor Disclosure After Bid Submission

As noted on the map on page 106 above, 11 states require subcontractor information after the identification of a low-bidding contractor. The submission of this information is generally considered not part of a bid and, thus, not a matter subject to procurement protest. However, this process does not so much eliminate bid shopping as much as it mitigates bid shopping – such shopping can occur in the window between the identification of a low bidding general contractor and its submission of subcontractor information. As some of these states allow the submission up to two weeks after the bids are opened, the time available for bid shopping is so long as to render this "mitigation" virtually meaningless. As subcontractors all noted, "it only takes a phone call to bid shop," so a delay of even an hour is still ample time to bid shop. Thus, this nature of disclosure is not recommended.

State Licensing Variety and its Impact on Protest Volume

The claim by some general contractors that the number of licenses issued by Hawaii uniquely combines with its disclosure requirements to compound the protest risk is likely not accurate. The premise of this hypothesis is that, as the State issues more types of subcontractor licenses, the risk of having the wrong license (and thus, a protest for that subcontractor's suitability) is increased. This hypothesis posits that other States with similar disclosure requirements do not experience the same level of protest risk because they issue fewer licenses. There are over 110 specialty (class C) licenses issued by the State, the type of licenses typically associated with subcontractors.[57] New Mexico, another disclosure state, issues approximately 100.[58] Nevada, also a disclosure state, has more classifications and subclassifications than Hawaii.[59] Accordingly, while this Report does not have access to the number of subcontractor-related protests lodged in other disclosure states, this hypothesis is nonetheless disproven as other disclosure states have a similar number of licenses.

[57] *See* Description of Contractor License Classifications, *available at* https://cca.hawaii.gov/pvl/files/2014/08/DescriptionofContractorLicenseClassifications.pdf
[58] *See* rld.state.nm.us/construction/modular.aspx
[59] *See* leg.state.nv.us/NAC/NAC-624.html#NAC624Sec140

Recommendation(s) Based on FAR Alignment Analysis:

Rec. #	Details				
III-1	Eliminate the practice of asking for any information about subcontractors not required by statute.	✓	✓		✓
III-2	Amend HRS § 103D-302(b) to eliminate the requirement to disclose the "nature and scope" of a listed subcontractor's role.	✓	✓		✓

Key:

Application of Best Practices		Thoughtful Contractor (& Subcontractor) Selection Process	
Process Transparency & Integrity		Consistent & Efficient Processes	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation III-2 – Reduce What Subcontractor Information is Required**, amend HRS § 103D-302(b) as follows:

  "…all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract ~~and the nature and scope of the work to be performed by each~~."

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- None

Effort and Complexity to Implement Recommendation(s):

Recommendation III-1 – Limit Subcontractor Information to What is Required:

The effort associated with the discontinuation of an informal and not widely adopted practice is minimal. It can be communicated out to all impacted State agencies through a procurement circular or memorandum calling for the discontinuation of the practice. Additionally, a minimal amount of time may be needed for agencies to adjust any informal templates they may have created soliciting information beyond what is required by statute. The changes can take effect immediately.

Recommendation III-2 – Reduce What Subcontractor Information is Required:

Most of the effort involved with implementing this recommendation will be preparing and passing the associated bill, available in Exhibit 2. Beyond this, the change may require a procurement circular alerting agencies of the change and the adjustment of any templates used by various agencies. Once the bill is passed, the communications sent, and templates adjusted, the change can take effect immediately.

Estimated Cost to Implement Recommendation(s):

Recommendation III-1 – Limit Subcontractor Information to What is Required:

The estimated cost of this change is $990.36. This constitutes an estimated eight hours of SPO time at $35.37 dollars an hour to develop the circular or memorandum, and a cumulative 20 hours of SPO (or similarly compensated agency time) adjusting any templates or other internal materials to discontinue the solicitation of non-required information regarding subcontractors.

Recommendation III-2 – Reduce What Subcontractor Information is Required:

The estimated cost of this change is $7,763.80. This is the estimated cost of a statute change ($6,773.44, see Exhibit 2) plus the estimated cost for communicating the change and updating templates (the same cost discussed for Recommendation III-1 – Limit Subcontractor Information to What is Required - $990.36).

IV. Evaluation Preferences

Section Summary:

This section will analyze:

- Hawaii Products Preference – the State preference established for bidders or offerors who utilize products listed on the Hawaii products list
- Apprenticeship Program Preference – the State preference established to benefit bidders or offerors who are party to a registered apprenticeship agreement with the Department of Labor and Industrial Relations for the trade employed on the project
- Recycled Products Preference – the State preference established to encourage the use of products containing recycled materials

The three State evaluation preferences described in this section do not have similar Federal preferences to compare against in the FAR for the purpose of analyzing differences and benefits of alignment. However, based on the Task Force evaluation as well as the various interviews with stakeholders of construction procurement, these preferences have been found to not only be unpopular but also either rarely used, ineffective, unnecessary, or in some cases even costly. The Task Force Report cites analysis performed that demonstrates that at least two of these preferences have cost the State hundreds of thousands of dollars in a single year due to the award of one or more project(s) to a party other than the lowest cost bidder. Accordingly, this Report recommends the same changes as the Task Force Report: the elimination of the State preferences.

Section IV Summary Analysis Table

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Hawaii Products Preference	Applies to both bids and proposals, subtracts either 10% or 15% off of the price of the vendor's bid or proposal if they utilize registered or qualified Hawaii products.	A Federal analog for this preference does not exist.	State law applies this preference to construction procurements while Federal law does not.	**Recommendation IV-1 – Eliminate Hawaii Products Preference:** Amend HRS § §103D-1001.5 in order to make the Hawaii Products Preference inapplicable to construction procurements.
Apprenticeship Program Preference	Applies to both bids and proposals, decreases the price of the vendor's bid or proposal by 5% if	A Federal analog for this preference does not exist.	State law applies this preference to construction procurements while Federal law does not.	**Recommendation IV-2 – Eliminate Apprenticeship Program Preference:** Repeal

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	they are party to a registered apprenticeship agreement with the Department of Labor and Industrial Relations for the trade employed on the project.			HRS § 103-55.6 (Act 17, SLH 2009).
Recycled Products Preference	Applies only to bids, decreases the price of the recycled product by 5% or as specified in the IFB.	A Federal analog for this preference does not exist.	State law applies this preference to construction procurements while Federal law does not.	**Recommendation IV-3 – Eliminate Recycled Products Preference:** Amend HRS § §103D-1001.5 in order to make the Recycled Products Preference inapplicable to construction procurements.
Small Business Preference	The State has the statutory basis for a small business preference but has not implemented the program.	The Federal procurement system has an implemented small business preference.	The Federal government has implemented its small business preference program while the State has not.	*No change*

Subtopic – Hawaii Products Preference

HRS § 103D-1001 defines "Hawaii products" as "products that are mined, excavated, produced, manufactured, raised, or grown in the State and where the cost of the Hawaii input towards the product exceeds fifty per cent of the total cost of the product; provided that (1) Where the value of the input exceeds fifty per cent of the total cost, the product shall be classified as class I; and (2) Where any agricultural, aquaculture, horticultural, silvicultural, floricultural, or livestock product is raised, grown, or harvested in the State, the product shall be classified as class II."

HRS § 103D-1002 establishes a preference for bidders or offerors who utilize products listed on the Hawaii products list. This preference applies to both competitive sealed bids and competitive sealed proposals. For the evaluation of the preference, no preference is considered when only Hawaii products are offered; rather, this preference is considered only when "offers include both registered Hawaii products and non-Hawaii products." *See* HAR § 3-124-5. When a bid or proposal utilizes a certified

Hawaii product, the price or bid offered is decreased by subtracting 10% for class I products and 15% for class II products. *See* HRS § 103D-1002(d).

The administrator of the SPO maintains and distributes copies of the Hawaii products list to governmental purchasing agencies. *See* HRS § 103D-1002(c). This list includes "products approved as Hawaii products, the names and addresses of the manufacturers, the classes and preference percentages the products will be allocated to meet the requirements for which offers are solicited." *See* HAR § 3-124-2. Applicable Hawaii products for this preference may be either registered or qualified. A registered product is one that has already been included on the Hawaii product list, while a qualified product is one that has been "reviewed, qualified, and approved by the procurement officer of a specific solicitation." *Id.* The offeror or bidder that desires to obtain a qualification for a Hawaii product not already on the list must submit an application pursuant to HRS § 103D-1002 and Subchapter 1 of HAR § 3-124.

The lowest bid or proposal, after the incorporation of the Hawaii Products Preference, is awarded the contract for the amount of the price they offered exclusive of the preference, taking into account any additional evaluation or award criteria described in the solicitation. *See* HRS § 103D-1002(d).

Treatment under FAR 36 and Other Incorporated Federal Sources

A Federal analog for this preference does not exist in the FAR.

Interview Findings

- No interviewee, including users of State construction procurement, contractors, or subcontractors, cited any value provided by this preference.
- When asked, most interviewed subjects said that they either preferred the preference be repealed or had no opinion on it.
- No interviewee said that they preferred the preference remain applicable in State law.
- State agencies interviewed also described the difficulty in determining the effectiveness of this preference and the lack of data points reported to use in order to track trends.

Analysis of Differences, Consequences, and Benefits of Alignment

This State preference does not have an analogous Federal preference for comparison purposes. As noted in the Procurement Task Force Final Report, this preference was "originally established in the early 1990s, [and] was intended to encourage use of Hawaii Products." However, the Task Force notes that this preference is no longer the main reason construction projects include the use of Hawaii products; in fact, construction community members on the Task Force said that they prefer to use Hawaii products outside of the preference "due to the fact that Hawaii products are easily obtained, cost effective, and in good supply." *Id.*

Additionally, according to the Task Force Report, application of this preference has cost six governmental agencies $185,000 more in a single fiscal year "because it resulted in award to other than the apparent low bidder." *Id.* In addition to the monetary costs, the Task Force describes how this preference costs State agencies time as well due to the increased difficulty in determining when and how the preference application is appropriate. *Id.* This was corroborated by all of the interviews conducted for this Report that touched on this subject.

Due to all of the reasons cited in the Task Force Report, along with the fact that no interviewee cited any benefits or attachment to this preference, **Recommendation IV-1 – Eliminate Hawaii Products Preference** suggests the repeal of the Hawaii Products Preference as it applies to construction procurements, in alignment with the Task Force Report.

Subtopic – Apprenticeship Program Preference

State Law Treatment

Through the enactment of Act 17 in 2009, found in HRS § 103-55.6, an entity that bids on, or submits a proposal for, a public works construction project valued at or over $250,000 is given the opportunity to qualify for the Apprenticeship Program Preference in conformance with Chapter 372. This preference applies to both competitive sealed bids and competitive sealed proposals. If the bidder or offeror is "a party to an apprenticeship agreement registered with the department of labor and industrial relations for each apprenticeable trade the bidder will employ to construct the public works," then their bid or proposal amount is decreased by 5%. *Id.*

The lowest bid or proposal, taking into account the Apprenticeship Preference, is awarded the contract for the amount of the price they offered rather than for the reduced 5% amount, taking into account any additional award criteria described in the solicitation. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

A Federal analog for this preference does not exist in the FAR.

Interview Findings

- No interviewee, including users of State construction procurement, contractors, or subcontractors, cited any value provided by this preference.
- When asked, most interviewed subjects said that they either preferred the preference be repealed or had no opinion on it.
- No interviewee said that they preferred the preference remain applicable in State law.

- State agencies described the difficulties caused by protests related to this preference and the additional work this adds to the procurement process.
- State agencies interviewed also described the difficulty in determining the effectiveness of this preference and the lack of data points reported to use in order to track trends.
- One interviewee commented that this preference "makes the State the enforcer of something that isn't tracked" and results in no clear benefit to the State.
- One general contractor noted that his firm probably qualified for and benefitted from the preference, but also called it "more trouble than its worth" and favored its elimination.
- Several interviewees posited that apprentice programs were driven primarily or exclusively by economic factors such as the need for labor and not the availability of this preference.

Analysis of Differences, Consequences, and Benefits of Alignment

This State preference does not have an analogous Federal preference for comparison purposes. As noted in the Procurement Task Force Final Report, "the original intent of this legislation was to incentivize the use of apprenticeship programs duly certified by the State to ensure a skilled construction workforce." However, the Task Force describes that not only is there "no evidence that the intent and purpose of the law has been effective at increasing the usage of apprenticeship programs," but also the application of this preference has cost six governmental agencies almost $400,000 more in a single fiscal year "because it resulted in award to other than the apparent low bidder." *Id.*

The Task Force also describes the confusion that this preference has caused contactors due to inconsistent application of the preference between agencies, as well as the increased "time, effort, and cost of administrating construction contracts through the award process" for government agencies. *Id.* This increase in time, effort, and costs is due to both the difficulties added to the bid as well as the protests that have delayed the award process from the application of the preference. *Id.* These findings were corroborated by interviews conducted for this Report.

Due to all of the reasons cited in the Task Force Report, along with the fact that no interviewee cited any benefits or attachment to this preference, **Recommendation IV-2 – Eliminate Apprenticeship Program Preference** suggests the repeal of Act 17 (SLH 2009), in alignment with the Task Force Report.

Subtopic – Recycled Products Preference

State Law Treatment

HRS § 103D-1005 establishes a preference to encourage the use of products containing recycled materials and discourage the purchase of products that are "deemed environmentally harmful." This preference applies only to competitive sealed bids. Subchapter 4 of HAR § 3-124 describes the procedures to be used when issuing solicitations utilizing this preference, including that the solicitation must state whether a price preference will be given to the use of recycled products.

If a price preference is to be given to recycled products, the solicitation must also state the "percent of recycled content required to qualify various products for a price preference." *See* HAR § 3-124-24(a). For price evaluation, "the price preference will be at least five per cent of the price of the item," or as specified in the IFB. *Id.* Similar to the Hawaii Products Preference, this preference does not apply if the solicitation specifies that all products are to be recycled or when all bids include recycled products. *See* HAR § 3-124-24(c).

The lowest bid, after the incorporation of the Recycled Products Preference, is awarded the contract for the amount of the price they offered exclusive of the preference, taking into account any additional preferences and evaluation or award criteria described in the solicitation. *See* HRS § 3-124-25(c).

Treatment under FAR 36 and Other Incorporated Federal Sources

A Federal analog for this preference does not exist in the FAR. However, Executive Order No. 12873, published in 1993, promoted green procurement as well as the demand for recycled products in Federal procurement. This executive order, as well as any subsequent amendments to this order, is cited in HRS § 103D-1005.

Interview Findings

- No interviewee, including users of State construction procurement, contractors, or subcontractors, cited any value provided by this preference.
- When asked, most interviewed subjects said that they either preferred the preference be repealed or had no opinion on it.
- No interviewee said that they preferred the preference remain applicable in State law.

Analysis of Differences, Consequences, and Benefits of Alignment

This State preference does not have an analogous Federal preference for comparison purposes, though it is worth noting that an executive order encouraging the preference of recycled products at the Federal level was issued in the 1990s. As noted in the Procurement Task Force Final Report, the

Recycled Products Preference was originally intended "to incentivize the use of recycled products." However, the Task Force notes that this preference has "not been used and other incentives exist for usage of such materials." *Id.* Two of these factors include that there already exists "a heightened awareness of the importance of using recycled products for environmental reasons" and that "usage of recycled products in construction counts toward Leadership in Energy and Environmental Design (LEED) certification for buildings." *Id.*

Additionally, application of this preference is rare and according to the Task Force, uncertainties still remain regarding its application. *Id.* The Task Force did not cite any negative impact around this preference as it is generally not used in procurements, but did note that if it were to be applied, additional guidelines would need to be developed around its usage, potentially leading to delays in award and project start dates. *Id.* These findings were further corroborated by interviews conducted for this Report.

Due to all of the reasons cited in the Task Force Report, along with the fact that no interviewee cited any benefits or attachment to this preference, **Recommendation IV-3 – Eliminate Recycled Products Preference** suggests the repeal of the Recycled Products Preference as it applies to construction procurements, in alignment with the Task Force Report.

Subtopic – Small Business Preference

State Law Treatment

Part IX of HRS § 103D creates the statutory basis for a small business program. The Part provides general concepts for a program, including the creation of a set-aside for qualified small businesses, and directs the Procurement Policy Board to develop additional rules to implement the program. *See generally* HRS §§ 103D-902; 906. To date, no rules have been adopted.

Treatment under FAR 36 and Other Incorporated Federal Sources

The Federal government has an implemented small business utilization program. The program contains goals for small business utilization, an established definition of what constitutes a small business, set-asides for small business, and efforts to otherwise encourage small business participation.[60] While these programs are a factor in construction procurement, they are not specifically covered in FAR 36.

[60] *See* "Government Contracting 101 – Overview of Small Business Programs" prepared by the U.S. Small Business Administration, 2015, *available here*: https://www.sba.gov/sites/default/files/2018-02/gc101-1_workbook.pdf

Interview Findings

- The contractors interviewed described the Federal system as cumbersome and difficult to navigate.
- State parties interviewed noted that, while the legislature has enacted the statutory basis for a small business preference program, funding for the development of the program has been inconsistent. As a result, the program remains partially developed.

Analysis of Differences, Consequences, and Benefits of Alignment

According to interviews, the State's small business program is mid-development. Accordingly, no recommendation is made in this regard.

Recommendation(s) Based on FAR Alignment Analysis:

Rec. #	Details				
IV-1	Amend HRS § 103D-1001.5 in order to make the Hawaii Products Preference inapplicable to construction procurements.		✓		✓
IV-2	Repeal HRS § 103-55.6 (Act 17, SLH 2009).		✓		✓
IV-3	Amend HRS § 103D-1001.5 in order to make the Recycled Products Preference inapplicable to construction procurements.		✓		✓

Key:

Application of Best Practices		Thoughtful Contractor (& Subcontractor) Selection Process	
Process Transparency & Integrity		Consistent & Efficient Processes	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation IV-1 – Eliminate Hawaii Products Preference** and **Recommendation IV-3 – Eliminate Recycled Products Preference**, amend HRS § 103D-1001.5:

> "**Application of this part.** The preferences in this part shall apply, when applicable *and unless otherwise stated below*, to procurements made pursuant to section 103D-302, or 103D-303, or both. *The Hawaii products preference (103D-1002) and the recycled products preference (103D-1002) shall not apply to construction procurements made pursuant to sections 103D-302, or 103D-303, or both.*"

- Per **Recommendation IV-2 – Eliminate Apprenticeship Program Preference**, repeal Act 17 (SLH 2009), or HRS § 103-55.6:

> "~~**Public works construction; apprenticeship agreement.** (a) A governmental body, as defined in section 103D-104, that enters into a public works contract under this chapter having an estimated value of not less than $250,000, shall decrease the bid amount of a bidder by five per cent if the bidder is a party to an apprenticeship agreement registered with the department of labor and industrial relations for each apprenticeable trade the bidder will employ to construct the public works, and in conformance with chapter 372. The lowest total bid, taking the preference into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria. The contract amount awarded, however, shall be the amount of the price offered, exclusive of the preference.~~
>
> ~~(b) For purposes of subsection (a), in determining whether there is conformance with chapter 372, the procurement officer shall consider the actual number of apprentices enrolled in and the annual number of graduates of the apprenticeship program.~~
>
> ~~(c) At the time of submission of a competitive sealed bid or a competitive sealed proposal by a bidder, the bidder shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works and, if awarded the contract, shall continue to certify monthly in writing that the bidder is a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works for the entire duration of the bidder's work on the project. This subsection shall be deemed to be incorporated into a public works contract. A bidder who is awarded a contract shall be subject to the following sanctions if, after commencement of work, the bidder at any time during the construction is no longer a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works:~~
>
> ~~(1) Temporary or permanent cessation of work on the project, without recourse to breach of contract claims by the bidder; provided that the governmental body shall be entitled to restitution for nonperformance or liquidated damages, as appropriate; or~~
>
> ~~(2) Proceedings to debar or suspend under section 103D-702.~~

~~(d) For purposes of this section, "bidder" means an entity that submits a competitive sealed bid under section 103D-302 or submits a competitive sealed proposal under section 103D-303. [L Sp 2009, c 17, §1]~~

~~**Cross References**~~

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

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation IV-1 – Eliminate Hawaii Products Preference**, amend HAR § 3-124-1.01:

  "Applicability. (a) These rules shall apply to all *non-construction* solicitations made pursuant to sections l03D-302 and 103D-303, HRS, issued by a procurement officer when a registered and qualified Hawaii product is available.
  (b) These rules shall not apply whenever the application will disqualify any government agency from receiving Federal funds or aid."

- Per **Recommendation IV-3 – Eliminate Recycled Products Preference**, amend HAR § 3-124-22:

  "Applicability. (a) These rules shall apply to all *non-construction* solicitations issued pursuant to section 103D-302, HRS, by a purchasing agency when it is required or so stated in the solicitation.
  (b) These rules shall not apply whenever the application will disqualify any government agency from receiving Federal funds or aid."

Effort and Complexity to Implement Recommendation(s):

Recommendation IV-1 – Eliminate Hawaii Products Preference:

There is no effort involved with implementing this recommendation beyond preparing and promulgating the associated statute and rule changes. As discussed in the Analysis of Differences, Consequences, and Benefits of Alignment, removal of this preference would actually make the procurement process less complex and time intensive than it already is, and will result in less effort required overall.

Furthermore, this recommendation is not complex because it simply involves removing the practice of an unpopular preference. Implementation of this recommendation can take effect

immediately upon the statute or rule changes' finalization because the only adjustment required will be to remove an aspect of the procurement process that adds time, effort, and complexity. For more information on the estimations for time, effort, and complexity of implementing a statute or rule change, see Appendices 5 and 6.

Recommendation IV-2 – Eliminate Apprenticeship Program Preference:

There is no effort involved with implementing this recommendation beyond preparing the associated statute change. As discussed in the Analysis of Differences, Consequences, and Benefits of Alignment, removal of this preference would actually make the procurement process less complex and time intensive than it already is, and will result in less effort required overall.

Furthermore, this recommendation is not complex because it simply involves removing the practice of an unpopular preference. Implementation of this recommendation can take effect immediately upon the statute change's finalization because the only adjustment required will be to remove an aspect of the procurement process that adds time, effort, and complexity. For more information on the estimations for time, effort, and complexity of implementing a statute change, see Exhibit 2.

Recommendation IV-3 – Eliminate Recycled Products Preference:

There is no effort involved with implementing this recommendation beyond preparing and promulgating the associated statute and rule changes. As discussed in the Analysis of Differences, Consequences, and Benefits of Alignment, this preference is already rarely, if ever, used in construction procurement. Therefore, there is virtually no additional implementation effort needed as everyone is already practicing the removal of the preference as it applies to construction.

Furthermore, this recommendation is not complex because it simply involves the formalization of an already observed but informal practice. Implementation of this recommendation can take effect immediately upon the statute or rule changes' finalization because there will be no adjustment required. For more information on the estimations for time, effort, and complexity of implementing a statute or rule change, see Appendices 5 and 6.

Estimated Cost to Implement Recommendation(s):

Recommendation IV-1 – Eliminate Hawaii Products Preference:

The estimated cost of this recommendation (which involves both a statute and rule change) is $13,750.75. For more information on the estimation of cost required to implement a statute and rule change, see Exhibits 2 and 3.

For the reasons described in the Effort and Complexity section above, there are no additional costs required to implement the recommended changes beyond the promulgation of statute and rule changes; in fact, this recommendation will likely even result in cost savings realized by allowing the State to select the lowest bidder in all cases, not taking this preference into account.

Recommendation IV-2 – Eliminate Apprenticeship Program Preference:

The estimated cost of this recommendation is the cost of a statute per Exhibit 2: $6,773.44.

For the reasons described in the Effort and Complexity section above, there are no additional costs required to implement the recommended changes beyond the statute change; in fact, this recommendation will likely even result in cost savings realized by allowing the State to select the lowest bidder in all cases, not taking this preference into account.

Recommendation IV-3 – Eliminate Recycled Products Preference:

The estimated cost of this recommendation (which involves both a statute and rule change) is $7,211.53. For more information on the estimation of cost required to implement a statute and rule change, see Appendices 5 and 6.

For the reasons described in the Effort and Complexity section above, there are no additional costs required to implement the recommended changes beyond the promulgation of statute and rule changes; in fact, this recommendation will likely even result in cost savings realized by allowing the State to select the lowest bidder in all cases, not taking this preference into account.

V. Design Build ("Two-Phase") Procurement

Section Summary:

This section will analyze:

- Definition of Design-Build – the procurement method for a single contract for both design and construction
- When to Use Two-Phase Method – the determination factors and guidance for determining when design-build should be used
- Who Determines Two-Phase Use – the entity (or entities) tasked with making the determination of when to use design-build
- Evaluation Committee Determination – how the evaluation committee is chosen and what aspects of the procurement are evaluated by the committee
- Scope of Work Development – the guidance provided on developing a design-build's Scope of Work
- Preparation Time for Offer and Pre-Proposal Conference – the guidance provided on the amount of time allowed to offerors to prepare their offer after a pre-proposal conference is held
- Phase One Procedures – the methods by which a short list of offerors is selected and the evaluation criteria they are evaluated with
- Phase Two Procedures – the evaluation criteria with which short-listed offerors are evaluated and the methods by which a final contract award is determined
- Stipend / Design Fee – whether non-selected, short-listed offerors may receive compensation for participation in the design-build method

The method by which design-build procurements are facilitated under State law and Federal regulation are substantively similar at a high level. Both the State and the FAR allow for interested offerors to submit pre-qualifying proposals before a short list is selected that determines which vendors are evaluated on other, more in-depth, factors.

However, there are a few notable differences between the way FAR 36 describes two-phase procurement and the way State law describes the design-build RFP process. The FAR more clearly describes each phase of the design-build method from the beginning to the end of the procurement process. In addition to describing each phase more clearly, the FAR also provides more guidance within

each phase, dedicating entire subsections to selection and evaluation procedure descriptions while the State statute only dedicates around a quarter of a page to the three guidelines around design-build. State law treats design-build procurement as a type of RFP and therefore design-build methods are informed by the Competitive Sealed Proposals subsections of State law, which does not fully inform a design-build process. On the other hand, Federal statute treats design-build procurement as its own type of solicitation outside of a typical IFB or RFP.

One of the clearest ways State and Federal design-build laws differ is in terms of how many offerors may be short-listed to move onto the second phase of the procurement: HRS § 103D-303 sets this maximum number at three while FAR 36.3 sets this maximum number at five. However, aside from the short list requirements, the major differences between State law and FAR 36 arise from the State's Procurement Code not explicitly defining the design-build method in terms of two separate phases that each are evaluated using different criteria and procedures. While, in practice, these procedures are largely similar, many of the interviewees we discussed this topic with stated that they are unsure of how to not only determine when to use a design-build RFP, but also how to facilitate the procurement once the two-phase method is chosen. This uncertainty and lack of guidelines around design-build procurements in State rule or statute may be partially responsible for the relatively infrequent usage of design-build RFPs by State agencies. Defining the procedures and considerations around design-build RFPs in closer alignment with Federal statute will help give agencies the information they need in order to make an informed decision when choosing between utilizing an IFB or RFP for their construction project.

Section V Summary Analysis Table

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Definition of Design-Build	Design-build is a method where the State enters into a single contract for both design and construction.	The design-build method combines design and construction into a single contract with one contractor.	The two definitions are substantially similar, and the FAR goes a step further as to also define the define-build selection procedures.	*No change*
When to Use Two-Phase Method	Does not specifically advise when design-build RFPs should be used, but rather when RFPs should be used over IFBs generally.	Provides specific guidance as to what criteria should be considered when determining whether to use the design-build method, including time constraints and	The State does not provide criteria to consider when specifically determining the use of design-build RFPs as does the FAR.	**Recommendation V-1 – Provide Guidance on When to Use Two-Phase Method**: Add relevant design-build determination language into rule in order to provide more

Subtopic	HI Law	FAR 36	Comparison	Recommendation
		capability of contractors and the agency, among others.		guidance for agencies considering use of the design-build method.
Who Determines Two-Phase Use	Allows for the procurement policy board or the head of a purchasing agency to make the determination of what procurements an RFP should be used for.	The contracting officer makes the determination of when to use the design-build method.	State law allows for two potential parties to make the determination while Federal law gives only the contracting officer this ability.	*No change*
Evaluation Committee Determination	The procurement officer either chooses to evaluate the RFP alone, or they select an evaluation committee and serve as an advisor.	The contracting officer evaluates Phase One proposals alone and then selects an evaluation committee to evaluate Phase Two of the solicitation. The head of the purchasing agency may also appoint an individual to serve as the source selection authority and establish an evaluation team instead.	Both task the procurement officer with evaluation committee determination. Under State law the committee can evaluate both the first and second phase of the procurement, and under Federal law the contracting officer alone evaluates Phase One proposals and the evaluation committee evaluates Phase Two proposals.	*No change*
Scope of Work Development	No specific guidance is provided around developing the Scope of Work included in a design-build RFP.	A small subsection is devoted to a design-build procurement's Scope of Work, including what it is, who can create it, and what requirements should be included in it.	Federal law provides specific (though minimal) guidance on a design-build's Scope of Work development while State law does not.	*No change*
Preparation Time for Offer and Pre-Proposal Conference	For a design-build project with a total estimated contract value of $100,000 or more, a pre-proposal conference must be held at least fifteen days prior to the due date for proposals.	Does not provide any specifications regarding preparation time or pre-proposal conference procedures for design-build procurements.	State law provides specifications around pre-proposal conferences while Federal law does not.	*No change*
Phase One Procedures	State law does not describe Phase One	Federal law has a specific subsection	State law does not describe the design-	**Recommendation V-2 – Provide**

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	for a design-build RFP or define specific pre-short list procedures, but does require that a short list of a maximum of three offerors is chosen to pre-qualify offerors.	for Phase One procedures, including the evaluation criteria to be used. The short list must include a maximum of five offerors, though this can be raised with approval.	build method in terms of phases as Federal law does. Additionally, the State's short list includes a maximum of three offerors while the Federal short list allows for up to five offerors.	**Guidance on Short List Development**: Add clarifying language surrounding Phase One procedures and evaluation factors into rule in order to provide more guidance for agencies utilizing the design-build method.
Phase Two Procedures	State law does not describe Phase Two for a design-build RFP or define specific post-short list procedures. Based on RFP evaluation methods, best and final offer discussions may be held with short-listed offerors but negotiation discussions to mutually revise cost or technical approach is not contemplated.	Federal law has a specific subsection for Phase Two procedures, including the evaluation criteria and the contracting by negotiation method to be used. Negotiated discussions may be held with multiple short-listed offerors prior to award based on technical and price factors.	State law does not describe the design-build method in terms of phases as Federal law does. Additionally, the FAR allows for contracting by negotiation while State law's RFP procedures only allow for discussion in the form of best and final offers or clarifications.	**Recommendation V-3 – Provide Guidance on Selecting a Contractor from the Short List**: Add clarifying language surrounding Phase Two procedures and evaluation factors into rule in order to provide more guidance for agencies utilizing the design-build method.
Stipend / Design Fee	State law allows for design-build RFPs to include the payment of a conceptual design fee to non-selected offerors that submit a technically responsive proposal if the project costs at least $1,000,000.	The FAR does not contemplate the payment of a conceptual design fee, but does not explicitly disallow it either.	State law expressly allows for the use of a conceptual design fee; Federal law is silent on the issue but the use of stipends for unsuccessful offerors in a design-build RFP is encouraged on the Federal level by an OMB Circular. Neither the State nor the Federal law provide guidance on the fee's calculation.	*No change*

Subtopic – Definition of Design-Build

State Law Treatment

HRS § 103D-104 defines "design-build" as "a project delivery method in which the procurement officer enters into a single contract for design and construction."

Treatment under FAR 36 and Other Incorporated Federal Sources

FAR 36.102 defines "design-build" as "combining design and construction in a single contract with one contractor." In the same section, the FAR also defines "Two-phase design-build selection procedures" as "a selection method in which a limited number of offerors (normally five or fewer) is selected during Phase One to submit detailed proposals for Phase Two."

Interview Findings

- No interviews touched on this subject specifically.

Analysis of Differences, Consequences, and Benefits of Alignment

The State and Federal definitions of "design-build" are very similar and have no appreciable differences. It may be worth noting that the FAR goes a step further than the State Procurement Code in that it defines the selection procedures used in the two-phase process in addition to defining the term "design-build." However, the addition of a comparable definition to HRS § 103D-104 would not materially benefit the State's Procurement Code (and is obviated by recommendations below), so no change is recommended.

Subtopic – When to Use Two-Phase Method

State Law Treatment

HRS § 103D-303 does not provide extensive detail around when the two-phase design-build method should be used. In fact, HRS § 103D-303(i) only lists three provisions specifically around design-build. These provisions reference a short list, the option of a conceptual design fee, and the information that must be included in the RFP. *Id.*

However, as design-build is a type of competitive sealed proposal, guidance in these sections of State law regarding when to utilize RFPs in a procurement may be interpreted to apply to design-build RFPs as well. Please see Section II Subtopic – Solicitation Method for a discussion of State law regarding the use of competitive sealed proposals for construction.

Treatment under FAR 36 and Other Incorporated Federal Sources

Unlike State Law, design-builds are their own type of procurement method under Federal law and are not treated as a type of RFP. As such, the FAR provides specific detail around when the two-phase design-build method should be employed. FAR 36.301(b) describes how the decision to use the two-phase method is based on the following factors:

- If three or more offers are anticipated.

- Design work must be performed by offerors before developing price or cost proposals, and offerors will incur a substantial amount of expense in preparing offers.
- A consideration of the following criteria:
    - The extent to which the project requirements have been adequately defined.
    - The time constraints for delivery of the project.
    - The capability and experience of potential contractors.
    - The suitability of the project for use of the two-phase selection method.
    - The capability of the agency to manage the two-phase selection process.
    - Other criteria established by the head of the contracting activity.

Interview Findings

- The vast majority of interviewed State agencies could not cite any particular guidance for when to use the design-build method and many expressed a desire for more clear instructions.
- Multiple interviewees suggested that either this lack of guidance on when to use design-build or the fact that design-bid-builds (traditional "three-phase" IFB-based construction procurement) are what the State understands best and is most comfortable with, are the reasons why design-build RFPs are used relatively infrequently compared to IFBs.
- Other observations that interviewed agencies provided when discussing the determination of using a design-build RFP include:
    - Certainty and expectations: Some interviewees suggested design-builds are more commonly used when the State doesn't have preconceived expectations, unlike a project like building a school with specific requirements.
    - Time: Some interviewed agencies said that design-build RFPs are more often chosen when there is a time constraint. Other interviewees, however, disagreed that design-build projects are faster and claimed this is a false perception, even countering that sometimes these projects actually take longer than a typical IFB.
    - Money: Some interviewed agencies said that larger, multi-million-dollar projects are more likely to be procured through the two-phase method. However, interviewees noted that the money available for design-build RFPs must be determined before the RFP is published, which may be a limiting factor on projects with less certain budgets.
    - Capability: Different agencies cited agency capability as a reason for or against choosing to use the design-build method. While some agencies find that IFBs require more in-

house work for the agency, others said that design-build RFPs actually require more staff resources to manage. Depending on the agency's perception of comparative effort and in-house capabilities, interviewees said they may issue a design-build RFP when they recognize they don't have the in-house capability for an IFB, or vice versa.

- Risk: One criterion in the determination of the use of design-build RFPs that was mentioned multiple times across various agencies is the risk transfer factor. Some interviewees noted that an agency may choose to issue a design-build RFP when they would prefer to shift the risk associated with insufficient design plans and their construction impact to a contractor rather than taking it on themselves.[61]

Analysis of Differences, Consequences, and Benefits of Alignment

While Federal law treats design-build procurement as its own entity, State law treats design-builds as a type of RFP. Furthermore, the FAR dedicates a subsection to describing what criteria to use to determine when to use the two-phase method while State law provides notably less specific guidance on this subject. Various interviewed agencies said that they would appreciate more State guidance on when the two-phase method should be utilized.

State law describes when RFPs should be used generally, and these factors are described in relation to bidding, including when bidding is not practicable or advantageous to the State. This direction fits with the narrative that multiple interviewed agencies described about bidding being the typical method used for construction procurement and design-build RFPs as a rarely used alternative. Federal law does not describe use of the two-phase method in relation to the sealed bidding method, but rather provides a list of project-specific considerations regarding requirements, time constraints, contractor experience and capability, the sustainability of the project, and the agency's capability to manage a two-phase procurement. The FAR does not say whether this method is more or less time or effort intensive than sealed bidding.

The State could benefit from aligning with the FAR by more clearly defining the two-phase determination criteria. **Recommendation V-1 – Provide Guidance on When to Use Two-Phase Method** proposes to add design-build determination language into HAR § 3-122-43, thus aligning it

[61] This risk is assumed by the State in a traditional three-phase method because, when the State issues an IFB for a construction project, it is assuming the risk associated with those plans' accuracy vis-à-vis the contractor building the project. Theoretically the State can pursue damages from the Design Professional if the design work is insufficient and the cause of, for example, cost overruns. However, in a two-phase method, the State never issues a solicitation with designs, and, thus does not assume responsibility for their accuracy or completeness in construction.

more with its Federal analog and the applicable criteria listed in the FAR. This will provide agencies the same guidance afforded to their Federal counterparts when considering use of the design-build method.

Rather than agencies implicitly applying RFP determination criteria to design-build procurements or making this determination through undefined considerations, or agencies using their own subjective impressions on the method's suitability, the State should explicitly identify what should be considered in deciding to pursue a design-build RFP. This guidance could provide agencies with the guidance they feel they are currently lacking, and help streamline the IFB vs. design-build determination process.

Subtopic – Who Determines Two-Phase Use

State Law Treatment

Similar to how it does not provide detailed guidance on *when* to use the design-build method, State law also does not provide explicit direction as to *who* makes this determination. Instead, as with most of the guidance related to the two-phase method under State law, the details can be interpreted by extrapolating direction from the Competitive Sealed Proposals subsection of State statutes and rules. According to HAR § 3-122-45(a), the procurement policy board makes the determination of when to use competitive sealed proposals as they are able to "approve a list of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency."

However, if the specific procurement is not included on the "Procurements Approved for Competitive Sealed Proposals" list, an RFP – and therefore a design-build RFP – may still be conducted. The head of a purchasing agency can "determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous" for both individual construction procurements as well as categories of construction procurements. *See* HAR § 3-122-45(c).

After this determination is made by either the procurement policy board's list or the head of the purchasing agency, a procurement officer may then issue an RFP that requests submissions of proposals for the provision of construction based on a design that the offeror provides as well as submission of a single price that incorporates the costs of both the design and build aspects. *See* HAR § 3-122-45(d).

Treatment under FAR 36 and Other Incorporated Federal Sources

Under FAR 36.301, use of the two-phase design-build process is determined by the contracting officer. Unlike State law, Federal law does not allow for this determination to be made by various entities and tasks only the contracting officer with this responsibility.

Interview Findings

- Most interviewees did not cite a particular entity that decides when a design-build RFP will be used in their construction procurements.
- Some interviewees stated that in the past they have been given instruction to use design-build (*e.g.* an interviewed agency recalled that in the 1990s, a statute or Federal funding mandate called for the use of design-build RFPs for school buildings).

Analysis of Differences, Consequences, and Benefits of Alignment

While State law allows for the procurement policy board or the head of a purchasing agency to make the determination of when to procure using an RFP, Federal law tasks only the contracting officer with this determination. No interviewed agency suggested having any issues with the entity who makes the decision to use a particular procurement method and there is no identifiable benefit in narrowing this responsibility to one person, as this would make the determination process less flexible than it is currently. Therefore, there no recommended change to State law as there is no determinable benefit to aligning with the FAR on this topic.

Subtopic – Evaluation Committee Determination

State Law Treatment

As an RFP, prior to preparation of the design-build procurement, State law requires a decision to be made by the procurement officer regarding who will evaluate the proposals. *See* HAR § 3-122-45.01 Either the procurement officer will choose to evaluate the proposals themselves,[62] or select an evaluation committee that consists of "at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured," the contract administrator, and potentially private consultants that meet the requirements in the section. *Id.*

[62] It is atypical to afford this level of discretion and authority to a single individual without further oversight. As this is a rule of application to all RFPs this report declines to recommend a sweeping change with impacts outside of construction. It also bears noting that all interviewees who had conducted design-build RFPs had convened an evaluation committee.

Additionally, should an evaluation committee be chosen, the contract administrator must serve as a member of the evaluation committee and either the contract administrator or a designee "shall serve as chairperson, and the procurement officer or a designee shall serve as advisor." *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

Under the FAR, a single design-build evaluation committee (if any) is not determined at the outset of the procurement. Instead, different parties conduct evaluation of the two-phase procurement, depending on the phase. In Phase One, the contracting officer evaluates the initial set of proposals and selects which offerors can move onto the second phase. *See* FAR 36.303-1(b).

For Phase Two of the process, the FAR follows Part 15, "Contracting by Negotiation." FAR 15.303 states that either the contracting officer or the individual that the agency head appoints is the source selection authority who establishes an evaluation team "tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers." This evaluation team later evaluates Phase Two proposals.

Interview Findings

- No interviews touched on this subject specifically.

Analysis of Differences, Consequences, and Benefits of Alignment

State and Federal law both task the procurement officer (called the contracting officer, in the FAR) with the determination of the evaluation committee. However, the way in which this committee operates during the evaluation of a two-phase procurement varies. While State law allows for the procurement officer to choose to evaluate the entire RFP on their own or select an evaluation committee, Federal law requires the contracting officer to evaluate Phase One proposals on their own and choose an evaluation team to evaluate Phase Two proposals. Additionally, the State provides more guidance as to who could serve on the evaluation committee, while the FAR does not detail who may be chosen and why.

While there is a slight difference in when and how these evaluation committees operate, it is not advisable to change State law to align with Federal law by mandating that the procurement officer evaluates proposals on their own for the first phase and select a team for the second phase. In fact, this change would likely introduce more rigid requirements for a process which no interviewed agency took issue with. Therefore, no benefit can be gained by changing this procedure.

Subtopic – Scope of Work Development

State Law Treatment

Neither HRS § 103D-303 nor HAR's Subchapter 6 provide any specific guidance as to how to develop the Scope of Work included in a design-build RFP. However, HAR § 3-122-46(1) states that when an RFP should include the "specifications for the goods, services, or construction items to be procured, including a description of the performance or benefit required." This direction could apply to information included either in the RFP itself, or the Scope of Work.

Treatment under FAR 36 and Other Incorporated Federal Sources

Federal law provides some guidance on the development of a two-phase procurement's Scope of Work. According to FAR 36.302, a Scope of Work which "defines the project and states the Government's requirements" can be developed in-house by the agency or the drafting can be contracted out. Additionally, details within the scope of work "may include criteria and preliminary design, budget parameters, and schedule or delivery requirements." *Id.*

Interview Findings

- No interviews touched on this subject specifically.

Analysis of Differences, Consequences, and Benefits of Alignment

Federal law provides specific guidance on a design-build's Scope of Work development while State law does not. However, the level of guidance provided in the FAR is notably minimal and does not provide detail that would be beneficial to mirror in State statute or rules.

In addition, no interviewed agencies cited any difficulties in determining how to develop a design-build RFP's Scope of Work. As the details of a Scope of Work vary widely based on both agency and procurement, any guidance on Scope of Work development would need to be generalized and would be best determined by agencies own policies learned through experience. Therefore, it is not recommended that any changes be made to align this aspect of State law to the FAR.

Subtopic – Preparation Time for Offer and Pre-Proposal Conference

State Law Treatment

Under HRS § 103D-303.5, "at least fifteen days prior to submission of proposals pursuant to section HRS § 103D-303 for a construction or design-build project with a total estimated contract value of $100,000 or more" a pre-proposal conference shall be held. The head of the purchasing agency hosts the conference and is directed to invite any potentially interested offerors, subcontractors, and union representatives. *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

Federal law does not provide any specifications regarding preparation time or pre-proposal conference procedures for design-build procurements.

Interview Findings

- No interviews touched on this subject specifically.

Analysis of Differences, Consequences, and Benefits of Alignment

As the FAR does not provide any guidance on this subject and State law does, it is not recommended that any changes be made to align with Federal law. The State's law evinces an understanding of the benefits of holding pre-proposal conferences (*e.g.* ensuring clarity in the solicitation documents, answering vendor questions) and no purpose is served by eliminating this step.

Subtopic – Phase One Procedures

State Law Treatment

State law does not describe the design-build RFP process in terms of two separate phases specific to this procurement method. However, earlier versions of the legislation creating the design-build method did: SB 779,[63] the bill which amended HRS § 103D-303 in 2011 to introduce the design-build method, initially included a delineation of the process into two separate phases. Based on public testimony[64] around SB 779, it should be noted that while most parties supported the language, some agencies (including DAGS and DOT) requested that the specific two-phase language be removed in order to provide for more flexibility outside of the two defined phases. While the final language in statute did not include the terms "Phase One" and "Phase Two," the language specifying a short list of offerors prior to receiving full proposals necessarily segmented the process into a phased approach. For the purposes of this analysis, "Phase One" will refer to the procedures that take place prior to determining a short list of offerors to submit full technical and price proposals.

Although State law does not explicitly outline procedures for each phase of the design-build method, information on Phase One procedures can be gleaned from the direction provided for RFPs in general in the Competitive Sealed Proposals Subsection 6 of the HAR. According to this section, an RFP must "state the relative importance of price and other evaluation factors." *See* HRS § 103D-303(e). HAR § 3-122-46 provides further guidance on what evaluation factors may be included in the RFP, including

[63] *Available here*: https://www.capitol.hawaii.gov/session2011/testimony/SB779_HD1_TESTIMONY_FIN_03-30-11_4_.PDF

[64] *Available here*: https://www.capitol.hawaii.gov/session2011/testimony/SB779_TESTIMONY_PGM_02-12-11.pdf

but not limited to: the offeror's technical capability and approach to meeting the requirements of the RFP; the reasonableness and competitiveness of the offeror's price; their managerial capabilities; and best value factors.

The HAR also expands on other elements that are to be included in RFPs, including a statement on when and how prices should be submitted, the applicable contractual terms and conditions, the contract term, pre-proposal conference instructions, and a statement that "discussions may be conducted with 'priority-listed offerors' pursuant to section HAR § 3-122-53, but that proposals may be accepted without discussions." *Id.*

Furthermore, HAR § 3-122-52 states that the RFP must set forth the evaluation factors and only evaluate proposals based on those factors. In order to evaluate proposals, a "numerical rating system shall be used" and the "relative priority to be applied to each evaluation factor shall also be set out in the request for proposals." *Id.*

HRS § 103D-303(i)(3) provides more design-build specific guidance on the evaluation criteria to be included in the RFP for a two-phase procurement. This section advises that the RFP must state the "criteria for pre-qualification of offerors, design requirements, development documents, proposal evaluation criteria, terms of the payment of a conceptual design fee, or any other pertinent information."

Although not explicitly stated in either the statute or rules, in practice (as determined through interviews) cost is not evaluated in the first phase of a design-build procurement before a short list of prequalified offerors is selected to move on to the second phase.

Based on the evaluation of the criteria for pre-qualification of offerors, a "short list of no more than three responsible offerors" is selected prior to the submittal of the full proposals. *See* HRS § 103D-303(i)(1). The precise number of offerors to be selected for this short list must be stated in the RFP, and prompt notice must be given to those short-listed offerors after the decision has been made. *Id.*

Under the Competitive Sealed Proposals Subsection 6 of the HAR, there is also guidance provided on the potential use of a "priority list" of responsible offerors who submit "acceptable or potentially acceptable proposals." *See* HAR § 3-122-53. This list could be generated by either the procurement officer or evaluation committee prior to conducting any discussions with offerors, and the list must be limited to "at least three responsible offerors who submitted the highest-ranked proposals." *Id.* The guidance of "at least three" offerors for the priority list of RFPs contrasts slightly with the guidance of a short list of "no more than three" offerors for design-build RFPs in particular, but the statutory language controls.

For the purposes of this analysis, Phase One of the design-build process is considered over, after the selection of the short list has taken place.

Treatment under FAR 36 and Other Incorporated Federal Sources

Unlike State law, Federal law clearly defines each phase of the design-build process and the procedures that take place throughout Subpart 36.3 of the FAR. FAR 36.303 also notes that one solicitation can be issued that covers both phases of the procurement, or alternatively two solicitations may be issued in succession for each phase.

In practice, the evaluation of Phase One proposals under Federal law is very similar to the evaluation of Phase One proposals under State law. The solicitation includes a Scope of Work for the project and must list the evaluation criteria for both phases of the solicitation and include a statement on how many offerors are anticipated to be shortlisted onto the second phase of the evaluation. *See* FAR 36.303-1(a). Phase One evaluation criteria include the offeror's technical approach and qualifications as well as any non-cost or price related factors, which are not permitted in Phase One. *Id.* The technical approach does not include detailed technical design information, as this is evaluated during Phase Two. *Id.* Additionally, the technical qualifications evaluated may include specialized experience and technical competence, performance capability, and past performance of the team. *Id.*

Unlike State law, Federal law does not require that the rating method for each evaluation factor be listed in the RFP. However, according to FAR 15.304 which governs the Phase Two evaluation of the design-build solicitation, the solicitation does have to state whether all non-cost or price evaluation criteria, when combined, are significantly more, less, or equally important compared to cost or price.

After the contracting officer evaluates Phase One proposals, a short list based on the maximum number stated in the solicitation is chosen. *See* FAR 36.303-1. This number differs from that specified in State law: rather than a maximum of three offerors, Federal law allows for up to five potential offerors to move on to the second phase. The FAR allows for more flexibility than State law in that if the contracting officer determines "that a number greater than five is in the Government's interest and is consistent with the purposes and objectives of two-phase design-build selection procedures," then an exception can be made. *Id.* However, for contracts resulting in an award of greater than $4 million, additional approval is needed for this decision. *Id.*

Like State law, for the purposes of this analysis, Phase One of the design-build process is considered over after the selection of the short list has taken place.

Interview Findings

- Interviewees confirmed that neither cost nor price is evaluated in the first phase of design-build RFPs prior to the selection of the short list.
- Interviewed agencies also said that the detailed technical design proposal is not submitted until after the short list has been established.
- Some interviewees said that in their experience, design-build RFPs do not receive as many responses as IFB-based solicitations.
- Generally, interviewed agencies believed that the maximum threshold of three offerors is appropriate for the short list, though one agency expressed interest in having a higher maximum option and suggested that they like the flexibility offered the FAR.
- Some interviewees noted that allowing for only three short-listed offerors could mean that competition may be stymied.
- One interviewed agency mentioned the confusion created by the guidance of "no more than three" short-listed offerors in HRS § 103D-303(i)(1) compared to the guidance of "at least three" priority listed offerors in HAR § 3-122-53.

Analysis of Differences, Consequences, and Benefits of Alignment

Although Federal law and State law procedures around the first phase of the design-build process are substantially similar in practice, the amount of guidance provided by the FAR for how Phase One evaluation is conducted is significantly higher than that provided by State statute and rules. State law does not describe the design-build method in terms of phases as Federal law does. Furthermore, State law does not describe the precise evaluation factors to be utilized in a design-build RFP, though the HAR does provide guidance on what evaluation factors may be used in RFPs generally. While both Federal and State law require that the evaluation factors be stated in the solicitation, State law goes a step further and requires that the relative priority of each evaluation factor, including price, be included in the RFP. Though not stated explicitly in State law, design-build procurements in both State and Federal law do not evaluate price or detailed technical plans in the first phase of evaluations.

Recommendation V-2 – Provide Guidance on Short List Development suggests clarification surrounding Phase One procedures and evaluation factors in HAR § 3-122-52. This recommended change to State rules is informed by the language included in the FAR, but will not change current practices. Rather, the proposed change will clarify the design-build process in terms of the phases that exist in practice today, though does not delineate the phases with the terms "Phase One" and "Phase

Two" in order to allow agencies the flexibility requested during the initial hearings for SB 779, while also providing needed guidance on what factors are evaluated before short list selection. By including language that aligns with the FAR in specification of Phase One procedures, State agencies will be afforded more guidance specific to design-build procurements. In turn, this enhanced understanding may encourage agencies to utilize the two-phase method more often when it would benefit their project.

Another Phase One topic where State and Federal law differ is the maximum number of short-listed offerors that can move on to the second evaluation phase: the State sets this number at three while the Federal system sets this number at five. It is worth noting that SB 779 at one point included the suggestion of up to five offerors for the short-list, but was later changed to the standard of "no more than three" that now exists. Although one interviewed agency said that they preferred the flexibility allowed by the FAR by setting this maximum limit higher and allowing it to be raised even higher with approval, most interviewees believed that three was a sufficient guideline.

Furthermore, the Design-Build Institute of America ("DBIA"), a group that researches and advocates for design-build best practices, stresses the importance of limiting the number of short-listed offerors at the Federal level and adhering to a maximum of five finalists rather than allowing agencies to raise this amount higher with approval.[65] The DBIA notes that when the number of finalists that move on to Phase Two is not limited to five or fewer, "highly qualified design-builders are less likely to participate, small businesses are crowded out, innovation is discouraged, and quality is driven down." *Id.* This impact may be exacerbated in Hawaii which has unique market considerations given its size and location. Considering the sentiment that few offerors submit proposals to State-issued design-build RFPs compared to other procurement methods, that the number of potential design-build offerors is much lower in the State arena compared to the Federal arena, and that this short-list guideline of "no more than three" has sufficiently allowed agencies to conduct these procurements when needed, changing State law's language around the short list is not recommended in order to align with the FAR.

Subtopic – Phase Two Procedures

State Law Treatment

As noted in "Phase One Procedures" above, State law does not describe the design-build procurement method in terms of phases or separate procedures by phase. However, based on information included in the Competitive Sealed Proposals sections of State law as well as what can be observed in

[65] *See* https://dbia.org/advocacy/federal/

practice, Phase Two of the two-phase method includes the short-listed offerors from Phase One submitting their technical and price proposals, which are evaluated based on the criteria stated in the RFP.

HAR § 3-122-52(d) describes briefly how cost is evaluated in RFPs: the proposal with the lowest cost factor receives the highest cost rating, and any proposal with a cost factor higher than the lowest cost factor proposal receives a lower rating for cost. In addition, whichever points are allocated to the "higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price." *Id.*

As with other competitive sealed proposals, a design-build RFP by inclusion must also allow for an evaluation factor that takes into account "whether an offeror qualifies for any procurement preferences pursuant to chapter 3-124." *See* HAR § 3-122-52(e).

HAR § 3-122-53 allows for discussions to take place between the State and priority-listed offerors of an RFP. State law is not clear regarding whether these priority-listed offerors are equivalent to a design-build RFP's short-listed offerors. If the rules are interpreted to apply to design-build RFPs, then these discussions may be held to promote an understanding of both State requirements and offerors proposals, and "facilitate arriving at a contract that will provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals." *Id.*

The procurement officer establishes the procedures for any discussions that take place and is responsible for scheduling the meetings. HRS § 103D-303(f) states that if these discussions are conducted, "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers." Any information derived from these discussions or an offeror's proposal may not be disclosed to competing offerors during these discussions. *Id.*

After the Phase Two evaluation of proposals takes place, including technical and price proposal evaluations and any potential discussions or best and final offers, an award recommendation is made. This award is given "to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals." *See* HAR § 3-122-57.

Treatment under FAR 36 and Other Incorporated Federal Sources

Phase Two procedures are outlined in FAR 36.303-2. This section states that Phase Two of a design-build procurement is conducted in accordance with Part 15 of the FAR, "Contracting by

Negotiation." Offerors who have been selected to move onto Phase Two of the solicitation must submit technical and price proposals, which are evaluated separately. *Id.* Examples of technical evaluation factors include "design concepts, management approach, key personnel, and proposed technical solutions." *Id.*

In terms of cost evaluation, FAR 15.305(a)(1) states that "when contracting on a firm-fixed-price or fixed-price with economic price adjustment basis, comparison of the proposed prices will usually satisfy the requirement to perform a price analysis, and a cost analysis need not be performed." On the other hand, if the contract is paid on a cost-reimbursement basis, "evaluations shall include a cost realism analysis to determine what the Government should realistically expect to pay for the proposed effort, the offeror's understanding of the work, and the offeror's ability to perform the contract." *Id.* The contracting officer conducts the cost evaluation and may share this information with members of the technical evaluation team depending on the agency's procedures. S*ee* FAR 15.305(a)(4).

Aside from the cost evaluation component, proposals are also evaluated based on past performance of the offeror (if applicable), as well as "an assessment of each offeror's ability to accomplish the technical requirements." S*ee* FAR 15.305(a)(2) and (3). The results of these evaluations include a ranking of offerors and summary narrative. *Id.*

After the evaluation of Phase Two offerors' proposals, an award may be made either with or without discussions. The government must state in the solicitation whether it plans to award with or without discussions. S*ee* FAR 15.306(a). If discussions do not take place, clarifications may still take place and an offeror may still "be given the opportunity to clarify certain aspects of proposals (*e.g.* the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors." *Id.*

Alternatively, if the solicitation allows for an award to be made after discussions, "the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals." *See* FAR 15.306(c). After the competitive range has been established, the government then proceeds to engage in negotiations with offerors that may include discussions around "price, schedule, technical requirements, type of contract, or other terms of a proposed contract." FAR 15.306(d). As part of the discussions, offerors may be given the opportunity to partake in "proposal revisions to clarify and document understandings reached during negotiations." *Id.* Ultimately, the primary goal of these discussions is "to maximize the Government's ability to obtain best value" from the resulting contract. *Id.*

After these discussions with offerors in the competitive range are concluded and a fair-and-reasonable contract price is negotiated with the successful offeror, a contract is awarded and any unsuccessful offerors are notified. S*ee* FAR 15.503 and 15.504.

Interview Findings

- No interviews touched on this subject specifically.

Analysis of Differences, Consequences, and Benefits of Alignment

While Federal and State Phase One procedures are substantially similar in practice, the procedures used in Phase Two of a design-build solicitation are notably different. State law provides significantly less guidance on how to conduct Phase Two evaluations for two-phase RFPs than Federal law. In fact, State law does not even explicitly note that in design-build RFPs, cost and technical proposal submissions are not made until the second part of the two-phase process.

Per the Competitive Sealed Proposals subsections of State law, once these proposals are submitted and evaluated, the technical and price terms of the selected proposal are then included as part of the contract unless a best and final offer takes place. Discussions may take place with all remaining vendors in order to facilitate an understanding and clarify elements that the State wishes to discuss in further detail, but once any best and final offers are submitted, these terms inform the contract without any additional negotiations or changes.

In contrast, under Federal law, after the technical and price evaluations are concluded, negotiations may take place that allow for multiple rounds of discussions and revisions to an offeror's original proposal. Price negotiation is a significant portion of these discussions and the final contract price is negotiated and agreed upon by both the State and offeror before a final contract is awarded or signed.

Changing State law to allow for these more extensive design-build negotiations in alignment with the FAR would conflict with the procedures currently outlined for competitive sealed proposals generally. The State does not conceive of allowing for multiple rounds of RFP negotiations to take place prior to award with different offerors at once outside of the best and final offer discussions in any part of the statute or rules. Changing the statute and rules to reflect a completely new contracting by negotiation process would require a significant procedural shift as well as significant time and effort spent training staff on how to conduct these negotiations, without adding any appreciable benefit.

However, while it is not recommended to change Phase Two evaluation procedures in order to align precisely with the FAR's contracting by negotiations method, it is recommended to clarify Phase Two evaluation factors in State rules in closer alignment with the FAR to provide design-build specific

guidance in place of the not-directly-applicable RFP guidance. State law is not clear on what procedures should be used specifically when conducting the post-short list phase of evaluations for design-build RFPs and how these procedures may differ from those outlined for RFPs in general. **Recommendation V-3 – Provide Guidance on Selecting a Contractor from the Short List** suggests adding language to HAR § 3-122-52 that discusses how "Phase Two" evaluation factors differ from those utilized in Phase One.

Subtopic – Stipend / Design Fee

State Law Treatment

According to HRS § 103D-303(i)(2), design-build RFPs may include the payment of a conceptual design fee to "non-selected offerors that submit a technically responsive proposal; provided that the cost of the entire project is greater than $1,000,000." If a conceptual design fee is offered for the project, the terms of the payment must be listed in the RFP. *See* HRS § 103D-303(i)(3).

Neither statute nor code provide guidance on when this fee should be utilized, aside from the minimum threshold of the project costing more than $1,000,000. Furthermore, State law does not provide guidance on how to calculate the amount of the fee provided.

Treatment under FAR 36 and Other Incorporated Federal Sources

Unlike State law, the FAR does not mention the use of a conceptual design fee for non-selected offerors. However, OMB Circular No. A-11 (2019) does discuss the use of "stipends" for non-selected offerors on page 29 of the Capital Programming Guide, including by noting that proposal development for Phase Two offerors is costly and therefore the stipend may improve the quality of firms that submit proposals and encourage full effort from offerors if the government offers a stipend to signal their serious intent to carry the project forward.

Interview Findings

- Interviewed agencies were generally familiar with the concept of a conceptual design fee and a majority, though not all, of those who had executed design-build RFPs had used the fee.
- The methods of calculating the fee differed from agency to agency. Some interviewees said the fee is calculated by conducting market research on the industry, others calculated the fee on the basis of a general assessment of what is reasonable for the project and what the agency is willing to pay for quality proposals.
- When agencies base their fee determination on the specific project, some choose to calculate it as a percentage of the total value of the project.

- Generally, interviewed agencies could not cite specific State guidance on how and when to utilize this fee or calculate its amount.

Analysis of Differences, Consequences, and Benefits of Alignment

While State law expressly allows for the use of a conceptual design fee, Federal law is silent on the issue. However, the use of stipends for unsuccessful offerors in a design-build RFP is encouraged on the Federal level by OMB Circular No. A-11. Guidance on the specific calculation of this fee through any kind of formula-based analysis, however, is not provided by either the State or Federal Government.

As the current statute allows for flexibility in providing this fee at the discretion of the procurement officer and/or purchasing agency, no benefit would be gained by removing mention of the conceptual design fee from State law in order to align with the FAR. Additionally, though there is not standard guidance on how to calculate this fee, interviewed agencies have cited that they use methods that work best for their own agency in making the determination of the amount. Therefore, it is not recommended that any change be made to this provision in either statute or rule.

Recommendation(s) Based on FAR Alignment Analysis:

Rec. #	Details				
V-1	Include, in HAR § 3-122-43, determination criteria that may be considered when considering a design-build procurement.	✓	✓		✓
V-2	Include, in HAR § 3-122-52, a description of evaluation criteria and solicitation procedures to be used in design-build RFPs when determining the short list of offerors.	✓	✓		✓
V-3	Include, in HAR § 3-122-52, a description of evaluation criteria and solicitation procedures to be used in design-build RFPs after determining the short list of offerors.	✓	✓		✓

Key:

Application of Best Practices		Thoughtful Contractor (& Subcontractor) Selection Process	
Process Transparency & Integrity		Consistent & Efficient Processes	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- None

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation V-1 – Provide Guidance on When to Use Two-Phase Method**, add the following to the end of HAR § 3-122-43 as subsection (e):

> "*(e) Pursuant to section 103D-303(i), HRS, in addition to any other provisions of this section, construction may be solicited using competitive sealed proposals with the design-build method. When determining whether the design-build method is appropriate, the following criteria may be considered:*
>
> *(1) The extent to which the project requirements have been adequately defined;*
> *(2) The time constraints for delivery of the project;*
> *(3) The capability and experience of potential contractors;*
> *(4) The suitability of the project for use of the design-build selection method;*
> *(5) The capability of the agency to manage the design-build selection process.*
> *(6) Other criteria established by the purchasing agency or procurement officer."*

- Per **Recommendation V-2 – Provide Guidance on Short List Development**, add the following to the end of HAR § 3-122-52 as subsection (g):

> "*(g) Pursuant to section 103D-303(i), HRS, in addition to any other provisions of this section, if soliciting a construction project using the design-build method, the initial step of this process shall include issuing a request for proposals to pre-qualify offerors to select a short list of no more than three responsible offerors based on the following evaluation criteria:*
>
> *(1) Technical approach (but not detailed design or technical information);*
> *(2) Technical qualifications, such as*
> *(A) Specialized experience and technical competence;*
> *(B) Capability to perform;*
> *(C) Past performance of the offeror's team (including the architect engineer and construction members); and*
> *(3) Other appropriate factors (excluding cost or price related factors, which are not evaluated prior to determining the short list).*"

- Per **Recommendation V-3 – Provide Guidance on Selecting a Contractor from the Short List**, add the following to the end of HAR § 3-122-52 as subsection (h):

> "*(h) Pursuant to section 103D-303(i), HRS, in addition to any other provisions of this section, if soliciting a construction project using the design-build method, after identifying the short-listed offerors, the short-listed offerors may then be evaluated based on the following evaluation criteria:*
>
> *(1) Any criteria initially used in the evaluation of the pre-qualification of offerors;*
> *(2) Detailed design and technical information;*
> *(2) Cost or price related factors;*
> *(3) Other criteria as stated in the request for proposals.*"

Effort and Complexity to Implement Recommendation(s):

For each of the three recommendations listed in this section there is little effort involved with implementing the recommendation because, although State law is not prescriptive on these design-build procedures, they are already observed in practice. Beyond preparing and promulgating the associated rule changes, there is virtually no additional implementation effort needed.

Furthermore, these recommendations are not complex because they simply involve the formalization of an already observed but informal practice. Implementation of each of these recommendations can take effect immediately upon the rule changes' finalization because there will be no adjustment required. For more information on the estimations for time, effort, and complexity of implementing a rule change, see Exhibit 3.

Estimated Cost to Implement Recommendation(s):

The cost to implement these recommendations is $20,931.93, the cost of three individual rules.

For the reasons described in the section above, there are no additional costs required to implement the recommended changes beyond the regulations' promulgation as there are no materials to update or procedures to change. For more information on the estimation of cost required to implement a rule change, see Exhibit 3.

VI. Required Contract Clauses

Section Summary:

Both the FAR and State law require the inclusion of certain contract clauses for construction and Design Professional contracts. FAR 36 requires certain clauses to be included in most[66] Design Professional and construction contracts, the language of which is found in FAR Part 52. The State also requires certain conditions to be inserted, and most of these can be found in the General Terms and Conditions from PWD.[67]

There was not an appreciable difference between the clauses required by the FAR and their analogs in the State's boilerplate contract. Of the 27 clauses required by the FAR in Federal contracts, there are equivalent State analogs or practices for 26 of them. Thus, this is not an area where there is a material disconnect between State and Federal practices.

The 27th clause for which there is no State analog relates to clarifying who is responsible for the expenses related to utilities used in construction (*e.g.* the electricity or water used in the construction of a building or any temporary hook ups required to obtain utilities at a construction site). As clarity surrounding these expenses seems prudent, **Recommendation VI-1 – Utilities During Construction Clause** is the addition of this concept into the State's boilerplate construction contract.

Please note: this Section is structured differently than other sections of this Report. It compares Federal and State clauses on a clause by clause basis and then analyzes the specific clause or concept. There is no interview findings section outside of a handful of references in the analyses sections.

Section VI Summary Analysis Table

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Required Design Professional Clauses	The State's boilerplate contract and policies contain a number of clauses related to the work performed by Design Professionals	Four specific contract clauses are required in Design Professional Contracts.	The four clauses required by the FAR have analogs in the State contracts and policies. No change is warranted to better align with Federal practices.	*No change*
Required Construction Clauses	The State's boilerplate construction General	23 specific contract clauses are required	Of the 23 clauses required by the FAR, 22 have either direct	**Recommendation VI-1 – Utilities During**

[66] The requirement to include these clauses is typically relaxed if the solicitation is below the simplified acquisition threshold.
[67] *See* Public Works Division, *Interim General Terms and Conditions*, March 2000, *available at* https://pwd.hawaii.gov/wp-content/uploads/2014/12/InterimGeneralConditions1999Edition.pdf *(Note*: *The Interim General Terms and Conditions from PWD are interim and were last updated in 1999.)*

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	Terms and Conditions covers a vast array of construction concepts.	in construction contracts.	State analogs or practices, or are inapplicable to the State. One FAR clause on the subject of utilities consumed during construction has no State analog.	**Construction Clause:** Add a clause to the General Terms and Conditions clarifying contractor responsibility and cost for utilities used during construction.

Subtopic – Required Clauses – Design Professionals

Design Within Funding Limitations

FAR:

FAR 36.609-1(c) requires the inclusion of language found in FAR 52.236-22. This clause requires the listing of an estimated cost for the project and prohibits Design Professional from producing a design that will surpass that estimated cost of the ultimate construction project. This clause also prescribes what to do if the designs for a project begin to resemble a design that will surpass the estimated cost.

State:

Policies and Procedures Governing Design Consultant Contracts (hereinafter "PPGDCC") Chapter III, Section B, Part 2 requires inclusion of a clause that lists everything that DAGS/PWD will furnish to the Design Professionals for reference in its design work, among which is the total project budget. Per Section C, Part 3 of Chapter III, written approval is required in order to deviate from the approved budget.[68]

Analysis of Differences, Consequences, and Benefits of Alignment:

These clauses are substantively similar and the State clause does not require any changes. Therefore, we do not recommend any changes to this State clause.

Performance of Work by the Contractor

FAR:

FAR 36.609-2(b) requires the inclusion of language found in FAR 52.236-23. This clause clearly explains that Design Professionals are responsible for performing their work to a professional standard of quality and accuracy. Additionally, they are responsible for any mistakes or work that does not meet a

[68] *See* Division of Public Works, *Policies and Procedures Governing Design Consultant Contracts*, November 1981, *available at* http://pwd.hawaii.gov/wp-content/uploads/2014/09/PP_Consult_Contracts_Nov_1981.pdf.

professional standard and will correct those mistakes or make improvements at no cost to the government.

State:

PPGDCC Chapter III, Section C and Chapter V, Section G contain clauses which hold Design Professionals responsible for work that does not meet the prescribed professional standards of accuracy and completion. Additionally, the State will not issue payments for design work until the work is satisfactorily completed.

Analysis of Differences, Consequences, and Benefits of Alignment:

These clauses articulate and require similar professional standards for Design Professionals. Because the State will not issue payment until work is satisfactorily completed, there cannot be any re-design costs for the State to approve. Because of this, there is no need for the State to explicitly state that the contractor is responsible for costs associated with redesign. In light of this, no change is recommended.

Work Oversight

FAR:

FAR 36.609-3 requires the inclusion of language found in FAR 52.236-24. This clause states that the work of Design Professionals is subject to oversight, supervision, direction and control of the contracting officer.

State:

PPGDCC Chapter III lays out the responsibilities of DAGS/PWD to oversee, supervise, and direct the work of Design Professionals.

Analysis of Differences, Consequences, and Benefits of Alignment:

The State and the Federal government have similar requirements of contracting officers when it comes to Design Professionals. Therefore, no change is recommended.

Requirements for Registration of Designers

FAR:

FAR 36.609-4 requires the inclusion of language found in FAR 52.236-25. This clause requires that the Design Professionals on a project are properly licensed for the work they are performing.

State:

General Conditions Clause 2D requires contractors, including Design Professionals, to obtain any necessary licensure prior to conducting any work. Also, a Design Professional cannot be awarded a contract unless cleared by the Review Committee for, *inter alia*, having a valid professional license.

Analysis of Differences, Consequences, and Benefits of Alignment:

Both the State and Federal government require Design Professional to be properly licensed before performing any contracted work. There are no substantial differences between the requirements of the State and of the Federal government. Therefore, no change is recommended.

Subtopic – Required Clauses - Construction

Performance of Work by the Contractor

FAR:

FAR 36.501(b) requires the inclusion of language found in FAR 52.236-1. This clause requires the contract to specify how much of the work will be performed by the general contractor versus the percentage of work to be done by subcontractors. This clause does not specify an amount but rather leaves a space for the inclusion of a percentage.

State:

The General Terms and Conditions clause 5.12.4 is an equivalent clause. It specifies that a minimum of 20% of the work on a given project should be performed by a general contractor. Additionally, HRS § 103D-302(b) requires the disclosure of all the subcontractors the general contractor plans to use (*See* Section III above).

Analysis of Differences, Consequences, and Benefits of Alignment:

In addition to the State requirement of a specific percentage of work that the general contractor is to perform on a project, the State also has a subcontractor listing requirement that the Federal government does not require. Combined, these two aspects do not produce outcomes that are discernibly or consequentially different from those that stem from the Federal clause. Therefore, no change is recommended.

Differing Site Conditions

FAR:

FAR 36.502 requires the inclusion of language found in FAR 52.236-2. This clause specifies the responsibility of the general contractor to alert the government of any aspects of the site that differ from the conditions they were aware of when awarded the contract.

State:

HAR § 3-125-11 requires that all construction contracts include a clause specifying that the general contractor is obligated to review a site and its conditions (where the State determines that the Contractor should assume the risk for site conditions).

Analysis of Differences, Consequences, and Benefits of Alignment:

The Federal and State clauses are substantively similar in their intent and language. No change is recommended.

Physical Data

FAR:

FAR 36.504 requires the inclusion of language found in FAR 52.235-4. This clause specifies the responsibility of the Government to provide the Contractor with information regarding the physical test samples, typical weather conditions, transportation facilities, and other pertinent information about the site.

State:

The State does not have an analog clause.

Analysis of Differences, Consequences, and Benefits of Alignment:

This clause puts a burden on the government to alert contractors of physical test samples, weather information, transportation information, or other information which the contractor may need. Put another way, it may create liability for the government for its failure to disclose this information. It is an opportunity for contractors to point a finger at the government for problems it may face for, among other things, delays caused by bad weather the government "should have told them about."

There is no reason to believe that the State does not presently disclose all information it believes germane to any construction project – all interviews are in accordance with this premise. Accordingly, adding a contractual duty to disclose only creates the risk that the State's failure to disclose something comes with increased risk of liability to the State. Thus, closer alignment to Federal practices would not benefit the State so there is no recommendation.

Material and Workmanship

FAR:

FAR 36.505 requires the inclusion of language found in FAR 52.236-5. This clause specifies that quality equipment and materials will be used on construction projects as well as the responsibility of the contractor to have the equipment and materials approved by the Government.

State:

Clause 6.1 of the State's General Terms and Conditions specify that quality materials, equipment and workmanship be used in the performance of a contract.

Analysis of Differences, Consequences, and Benefits of Alignment:

As the State and Federal clauses substantially mirror each other, no recommendation is made.

Superintendence by the Contractor

FAR:

FAR 36.506 requires the inclusion of language found in FAR 52.236-6. This clause lays out the requirement of the contractor to superintend or assign an individual to superintend the performance of the work on construction projects.

State:

General Terms and Conditions clause 5.8.2 lays out the requirement that a superintendent be present on the site of construction projects. It also specifies the required qualifications of the superintendent such as experience in the work being conducted.

Analysis of Differences, Consequences, and Benefits of Alignment:

As the State and Federal clauses substantially mirror each other, no recommendation is made.

Permits and Responsibilities

FAR:

FAR 36.507 requires the inclusion of language found in FAR 52.236-7. This clause dictates the responsibility of the contractor to obtain all necessary permits to conduct the construction work in accordance with Federal laws as well as the laws of the state and locality in which the work is to take place.

State:

General Terms and Conditions clause 4.9.2 specifies the that, while it is up to the contractor to obtain all necessary permits and licenses, the State may begin the permit and license application procedure. Furthermore, this clause places the responsibility of payment for the necessary permits and licenses upon the contractor.

Analysis of Differences, Consequences, and Benefits of Alignment:

While there are slight differences between the clauses, such as the State's ability to begin the application process for permits, these differences are not substantial. Alignment with the Federal process would appear to eliminate the State's ability to start (but not pay for) a contractor's obtaining permits, which is likely a valuable way to save time on projects. Accordingly, no recommendation is made.

Other Contracts

FAR:

FAR 36.508 requires the inclusion of language found in FAR 52.236-8. This clause explains the scenarios that arise when the government awards contracts for sites that are located near each other. This clause requires the contractor not to interfere with the work of another contractor.

State:

General Terms and Conditions clause 7.12.2 specifies that, when contractors are engaged on adjacent sites, to cooperate with the work of others and to coordinate with engineers from the State.

Analysis of Differences, Consequences, and Benefits of Alignment:

As the State and Federal clauses substantially mirror each other, no recommendation is made.

Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements

FAR:

FAR 36.509 requires the inclusion of language found in FAR 52.236-9. This clause specifies the responsibility of the general contractor to not affect or disturb vegetation, structures, or utilities during the performance of construction work. If damage is done to any existing building, the contractor is required to repair the damage.

State:

The State requires general contractors to protect structures, utilities, and vegetation in General Terms and Conditions clauses 7.17.1.3, 7.17.3 and 7.17.4.

Analysis of Differences, Consequences, and Benefits of Alignment:

What the Federal government requires in one clause is broken down into several clauses in the State's boilerplate contract. However, the requirements contained within these clauses are substantially similar and no change is required.

Operations and Storage Areas

FAR:

FAR 36.510 requires the inclusion of language found in FAR 52.236-10. This clause limits the contractor to the worksite for work and storage of materials and equipment. Additionally, it allows for the construction of temporary buildings and requires the use of established roadways or temporary roadways that are permitted by the government.

State:

General Terms and Conditions 6.8 and 6.9 specify how contractors are to handle, transport, and store materials to prevent loss as well as to provide for easy inspection. Materials are to be stored onsite or at the contractor's expense.

Analysis of Differences, Consequences, and Benefits of Alignment:

A minor difference between the State and the Federal government is that the State does not require permits before constructing temporary buildings. Other than this minor distinction, there are no substantial differences. Because it is not apparent that the absence of the permission requirement is detrimental to the performance of construction work or that the addition would positively affect construction work, no recommendation to add a permission process for the erection of temporary structures is recommended.

Use and Possession Prior to Completion

FAR:

FAR 36.511 requires the inclusion of language found in FAR 52.236-11. This clause explains the right and ability of the government to take over the work being performed by a contractor before the completion of a project.

State:

The State has the ability to take use and possession of work for cause (per General Terms and Condition clause 7.7.21) or convenience (clause 7.28.3)

Analysis of Differences, Consequences, and Benefits of Alignment:

Both the State and the Federal government are permitted to take over construction work prior to completion of the work. There are no substantial differences between the State and Federal clauses that allow them to do this. As such, no recommendation is needed.

Cleaning Up

FAR:

FAR 36.512 requires the inclusion of language found in FAR 52.236-12. This clause specifies the responsibility of the general contractor to continually maintain cleanliness and organization of the site both during the performance of the work as well as once the work ends.

State:

The State's General Terms and Conditions clauses 7.3 and 7.16.1 establish the responsibility of the contractor to keep a clean work site during the performance of construction work and to clean up the site once a project concludes.

Analysis of Differences, Consequences, and Benefits of Alignment:

There are no substantial differences between State and Federal clauses regarding cleaning. Therefore, there is no recommendation.

Accident Prevention

FAR:

FAR 36.513 requires the inclusion of language found in FAR 52.236-13. This clause specifies the responsibility of the general contractor to maintain a work environment that provides reasonable safety measures to protect people, property, and equipment.

State:

General Terms and Conditions 7.17.1 notes that the contractor is responsible to develop a safety program to prevent injury or loss to people, property, and equipment.

Analysis of Differences, Consequences, and Benefits of Alignment:

There are no substantial differences between the State and Federal clauses. Therefore, there is no recommendation.

Availability and Use of Utility Services

FAR:

FAR 36.514 requires the inclusion of language found in FAR 52.236-14. This clause clarifies that the contractor will pay for all utilities consumed by the contractor in the performance of the project. It also explains that contractors will be financially responsible for setting up and removing temporary utility services, if they are needed.

State:

No equivalent clause could be located nor any description of who bears this cost.

Analysis of Differences, Consequences, and Benefits of Alignment:

In State projects, presumably the cost of utilities (and any temporary hook-ups therefore) is born by the contractor as part of a project, but this is an implied arrangement. There is no down-side to adding clarity to the contract that contractors are responsible for this expense. Accordingly, **Recommendation VI-1 – Utilities During Construction Clause** is to add a contract term specifying a contractor's responsibilities regarding project utilities.[69]

[69] Please note: this is not the same thing as ensuring that completed buildings have utilities installed for future State use. This subject is adequately covered.

Schedules for Construction Contracts

FAR:

FAR 36.515 requires the inclusion of language found in FAR 52.236-15. This clause lays out the requirements of the contractor to create a schedule for how the work will proceed and to report progress on the work according to the schedule. Additionally, this clause allows the government to use any failure of the contractor to adhere to the schedule as reason for determining that the contractor will not complete the work on time.

State:

General Terms and Conditions clause 7.22 requires the contractor to produce, submit to the State, and adhere to a construction schedule.

Analysis of Differences, Consequences, and Benefits of Alignment:

There are no substantial differences between the State and Federal clauses. Therefore, there is no recommendation.

Quantity Surveys

FAR:

FAR 36.516 requires the inclusion of language found in FAR 52.236-16. This clause requires either the government or the contractor to conduct original and final quantity surveys (a data collection process used to determine the quantity of work performed and the actual construction completed). The responsibility of conducting these surveys will be decided at the time of contracting.

State:

General Terms and Conditions 8.4.1 makes the contractor responsible for compiling and submitting progress reports.

Analysis of Differences, Consequences, and Benefits of Alignment:

The difference between the State and Federal clauses is that the Federal clause leaves open the option for the government or contractor to officially measure progress of a project while the State puts the onus for such measurement on the contractor. This option (State measurement) would represent a potential burden on the State as it would involve more work for the State. While this work would potentially give the State more visibility into progress (or more control over the issuance of progress-based payments), this visibility is already available to the State pursuant to its audit rights under General Terms and Conditions clause 7.37. Accordingly, as adoption of the Federal standard would only give the potential for more work for the State without additional benefits, no recommendation is made.

Layout of Work

FAR:

FAR 36.517 requires the inclusion of language found in FAR 52.236-17. This clause requires the contractor to lay out benchmarks and base lines indicated on the drawings for the project. The contractor is responsible for maintaining all stakes and marks from the Federal contracting officer.

State:

General Terms and Conditions clause 5.8.3 requires the contractor to lay out benchmarks and base lines for the work from the government and holds contractor responsible for any errors in the performance of this duty.

Analysis of Differences, Consequences, and Benefits of Alignment:

There are no substantial differences between the State and Federal clauses. Therefore, there is no recommendation.

Work Oversight in Cost Reimbursement Construction Contracts

FAR:

FAR 36.518 requires the inclusion of language found in FAR 52.236-18. This clause makes it clear that all Federal work is subject to the supervision, direction, control and approval of the Federal contracting officer.

State:

General Terms and Conditions clause 5.1 gives supervision, direction, and approval over a construction project to an engineer from the State (in all contracts, not just cost reimbursement ones).

Analysis of Differences, Consequences, and Benefits of Alignment:

Notably, interviews suggest that the State rarely, if ever, uses cost reimbursement contracts for construction, so the applicability of this concept is very limited. Notwithstanding this fact, the State's engineer always maintains the rights granted to the contracting officer in cost reimbursement contracts by FAR 52.236-18, so no recommendation is needed.

Organization and Direction of the Work

FAR:

FAR 36.519 requires the inclusion of language found in FAR 52.236-19. The clause requires the contractor to, upon execution of the contract, submit information about their company and the people who will be employed on the project. The clause also specifies that a principal partner or senior officer should run the project, unless the government gives the contractor approval for a different individual to run the project.

State:

State General Terms and Conditions clauses 5.8.2 and 2.1.1.7 state the requirement that a project maintain a qualified superintendent as well as provide a questionnaire process for the State to obtain information about the company and the executives who will be working on a project. This optional questionnaire process takes place before contracting at the discretion of the State.

Analysis of Differences, Consequences, and Benefits of Alignment:

While the superintendent and direction of work has been covered previously in this section, there is a slight difference between State and Federal rules worth mentioning. Even though the obtaining of company and employee information is required for Federal contracts and not required for State contracts, the State is able to obtain this information at its discretion. Thus, closer Federal alignment would take the option of collecting information about a contractor's employees and render it mandatory. It is not clear how this would benefit the State as it can obtain this information when it wishes already. Accordingly, no recommendation is made.

Contracting by Negotiation

FAR:

FAR 36.520 requires the inclusion of language found in FAR 52.236-28. The Federal clause prescribes the forms that must be included in a solicitation and contract when construction is acquired by contracting through negotiation.

State:

The State does not acquire construction via contracting through negotiations.

Analysis of Differences, Consequences, and Benefits of Alignment:

While other portions of this Report address the practices of negotiations (*See* Section I Subtopic – Negotiating with Ranked Vendors; Section II Subtopic – Negotiation; and Section V Subtopic – Phase Two Procedures) none of these practices are the equivalent of contracting by negotiation governed by FAR part 15. Thus, the State has no need to mandate the use of the forms prescribed by this clause and no recommendation is needed.

Specifications and Drawings for Construction

FAR:

FAR 36.521 requires the inclusion of language found in FAR 52.236-21. This clause explains how the contractor will receive specifications and drawings, how the contractor should review them, and then lays out the process by which to resolve discrepancies and issues with the government.

State:

General Terms and Conditions clauses 5.8.1 and 5.6 explain how contractors will obtain specifications and drawings, how the contractor should review the specifications and drawings, and how to resolve any issues or discrepancies.

Analysis of Differences, Consequences, and Benefits of Alignment:

There are no substantial differences between the State and Federal clauses. Therefore, there is no recommendation.

Preconstruction Conference

FAR:

FAR 36.522 requires the inclusion of language found in FAR 52.236-26. This clause gives the Federal government the option to hold a preconstruction conference with the contractor.

State:

There is no State analog clause.

Analysis of Differences, Consequences, and Benefits of Alignment:

While there is no State equivalent to 52.236-26, there is nothing in State law that would prevent the State from holding a preconstruction conference with a contractor. The State is free to hold preconstruction conferences and interviews indicated that they sometimes happen. Accordingly, the "right" granted by this clause is already observed and no recommendation is needed.

Site Visit

FAR:

FAR 36.523 requires the inclusion of language found in FAR 52.236-27. This clause notes that the government may hold a site visit and notes that bidders should visit the site.

State:

General Terms and Condition 2.4 sets the expectation that potential bidders will visit the construction site location, but it is not a requirement.

Analysis of Differences, Consequences, and Benefits of Alignment:

There are no substantial differences between the State and Federal clauses. Therefore, there is no recommendation.

Recommendation(s) Based on FAR Alignment Analysis:

Rec. #	Details				
VI-1	Add a clause to the General Terms and Conditions clarifying that the contractor is responsible for the cost of utilities consumed during the project as well as any costs associated with temporary, project-specific utility hook-ups.	✓		✓	✓

Key:

Application of Best Practices		Thoughtful Contractor (& Subcontractor) Selection Process	
Process Transparency & Integrity		Consistent & Efficient Processes	

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- None

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- None

Effort and Complexity to Implement Recommendation(s):

Recommendation VI-1 – Utilities During Construction Clause:

The effort and complexity of this recommendation is low. In short, it will require a small amount of effort from the attorney tasked with updating the boilerplate contract. The effort will be specifically drafting one clause to the effect of this recommendation. It will be effective immediately once the new boilerplate is released.

Estimated Cost to Implement Recommendation(s):

Recommendation VI-1 – Utilities During Construction Clause:

The cost to implement this recommendation $360.69. This is the estimated cost of three hours of an assistant attorney general's time (at $61.28[70] per hour) to prepare the clause for inclusion in the next generation of the boilerplate contract, and five hours of SPO support (at $35.37 per hour).

[70] To arrive at this figure, forty attorney general employees were researched on the public employee salary database maintained by Honolulu Civil Beat, taking the middle point when a salary was presented as a range. These salaries were averaged to develop an average SPO salary of $122,566.20. Assuming a work-year of approximately 2,000 hours, this equates with an average hourly rate of $61.28.

VII. Other

Section Summary:

There are a handful of subjects which impact construction procurement which do not fit squarely in any of the above sections. They are analyzed separately in this section, and they include:

- Statutory Treatment – how the concept of construction procurement is discretely addressed or addressed in tandem with non-construction
- Definition of Construction – how the term "construction" is defined
- Small Purchases - Design Professionals – how lower value contracts for Design Professionals are procured
- Small Purchases - Construction – how lower value contracts for construction are procured
- Recycled Glass Content Requirements – the requirement to use a minimum amount of recycled glass in public works projects
- Hawaiian Plants in Landscaping – the requirement to use native plants in landscaping

While these sections analyze differences between State and Federal practices, none of these differences warrant the replacement of State practices with their Federal analogs.

Section VII Summary Analysis Table

Subtopic	HI Law	FAR 36	Comparison	Recommendation
Statutory Treatment	Construction procurement is governed throughout the entirety of the State's procurement code.	Construction procurement is centrally regulated by FAR 36.	The State does not regulate construction procurement in one place, unlike the Federal government.	*No change*
Definition of Construction	Construction includes new projects, renovations, repair and maintenance.	Construction includes new projects, renovations, and certain repairs.	The Federal definition of construction is narrower than the State's.	*No change*
Small Purchases – Design Professionals	There is a streamlined manner in which lower dollar Design Professional contracts may be procured.	There is a streamlined manner in which lower dollar Design Professional contracts may be procured.	Differences between the two systems are not significant.	*No change*
Small Purchases – Construction	There is a streamlined manner in which lower dollar	There is a streamlined manner in which lower dollar construction	Differences between the two systems are not significant.	*No change*

Subtopic	HI Law	FAR 36	Comparison	Recommendation
	construction contracts may be procured.	contracts may be procured.		
Recycled Glass Content Requirements	State law requires the use of a certain percentage of recycled glass in public works projects.	There is no Federal analog.	This is a State specific requirement.	*No change*
Hawaiian Plants in Landscaping	State law requires the use of a certain amount of native plants in landscaping on public works projects.	There is no Federal analog.	This is a State specific requirement.	*No change*

Subtopic – Statutory Treatment

State Law Treatment

Construction procurement is not separately regulated but, instead, is discussed throughout the Procurement Code in HRS § 103D. The exception to this, insofar as it is considered within the parameters of construction procurement, is Design Professional procurement, which is separately regulated pursuant to HRS § 103D-304.

Treatment under FAR 36 and Other Incorporated Federal Sources

Construction procurement (including Design Professional Procurement) is separately regulated in FAR part 36. While FAR part 36 does incorporate or reference other sections of the FAR (*e.g.* FAR 14 for IFB practices), FAR 36 definitively and discretely covers the subject.

Interview Findings

- One person interviewed noted that it would be nice to have construction regulated in single place rather than in pockets throughout 103D.

Analysis of Differences, Consequences, and Benefits of Alignment

Separately segregating construction procurement would require a monumental amendment to 103D to cleave the concept from virtually every section. While this may add a modicum of clarity for those unfamiliar with the subject in the State, the cost and confusion caused by such a disruptive measure would far outweigh this minor benefit. Accordingly, no recommendation is made to this end.

Subtopic – Definition of Construction

State Law Treatment

HRS § 103D-104 defines construction as "the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. The term includes the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property."[71]

Treatment under FAR 36 and Other Incorporated Federal Sources

"Construction" is defined in the FAR as "construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include, but are not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property (except that for use in subpart 22.5, see the definition at 22.502)." *See* FAR 2.101.

Interview Findings

- Some interviewees observed that the State's definition of construction to include routine maintenance is why certain measures (like job order contracting) are considered construction procurement and not the procurement of services.

Analysis of Differences, Consequences, and Benefits of Alignment

For the most part, the definition of construction at the State and Federal level agree. Both definitions conceive the erection of new structures, remodeling or alteration thereof, their repair, new forms of public works projects, and other forms of structural, building and real property modification of the types typically engaged in by public sector entities.

[71] Notably, while HRS § 103D is the enactment of a version of the ABA Model Procurement code, subsequent issuances of the ABA Model procurement code provide a directly different definition. Under the 2007 ABA Model Procurement Code for Public Infrastructure Procurement, construction is defined as "the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property. It **does not** include the routine operation, routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property." (Emphasis added). Thus, later definitions expressly carve out what the State's definition expressly carves in: variations of routine maintenance.

Where the definitions diverge is on activities related to normal wear and tear: the State definition expressly includes “routine” maintenance and operations while these concepts are absent from the Federal definition.

Despite this divergence, it is not clear how the State would gain any benefit from eliminating this component of the definition of construction. In fact, such an edit may only seed confusion for individuals who have grown accustomed to the historical definition. Accordingly, no recommendation is made in this regard.

Subtopic – Small Purchases – Design Professionals

State Law Treatment

There is a simplified acquisition process for hiring Design Professionals when the expected cost of their services is less than $100,000. *See* HRS § 103D-305. Under HRS § 103D-305(j), a full Selection Committee is not required (*See* Section I -Acquisition of Design Professionals). Instead, the head of a purchasing agency can negotiate directly with at least two Design Professionals deemed qualified by the Evaluation Committee. *Id.* Those negotiations are to be conducted in accordance with the procedures established in 305(h) (*See* Subtopic - Negotiating with Ranked Vendors) and based on selection criteria set forth in 305(e) (*See* Subtopic - Selection Factors).

Treatment under FAR 36 and Other Incorporated Federal Sources

With agency authorization, a small/simplified acquisition process for Design Professionals is allowed when the estimated cost of the purchase falls below $250,000. *See* Section 805 of NDAA (National Defense Authorization Act) 2018 (raising the simplified acquisition threshold to its current level). There are two simplified processes contemplated by FAR 36.602-3 and FAR 36.602-4.

The first method skips a step over the process discussed in Section I above. In the full process, an Evaluation Board provides their ranked list to a selection authority, who makes a final determination, and then engages the contracting officer to commence negotiations. *See* FAR 36.606. In the simplified process, the selection authority is bypassed and the output of the Evaluation Board is given directly to the contracting officer. *See* FAR 36.602-4.

The second method streamlines the Evaluation Board process. As noted in Subtopic – Evaluation Bodies above, the Federal Evaluation Board has a chairperson. In a simplified acquisition process, the responsibilities of the Evaluation Board may be conducted entirely by the chairperson in their individual capacity. *See* FAR 36.602-3.

Interview Findings

- This subject was not meaningfully discussed in interviews nor raised as a concern or issue by anyone.

Analysis of Differences, Consequences, and Benefits of Alignment

Both the FAR and HRS allow for a simpler process by which to procure Design Professionals on projects that are estimated to cost no more than a certain amount. The differences between the State and the Federal government on this subject are slight. There are two differences of note.

The first difference is one of cost: the State's small purchase/simplified acquisition threshold for Design Professionals is $100,000 versus the Federal government's threshold of $250,000. No difficulties were observed from this difference and no clear benefit would be gained by setting a higher simplified acquisition threshold.

The second difference is one of process. The Federal system allows a streamlining of the evaluation body activities but still requires a separate evaluation body and contract negotiator. The State system allows the direct evaluation and negotiation by the head of the purchasing agency – a far more streamlined process than the Federal system which still severs evaluation from negotiation. Given the lower purchasing threshold ($100,000 vs. $250,000) for the State, it seems fair to balance this with a more streamlined and autonomous method for the State. Accordingly, no greater alignment with Federal practices is recommended.

Subtopic – Small Purchases – Construction

State Law Treatment

HRS § 103D-305 allows for the small purchase/simplified acquisition of construction projects that are estimated to cost less than $250,000. This process involves the reduction or elimination of steps or considerations otherwise observed for construction projects estimated at over the threshold. The procurement must be conducted through the electronic system, which includes functionality for vendor notice and electronic receipt of offers. *See* HAR § 3-122-78.

The number of bids required for a project and the method of those bids receipts depends on the value of the project:

- Under $5,000: process in accordance with procedures established by the agency that ensures "adequate and reasonable competition"

- $5,000 and over, but less than $15,000: three bids which may be obtained over phone, fax, email, *etc.*
- $15,000 and over: three written bids obtained via HIePro

See HAR § 3-122 Subchapter 8, Procurement Circular 2012-04.

In evaluating these bids, any preferences that are given to construction bids in the State are not applicable. *See* HAR § 3-122-74(e). Additionally, the State permits solicitations for construction small purchases/simplified acquisitions to move forward without three quotes as long as written justification is placed in the procurement file, per HAR § 3-122-75(e). Of note: performance bonds are still required for small construction purchases over $50,000. *See* HRS § 103D-305(b).

Treatment under FAR 36 and Other Incorporated Federal Sources

The Federal threshold for small purchases/simplified acquisitions in construction is $250,000. *See* Section 805 of NDAA 2018. Below this point, neither an independent Government estimate of cost nor pre-solicitation notices are required per FAR 36.203 and 36.213

FAR 13.106 lays out the process for soliciting competition for small purchases/simplified acquisitions for construction. Below the small purchases/simplified acquisitions threshold, Federal contracting officers are permitted, even encouraged, to orally solicit quotes from potential bidders for construction requirements below $2,000 per FAR 13.106-1(d). Above the $2,000 construction limit, officers must issue written solicitations. When issuing solicitations, contracting officers will let the potential bidders know whether price or price and other factors will be used in the evaluation.

Interview Findings

- This subject was not meaningfully discussed in interviews nor raised as a concern or issue by anyone.

Analysis of Differences, Consequences, and Benefits of Alignment

The differences between Federal and State construction small purchases are not material. To begin, the thresholds are the same. The Federal government does not require three minimum quotes in order for a small purchase/simplified acquisition to take place whereas the State does. However, as noted above, State law simply requires written justification to be placed in the procurement file if the contracting officer does not receive three quotes and elects to move forward. The Federal process involves the removal of requirements not present in the State process, so this difference is moot as well.

The State system is universal (*i.e.* applies to more than construction) and appears to operate with no concerns or difficulties raised in any interview. Accordingly, there is no clear benefit to alignment

with a Federal system whose streamlining measures have no obvious application to the State process. Accordingly, no change is recommended.

Subtopic – Recycled Glass Content Requirements

State Law Treatment

Roadway materials and other end-use applications for public projects funded by the State or accepted by the State or a county as public roads have minimum standards for recycled glass content. *See* HRS § 103D-1005. This includes a minimum recycled glass content of 10% in basecourse paving materials, and a required usage of 100% recycled glass for non-structural backfill. *Id.* This requirement holds when glass is available to quarry/contractor at equivalent aggregate price "that shall not reduce the quality standards for highway and road construction." *Id.*

Treatment under FAR 36 and Other Incorporated Federal Sources

There is no equivalent Federal requirement. There is a 1993 Report to Congress about the usage of recycled paving materials and a mention in PL 102-240 from 1991[72] of a study to be commissioned to research recycled glass in pavement material: "(3) ADDITIONAL STUDY.—The Secretary and the Administrator, in cooperation with the States, shall jointly conduct a study to determine the economic savings, technical performance qualities, threats to human health and the environment, and environmental benefits of using recycled materials in highway devices and appurtenances and highway projects, including asphalt containing over 80 percent reclaimed asphalt, asphalt containing recycled glass, and asphalt containing recycled plastic" (page 75).

Interview Findings

- This subject was not meaningfully discussed in interviews nor raised as a concern or issue by anyone.

Analysis of Differences, Consequences, and Benefits of Alignment

Federal alignment on this practice would require the repeal of a statute which no one finds difficult to follow and the legislature found to be beneficial to the public. Accordingly, no change is recommended.

[72] Available here: https://www.govinfo.gov/content/pkg/STATUTE-105/pdf/STATUTE-105-Pg1914.pdf

Subtopic – Hawaiian Plants in Landscaping

State Law Treatment

HRS § 103D-408 requires new and renovated public landscaping projects developed by the State with public moneys to comply with increasing minimum percentages of Hawaiian plants on a set timeline (this replaces the loose requirement to use Hawaiian plants "wherever and whenever feasible"). These required percentages and goal years are: 10% of the total plant footprint for landscaping by 2019; 25% of the total plant footprint for landscaping by 2025; and 35% of the total plant footprint for landscaping by 2030. *Id.*

Hawaiian plants include indigenous species and those introduced by Polynesians before European contact. *Id.* These plants should be made available without jeopardizing wild plants in their natural habitat. *Id.*

Exceptions to this coverage and timeline are at the discretion of the head of the purchasing agency and must be outlined in procurement materials. These exceptions may include instances where there is no suitable Hawaiian plant alternative, such as for turf grass, landscaping in extreme environmental conditions such as erosion, approved "exceptional" trees under chapter 58, and landscaping for significant, National, or Hawaiian registered Historic Properties, research sites, food or medicinal production sites, and cultural heritage gardens.

Treatment under FAR 36 and Other Incorporated Federal Sources

There is no Federal analog. The closest equivalent is a 1999 Executive Order (13122) prohibiting Federal actions which would likely cause or promote the spread of invasive species in roadside vegetation.[73] There is also Federal guidance on landscaping which encourages the use of native plants.[74]

Interview Findings

- This subject was not meaningfully discussed in interviews nor raised as a concern or issue by anyone.

Analysis of Differences, Consequences, and Benefits of Alignment

As an island state with a unique and fragile ecosystem, the requirements set forth in HRS § 103D-408 are a well-considered formalization of practices which the Federal system encourages but does not specifically require. While closer alignment to the Federal standard would necessitate a relaxation of the State's requirements, given the ecological considerations unique to the State, this Report does not make that recommendation.

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[73] *See* https://www.environment.fhwa.dot.gov/env_topics/ecosystems/roadside_use/vegmgmt_rdus3_13.aspx.
[74] Available here: https://www.sustainability.gov/pdfs/sustainable_landscaping_practices.pdf

Recommendation(s) Based on FAR Alignment Analysis:

None

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- None

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- None

Effort and Complexity to Implement Recommendation(s):

N/A

Estimated Cost to Implement Recommendation(s):

N/A

Appendix 1 – List of Proposed Statutory and Rule Changes

Specific Statutory Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation I-2- Design Professional Selection Criteria**, amend HRS § 103D-304(e):

  "(e) The selection criteria employed ~~in descending order of importance~~ shall be:"

- Per **Recommendation II-3 – Negotiations with Low Bidder**, add the following to HRS § 103D-302(a):

  "Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids, *except for construction procurement that meets the criteria provided in section 103D-302(h)(2)*."

- Per **Recommendation II-3 – Negotiations with Low Bidder**, add the following to HRS § 103D-302(h):

  "*(2) In the event the lowest responsive and responsible bid for construction procurement significantly differs from the amounted estimated by the State for that project, and such estimated amount was developed prior to the opening of any bids for that project, the head of the purchasing agency may engage in negotiations with the low bidder to ensure the bid amount is reasonable and realistic for the scope of the construction project. Such negotiations may include the reduction of the bid amount or the increase to align with the State's estimate, provided the increase does not raise the low bidders' bid to an amount that makes it no longer the low bid. If negotiations with the low bidder do not result in any change to the bid amount, the original bid amount shall continue to be used.*"

- Per **Recommendation III-2 – Reduce What Subcontractor Information is Required**, amend HRS § 103D-302(b) as follows:

  "…all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract ~~and the nature and scope of the work to be performed by each~~."

- Per **Recommendations IV-1 – Eliminate Hawaii Products Preference** and **IV-3 – Eliminate Recycled Products Preference**, amend HRS § 103D-1001.5:

  "**Application of this part.** The preferences in this part shall apply, when applicable *and unless otherwise stated below*, to procurements made pursuant to section 103D-302, or 103D-303, or both. *The Hawaii products preference (103D-1002) and the recycled*

products preference (103D-1002) shall not apply to construction procurements made pursuant to sections 103D-302, or 103D-303, or both."

- Per **Recommendation IV-2 – Eliminate Apprenticeship Program Preference**, repeal Act 17 (SLH 2009), or HRS § 103-55.6:

"~~**Public works construction; apprenticeship agreement.** (a) A governmental body, as defined in section 103D-104, that enters into a public works contract under this chapter having an estimated value of not less than $250,000, shall decrease the bid amount of a bidder by five per cent if the bidder is a party to an apprenticeship agreement registered with the department of labor and industrial relations for each apprenticeable trade the bidder will employ to construct the public works, and in conformance with chapter 372. The lowest total bid, taking the preference into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria. The contract amount awarded, however, shall be the amount of the price offered, exclusive of the preference.~~

~~(b) For purposes of subsection (a), in determining whether there is conformance with chapter 372, the procurement officer shall consider the actual number of apprentices enrolled in and the annual number of graduates of the apprenticeship program.~~

~~(c) At the time of submission of a competitive sealed bid or a competitive sealed proposal by a bidder, the bidder shall furnish written proof of being a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works and, if awarded the contract, shall continue to certify monthly in writing that the bidder is a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works for the entire duration of the bidder's work on the project. This subsection shall be deemed to be incorporated into a public works contract. A bidder who is awarded a contract shall be subject to the following sanctions if, after commencement of work, the bidder at any time during the construction is no longer a party to a registered apprenticeship agreement for each apprenticeable trade the bidder will employ to construct the public works:~~

~~(1) Temporary or permanent cessation of work on the project, without recourse to breach of contract claims by the bidder; provided that the governmental body shall be entitled to restitution for nonperformance or liquidated damages, as appropriate; or~~

~~(2) Proceedings to debar or suspend under section 103D-702.~~

~~(d) For purposes of this section, "bidder" means an entity that submits a competitive sealed bid under section 103D-302 or submits a competitive sealed proposal under section 103D-303. [L Sp 2009, c 17, §1]~~

~~**Cross References**~~

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

Specific Rule Changes Suggested

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

- Per **Recommendation I-1 – Committee Conflict Prevention**, add the following to HAR § 3-122-69:

  "*(c) In the event that a member of a Selection Committee is not an employee of a governmental body, no contract shall be awarded to that member or a firm or company with which that member is employed.*"

- Per **Recommendation I-4 – Certified Cost and Price Data**, amend the following to HAR § 3-122-125(c) as follows:

  "(c) The offeror or contractor shall certify ~~as soon as practicable after agreement is reached on price~~ that the cost or pricing data submitted are accurate, complete, and current ~~as of the date of reaching agreement on price~~. *The procurement officer may request this certification at the time the data are submitted. If no previous request for certification is made, the offeror or contractor shall certify as soon as practicable after agreement is reached on price. In certifying that the data are "current," the certifying offeror or contractor shall certify currentness as of the date of the procurement officer's request or after agreement is reached, as applicable."*

- Per **Recommendation IV-1 – Eliminate Hawaii Products Preference**, amend HAR § 3-124-1.01:

  "Applicability. (a) These rules shall apply to all *non-construction* solicitations made pursuant to sections l03D-302 and 103D-303, HRS, issued by a procurement officer when a registered and qualified Hawaii product is available.
  (b) These rules shall not apply whenever the application will disqualify any government agency from receiving Federal funds or aid."

- Per **Recommendation IV-3 – Eliminate Recycled Products Preference**, amend HAR § 3-124-22:

  "Applicability. (a) These rules shall apply to all *non-construction* solicitations issued pursuant to section 103D-302, HRS, by a purchasing agency when it is required or so stated in the solicitation.
  (b) These rules shall not apply whenever the application will disqualify any government agency from receiving Federal funds or aid."

- Per **Recommendation V-1 – Provide Guidance on When to Use Two-Phase Method**, add the following to the end of HAR § 3-122-43 as subsection (e):

  "*(e) Pursuant to section 103D-303(i), HRS, in addition to any other provisions of this section, construction may be solicited using competitive sealed proposals with the design-*

build method. When determining whether the design-build method is appropriate, the following criteria may be considered:

(1) The extent to which the project requirements have been adequately defined;
(2) The time constraints for delivery of the project;
(3) The capability and experience of potential contractors;
(4) The suitability of the project for use of the design-build selection method;
(5) The capability of the agency to manage the design-build selection process.
(6) Other criteria established by the purchasing agency or procurement officer."

- Per **Recommendation V-2 – Provide Guidance on Short List Development**, add the following to the end of HAR § 3-122-52 as subsection (g):

"*(g) Pursuant to section 103D-303(i), HRS, in addition to any other provisions of this section, if soliciting a construction project using the design-build method, the initial step of this process shall include issuing a request for proposals to pre-qualify offerors to select a short list of no more than three responsible offerors based on the following evaluation criteria:*

(1) Technical approach (but not detailed design or technical information);
(2) Technical qualifications, such as
(A) Specialized experience and technical competence;
(B) Capability to perform;
(C) Past performance of the offeror's team (including the architect engineer and construction members); and
(3) Other appropriate factors (excluding cost or price related factors, which are not evaluated prior to determining the short list)."

- Per **Recommendation V-3 – Provide Guidance on Selecting a Contractor from the Short List**, add the following to the end of HAR § 3-122-52 as subsection (h):

"*(h) Pursuant to section 103D-303(i), HRS, in addition to any other provisions of this section, if soliciting a construction project using the design-build method, after identifying the short-listed offerors, the short-listed offerors may then be evaluated based on the following evaluation criteria:*

(1) Any criteria initially used in the evaluation of the pre-qualification of offerors;
(2) Detailed design and technical information;
(2) Cost or price related factors;
(3) Other criteria as stated in the request for proposals."

Appendix 2 - Acronym Glossary

Name	Acronym
American Council of Engineering Companies	ACEC
Computer Aided Design	CAD
Department of Accounting and General Services	DAGS
Design-Build Institute of America	DBIA
Department of Commerce and Consume Affairs	DCCA
Federal Acquisition Regulations	FAR
Government Point-of-Entry	GPE
Hawaii Awards and Notices Data System	HANDS
Hawaii Administrative Rules	HAR
Hawaii Revised Statutes	HRS
Invitation for Bids	IFB
Leadership in Energy and Environmental Design	LEED
Public Works Division	PWD
Quality Based Selection	QBS
Request for Proposals	RFP
State Procurement Office	SPO

Appendix 3 – List of Written Materials Reviewed

Ikaso conducted a comprehensive review and analysis of Hawaii's current laws, regulations, and policies related to construction procurement as well as comparing these policies to FAR 36 and other relevant parts of FAR.

Hawaii Written Materials

Procurement Code, Rules, and Circulars

- HRS § 103D – Hawaii Public Procurement Code
- HRS § 464, HRS § 196-9, HRS § 103-55.6
- HAR §§ 3-120, 3-122 to 3-126, and 3-132
- All Procurement Circulars which contain the word(s) construction, bond, debarment, suspension, professional service, small purchase, specification, and/or Act (34 in total)

Policies and Training

- Hawaii Public Procurement Code Desk Reference – 2018
- Policies and Procedures Governing Design Consultant Contracts – 1981
- State Procurement Office Construction Procurements (Workshop No. SPO 130 Part 1)
- Design Consultant Criteria Manual documents

Contract Terms and Conditions

- State of Hawaii AG General Conditions - Construction General Conditions
- Interim General Conditions for Construction – 1999
- Public Works Division, Interim General Terms and Conditions, March 2000
- Various contract terms and conditions used by different state agencies

Other

- Procurement Task Force Final Report 04-14-15
- HCR 196, 2016 Legislative Session
- State of Hawaii Department of Human Resources Development Salary Schedule
- SB 779, 2011 Legislative Session
- 2018 Protest Log and HANDS data

- Publicly posted material from PWD identified in the RFP, including on construction and consultants
- Form DPW-120 from the DAGS-PWD website
- Relevant Cases (including *Okada Trucking Co., Ltd. v. Board of Water Supply, et. al*, 97 Hawaii 54 4 (App. 2001)
- HAR Rule-Making Process and Timeline
- Legislative Reference Bureau's (LRB) Hawaii Administrative Rules Drafting Manual Third Edition (June 2016)

Federal Written Materials

Federal Acquisition Regulation Parts

- Part 36 (Construction and Architect-Engineer Contracts)
- Part 2 (Definitions of Words and Terms)
- Part 5 (Publicizing Contract Actions)
- Part 6 (Competition Requirements)
- Part 9 (Contractor Qualifications)
- Part 13 (Simplified Acquisition Procedures)
- Part 14 (Sealed Bidding)
- Part 15 (Contracting by Negotiation)
- Part 16 (Types of Contracts)
- Part 18 (Emergency Acquisitions)
- Part 19 (Small Business Programs)
- Part 31 (Contract Cost Principles and Procedures)
- Part 42 (Contract Administration and Audit Services)
- Part 52 (Solicitation Provisions and Contract Clauses)

Other

- OMB Circulars
- Standard Forms (30, 330, 1419, 1442)
- 1999 Executive Order (13122)
- US Army Corp of Engineers "Architect-Engineer Contracting Handbook" version 31 July 2002

- CPARS and FAPIIS websites
- 4 CFR Part 21
- GSA Project Planning Guide
- Report of the AIA Federal Architecture Task Group on the Federal Statutory Fee Limitation

Appendix 4 – List of Interviews Conducted

Ikaso conducted interviews with the following 40 stakeholders regarding the current construction procurement process in Hawaii. Ikaso requested to interview certain parties (*e.g.* State buyers, general contractors) and the SPO suggested possible interviewees. Below are the individuals, from that suggested list, who accepted the invitation for an interview.

Stakeholder Name	Role and Office	Date Interviewed
Sarah Allen	Administrator, State Procurement Office	September 19, 2019
Bonnie Kahakui	Assistant Administrator, State Procurement Office	September 4, 2019
Doug Murdock	Chief Information Officer, State of Hawaii	September 10, 2019
Jimmy Kurata	Project Management and Mineral Resources Branch Head, Department of Land and Natural Resources	September 4, 2019
Jadine Urasaki	Assistant Program Administrator, City and County of Honolulu Board of Water Supply	September 9, 2019
Jolie Yee	Engineer, Department of Accounting and General Services	September 9, 2019
Gina Ichiyama	Engineer, Department of Accounting and General Services	September 9, 2019
Tammy Lee	Administrative Service Officer, Hawaii Department of Transportation Highways Division	September 3, 2019
Wendy Imamura	Purchasing Administrator, City and County of Honolulu	September 6, 2019
Vicki Kitajima	Administrative Services Officer, Hawaii State Public Library System	September 13, 2019
Paula Youngling	Director of Procurement and Consultant Contracts, Honolulu Authority for Rapid Transportation	September 17, 2019

Stakeholder Name	Role and Office	Date Interviewed
Eric Nishimoto	Manager, Project Management Branch of the Public Works Division	September 9, 2019
Gordon Chen	Construction Management Branch Public Work Manager, Public Works Division	September 9, 2019
Chris Kinimaka	Administrator, Public Works Division	September 9, 2019
Chris Butt	Project Control Section Administrator, Hawaii Department of Education	September 5, 2019
John Chung	Public Works Administrator, Facilities Development Branch at the Hawaii Department of Education	September 5, 2019
Kelsey Soma Turek	Work Program Specialist, Project Control Section of the Office of Facilities and Operations for the Department of Education	September 5, 2019
Ford Fuchigami	Administrative Services Officer, Hawaii Department of Transportation - Airports Division	September 16, 2019
Ross Higashi	Deputy Director, Hawaii Department of Transportation Airports Division	September 16, 2019
Guy Ichinotsubo	Engineering Program Managers, Hawaii Department of Transportation Airports Division	September 16, 2019
Esther Brown	Complaints and Enforcement Officer, Department of Commerce and Consumer Affairs Regulated Industries Complaint Office	September 9, 2019
Craig Uyehara	Senior Hearings Officer, Department of Commerce & Consumer Affairs Hearings Office at Office of Administrative Hearings	September 24, 2019
Lance Inouye	President and CEO, Ralph S. Inouye Co.	September 9, 2019
Mike Kido	Government Affairs Attorney, Ashford + Wriston	September 9, 2019
Sherman Wong	Senior Account Manager, Gordian	September 9, 2019

Stakeholder Name	Role and Office	Date Interviewed
Jeff Masatsugu	Lobbyist, District Council 50	September 25, 2019
Brian Bowers	President, Bowers + Kubota	September 23, 2019
Ken Hayashida	Founder and President, KAI Hawaii	September 18, 2019
Glen Kaneshige	President, Nordic PCL Construction	September 18, 2019
Craig Nishimura	Vice President, Gray, Hong, Nojima & Associates	September 18, 2019
Keith Uemura	President, Park Engineering	September 23, 2019
Jan Gouveia	Vice President for Administration, University of Hawaii	September 20, 2019
Jamie Ho	Facilities Contract Manager, University of Hawaii Facilities Business Office	September 20, 2019
Lisa Dau	Director, Facilities Business Office at the University of Hawaii	September 20, 2019
Candace Ito	Executive Officer, Contractor License Board	October 4, 2019
Gregg Serikaku	Executive Director, PAMCA	October 3, 2019
Brian Lee	Director, LECET	October 2, 2019
Tim Lyons	President, Subcontractors Associations of Hawaii	October 9, 2019
Phyllis Ono-Evangelista	Procurement Manager, Office of Hawaiian Affairs	October 3, 2019
Miles Nishijima	Resource Manager and Land Assets Director, Office of Hawaiian Affairs	October 3, 2019

Appendix 5 – List of Report Exhibits

Exhibit 1 – Recommendation Implementation Considerations Model

Exhibit 2 – Cost and Time Estimates Associated with Passing a Statute

Exhibit 3 – Cost and Time Estimates Associated with Promulgating a Rule

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Exhibit 1:

Recommendation Implementation Consideration Model

Exhibit 1 - Recommendation Implementation Considerations Model

1/6/2020

In instances where the cost of a recommendation is expected to include (or be) the cost of a rule or statute, the reader is directed to Exhibits 2 and 3, respectively for those cost and time estimates. Exhibit 3 also provides the research used to calculate the hourly rates used herein.

		Time and Effort							Cost of Implementation					
Report Recommendation Number	**Recommendation**	**Constituencies Impacted by Recommendation**	**Level of Support for Recommendation**	**Nature and Complexity of Recommendation**	**Memorialization Method**	**Estimated Time Elapsed to Full Implementation**	**State Roles Impacted**	**Hours per Person to Implement**	**Personnel Costs**	**Tools and Systems Costs**	**Tool System Cost Explanation**	**Process Change Related Costs (e.g. Training, form development, Change Management)**	**Process Change Related Cost Explanation**	**Total**
I-1	Adopt, in rule, a prohibition on the award of contracts to Design Professionals who serve on Selection Committees, or to firms where that member is employed.	The impact of this recommendation is small - this is already a prohibition informally observed.	As this is a current practice, no resistance if expected.	This codifies a simple prohibition already observed.	Additional clause to existing rule	Effective immediately upon rule's effective date	*See Exhibit 3*	*See Exhibit 3*	$ 6,977.31	$ -	None	$ -	None	$ 6,977.31
I-2	Remove language in HRS § 103D-304(e) which dictates the relative importance of Design Professional selection criteria.	The constituencies impacted by this rule are State members of the Selection Committees who feel constrained by the statute's language. Also, Design Professionals with a history of working for the State could theoretically receive less business.	Some interviewees asked for this specifically. As experience is still a factor, it is not known if there will be resistance to the concept by Design Professionals.	This removes a constraint in evaluation - it is simple to implement.	Amending an existing statute.	Effective immediately upon statute's effective date.	*See Exhibit 2*	*See Exhibit 2*	$ 6,773.44	$ -	None	$ -	None	$ 6,773.44
I-3	Develop and deliver training pertaining to cost and price estimation of Design Professional services to better align actual State practices with Federal practices.	This recommendation impacts the SPO personnel who may hire and coordinate the development of the new training with the training vendor, as well as the individuals who receive the training.	We do not anticipate resistance as this training is only one additional course and will better equip personnel.	While the actual training and its receipt is simple, the cost estimation activities are of modest complexity for the ultimate State negotiators.	In training (no rule, no statute)	Effective immediately upon delivery of training	Training Recipients (SPO rate of $35.37/hour)	20	$ 707.40	$ -	None	$ 58,500.00	Cost of paying vendor to develop training ($130/hr, 450 hours)	$ 59,207.40
I-4	Amend the rule related to cost and price data certification to allow (but not require) procurement officers to request certification before negotiations are completed.	This recommendation impacts individuals in the SPO and other agencies who negotiate with Design Professionals.	As this suggestion only adds an option (and not a requirement) no resistance is expected.	This recommendation gives negotiators an option to ask for something they already ask for at an earlier point in the process.	Amending an existing rule.	Effective immediately upon rule's effective date	*See Exhibit 3*	*See Exhibit 3*	$ 6,977.31	$ -	None	$ -	None	$ 6,977.31
II-1	Train and encourage procurement officers to conduct and utilize an internal price estimation for construction procurements.	The SPO and other agency personnel impacted are those who are encouraged to prepare more internal construction estimates, to the extent they do not already do so or have one from Design Professionals.	This would constitute extra work so there may be some resistance to the implementation of these practices.	Given that Design Professionals already prepare these for most significant projects, the actual impact is expected to be minor.	In training (no rule, no statute)	Effective immediately upon delivery of training	Training Recipients (SPO rate of $35.37/hour)	40	$ 1,414.80	$ -	None	$ 58,500.00	Cost of paying vendor to develop training ($130/hr, 450 hours)	$ 153,298.80
							Estimation Prep (Annual figure, SPO rate of $35.37/hour) - assumes 200 projects will require an estimate, at 8 hours per estimate	1600	$ 56,592.00					
							Review of Estimates (Annual, SPO supervisor rate of $45.99/hour) - assumes 2 hours of review per estimate	800	$ 36,792.00					
II-2	Develop and institute a structured system for the collection, availability, and use of vendor performance information.	*This recommendation is already under way through the work of Sine Cera, LLC.*	*This recommendation is already under way through the work of Sine Cera, LLC.*	*This recommendation is already under way through the work of Sine Cera, LLC.*	*This recommendation is already under way through the work of Sine Cera, LLC.*	*This recommendation is already under way through the work of Sine Cera, LLC.*	n/a	n/a	n/a	$ -	n/a	$ -	n/a	n/a
II-3	Amend HRS § 103D-302 to allow negations of construction contracts resulting from competitive sealed bidding to include negotiations with the lowest responsible and responsive bidder when the bid amount varies significantly from the estimated price for the project, where such estimate was created prior to the opening of submitted bids.	The SPO and other agency personnel impacted are those who may negotiate. General contractors may be impacted as they will be asked, for the first time in a State setting, to negotiate.	This would constitute extra work so there may be some resistance to the implementation of these practices. However, The negotiations triggered by this change will likely be infrequent and optional.	The actual negotiations are likely relatively simple (pursuit of a lower price or more realistic one).	Amending an existing statute.	Effective immediately after statute passes	*See Exhibit 2 for Statute*	*See Exhibit 2 for Statute cost*	$ 6,773.44	$ -	None	$ -	None	$ 20,497.00
							SPO (or agency) Negotiator (SPO rate of $35.37/hour)	388	$ 13,723.56					
III-1	Eliminate the practice of asking for any information about subcontractors not required by statute.	An individual at the SPO will need to prepare a circular or memorandum. Thereafter, SPO and agency personnel will need to discontinue the practice. It will impact General Contractors because it will require less effort to submit a bid. It will positively impact DCCA and SPO personnel because it may reduce the number of protests received.	State personnel and General Contractors will likely support any reduction in this regard. Subcontractors will resist it for, while the recommendation still protects against bid shopping, it may be perceived as a dilution of those protections.	This recommendation is simple - it is a reduction in the amount of materials requested (and possibly updating existing forms or templates informally in use). It may result in fewer protests, simplifying the procurement process.	No formal memorialization needed - a memo or circular is sufficient.	Effective immediately upon notification	SPO time to prepare circular ($35.35/hour)	8	$ 282.96	$ -	None	$ -	None	$ 990.36
							Adjustments of templates (if any) ($35.37/hour)	20	$ 707.40					
III-2	Amend HRS § 103D-302(b) to eliminate the requirement to disclose the “nature and scope” of a listed subcontractor’s role.	An individual at the SPO will need to prepare a circular or memorandum. Thereafter, SPO and agency personnel will need to discontinue the practice. It will impact General Contractors because it will require less effort to submit a bid. It will positively impact DCCA and SPO personnel because it may reduce the number of protests received.	State personnel and General Contractors will likely support any reduction in this regard. Subcontractors will resist it for, while the recommendation still protects against bid shopping, it may be perceived as a dilution of those protections.	This recommendation is simple - it is a reduction in the amount of materials requested . It may result in fewer protests, simplifying the procurement process.	Amendment to an existing statute.	Effective upon the statute's effective date.	*See Exhibit 3*	*See Exhibit 3*	$ 6,773.44	$ -	None	$ -	None	$ 6,773.44
IV-1	Amend HRS § 103D-1001.5 in order to make the Hawaii Products Preference inapplicable to construction procurements.	This will impact SPO and agency personnel who no longer need to account for the preference and general contractors who might otherwise benefit (or be harmed) by the preference.	All interviewees supported the discontinuation of this preference.	This simplifies the evaluation process for construction.	Amendment to an existing statute and rule.	Effective upon the statute and rule's effective date.	*See Exhibit 2*	*See Exhibit 2*	$ 6,977.31	$ -	None	$ -	None	$ 13,750.75
							See Exhibit 3	*See Exhibit 3*	$ 6,773.44					
IV-2	Repeal HRS § 103-55.6 (Act 17 - Apprenticeship Program Preference).	This will impact SPO and agency personnel who no longer need to account for the preference and general contractors who might otherwise benefit (or be harmed) by the preference.	All interviewees supported the discontinuation of this preference.	This simplifies the evaluation process for construction.	Repeal of an existing statute.	Effective upon the statute's repeal.	*See Exhibit 2*	*See Exhibit 2*	$ 6,773.44	$ -	none	$ -	None	$ 6,773.44
IV-3	Amend HRS § 103D-1001.5 in order to make the Recycled Products Preference inapplicable to construction procurements.	This will impact SPO and agency personnel who no longer need to account for the preference and general contractors who might otherwise benefit (or be harmed) by the preference.	All interviewees supported the discontinuation of this preference.	This simplifies the evaluation process for construction.	Amendment to an existing statute and rule.	Effective upon the statute and rule's effective date.	*See Exhibit 2*	*See Exhibit 2*	$ 6,977.31	$ -	None	$ -	None	$ 13,750.75
							See Exhibit 3	*See Exhibit 3*	$ 6,773.44					
V-1	Include, in HAR § 3-122-43, determination criteria that may be weighted when considering whether to pursue a design-build procurement.	The impacted parties are the individuals in the SPO and agencies who may utilize the design-build method.	Support is predicted for this recommendation as it simply adds clarity to a process where interviewees requested guidance.	This should make determining the suitability of a design-build process easier.	Rule amendment (3x)	Effective upon the rule's effective date	*See Exhibit 3*	*See Exhibit 3*	$ 20,931.93	$ -	None	$ -	None	$ 20,931.93
V-2	Include, in HAR § 3-122-52, a description of evaluation criteria and solicitation procedures to be used in design-build RFPs when determining the short list of offerors.	The impacted parties are the individuals in the SPO and agencies who may utilize the design-build method.	Support is predicted for this recommendation as it simply adds clarity to a process where interviewees requested guidance.	This provides clarity on how to handle the first phase (pre-short list) of the process	Rule amendment	Effective upon the rule's effective date	*See Exhibit 3*	*See Exhibit 3*	$ 6,977.31	$ -		$ -	None	$ 6,977.31

Exhibit 1 - Recommendation Implementation Considerations Model

1/6/2020

In instances where the cost of a recommendation is expected to include (or be) the cost of a rule or statute, the reader is directed to Exhibits 2 and 3, respectively for those cost and time estimates. Exhibit 3 also provides the research used to calculate the hourly rates used herein.

		Time and Effort							Cost of Implementation					
Report Recommendation Number	**Recommendation**	**Constituencies Impacted by Recommendation**	**Level of Support for Recommendation**	**Nature and Complexity of Recommendation**	**Memorialization Method**	**Estimated Time Elapsed to Full Implementation**	**State Roles Impacted**	**Hours per Person to Implement**	**Personnel Costs**	**Tools and Systems Costs**	**Tool System Cost Explanation**	**Process Change Related Costs (e.g. Training, form development, Change Management)**	**Process Change Related Cost Explanation**	**Total**
V-3	Include, in HAR § 3-122-52, a description of evaluation criteria and solicitation procedures to be used in design-build RFPs after determining the short list of offerors.	The impacted parties are the individuals in the SPO and agencies who may utilize the design-build method.	Support is predicted for this recommendation as it simply adds clarity to a process where interviewees requested guidance.	This provides clarity on how to handle the second phase (post-short list) of the process	Rule amendment	Effective upon the rule's effective date	*See Exhibit 3*	*See Exhibit 3*	$ 6,977.31	$ -	None	$ -	None	$ 6,977.31
VI-1	Add a clause to the General Terms and Conditions clarifying that the contractor (or State) is responsible for the cost of utilities consumed during the project as well as any costs associated with temporary, project-specific utility hook-ups.	The drafting of this clause will take a small amount of a State attorney's time as well as a small amount of SPO time. Thereafter, the terms of the clause may impact the State or General Contractor, depending on how the clause is negotiated.	As the recommendation adds clarity to an open issue no resistance is expected. (The exact apportionment of liability for this issue can be addressed on a contract by contract basis.)	Simple addition of a term to a contract clarifying liability on an issue where the contract is presently silent.	Addition of one new contract clause.	Effective upon clause's introduction in the General Terms and Conditions (and in each contract thereafter).	Attorney General Resource ($61.28/hour)	3	$ 183.84	$ -	None	$ -	None	$ 360.69
							SPO Resource ($35.37/hour)	5	$ 176.85					

CPPR Final Report

Exhibit 2:

Cost and Time Estimates Associated with Statute

Exhibit 2 - Cost and Time Estimates Associated with Passing a Statute

11/15/2019

Below is a description of the legislative process, the roles involved, the anticipated time associated with those roles, and the predicted cost. All subsequent tabs provide the bases for the different hourly rates and other information used in this matrix.

Index	Description of Step	State Roles Affected		Hours/Role to Implement	Personnel Costs
		Role	Count		
1	Bill is drafted.	Legislative Aide	1	8.00	$ 252.12
		SPO	1	5.00	$ 176.85
2	House - Introduction. Bill is given to a clerk and assigned a number.	Clerk	1	0.25	$ 11.60
3	House - First Reading. Bill is referred to standing committee, considered by the committee, and amended as applicable. Bill is reported by committee with recommendation to pass on second reading or referred to the next committee.	House Committee	8	3.00	$ 1,388.45
4	House - Second Reading. Bill is referred to standing committee, considered by the committee, and amended as applicable. Bill is reported by committee with recommendation to pass third reading or referred to the next committee.	House Committee	8	1.50	$ 694.22
5	House - Third Reading. Bill is read "throughout," debated, amended as applicable, and voted.	Full House	51	0.50	$ 1,475.23
6	House - Certification. Passage certified by Speaker and clerk.	Speaker	1	0.10	$ 7.01
		Clerk	1	0.10	$ 4.64
7	Crossover. Bill is sent to Senate.	n/a	n/a	n/a	$ 0
8	Senate - First Reading. Bill is referred to standing committee, considered by the committee, and amended as applicable. Bill is reported by committee with recommendation to pass on second reading or referred to the next committee.	Senate Committee	5	3.00	$ 867.78
9	Senate - Second Reading. Bill is referred to standing committee, considered by the committee, and amended as applicable. Bill is reported by committee with recommendation to pass third reading or referred to the next committee.	Senate Committee	5	1.50	$ 433.89
10	Senate - Third Reading. Bill is read "throughout," debated, amended as applicable, and voted.	Full Senate	25	0.50	$ 723.15
11	Senate - Certification. Passage certified by President and clerk.	President	1	0.10	$ 7.01
		Clerk	1	0.10	$ 3.67
12	Joint Conference. Bill is considered by committee and reported back to both houses.	House Members	8	0.75	$ 347.11
		Senate Members	5	0.75	$ 216.95
13	Enrollment. Bill is examined for technical errors, retyped if amended, and certified by both presiding officers and clerks.	Legislative Aide	1	1.00	$ 31.51
		Speaker	1	0.50	$ 35.05
		President	1	0.50	$ 35.05
		Clerk	2	0.50	$ 41.52
14	Governor - Signature. For bills presented ten or more days before adjournment, Governor has ten days to sign, veto or let bill become law after the expiration of ten days. For bills presented less than ten days before adjournment or after adjournment, Governor has forty-five days to sign, veto or let bill become law after the expiration of forty-five days.	Governor	1	0.25	$ 20.63
15	Publication. In session laws and in cumulative supplement to Revised Statutes.	n/a	n/a	n/a	$ 0
				Total	**$ 6,773.44**

Salary Information and Committee Size - FY 2020

Position	Salary	Hourly
Legislator[1]	$57,852	$57.85
House Clerk[2]	$92,781	$46.39
Senate Clerk[2]	$73,313	$36.66
Legislative Aide[2]	$63,030	$31.51
Governor[2]	$165,048	$82.52
Speaker of the House[1]	$70,104	$70.10
President of the Senate[1]	$70,104	$70.10

[1] *Assumes legislative salary covers 6 months (1,000 hours) of annual work for citizen legislators*

[2] *Assumes 2,000 hours per work year*

Senate	Size
Full Body	*25*
Agriculture and Environment Committee	5
Commerce, Consumer Protection, and Health Committee	7
Education Committee	5
Energy, Economic Development, and Tourism Committee	5
Government Operations Committee	5
Human Services Committee	5
Housing Committee	5
Higher Education Committee	5
Hawaiian Affairs Committee	5
Judiciary Committee	5
Labor, Culture and the Arts Committee	5
Public Safety, Intergovernmental, and Military Affairs Committee	5
Technology Committee	5
Transportation Committee	5
Ways and Means Committee	13
Water and Land Committee	5
Median Committee Size	**5**

House	Size
Full Body	*51*
Agriculture Committee	8
Consumer Protection & Commerce Committee	11
Economic Development & Business Committee	8
Energy & Environmental Protection Committee	7
Finance Committee	15
Health Committee	8
Housing Committee	8
Human Services & Homelessness Committee	8
Intrastate Commerce Committee	7
Judiciary Committee	12
Labor & Public Employment Committee	8
Lower & Higher Education Committee	11
Legislative Management Committee	5
Public Safety, Veterans, & Military Affairs Committee	7
Tourism & International Affairs Committee	8
Transportation Committee	8
Water, Land, & Hawaiian Affairs Committee	7
Median Committee Size	**8**

Legislative Clerk Salaries- FY 2020

Department	Name	Title	Salary Range		Midpoint Salary
Hawaii House of Representatives	*[Name Redacted]*	Chief Clerk	$149,676.00	$149,676.00	$149,676.00
Hawaii House of Representatives	*[Name Redacted]*	Committee Clerk	$134,988.00	$134,988.00	$134,988.00
Hawaii House of Representatives	*[Name Redacted]*	Assistant Chief Clerk	$129,804.00	$129,804.00	$129,804.00
Hawaii House of Representatives	*[Name Redacted]*	Account Clerk	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Journal Clerk	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Account Clerk	$40,001.00	$55,000.00	$47,500.50
Hawaii House of Representatives	*[Name Redacted]*	Journal Clerk	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Chief Clerk	$125,652.00	$125,652.00	$125,652.00
Hawaii Senate	*[Name Redacted]*	Assistant Chief Clerk	$106,104.00	$106,104.00	$106,104.00
Hawaii Senate	*[Name Redacted]*	Committee Clerk	$104,682.00	$104,682.00	$104,682.00
Hawaii Senate	*[Name Redacted]*	Committee Clerk	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Calendar Clerk	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Journal Clerk	$55,001.00	$70,000.00	$62,500.50
Hawaii Senate	*[Name Redacted]*	Records Clerk	$55,001.00	$70,000.00	$62,500.50
Hawaii Senate	*[Name Redacted]*	Account Clerk	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Committee Clerk	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Committee Clerk	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Assistant Journal Clerk	$40,001.00	$55,000.00	$47,500.50

House Clerk Avg. Salary	**$92,781.43**
Senate Clerk Avg. Salary	**$73,312.91**

Legislative Staff Salaries- FY 2020

Department	Name	Title	Salary Range		Midpoint Salary
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$120,012.00	$120,012.00	$120,012.00
Hawaii House of Representatives	*[Name Redacted]*	Acting Director of Research	$120,012.00	$120,012.00	$120,012.00
Hawaii House of Representatives	*[Name Redacted]*	Assistant Director of Research	$115,392.00	$115,392.00	$115,392.00
Hawaii House of Representatives	*[Name Redacted]*	Research Chief	$106,704.00	$106,704.00	$106,704.00
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$106,704.00	$106,704.00	$106,704.00
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$102,576.00	$102,576.00	$102,576.00
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$91,200.00	$91,200.00	$91,200.00
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$87,696.00	$87,696.00	$87,696.00
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Director of Research	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$70,001.00	$85,000.00	$77,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Administrative Assistant	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Attorney	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Researcher	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$55,001.00	$70,000.00	$62,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$40,001.00	$55,000.00	$47,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$40,001.00	$55,000.00	$47,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$40,001.00	$55,000.00	$47,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Administrative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii House of Representatives	*[Name Redacted]*	Researcher	$40,001.00	$55,000.00	$47,500.50
Hawaii House of Representatives	*[Name Redacted]*	Legislative Analyst	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Research Attorney	$99,804.00	$99,804.00	$99,804.00
Hawaii Senate	*[Name Redacted]*	Research Attorney	$91,248.00	$91,248.00	$91,248.00
Hawaii Senate	*[Name Redacted]*	Legislative Aide/Researcher	$86,100.00	$86,100.00	$86,100.00

Legislative Staff Salaries- FY 2020

Department	Name	Title	Salary Range		Midpoint Salary
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Attorney	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Researcher	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Research Attorney	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Researcher	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Research Attorney	$70,001.00	$85,000.00	$77,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$55,001.00	$70,000.00	$62,500.50
Hawaii Senate	*[Name Redacted]*	Researcher	$55,001.00	$70,000.00	$62,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$55,001.00	$70,000.00	$62,500.50
Hawaii Senate	*[Name Redacted]*	Research Attorney	$55,001.00	$70,000.00	$62,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Research Analyst	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant (PT)	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Assistant	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Research Analyst	$40,001.00	$55,000.00	$47,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide	$25,001.00	$40,000.00	$32,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide/Researcher	$25,001.00	$40,000.00	$32,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide (PT)	$25,001.00	$40,000.00	$32,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide (PT)	$10,001.00	$25,000.00	$17,500.50

Legislative Staff Salaries- FY 2020

Department	Name	Title	Salary Range		Midpoint Salary
Hawaii Senate	*[Name Redacted]*	Legislative Aide (PT)	$10,001.00	$25,000.00	$17,500.50
Hawaii Senate	*[Name Redacted]*	Legislative Aide (PT)	$10,001.00	$25,000.00	$17,500.50

Legis. Aide Avg. Salary	**$63,029.93**

Governor, Speaker of the House, and Senate President Salaries- FY 2020

Title	Salary
Governor	$165,048.00
Speaker of the House	$70,104.00
President of the Senate	$70,104.00

CPPR Final Report

Exhibit 3:

Cost and Time Estimates Associated with Rule

Exhibit 3 - Cost and Time Estimates Associated with Promulgating a Rule

12/13/2019

Below is a description of the rule making process, the roles involved, the anticipated time associated with those roles, and the predicted cost. The next tab performs the same analysis should the State elect to first pass an Interim rule. All subsequent tabs provide the bases for the different hourly rates and other information used in this matrix.

						State Roles Impacted			
Index	Bus. Days	Cum. Days	Type	Description of Step	Note	Role	Count	Hours/Role to Implement	Personnel Costs
1	0	0	preparing / drafting	PPB or State Procurement Office ("SPO") Administrator determines a new rule or an amendment or repeal of an existing rule is needed, or a rule is struck by the courts. (Note: Any interested person may petition for the adoption, amendment, or repeal of rules, pursuant to Hawaii Revised Statutes ("HRS") 91-6.) SPO drafts the preliminary rule.		SPO	2	2.00	$ 141.48
2	5	5	preparing / drafting	SPO consults with the Small Business Regulatory Review Board ("SBRRB") to determine whether the rule affects small businesses.	Full (eleven member)	SBRRB	11	0.50	$ 0
					SBRRB - uncompensated role	SPO	2	1.00	$ 70.74
3	5	10	preparing / drafting	If the rule is determined to affect small business, SPO drafts a small business impact statement, in accordance with HRS Chapter 201M, and submits it and the rules (present and new) to SBRRB.	Assume all rules affect small businesses, given nature of construction industry	SPO	2	2.00	$ 141.48
4	15	25	external action	If a small business impact statement is submitted, SBRRB responds with recommendations or an approval. [+15 or more from time submitted, depending on SBRRB meeting schedule]		SBRRB	11	0.50	$ 0
5	5	30	preparing / drafting	If SBRRB makes recommendations, SPO considers the recommendations and makes any necessary adjustments to the preliminary rule and small business impact statement. SPO prepares the draft proposed rule in the Standard and Ramseyer formats and sends it to the LRB for technical review.		SPO	2	2.00	$ 141.48
6	5	35	preparing / drafting	SPO drafts a memo to the Governor, in accordance with Administrative Directive No. 09-01 ("AD 09-01"), requesting a public hearing. (Note: Do NOT send the memo to the Governor until PPB approves draft proposed rule.)	Step expected to apply across multiple rules - hours adjusted downward accordingly	SPO	2	0.20	$ 14.15
7	5	40	external action	LRB responds to SPO's request for a technical review with recommendations. [+10 from time submitted]		LRB	1	1.00	$ 35.39
8	3	43	preparing / drafting	SPO makes necessary corrections, based on LRB's recommendations, to the draft proposed rule and sends the corrected draft proposed rule to PPB's deputy attorney general ("AG").		SPO	2	1.00	$ 70.74
9	10	53	external action	PPB's deputy AG provides recommendations. [+10 from time submitted]		Deputy AG	1	1.00	$ 61.28
10	3	56	preparing / drafting	SPO makes necessary corrections, based on the deputy AG's recommendations, to the draft proposed rule and sends the corrected draft proposed rule back to the deputy AG.		SPO	2	1.00	$ 70.74
11	3	59	external action	PPB's deputy AG approves the draft proposed rule "as to form."		Deputy AG	1	0.25	$ 15.32

Exhibit 3 - Cost and Time Estimates Associated with Promulgating a Rule

12/13/2019

12	10	69	board action	PPB meets and approves the draft proposed rule. (Note: If changes are made, the deputy AG needs to review the proposed rule again and approve "as to form." (+5))		PPB	7	0.50	$	0
13	1	70	preparing / drafting	If changes have been made to the proposed rule since LRB last reviewed it, SPO may send the proposed rule to LRB for another technical review.		n/a	n/a	n/a	$	0
14	10	80	external action	(OPTIONAL) LRB responds to SPO's request for a technical review with recommendations. [+10 from time submitted]		n/a	n/a	n/a	$	0
15	3	83	preparing / drafting	If LRB makes recommendations, SPO makes necessary corrections to the proposed rule and sends the corrected proposed rule to PPB's deputy AG.		n/a	n/a	n/a	$	0
16	5	88	external action	If changes are made per LRB, PPB's deputy AG approves the draft proposed rule "as to form." [+5 from time submitted]		n/a	n/a	n/a	$	0
17	1	89	submission / publication	SPO sends the rules and (previously prepared and verified with necessary changes) memo to the Governor requesting a public hearing. (Note: The memo should be copied to the Department of Budget and Finance and the Department of Business, Economic Development and Tourism, pursuant to AD 09-01.) [upon PPB's approval but after LRB and deputy AG reviews, if any]	Step expected to apply across multiple rules - hours adjusted downward accordingly	SPO	2	0.20	$	14.15
18	10	99	preparing / drafting	SPO drafts the notice of public hearing, in accordance with HRS 91-3(a), while awaiting the Governor's approval. Hearing must be held at least 30 days after publication of notice. (Note: SPO may want the deputy AG to review the draft notice of public hearing.) SPO also prepares for the public hearing: * Coordinate public hearing logistics (possible meeting spaces, dates, times, cost of publishing, etc.); * Compile a list of contact information of interested stakeholders; and * Determine if the full PPB or a hearing officer (recommended) will preside over public hearing. If a hearing officer will be presiding: o Draft terms, conditions, and powers of the hearing officer; and o Coordinate logistics to ensure a recording or transcript of public testimony is available for PPB members after the hearing and prior to decision-making.	Step expected to apply across multiple rules - hours adjusted downward accordingly	SPO Deputy AG	2 1	0.50 0.10	$ $	35.37 6.13
19	10	109	board action	If a hearing officer instead of the PPB will conduct the public hearing, PPB meets to designate a hearing officer(s) (or masters), pursuant to HRS 92-16(a)(3), through a board resolution. The resolution should include the names of hearing officers and the terms, conditions, and powers of hearing officers.	Step expected to apply across multiple rules - hours adjusted downward accordingly Note: uncompensated role	PPB	7	0.10	$	0
20	0	109	external action	Governor approves public hearing request. [+20 from time submitted]	Step expected to apply across multiple rules - hours adjusted downward accordingly	Gov.	1	0.10	$	8.25

Exhibit 3 - Cost and Time Estimates Associated with Promulgating a Rule

12/13/2019

21	5	114	preparing / drafting	SPO coordinates with the designated official (hearing officer(s) or PPB) to schedule the public hearing: * Reserve meeting location(s); * Update the notice for public hearing accordingly; and SPO also coordinates with PPB in scheduling the decision-making meeting to follow the public hearing (between 3-6 weeks after the public hearing) and reserves the meeting location.	Step expected to apply across multiple rules - hours adjusted downward accordingly	SPO	2	0.20	$ 14.15
22	1	115	submission / publication	SPO publishes the notice for public hearing (to be held at least 30 days after publication of notice): * In newspapers statewide and each county (Honolulu Advertiser, Maui News, Garden Island, Hawaii Tribune-Herald, and West Hawaii Today); * Via email to list of interested stakeholders; * On the LG website, in accordance with HRS 91-2.6; and * On SPO's website. (Note: Notice cannot be published until the Governor approves the hearing.)	Step expected to apply across multiple rules - hours adjusted downward accordingly The $4,974.08 is the estimated cost to place the required notice in various publications (see "Publication Costs" tab for a demonstration of its calculation.)	SPO	2	0.20	$ 14.15
								1.00	$ 4,974.08
23	2	117	communication /coordination	SPO communicates and coordinates with various entities in preparation for public hearing and continues to communicate and coordinate with entities that will be engaged in future steps of the promulgation process	Requested inclusion from SPO	SPO	2	8.00	$ 565.93
24	10	127	preparing / drafting	SPO prepares for the public hearing: * Draft procedures for designated hearing officer or PPB chair (whichever is appropriate); * Prepare a script; and * Invite and advise PPB members on participation in public hearing.	Step expected to apply across multiple rules - hours adjusted downward accordingly	SPO	2	0.20	$ 14.15
25	20	147	public hearing	Hearing officer and/or PPB holds public hearing. * Hearing officer reads public hearing notice out loud. * The public testifies.		SPO	2	2.00	$ 141.48
						Hearing Officer	1	1.00	$ 52.06
26	5	152	preparing / drafting	If hearing officer presided over public hearing, a transcript or recording of oral testimony is made available to PPB members along with any written testimony.		SPO	1	2.00	$ 70.74
27	10	162	preparing / drafting	SPO reviews public testimony, documents reasons for accepting or not accepting any suggested changes to proposed rule and prepares a recommendation for PPB. If the rules affect small business, SPO also prepares a post public hearing Small Business Statement in accordance with HRS 201M-3(a).		SPO	1	4.00	$ 141.48
28	10	172	board action	PPB holds decision-making meeting, makes any necessary adjustments, and adopts the proposed rule, and approves the Small Business Statement. * PPB authorizes the chair to sign the proposed rule on board's behalf. * PPB chair signs three copies of the adopted proposed rule in Standard format. * SPO sends the adopted proposed rule to deputy AG for review. [+20 from public hearing]		PPB	7	0.50	$ 0
29	5	177	external action	Deputy AG approves adopted proposed rule "as to form." (Note: If deputy AG		Deputy AG	1	0.25	$ 15.32
30	5	182	preparing /	SPO sends previously prepared and approved Small Business Statement and rules to		SPO	1	1.00	$ 35.37

Exhibit 3 - Cost and Time Estimates Associated with Promulgating a Rule

12/13/2019

31	1	183	submission / publication	SPO sends the (previously prepared) memo along with three signed copies (signed by the PPB chair) of the proposed rule in Standard format to the Governor.		SPO	1	0.50	$	17.69
32	10	193	external action	Governor approves and signs the rule and files the copies with the LG. The LG provides PPB/SPO with a copy of the signed, approved rule.		Gov.	1	0.25	$	20.63
						Lieut. Gov.	1	0.25	$	20.32
33	0	193	submission / publication	SPO sends a file-stamped and certified copy of the rules in Ramseyer and Standards formats to LRB. SPO also sends a copy to deputy AG and the Comptroller, as a courtesy.		SPO	1	0.50	$	17.69
34	10	203	external action	Approved rule becomes effective 10 days after being filed with the Office of the LG, pursuant to HRS 91-4(b). [+10 after being filed]		n/a	n/a	n/a	$	0
35	15	218	submission / publication	SPO issues a Procurement Directive explaining the newly approved rule.		SPO	1	1.00	$	35.37
								Total	**$**	**6,977.31**

Exhibit 3 - Cost and Time Associated with Passing an Interim Rule

Index	Bus. Days	Cum. Days	Type	Description of Step	Note	State Roles Impacted: Role	Count	Hours/Role to Implement	Personnel Costs
1	0	0	board action	The Procurement Policy Board ("PPB") adopts interim administrative rules that repeal, amend, or adopt * PPB authorizes chair to sign Standard format interim rules on behalf of the board * PPB chair signs interim rules	Full (seven member) PPB	PPB	7	1.00	$ 0
2	1-5	5	submission / publication	File Standard format of interim administrative rules with the office of the Lieutenant Governor ("LG") * Also send a Ramseyer and Standard copy to Legislative Reference Bureau ("LRB") and to deputy AG, as a courtesy		PPB	1	1.00	$ 0
3	10	15	submission / publication	Issue Procurement Directive explaining the interim admin rule		PPB	1	1.00	$ 0
4	547	562	sunset / expiration	Interim repeal of HAR 3-122-66 sunsets/expires (unless formal adoption of administrative rules overrides interim rules earlier) [18 Months from Start Date of Interim Admin Rule]		n/a	n/a	n/a	$ 0
								Total	**$ 0**

note: the PPB is uncompensated so there is no estimated cost for an Interim Rule

Notice and Publication Cost

	Actual FY 2016 Benchmarks			
Name	**October 2015 Cost**	**April 2016 Cost**	**FY2016 Average**	**Estimated* FY 2020 Figure**
Maui News	$388.02	$450.84	$419.43	$733.59
West Hawaii Today	$368.56	$421.20	$394.88	$690.65
The Hawaii Tribune Herald	$497.30	$568.34	$532.82	$931.91
The Garden Island Newspaper	$409.50	$468.00	$438.75	$767.38
Honolulu Star-Advertiser	$987.53	$1,128.60	$1,058.07	$1,850.56
		Notice Total	**$2,843.95**	**$4,974.08**

*assumes 15% annual increase (as reported by SPO)

State Procurement Office (SPO) Salaries - FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Accounting & General Services	*[Name Redacted]*	State Procurement Asst Admr	$101,508.00	$168,936.00	2020	$135,222.00
Accounting & General Services	*[Name Redacted]*	State Procurement Admin	$126,912.00	$126,912.00	2020	$126,912.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt VI	$64,476.00	$95,436.00	2020	$79,956.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt VI	$64,476.00	$95,436.00	2020	$79,956.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt V	$59,616.00	$88,248.00	2020	$73,932.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt V	$59,616.00	$88,248.00	2020	$73,932.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt V	$59,616.00	$88,248.00	2020	$73,932.00
Accounting & General Services	*[Name Redacted]*	Procurement & Supply Spclt IV	$52,956.00	$78,420.00	2020	$65,688.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt IV	$52,956.00	$78,420.00	2020	$65,688.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt IV	$52,956.00	$78,420.00	2020	$65,688.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt IV	$52,956.00	$78,420.00	2020	$65,688.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt III	$48,948.00	$72,528.00	2020	$60,738.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt III	$48,948.00	$72,528.00	2020	$60,738.00
Accounting & General Services	*[Name Redacted]*	Procurement & Supply Spclt III	$48,948.00	$72,528.00	2020	$60,738.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt III	$48,948.00	$72,528.00	2020	$60,738.00

State Procurement Office (SPO) Salaries - FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Accounting & General Services	*[Name Redacted]*	OIMT Contract&ProcurementSpec	$67,788.00	$67,788.00	2020	$67,788.00
Accounting & General Services	*[Name Redacted]*	Purchasing Spclt II	$45,288.00	$67,044.00	2020	$56,166.00
Accounting & General Services	*[Name Redacted]*	Procurement & Supply Spclt II	$45,288.00	$67,044.00	2020	$56,166.00
Accounting & General Services	*[Name Redacted]*	OIMT Procurement Specialist	$58,860.00	$58,860.00	2020	$58,860.00
Accounting & General Services	*[Name Redacted]*	Contracts Assistant I	$36,732.00	$56,532.00	2020	$46,632.00
Accounting & General Services	*[Name Redacted]*	OIMT Procurement Specialist	$50,400.00	$50,400.00	2020	$50,400.00

SPO Average	**$70,740.86**

Legislative Reference Bureau (LRB) Salaries- FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Director	$154,812.00	$154,812.00	2020	$154,812.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	First Assistant	$142,416.00	$142,416.00	2020	$142,416.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Assistant Director for Revision of Statutes	$122,000.00	$122,000.00	2020	$122,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Senior Research Attorney - Special Projects	$100,000.00	$100,000.00	2020	$100,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Private Secretary	$90,990.00	$90,990.00	2020	$90,990.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Senior Research Attorney	$89,580.00	$89,580.00	2020	$89,580.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Senior Research Attorney	$88,896.00	$88,896.00	2020	$88,896.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Head Research Librarian	$84,648.00	$84,648.00	2020	$84,648.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Legislative Researcher	$81,576.00	$81,576.00	2020	$81,576.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Legislative Researcher	$80,700.00	$80,700.00	2020	$80,700.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Senior Research Attorney	$78,492.00	$78,492.00	2020	$78,492.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Administrative Secretary	$76,224.00	$76,224.00	2020	$76,224.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Public Access Room Coordinator	$75,912.00	$75,912.00	2020	$75,912.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Systems Office Supervisor	$75,612.00	$75,612.00	2020	$75,612.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$74,340.00	$74,340.00	2020	$74,340.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$74,340.00	$74,340.00	2020	$74,340.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$73,740.00	$73,740.00	2020	$73,740.00

Legislative Reference Bureau (LRB) Salaries- FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Librarian	$71,928.00	$71,928.00	2020	$71,928.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$68,844.00	$68,844.00	2020	$68,844.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Legislative Researcher	$68,364.00	$68,364.00	2020	$68,364.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$66,960.00	$66,960.00	2020	$66,960.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$65,928.00	$65,928.00	2020	$65,928.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$64,000.00	$64,000.00	2020	$64,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Secretary	$63,696.00	$63,696.00	2020	$63,696.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Librarian	$63,000.00	$63,000.00	2020	$63,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Attorney	$62,400.00	$62,400.00	2020	$62,400.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Information/Computer Specialist	$61,224.00	$61,224.00	2020	$61,224.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Secretary	$60,492.00	$60,492.00	2020	$60,492.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Legislative Researcher	$60,000.00	$60,000.00	2020	$60,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Assistant PAR Coordinator	$57,216.00	$57,216.00	2020	$57,216.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Research Librarian	$57,000.00	$57,000.00	2020	$57,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Secretary	$55,000.00	$55,000.00	2020	$55,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Secretary	$53,544.00	$53,544.00	2020	$53,544.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Assistant Legislative Researcher	$51,132.00	$51,132.00	2020	$51,132.00

Legislative Reference Bureau (LRB) Salaries- FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Secretary	$45,000.00	$45,000.00	2020	$45,000.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Cataloging	$31,200.00	$31,200.00	2020	$31,200.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Student Clerical Assistant	$25,168.00	$25,168.00	2020	$25,168.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Student Clerical Assistant	$22,048.00	$22,048.00	2020	$22,048.00
Hawaii Legislative Reference Bureau	*[Name Redacted]*	Student Clerical Assistant	$22,048.00	$22,048.00	2020	$22,048.00

LRB Average	**$70,781.28**

Deputy Attorney General (AG) Salaries - FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Attorney General	*[Name Redacted]*	First Deputy Attorney General	$149,544.00	$149,544.00	2020	$149,544.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$141,000.00	$141,000.00	2020	$141,000.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$140,112.00	$140,112.00	2020	$140,112.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$140,040.00	$140,040.00	2020	$140,040.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$136,068.00	$136,068.00	2020	$136,068.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$133,440.00	$133,440.00	2020	$133,440.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$132,828.00	$132,828.00	2020	$132,828.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$132,624.00	$132,624.00	2020	$132,624.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$129,504.00	$129,504.00	2020	$129,504.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$129,276.00	$129,276.00	2020	$129,276.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$127,284.00	$127,284.00	2020	$127,284.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$127,284.00	$127,284.00	2020	$127,284.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$126,984.00	$126,984.00	2020	$126,984.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$126,900.00	$126,900.00	2020	$126,900.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$126,000.00	$126,000.00	2020	$126,000.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$125,280.00	$125,280.00	2020	$125,280.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$124,464.00	$124,464.00	2020	$124,464.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$123,540.00	$123,540.00	2020	$123,540.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$121,860.00	$121,860.00	2020	$121,860.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$120,348.00	$120,348.00	2020	$120,348.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$120,252.00	$120,252.00	2020	$120,252.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$120,048.00	$120,048.00	2020	$120,048.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$119,748.00	$119,748.00	2020	$119,748.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$119,004.00	$119,004.00	2020	$119,004.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$118,836.00	$118,836.00	2020	$118,836.00
Attorney General	*[Name Redacted]*	Supvg Deputy Attorney General	$116,424.00	$116,424.00	2020	$116,424.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$115,824.00	$115,824.00	2020	$115,824.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$115,008.00	$115,008.00	2020	$115,008.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$114,840.00	$114,840.00	2020	$114,840.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$113,208.00	$113,208.00	2020	$113,208.00

Deputy Attorney General (AG) Salaries - FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Attorney General	*[Name Redacted]*	Deputy Attorney General	$113,184.00	$113,184.00	2020	$113,184.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$112,728.00	$112,728.00	2020	$112,728.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$112,488.00	$112,488.00	2020	$112,488.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$112,032.00	$112,032.00	2020	$112,032.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$111,900.00	$111,900.00	2020	$111,900.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$111,396.00	$111,396.00	2020	$111,396.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$111,204.00	$111,204.00	2020	$111,204.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$110,976.00	$110,976.00	2020	$110,976.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$109,704.00	$109,704.00	2020	$109,704.00
Attorney General	*[Name Redacted]*	Deputy Attorney General	$109,464.00	$109,464.00	2020	$109,464.00

Dep. AG Average	**$122,566.20**

Governor and Lieutenant Governor (LG) Salaries - FY 2020

Sub-Department	Title	Salary Range		Fiscal Year	Midpoint Salary
Office of the Governor	Governor	$165,048.00	$165,048.00	2020	$165,048.00
Office of the Lieutenant Governor	Lieutenant Governor	$162,552.00	$162,552.00	2020	$162,552.00

Gov Salary	**$165,048.00**
LG Salary	**$162,552.00**

Hearings Officer Salaries - FY 2020

Sub-Department	Name	Title	Salary Range		Fiscal Year	Midpoint Salary
Commerce & Consumer Affairs	*[Name Redacted]*	Supervising Hearings Officer	$115,608.00	$115,608.00	2020	$115,608.00
Commerce & Consumer Affairs	*[Name Redacted]*	NF Hearings Officer	$105,780.00	$105,780.00	2020	$105,780.00
Commerce & Consumer Affairs	*[Name Redacted]*	Hearings Officer, CRF	$101,724.00	$101,724.00	2020	$101,724.00
Commerce & Consumer Affairs	*[Name Redacted]*	Hearings Officer CCA	$98,760.00	$98,760.00	2020	$98,760.00
Commerce & Consumer Affairs	*[Name Redacted]*	Hearings Officer CCA	$98,760.00	$98,760.00	2020	$98,760.00

Hearings Officer Average	**$104,126.40**

HOUSE OF REPRESENTATIVES
TWENTY-EIGHTH LEGISLATURE, 2016
STATE OF HAWAII

H.R. NO. 142

HOUSE RESOLUTION

REQUESTING THE STATE PROCUREMENT OFFICE TO REVIEW HAWAII'S PROCUREMENT LAWS IN COMPARISON WITH FEDERAL PROCUREMENT LAWS.

WHEREAS, the Hawaii public procurement code under chapter 103D, Hawaii Revised Statutes, governs the procurement of goods, services, or construction by state and county agencies; and

WHEREAS, chapter 103D, Hawaii Revised Statutes, was originally based on the framework provided by the American Bar Association's Model Procurement Code for State and Local Governments and was enacted to increase competition, ensure fairness, and establish greater uniformity in the public procurement of goods and services; and

WHEREAS, the State's procurement laws have been amended numerous times since the initial enactment of chapter 103D, Hawaii Revised Statutes; and

WHEREAS, federal procurement laws, including the Federal Acquisition Regulation, are not aligned with state procurement laws; and

WHEREAS, Hawaii's procurement process could be improved through a better understanding of the efficient and effective ways in which the federal government conducts procurement processes; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twenty-eighth Legislature of the State of Hawaii, Regular Session of 2016, that the State Procurement Office is requested to review Hawaii's procurement laws in comparison to federal procurement laws; and

BE IT FURTHER RESOLVED that the review should include:

(1) A cost-benefit analysis of the current Hawaii public procurement process with regard to construction contracts;

(2) An examination of issues and concerns regarding the Hawaii public procurement process that were raised by the task force established pursuant to Senate Concurrent Resolution No. 92, S.D. 2, Regular Session of 2013, in its final report submitted to the Legislature during the Regular Session of 2015;

(3) A review of federal procurement laws, particularly Federal Acquisition Regulation Part 36—Construction and Architect-Engineer Contracts, and a comparison of the similarities and differences between the construction procurement provisions of the Hawaii public procurement code and federal construction procurement laws;

(4) An analysis of whether closer alignment of construction procurement provisions of the Hawaii public procurement code to federal construction procurement laws would be beneficial to the State;

(5) The length of time and the effort required by the State to implement changes to better align the construction procurement provisions of the Hawaii public procurement code with federal construction procurement laws; and

(6) Any costs, including personnel costs, to the State should the construction procurement provisions of the Hawaii public procurement code be amended to more closely align with federal construction procurement laws; and

BE IT FURTHER RESOLVED that the State Procurement Office is requested to report its findings and recommendations, including any proposed legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2017; and

H.R. NO. 142

BE IT FURTHER RESOLVED that a certified copy of this Resolution be transmitted to the Administrator of the State Procurement Office.

OFFERED BY: _____

MAR 1 1 2016