

CHAPTER 103D
HAWAII PUBLIC PROCUREMENT CODE

Part I. General Provisions

Section

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

Part II. Procurement Organization

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- 103D-210 Repealed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- 103D-214 Repealed

Part III. Source Selection and Contract Formation

- 103D-301 Methods of source selection
- 103D-302 Competitive sealed bidding
- 103D-303 Competitive sealed proposals
- 103D-303.5 Pre-bid conference
- 103D-304 Procurement of professional services
- 103D-305 Small purchases; prohibition against parceling

103D-306 Sole source procurement
103D-307 Emergency procurements
103D-308 Cancellation of invitations for bids or requests
for proposals
103D-309 Contract not binding unless funds available
103D-310 Responsibility of offerors
103D-311 Prequalification of suppliers
103D-312 Cost or pricing data
103D-313 Types of contracts
103D-314 Approval of accounting system
103D-315 Multi-term contracts
103D-316 Right to inspect plant
103D-317 Right to audit records
103D-318 Finality of determinations
103D-319 Reporting of anticompetitive practices
103D-320 Retention of procurement records
103D-321 Repealed
103D-322 Multiple awards
103D-323 Bid security
103D-324 Contract performance and payment bonds
103D-325 Bond forms and copies
103D-326 Fiscal responsibility
103D-327 Safety and health programs for construction
103D-328 Tax clearances; setoff for due and unpaid taxes

Part IV. Specifications

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

Part V. Modification and Termination of Contracts

103D-501 Contract clauses and their administration

Part VI. Cost Principles

103D-601 Cost principles rules required

Part VII. Legal and Contractual Remedies

- 103D-701 Authority to resolve protested solicitations and awards
- 103D-701.5 Procurement statistics
- 103D-702 Authority to debar or suspend
- 103D-703 Authority to resolve contract and breach of contract controversies
- 103D-703.5 Settlement of default by contractor
- 103D-704 Exclusivity of remedies
- 103D-705 Solicitations or awards in violation of law
- 103D-706 Remedies prior to an award
- 103D-707 Remedies after an award
- 103D-708 Interest
- 103D-709 Administrative proceedings for review
- 103D-710 Judicial review
- 103D-711 Judicial action
- 103D-712 Time limitations on actions
- 103D-713 Defense of a governmental body

Part VIII. Governmental Relations and
Cooperative Purchasing

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

Part IX. Assistance to Small Businesses

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

Part X. Preferences

- 103D-1001 Definitions

- 103D-1001.5 Application of this part
- 103D-1002 Hawaii products
- 103D-1002.5 Failure to adequately verify, deliver, or supply Hawaii products
- 103D-1003 Printing, binding, and stationery work
- 103D-1004 Reciprocity
- 103D-1005 Recycled products
- 103D-1006 Software development businesses
- 103D-1007 Repealed
- 103D-1008 Taxpayer preference
- 103D-1009 Preference for qualified community rehabilitation programs
- 103D-1010 Purchases from qualified community rehabilitation programs
- 103D-1011 Qualified community rehabilitation program; proposal to provide goods and services
- 103D-1012 Biofuel preference

Part XI. Federal and State Surplus Property

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

Part XII. Inventory Management; State and County Property

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

Part XIII. Preference for Oil Products with
Greater Recycled Content

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

Note

Expedited information technology procurements; reports to legislature. L 2012, c 222.

Report to legislature (no later than 2016 session) regarding the university's procurement of construction contracts and construction-related consultant services. L 2013, c 87, §6.

Cross References

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

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

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

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

Attorney General Opinions

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

Law Journals and Reviews

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

Case Notes

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

Under the express terms of §103D-709(c), petitioner could not seek review of the chief procurement officer's decision on a chapter 103F health and human services contract pursuant to this chapter unless the protest was decided under one of the sections listed in §103D-709(c); §103D-709(c) thus foreclosed petitioner from seeking review of the chief procurement officer's decision made pursuant to §103F-501 under the procedures of §103D-709. 127 H. 76, 276 P.3d 645 (2012).

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

PART I. GENERAL PROVISIONS

§103D-101 Requirements of ethical public procurement. (a) All public employees shall conduct and participate in public procurement in an ethical manner. In conducting and participating in procurement, public employees shall:

- (1) Act as a fiduciary and trustee of public moneys;
- (2) Remain independent from any actual or prospective bidder, offeror, contractor, or business;
- (3) Act only in the public interest;
- (4) Abide by the statutes and administrative rules relating to public procurement;
- (5) Identify and maximize efficiencies in the public procurement process;
- (6) Encourage economic competition by:
 - (A) Ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment; and
 - (B) Researching innovative goods and services to meet the public's needs;
- (7) Avoid the intent and appearance of unethical behavior;
- (8) Avoid social interactions with any actual or prospective bidder, offeror, contractor, business, or other interested parties during the procurement process;
- (9) Maintain confidentiality in a manner that ensures a fair procurement process;

- (10) Remain impartial in dealings with any actual or prospective bidder, offeror, contractor, business, or other interested parties; and
 - (11) Identify and eliminate any conflicts of interest.
- (b) Any actual or prospective bidder, offeror, [contractor], or business taking part in the conduct of public procurement, shall act in good faith to practice purchasing ethics, and when applicable, display business integrity as a responsible offeror through the public procurement process, including but not limited to the following:
- (1) Avoiding the intent and appearance of unethical behavior or business practices;
 - (2) Refraining from any activity that would create the appearance of impropriety or conflicts of personal interest and the interests of the State or counties;
 - (3) Identifying and eliminating any conflicts of interest; and
 - (4) Ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment.
- (c) All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith. [L Sp 1993, c 8, pt of §2; am L 2010, c 207, §1]

§103D-102 Application of this chapter. (a) This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement.

(b) Notwithstanding subsection (a), this chapter shall not apply to contracts by governmental bodies:

- (1) Solicited or entered into before July 1, 1994, unless the parties agree to its application to a contract solicited or entered into prior to July 1, 1994;
- (2) To disburse funds, irrespective of their source:
 - (A) For grants as defined in section 42F-101, made by the State in accordance with standards provided by law as required by article VII, section 4, of the state constitution; or by the counties pursuant to their respective charters or ordinances;
 - (B) To make payments to or on behalf of public officers and employees for salaries, fringe benefits, professional fees, or reimbursements;
 - (C) To satisfy obligations that the State is required to pay by law, including paying fees, permanent

- settlements, subsidies, or other claims, making refunds, and returning funds held by the State as trustee, custodian, or bailee;
- (D) For entitlement programs, including public assistance, unemployment, and workers' compensation programs, established by state or federal law;
 - (E) For dues and fees of organizations of which the State or its officers and employees are members, including the National Association of Governors, the National Association of State and County Governments, and the Multi-State Tax Commission;
 - (F) For deposit, investment, or safekeeping, including expenses related to their deposit, investment, or safekeeping;
 - (G) To governmental bodies of the State;
 - (H) As loans, under loan programs administered by a governmental body; and
 - (I) For contracts awarded in accordance with chapter 103F;
- (3) To procure goods, services, or construction from a governmental body other than the University of Hawaii bookstores, from the federal government, or from another state or its political subdivision;
 - (4) To procure the following goods or services which are available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State:
 - (A) Services of expert witnesses for potential and actual litigation of legal matters involving the State, its agencies, and its officers and employees, including administrative quasi-judicial proceedings;
 - (B) Works of art for museum or public display;
 - (C) Research and reference materials including books, maps, periodicals, and pamphlets, which are published in print, video, audio, magnetic, or electronic form;
 - (D) Meats and foodstuffs for the Kalaupapa settlement;
 - (E) Opponents for athletic contests;
 - (F) Utility services whose rates or prices are fixed by regulatory processes or agencies;
 - (G) Performances, including entertainment, speeches, and cultural and artistic presentations;
 - (H) Goods and services for commercial resale by the State;
 - (I) Services of printers, rating agencies, support facilities, fiscal and paying agents, and

registrars for the issuance and sale of the State's or counties' bonds;

- (J) Services of attorneys employed or retained to advise, represent, or provide any other legal service to the State or any of its agencies, on matters arising under laws of another state or foreign country, or in an action brought in another state, federal, or foreign jurisdiction, when substantially all legal services are expected to be performed outside this State;
- (K) Financing agreements under chapter 37D; and
- (L) Any other goods or services which the policy board determines by rules or the chief procurement officer determines in writing is available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State; and

(5) Which are specific procurements expressly exempt from any or all of the requirements of this chapter by:

- (A) References in state or federal law to provisions of this chapter or a section of this chapter, or references to a particular requirement of this chapter; and
- (B) Trade agreements, including the Uruguay Round General Agreement on Tariffs and Trade (GATT) which require certain non-construction and non-software development procurements by the comptroller to be conducted in accordance with its terms.

(c) Notwithstanding subsection (a), this chapter shall not apply to contracts made by:

- (1) Any regional system board of the Hawaii health systems corporation; or
- (2) The Kaho'olawe island reserve commission, except as provided by section 6K-4.5.

(d) Governmental bodies making procurements which are exempt from this chapter are nevertheless encouraged to adopt and use provisions of this chapter and its implementing rules as appropriate; provided that the use of one or more provisions shall not constitute a waiver of the exemption conferred and subject the procurement or the governmental body to any other provision of this chapter. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §6; am L 1995, c 16, §1 and c 178, §3; am L 1996, c 13, §3; am L 1997, c 186, §§2, 5 and c 352, §23; am L 1999, c 149, §12; am L 2001, c 200, §4; am L 2002, c 182, §4; am L 2003, c 9, §3; am L 2007, c 290, §16; am L 2009, c 175, §§1, 14(1); am L 2010, c 82, §§2, 8, c 107, §1, and c 159, §§2, 4; am L 2012, c 173, §5; am L 2013, c 244, §2; am L 2014, c 96, §13]

Note

The amendment made by L 1997, c 190, §6 is not included in this section.

Cross References

University of Hawaii construction projects, etc., see §§304A-2690 to 2693.

Attorney General Opinions

The Code did not apply to board of trustees of deferred compensation plan's existing administrator or investment-product-provider contracts because they were entered into prior to July 1, 1994 applicability date in subsection (a) (Comp. 1993). Att. Gen. Op. 94-4.

Case Notes

Subsection (b) precludes administrative review of a chief procurement officer's exemption determination; hearings officer correctly concluded that officer did not have jurisdiction to review chief procurement officer's determination that the interim library automation services contract at issue was exempt from the requirements of the procurement code. 93 H. 155, 997 P.2d 567.

[\$103D-103] Retention of written determinations. Written determinations required by this chapter shall be retained in the appropriate official files of the chief procurement officer or in the case of delegated authority, in the files of that purchasing agency. [L Sp 1993, c 8, pt of §2]

§103D-104 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

"Change order" means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.

"Construction" means 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.

"Contract" means all types of agreements, regardless of what they may be called, for the procurement or disposal of goods or services, or for construction.

"Contract modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

"Contractor" means any person having a contract with a governmental body.

"Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this chapter, and a fee, if any.

"Data" means recorded information, regardless of form or characteristic.

"Design-build" means a project delivery method in which the procurement officer enters into a single contract for design and construction.

"Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing services for any governmental body.

"Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:

- (1) Is regularly maintained by a manufacturer or contractor;
- (2) Is either published or otherwise available for inspection by customers; and
- (3) States prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the goods or services involved.

"Goods" means all property, including but not limited to equipment, equipment leases, materials, supplies, printing, insurance, and processes, including computer systems and software, excluding land or a permanent interest in land, leases of real property, and office rentals.

"Governmental body" means any department, commission, council, board, bureau, authority, committee, institution, legislative body, agency, government corporation, or other establishment or office of the executive, legislative, or judicial branch of the State, including the office of Hawaiian affairs, and the several counties of the State.

"Grant" means the furnishing of assistance, whether financial or otherwise, to any person to support a program authorized by law. The term does not include an award whose primary purpose is to procure an end product, whether in the form of goods, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.

"Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

"Policy board" means the procurement policy board created in section 103D-201.

"Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

"Procurement card" means a charge card, with predetermined limitations, used by government agencies in place of cash or purchase orders for the purchase of goods, services, or construction.

"Procurement officer" means any person authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.

"Professional services" means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, public finance bond underwriting, public finance bond investment banking, or any other practice defined as professional by the laws of this State or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook.

"Purchase description" means the words used in a solicitation to describe the goods, services, or construction to be purchased, and includes specifications attached to, or made a part of, the solicitation.

"Purchasing agency" means any governmental body which is authorized by this chapter or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods, services, or construction.

"Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract

requirements, and the integrity and reliability which will assure good faith performance.

"Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

"Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.

"Specifications" means any description of the physical or functional characteristics, or of the nature of a good, service, or construction item. The term includes descriptions of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery.

"Using agency" means any governmental body which utilizes any goods, services, or construction procured under this chapter. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §7; am L 1996, c 71, §1; am L 1997, c 352, §23; am L 2003, c 51, §1; am L 2011, c 211, §2]

Note

Definition of "state resident" for purposes of federal construction employment preferences. L 2000, c 286, §§1, 2.

Case Notes

Bidder's submission of two bids in a sealed competitive bidding process that permitted submission of only one bid was a material deviation from the bid solicitation special conditions and nonresponsive; bid thus properly rejected. 89 H. 443, 974 P.2d 1033.

Where contractor was required to use a licensed plumbing subcontractor for the project and it was undisputed that contractor did not name in its bid a person or firm to be engaged by it as a plumbing subcontractor for the project, contractor's bid was nonresponsive. 101 H. 68 (App.), 62 P.3d 631.

Where the record amply indicated that contractor had the capability "in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance", it was therefore a "responsible bidder" within the meaning of §103D-302(h) and this section. 101 H. 68 (App.), 62 P.3d 631.

[§103D-104.5] Agricultural products subject to this chapter. The following agricultural products shall be subject to this chapter:

- (1) Fresh meats and produce; and
- (2) Animals and plants.

Except for the exemptions under section 103D-102(b), no exemptions under this chapter shall apply to this section. [L 2009, c 175, §3]

§103D-105 Public access to procurement information. Government records relating to procurement shall be available to the public as provided in chapter 92F. Part I of chapter 92 shall not apply to discussions, deliberations, or decisions required to be conducted or made confidentially under this chapter. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §4]

§103D-106 Penalties. (a) Any person who intentionally violates this chapter or any rules adopted pursuant to this chapter shall be guilty of a misdemeanor and shall be:

- (1) Subject to removal from office;
- (2) Liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county; and
- (3) Subject to imposition of an administrative fine under subsection (b).

(b) After reasonable notice and reasonable opportunity to be heard, the chief procurement officer, after consultation with the using agency and the attorney general or corporation counsel, as applicable, may render a written decision or issue a written order providing for the assessment of an administrative fine against a person found to have violated this chapter; provided that:

- (1) The amount of the fine shall be set out in rules adopted by the policy board pursuant to section 103D-202; and
- (2) The written decision or order shall be final and conclusive, subject to an administrative review under section 103D-709. [L Sp 1993, c 8, pt of §2; am L 2007, c 142, §1]

[§103D-107] Compliance audit unit; establishment and purpose. There is established a compliance audit unit within the office of the auditor. The purpose of this unit shall be to:

- (1) Periodically review and audit procurement practices within government to ensure compliance with this chapter and all applicable rules; and
- (2) Advocate competition, fairness, and accountability in the procurement process.

Reports made by this unit shall be a matter of public record. This unit shall utilize as part of the review process, a review of records and activities specifically for trends and patterns of occurrence. [L Sp 1993, c 8, pt of §2]

§103D-108 Compliance audit unit; duties and responsibilities. The compliance audit unit shall:

- (1) Review and assess applicable innovations in procurement methods or processes in other governmental jurisdictions or as described in national or regional publications;
- (2) Review current or proposed statutes and rules to determine whether they promote fairness, efficiency, and accountability in the procurement process;
- (3) Review selected contracts awarded pursuant to section 103D-304;
- (4) Conduct studies, research, and analyses, and make reports and recommendations with respect to existing and new methods of procurement and other matters within the jurisdiction of the policy board;
- (5) Establish and maintain a procurement library;
- (6) Report to the appropriate agency and the chief procurement officer stating the areas of noncompliance and recommendations for remedial action; and
- (7) Be present at legislative hearings and policy board meetings to present the findings of the unit. [L Sp 1993, c 8, pt of §2; am L 1998, c 11, §5]

[§103D-109] Compliance audit unit; government officers and employees to cooperate. The officers and employees of the State and of each county shall cooperate with this unit and furnish to them such information related to procurement activities as may be called for in connection with the research activities of this unit. The information shall be provided in a timely manner and shall be free of charge. [L Sp 1993, c 8, pt of §2]

§103D-110 Education and training. (a) The department of human resources development, either alone or in cooperation with any governmental body, including the department of labor and industrial relations, or in cooperation with other states, the federal government, or other persons may:

- (1) Conduct or participate in procurement education and training for persons not employed by the State; and
- (2) Sponsor a purchasing certification program conducted by a voluntary organization of procurement professionals.

(b) The state procurement office, in cooperation with the department of human resources development, shall develop and maintain a procurement practices training and development program for procurement officers of the State and the several counties, to ensure that an agency's procurement practices are in compliance with the procurement code and that proper procurement decisions are made consistent with this chapter. The program shall include a mandatory fundamental training and development session and follow-up training and development sessions.

(c) Each state procurement officer of a department of the executive branch shall attend a mandatory fundamental training and development session within sixty days of being appointed or named to the position of procurement officer.

(d) Each state procurement officer of a department of the executive branch whom the state procurement office determines is in need of further training and development based upon:

- (1) The history of procurement compliance to this chapter by the agency to which the particular procurement officer is attached; or
- (2) Any other need for training and development, shall attend follow-up training and development sessions.

(e) Attendance by state procurement officers at the follow-up training and development sessions, other than as required under subsection (d), and by county procurement officials at the fundamental and follow-up training and development sessions is optional, though encouraged. [L Sp 1993, c 8, pt of §2; am L 1994, c 56, §§1, 22; am L 2008, c 194, §1]

[\$103D-111] Applicability of chapter 103. Any provisions of chapter 103 not inconsistent with this chapter shall apply to the procurement of all goods, services, and construction under this chapter. [L Sp 1993, c 8, pt of §2]

PART II. PROCUREMENT ORGANIZATION

§103D-201 Creation and membership of the procurement policy board. (a) There is hereby created an autonomous state procurement policy board. The policy board shall be assigned, for administrative purposes only, to the department of accounting and general services.

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

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

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

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

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

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

§103D-202 Authority and duties of the policy board. Except as otherwise provided in this chapter, the policy board shall have the authority and responsibility to adopt rules, consistent with this chapter, governing the procurement,

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

§103D-203 Chief procurement officers. (a) The chief procurement officer for each of the following state entities shall be:

- (1) The judiciary--the administrative director of the courts;
- (2) The senate--the president of the senate;
- (3) The house of representatives--the speaker of the house of representatives;
- (4) The office of Hawaiian affairs--the chairperson of the board;
- (5) The University of Hawaii--the president of the University of Hawaii; provided that, except as specified in section 304A-2672(2), for contracts for construction and professional services furnished by licensees under chapter 464, the administrator of the state procurement office of the department of accounting and general services shall serve as the chief procurement officer;
- (6) The department of education, excluding the Hawaii public library system--the superintendent of education;
- (7) The Hawaii health systems corporation--the chief executive officer of the Hawaii health systems corporation; and
- (8) The remaining departments of the executive branch of the State and all governmental bodies administratively attached to them--the administrator of the state procurement office of the department of accounting and general services.

(b) The chief procurement officers for each of the several counties shall be:

- (1) The executive branch--the respective finance directors of the several counties, except as provided in paragraphs (3), (4), and (5);
- (2) The legislative branch--the respective chairpersons of the councils of the several counties;
- (3) The Honolulu, Kauai, and Maui boards or departments of water supply--the managers and chief engineers of the respective boards or departments of water supply as designated by county charter;
- (4) The Hawaii board of water supply--the manager of the board of water supply as designated by county charter; and
- (5) The semi-autonomous public transit agency--the director of the agency as designated by county charter;

provided that the chief procurement officers designated under paragraphs (1), (2), (3), (4), and (5) shall not exercise their powers or duties over contracting in a manner contrary to the respective county's charter, ordinances, or rules adopted in accordance with chapter 91.

(c) For purposes of applying this chapter to the judiciary, houses of the legislature, office of Hawaiian affairs, University of Hawaii, department of education, remaining departments of the executive branch and all governmental bodies administratively attached to them, and the several counties, unless otherwise expressly provided, "State" shall mean "judiciary", "state senate", "state house of representatives", "office of Hawaiian affairs", "University of Hawaii", "department of education", "executive branch", "county", "board of water supply" or "department of water supply", and "semi-autonomous public transit agency", respectively. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §8 and c 193, §§2, 5; am L 1996, c 262, §27; am L 1997, c 352, §§5, 19; am L 1999, c 149, §14; am L 2004, c 216, §17; am L 2006, c 283, §1; am L 2011, c 131, §2; am L 2013, c 87, §2]

Case Notes

Chief procurement officer authorized under §103D-204 (pre-1997) and this section to make substantial interest determination under §103D-701(f) for public library system was superintendent of education and not administrator of state procurement office. 85 H. 431, 946 P.2d 1.

§103D-204 Establishment of the state procurement office; administrator. (a) There shall be a state procurement office, placed for administrative purposes only, within the department of accounting and general services, which shall be headed by the administrator of the state procurement office. The administrator shall be the chief procurement officer for those governmental bodies of the executive branch as provided in section [103D-203(a)(8)]. The administrator shall be a full-time public official. The administrator shall serve a term of four years, and shall be paid a salary not to exceed eighty-seven per cent of the salary of the director of human resources development, without diminution during the administrator's term of office unless by general law applying to all deputies or assistants to department heads.

(b) The administrator shall be appointed by the governor from a list of no less than three and no more than five names submitted by the policy board. The appointment of the administrator shall require the advice and consent of the senate. The administrator may only be removed from office by the governor, provided the governor shall give prior notification of such removal to the chairperson of the policy board, the president of the senate, and the speaker of the house of representatives.

(c) The administrator shall have:

(1) A minimum of five years experience in public procurement within twelve years preceding the date of appointment; and

(2) Demonstrated executive and organizational ability.

(d) The administrator shall operate independently of the comptroller. The administrator may appoint and dismiss a private secretary without regard to chapters 76 and 89, who shall serve at the administrator's pleasure. The comptroller shall provide support to permit the administrator to satisfy all of the administrator's responsibilities as the chief procurement officer for those governmental bodies of the executive branch of the State for which a chief procurement officer is not otherwise designated. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §5 and c 211, §7; am L 1997, c 352, §6; am L 2002, c 148, §8; am L 2005, c 226, §4]

Case Notes

Chief procurement officer authorized under §103D-203 (pre-1997) and this section to make substantial interest determination under §103D-701(f) for public library system was superintendent of education and not administrator of state procurement office. 85 H. 431, 946 P.2d 1.

§103D-205 Authority and duties of the chief procurement officer. (a) For their respective jurisdictions and unless otherwise specifically provided in this chapter, each chief procurement officer shall serve as the central procurement officer for the officer's respective jurisdiction and:

- (1) Procure or supervise the procurement of all goods, services, and construction;
- (2) Exercise general supervision and control over all inventories of goods;
- (3) Sell, trade, or otherwise dispose of surplus goods;
- (4) Establish and maintain programs for the inspection, testing, and acceptance of goods, services, and construction;
- (5) Coordinate with the administrator regarding procurement policies, opportunities for statewide innovation implementation, and concerns; and
- (6) Report procurement contract data pursuant to requirements established by the administrator, in the form and manner prescribed by the state procurement office.

(b) Consistent with the provisions of this chapter and rules adopted by the policy board to implement its provisions, the chief procurement officers may adopt operational procedures to assist in the performance of these duties and responsibilities. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 2015, c 181, §1]

§103D-206 Additional duties of the administrator of the procurement office. In addition to the duties referred to in section 103D-205, the administrator shall:

- (1) Perform periodic review of the procurement practices of all governmental bodies;
- (2) Assist, advise, and guide governmental bodies in matters relating to procurement;
- (3) Determine corrective actions; provided that if a procurement officer under the jurisdiction of the administrator of the state procurement office or a chief procurement officer of any of the other state entities under section 103D-203, fails to comply with any determination rendered by the administrator within thirty days from the date of the issuance of the determination, or longer if permitted by the administrator upon request by the procurement officer or a chief procurement officer, the procurement officer or chief procurement officer shall be subject to an administrative fine under section 103D-106, for every day of noncompliance;
- (4) Develop and administer a statewide procurement orientation and training program;
- (5) Develop, distribute, and maintain a procurement manual for all state procurement officials; and

- (6) Develop, distribute, and maintain a procurement guide for vendors wishing to do business with the State and its counties. [L Sp 1993, c 8, pt of §2; am L 2003, c 52, §3; am L 2005, c 166, §3; am L 2008, c 203, §1]

Cross References

Procurement institute, see §304A-1352.

[§103D-207] Centralization of procurement authority. Except as otherwise provided in sections 103D-208, 103D-209, and 103D-210, all rights, powers, duties, and authority relating to the procurement of goods, services, and construction, and the management, control, warehousing, sale, and disposal of goods, services, and construction now vested in, or exercised by, the governmental bodies of the State and counties are hereby transferred to the respective chief procurement officers. [L Sp 1993, c 8, pt of §2]

Cross References

Section 103D-210, referred to in text, is repealed. For similar provisions, see §103D-102(b)(4).

§103D-208 Delegation of authority by the chief procurement officer. Subject to the rules of the policy board, each chief procurement officer may delegate any authority or duty conferred upon the chief procurement officer by this chapter to designees or to any department, agency or official within their respective jurisdictions. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

§103D-209 Authority to contract for certain services. Except as provided in section 28-8.3 with respect to agencies of the State of Hawaii, any governmental body of this State may act as a purchasing agency and contract on its own behalf for professional services subject to this chapter and rules adopted by the policy board. The purchasing agency may consult with the chief procurement officer or the officer's designee when procuring these services. [L Sp 1993, c 8, pt of §2; am L 1994, c 92, §3 and c 188, §§2, 7; am L 1995, c 178, §§6, 16; am L 1998, c 11, §6]

Note

L 1996, c 262, §25 purports to extend repeal date of June 30, 1995 to June 30, 1998.

§103D-210 REPEALED. L 1994, c 186, §25.

§103D-211 Procurement rules. (a) The procurement policy board shall adopt all rules necessary to carry out the purposes of this chapter and to implement its provisions in accordance with chapter 91. The policy board shall not delegate its power to adopt rules.

(b) No rule shall change any commitment, right, or obligation of the State or of a contractor under a contract in existence on the effective date of such rule. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

[\$103D-212] Collection of data concerning public procurement. The chief procurement officer and the heads of all purchasing agencies shall cooperate in the preparation of statistical data concerning the procurement, usage, and disposition of all goods, services, and construction, and employ such trained personnel as may be necessary to carry out this function. All using agencies shall furnish such reports as the chief procurement officer may require concerning usage, needs, and stocks on hand, and the chief procurement officer may prescribe forms to be used by the using agencies in requisitioning, ordering, and reporting of goods, services, and construction. [L Sp 1993, c 8, pt of §2]

§103D-213 Procurement advisory groups. (a) The chief procurement officer may appoint advisory groups to assist in the development of specifications or procurement in specific areas, and any other matters within the authority of the chief procurement officer.

(b) Members of procurement advisory groups may be reimbursed for expenses incurred in the performance of their duties, subject to such expenditure limitations prescribed by the policy board and applicable law. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

§103D-214 REPEALED. L 1995, c 178, §15.

Note

L 1997, c 352, §23 purports to amend this section.

PART III. SOURCE SELECTION AND CONTRACT FORMATION

§103D-301 Methods of source selection. Unless otherwise authorized by law, all contracts shall be awarded pursuant to the following sections, as applicable:

- (1) Section 103D-302 (Competitive sealed bids);
- (2) Section 103D-303 (Competitive sealed proposals);

- (3) Section 103D-304 (Professional services procurement);
- (4) Section 103D-305 (Small purchases);
- (5) Section 103D-306 (Sole source procurement); and
- (6) Section 103D-307 (Emergency procurements). [L Sp 1993, c 8, pt of §2; am L 2013, c 239, §2]

§103D-302 Competitive sealed bidding. (a) Contracts shall be awarded by competitive sealed bidding except as otherwise provided in section 103D-301. Awards of contracts by competitive sealed bidding may be made after single or multi-step bidding. Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is based on the criteria set forth in the invitation for bids.

(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that 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. 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.

(c) Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids. The policy board shall adopt rules which specify:

- (1) The form that the notice is to take;
- (2) What constitutes a reasonable interim between publication and bid opening; and
- (3) How notice may be published, including publication in a newspaper of general circulation, notice by mail to all persons on any applicable bidders mailing list, publication by any public or private telecommunication information network, or any other method of publication it deems to be effective.

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection.

(e) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter or by rules adopted by the policy board.

(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. 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. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(g) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes, shall be permitted in accordance with rules adopted by the policy board. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be 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.

(h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope 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.

(i) When it is not practicable to initially prepare a purchase description to support an award based on price, an invitation for bids, which requests the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation, may be used. If a multi-step sealed bidding process is used, the notice and the invitation for bids shall describe each step to be used in soliciting, evaluating, and selecting unpriced offers. [L Sp 1993, c 8, pt

of §2; am L 1994, c 186, §9; am L 1995, c 178, §7; am L 1997, c 352, §23]

Case Notes

Bidder's submission of two bids in a sealed competitive bidding process that permitted submission of only one bid was a material deviation from the bid solicitation special conditions and nonresponsive; bid thus properly rejected. 89 H. 443, 974 P.2d 1033.

Question of whether construction company complied with the bidding process requirements of this section was not moot as it involved a matter of public concern and was capable of repetition, yet likely to evade appellate review. 99 H. 191, 53 P.3d 799.

As prerequisites for board of water supply's exercise of its authority to waive the mandatory subcontractor listing requirement under subsection (b) were indisputably present where board determined that it was in the best interest of the State to do so, hearings officer erred in interpreting subsection (b) to preclude waiver of a bidder's failure to list a subcontractor who had not been "lined up" prior to bid opening. 101 H. 68 (App.), 62 P.3d 631.

Where contractor was required to use a licensed plumbing subcontractor for the project and it was undisputed that contractor did not name in its bid a person or firm to be engaged by it as a plumbing subcontractor for the project, contractor's bid was nonresponsive. 101 H. 68 (App.), 62 P.3d 631.

Where the record amply indicated that contractor had the capability "in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance", it was therefore a "responsible bidder" within the meaning of §103D-104 and this section. 101 H. 68 (App.), 62 P.3d 631.

§103D-303 Competitive sealed proposals. (a) 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.

(b) Proposals shall be solicited through a request for proposals.

(c) Notice of the request for proposals shall be given in the same manner as provided in section 103D-302(c).

(d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of evaluation. A register of proposals shall be prepared and shall be open for public inspection after contract award.

(e) The request for proposals shall state the relative importance of price and other evaluation factors.

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably likely to be selected for a contract award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors 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. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

(h) In cases of awards made under this section, non-selected offerors may submit a written request for debriefing to the procurement officer within three working days after the posting of the award of the contract. Thereafter, the procurement officer shall provide the non-selected offeror a prompt debriefing. Any protest by the non-selected offeror pursuant to section 103D-701 following debriefing shall be filed in writing with the procurement officer within five working days after the date upon which the debriefing is completed.

(i) In addition to any other provisions of this section, construction projects may be solicited through a request for proposals to use the design-build method; provided that:

- (1) A request for proposals is issued to prequalify offerors to select a short list of no more than three responsible offerors, prior to the submittal of proposals; provided that the number of offerors to be selected for the short list shall be stated in the request for proposals and prompt notice is given to all offerors as to which offerors have been short-listed;
- (2) A conceptual design fee may be paid to non-selected offerors that submit a technically responsive proposal; provided that the cost of the entire project is greater than \$1,000,000; and
- (3) 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 shall be stated in the request for proposals. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §§8, 9; am L 1997, c 352, §23; am L 2003, c 52, §4; am L 2011, c 211, §3]

Case Notes

Defendant city satisfied its duty to conduct "meaningful discussions" under this section where it issued four addenda specifically addressing questions about the indemnification provisions and confirming that no changes would be made and plaintiff revised its proposal language after these amendments and before it submitted its best and final offers. 128 H. 413 (App.), 289 P.3d 1049 (2012).

[\$103D-303.5] Pre-bid conference. (a) At least fifteen days prior to submission of bids pursuant to section 103D-302 for a construction or design-build project with a total estimated contract value of \$500,000 or more, and at least fifteen days prior to submission of proposals pursuant to section 103D-303 for a construction or design-build project with a total estimated contract value of \$100,000 or more, the head of the purchasing agency shall hold a pre-bid conference and shall invite all potential interested bidders, offerors, subcontractors, and union representatives to attend.

(b) The procurement policy board shall adopt rules under chapter 91 to effectuate this section. [L 2003, c 52, §2]

Revision Note

This section, enacted as an addition to part X, is redesignated to this part pursuant to §23G-15.

§103D-304 Procurement of professional services. (a) Professional services shall be procured in accordance with sections 103D-302, 103D-303, 103D-305, 103D-306, or 103D-307, or this section; provided that design professional services furnished by licensees under chapter 464 shall be procured pursuant to this section or section 103D-307. Contracts for professional services shall be awarded on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(b) At a minimum, before the beginning of each fiscal year, the head of each purchasing agency shall publish a notice inviting persons engaged in providing professional services which the agency anticipates needing in the next fiscal year, to submit current statements of qualifications and expressions of interest to the agency. Additional notices shall be given if:

- (1) The response to the initial notice is inadequate;
- (2) The response to the initial notice does not result in adequate representation of available sources;

(3) New needs for professional services arise; or

(4) Rules adopted by the policy board so specify.

The chief procurement officer may specify a uniform format for statements of qualifications. Persons may amend these statements by filing a new statement prior to the date designated for submission.

(c) The head of the purchasing agency shall designate a review committee consisting of a minimum of three persons with sufficient education, training, and licenses or credentials for each type of professional service which may be required. In designating the members of the review committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of the review committee established under this section shall be placed in the contract file.

The committee shall review and evaluate all submissions and other pertinent information, including references and reports, and prepare a list of qualified persons to provide these services. Persons included on the list of qualified persons may amend their statements of qualifications as necessary or appropriate. Persons shall immediately inform the head of the purchasing agency of any change in information furnished which would disqualify the person from being considered for a contract award.

(d) Whenever during the course of the fiscal year the agency needs a particular professional service, the head of the purchasing agency shall designate a selection committee to evaluate the statements of qualification and performance data of those persons on the list prepared pursuant to subsection (c) along with any other pertinent information, including references and reports. The selection committee shall be comprised of a minimum of three persons with sufficient education, training, and licenses or credentials in the area of the services required. In designating the members of the selection committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of a selection committee established under this section shall be placed in the contract file.

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

- (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 selection committee to be relevant to the purchasing agency's needs or necessary and appropriate to ensure full, open, and fair competition for professional services contracts.

(f) The selection committee shall evaluate the submissions of persons on the list prepared pursuant to subsection (c) and any other pertinent information which may be available to the agency, against the selection criteria. The committee may conduct confidential discussions with any person who is included on the list prepared pursuant to subsection (c) regarding the services which are required and the services they are able to provide. In conducting discussions, there shall be no disclosure of any information derived from the competing professional service offerors.

(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause.

(h) The head of the purchasing agency or designee shall negotiate a contract with the first ranked person, including a rate of compensation which is fair and reasonable, established in writing, and based upon the estimated value, scope, complexity, and nature of the services to be rendered. If a satisfactory contract cannot be negotiated with the first ranked person, negotiations with that person shall be formally terminated and negotiations with the second ranked person on the list shall commence. The contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked or next ranked person. Failing accord with the second ranked person, negotiations with the next ranked person on the list shall commence. If a contract at a fair and reasonable price cannot be negotiated, the selection committee may be asked to submit a minimum of three additional persons for the head of the purchasing agency to resume negotiations in the same manner provided in this subsection. Negotiations shall be conducted confidentially.

(i) Contracts awarded under this section for \$5,000 or more shall be posted electronically within seven days of the contract award by the chief procurement officer or designee and shall remain posted for at least one year. Information to be posted shall include, but not be limited to:

- (1) The names of the persons submitted under subsection (g);
- (2) The name of the person or organization receiving the award;
- (3) The dollar amount of the contract;
- (4) The name of the head of the purchasing agency or designee making the selection; and
- (5) Any relationship of the principals to the official making the award.

(j) Contracts for professional services of less than the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, with at least any two persons on the list of qualified persons established pursuant to subsection (c). Negotiations shall be conducted in the manner set forth in subsection (h), with ranking based on the selection criteria of subsection (e) as determined by the head of the agency.

(k) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §10; am L 1997, c 21, §1 and c 352, §7; am L 2000, c 141, §1; am L 2003, c 52, §5; am L 2004, c 216, §1]

Note

L 1997, c 352, §23 purports to amend this section.

§103D-305 Small purchases; prohibition against parceling. (a) Procurements of less than \$100,000 for goods or services, or \$250,000 for construction shall be made in accordance with procedures set forth in rules adopted by the policy board that are designed to ensure administrative simplicity and as much competition as is practicable; provided that multiple expenditures shall not be created at the inception of a transaction or project so as to evade the requirements of

this chapter; and provided further that procurement requirements shall not be artificially divided or parceled so as to constitute a small purchase under this section.

(b) Procurements greater than \$50,000 for construction under subsection (a) shall require security by performance and payment bonds, pursuant to section 103D-324, delivered to the procurement officer, that are:

- (1) In a form prescribed by the rules of the policy board;
- (2) Executed by a surety company authorized to do business in this State; and
- (3) In an amount equal to one hundred per cent of the price specified in the contract,

or shall otherwise be secured by a performance bond in a manner satisfactory to the procurement officer.

(c) Procurements of \$25,000 to less than \$250,000 shall be made in accordance with small purchase procedures; provided that such small purchase procurements through an electronic system shall be required. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §10; am L 1995, c 178, §11; am L 1997, c 352, §8; am L 2006, c 283, §2; am L 2009, c 175, §§2, 14(1); am L 2010, c 107, §1; am L 2012, c 173, §§2, 5]

§103D-306 Sole source procurement. (a) A contract may be awarded for goods, services, or construction without competition when the head of a purchasing agency determines in writing that there is only one source for the required good, service, or construction, the determination is reviewed and approved by the chief procurement officer, the written determination is posted in the manner described in rules adopted by the policy board, and no objection is outstanding. The written determination, any objection, and a written summary of the disposition of any objection shall be included in the contract file.

(b) The written determination shall contain such information as the rules of the policy board require. Persons may file written objections to the issuance of a contract pursuant to this section. Rules of the policy board shall provide for the disposition of objections, including a written summary of the disposition.

(c) The rules of the policy board shall include a non-exhaustive list of procurements which constitute sole source procurements and criteria for determining when a particular procurement may be determined to be a sole source. The rules shall also prescribe when cost or pricing data must be considered and how they are to be used in establishing the price, terms, and conditions, if any, for a contract awarded pursuant to this section. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §12; am L 1997, c 352, §23]

[§103D-307] Emergency procurements. (a) The head of a purchasing agency may obtain a good, service, or construction 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.

(b) The emergency procurement shall be made with such competition as is practicable under the circumstances and, where practicable, approval from the chief procurement officer shall be obtained prior to the procurement. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. [L Sp 1993, c 8, pt of §2]

§103D-308 Cancellation of invitations for bids or requests for proposals. An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the governmental body which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefor shall be made part of the contract file. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §9]

§103D-309 Contract not binding unless funds available. (a) Contracts awarded pursuant to section 103D-302, 103D-303, or 103D-306, shall neither be binding nor have any force and effect of law unless the comptroller, the director of finance of a county, or the respective chief financial officers of the department of education, the judiciary, or the legislative branches of the State or county, as the case may be, endorses thereon a certificate that there is an appropriation or balance of an appropriation over and above all outstanding

contracts, sufficient to cover the amount required by the contract; provided that if the contract is a multi-term contract, the comptroller, director of finance, or chief financial officer shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts, that is sufficient to cover the amount required to be paid under the contract during the fiscal year or remaining portion of the fiscal year of each term of the multi-year contract; provided further that the administrator of the state procurement office shall attest in writing to any recommendation or solicitations. This section shall not apply to any contract under which the total amount to be paid to the contractor cannot be accurately estimated at the time the contract is to be awarded, or to any contract for which consideration is in kind or forbearance, or to any contract awarded pursuant to section 103D-306 that is a one-time payment through a purchase order.

(b) In any contract involving not only state or county funds but supplemental funds from the federal government, this section shall be applicable only to that portion of the contract price as is payable out of state or county funds. As to the portion of the contract price as is expressed in the contract to be payable out of federal funds, the contract shall be construed to be an agreement to pay the portion to the contractor, only out of federal funds to be received from the federal government. This subsection shall be liberally construed so as not to hinder or impede the State in contracting for any project involving financial aid from the federal government.

(c) In any contract involving not only state or county funds but supplemental funds from a utility, this section shall be applicable to that portion of the contract price payable out of state or county funds as well as that portion of the contract price payable out of funds from a utility, or payable out of state or county funds paid to a utility. The State or county may certify that there are sufficient funds for the utility's portion of the contract price if the amounts that a utility is obligated to pay under a legal agreement between the utility and the State, or a county, are sufficient to pay that portion of the contract price and the legal agreement:

- (1) Includes a specific description of the utility's share of the payment and terms of that payment;
- (2) Allows the State, county, or utility to provide progress payments or final payment based on the actual cost after a project is completed; and
- (3) Provides that in the event the State, county, or utility is delinquent in payments under the legal agreement, the State, county, or utility shall be

responsible for any and all additional costs attributable to such late payment.

Any such legal agreement shall be executed prior to the execution of the state or county contract and shall not jeopardize any federal, state, or county funds.

For the purposes of this subsection:

"Legal agreement" includes a utility agreement, memorandum of understanding, or memorandum of agreement.

"Utility" means a utility company or entity. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §13; am L 1999, c 149, §15; am L 2010, c 140, §1 and c 187, §§3, 12; am L 2012, c 70, §1, and c 175, §1]

§103D-310 Responsibility of offerors. (a) Unless the policy board, by rules, specifies otherwise, before submitting an offer, a prospective offeror, not less than ten calendar days prior to the day designated for opening offers, shall give written notice of the intention to submit an offer to the procurement officer responsible for that particular procurement.

(b) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709.

(c) All offerors, upon award of contract, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392, and 393. Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. Any offeror making a false affirmation or certification under this subsection shall be suspended from further offerings or awards pursuant to section 103D-702. The procuring officer shall verify compliance with

this subsection for all contracts awarded pursuant to sections 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts and procurements of \$2,500 or more awarded pursuant to section 103D-305; provided that the attorney general may waive the requirements of this subsection for contracts for legal services if the attorney general certifies in writing that comparable legal services are not available in this State.

(d) Information furnished by an offeror pursuant to this section shall not be disclosed to any person except to law enforcement agencies as provided by chapter 92F. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §§10, 23; am L 2003, c 52, §6; am L 2004, c 216, §4; am L 2005, c 211, §1; am L 2011, c 190, §2]

§103D-311 Prequalification of suppliers. (a) The policy board may adopt rules to prequalify prospective suppliers for particular types of goods, services, and construction or to limit a solicitation to prequalified vendors to meet statutory or licensing requirements applying to the solicitation or when the time necessary to verify vendor qualifications would jeopardize timely award of contracts.

(b) A prospective supplier may be prequalified for a particular type of goods or services. Solicitation mailing lists of potential contractors shall include, but shall not be limited to, prequalified suppliers. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

§103D-312 Cost or pricing data. (a) A contractor, except as provided in subsection (c), shall submit cost or pricing data and shall certify that, to the best of the contractor's knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date prior to the date of:

- (1) The pricing of any contract awarded by competitive sealed proposals or pursuant to the sole source procurement authority, where the total contract amount is expected to exceed an amount established by rules adopted by the policy board; or
- (2) The pricing of any change order or contract modification that is expected to exceed an amount established by rules adopted by the policy board.

(b) Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that the price was increased because the contractor furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between the parties.

(c) The requirements of this section shall not apply to contracts:

- (1) Where the contract price is based on adequate price competition;
- (2) Where the contract price is based on established catalog prices or market prices;
- (3) Where the contract prices are set by law or rule; or
- (4) Where it is determined in writing in accordance with rules adopted by the policy board that the requirements of this section may be waived, and the reasons for the waiver are stated in writing. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

§103D-313 Types of contracts. (a) Subject to the limitations of this section, any type of contract that will promote the State's best interests may be used.

(b) Cost-reimbursement and cost-plus-a-percentage-of-cost contracts may be used only when the chief procurement officer determines in writing that such a contract is likely to be less costly than any other type of contract or that it is impracticable to obtain the goods, services, or construction required except by means of such a contract. Cost-reimbursement and cost-plus-a-percentage-of-cost contracts shall not be used if their use would jeopardize the receipt of federal assistance moneys or reduce the amount of such assistance under any applicable federal statute or regulation.

(c) In addition to the requirements of subsections (a) and (b), a cost-plus-a-percentage-of-cost contract may not be awarded unless:

- (1) Notice is given to the head of the compliance audit unit, president of the senate, speaker of the house of representatives, and the chairpersons of the senate ways and means and house finance committees; and
- (2) Notice is conspicuously posted in an area accessible to the public in the office of the chief procurement officer and available for public inspection during normal business hours.

(d) The policy board shall adopt rules to implement this section. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

[§103D-314] Approval of accounting system. Except with respect to firm fixed-price contracts, no contract shall be used unless it has been determined in writing by the chief procurement officer, the head of a purchasing agency, or a designee of either officer that:

- (1) The proposed contractor's accounting system will permit timely development of all necessary cost data

in the form required by the specific contract type contemplated; and

- (2) The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles. [L Sp 1993, c 8, pt of §2]

[\$103D-315] Multi-term contracts. (a) Unless otherwise provided by law, a contract for goods or services may be entered into for any period of time deemed to be in the best interests of the governmental body, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

(b) Prior to the utilization of a multi-term contract, it shall be determined in writing:

- (1) That estimated requirements cover the period of the contract and are reasonably firm and continuing;
- (2) That such a contract will serve the best interests of the governmental body by encouraging effective competition or otherwise promoting economies in procurement; and
- (3) That sufficient funds to pay for the initial term of the contract are available and the funds necessary for the remaining terms of the contract are likely to be available from sources which are identified in writing.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of goods or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes. [L Sp 1993, c 8, pt of §2]

[\$103D-316] Right to inspect plant. The State, at reasonable times, may inspect the part of the plant or place of business of a contractor or any subcontractor that is related to the performance of a contract awarded or to be awarded by the State. [L Sp 1993, c 8, pt of §2]

[\$103D-317] Right to audit records. (a) The purchasing agency, at reasonable times and places, may audit the books and records of any person who has submitted cost or pricing data

pursuant to section 103D-312 to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless another period is otherwise authorized in writing.

(b) The purchasing agency shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. The books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless another period is otherwise authorized in writing. [L Sp 1993, c 8, pt of §2]

[\$103D-318] Finality of determinations. The determinations required by sections 103D-302(g), 103D-303(a), 103D-303(g), 103D-306, 103D-307, 103D-310, 103D-312(c), 103D-313, and 103D-314 shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [L Sp 1993, c 8, pt of §2]

[\$103D-319] Reporting of anticompetitive practices. When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general. [L Sp 1993, c 8, pt of §2]

[\$103D-320] Retention of procurement records. All procurement records shall be retained and disposed of in accordance with chapter 94 and records retention guidelines and schedules approved by the comptroller. [L Sp 1993, c 8, pt of §2]

§103D-321 REPEALED. L 2001, c 43, §1.

§103D-322 Multiple awards. The policy board may adopt rules authorizing the use and prescribing the manner in which goods, services, or construction may be procured through multiple awards. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

§103D-323 Bid security. (a) Unless the policy board determines otherwise by rules, bid security shall be required only for construction contracts to be awarded pursuant to sections 103D-302 and 103D-303 and when the price of the contract is estimated by the procurement officer to exceed \$25,000 or, if the contract is for goods or services, the purchasing agency secures the approval of the chief procurement officer. Bid security shall be a bond provided by a surety company authorized to do business in the State, or the equivalent in cash, or otherwise supplied in a form specified in rules.

(b) Bid security shall be in an amount equal to at least five per cent of the amount of the bid.

(c) Unless, pursuant to rules, it is determined that a failure to provide bid security is nonsubstantial, all bids required to be accompanied by bid security shall be rejected when not accompanied by the required bid security.

(d) After the bids are opened, they shall be irrevocable for the period specified in the invitation for bids, except as provided in section 103D-302(g). If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §11; am L 1997, c 352, §23]

§103D-324 Contract performance and payment bonds. (a) Unless the policy board determines otherwise by rules, the following bonds or security shall be delivered to the purchasing agency and shall become binding on the parties upon the execution of the contract if the contract which is awarded exceeds \$25,000 and is for construction, or the purchasing agency secures the approval of the chief procurement officer:

- (1) A performance bond in a form prescribed by the rules of the policy board, executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the purchasing agency, in an amount equal to one hundred per cent of the price specified in the contract;
- (2) A payment bond in a form prescribed by the rules of the policy board, executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the purchasing agency, for the protection of all persons supplying labor and material to the contractor for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred per cent of the price specified in the contract; or

(3) A performance and payment bond which satisfies all of the requirements of paragraphs (1) and (2).

(b) The policy board may adopt rules that authorize the head of a purchasing agency to reduce the amount of performance and payment bonds.

(c) Nothing in this section shall be construed to limit the authority of the chief procurement officer to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in subsection (a).

(d) Every person who has furnished labor or material to the contractor for the work provided in the contract, in respect of which a payment bond or a performance and payment bond is furnished under this section, and who has not been paid amounts due therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed or material was furnished or supplied, for which such a claim is made, may institute an action for the amount, or balance thereof, unpaid at the time of the institution of the action against the contractor and its sureties, on the payment bond or the performance and payment bond, and have their rights and claims adjudicated in the action, and judgment rendered thereon; subject to the State's priority on the bonds. If the full amount of the liability of the sureties on the payment bond is insufficient to pay the full amount of the claims, then, after paying the full amount due the State, the remainder shall be distributed pro rata among the claimants.

As a condition precedent to any such suit, written notice shall be given to contractor and surety, within ninety days from the date on which the person did or performed the last labor or furnished or supplied the last of the material for which claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

The written notice shall be served by registered or certified mailing of the notice, to the contractor and surety, at any place they maintain an office or conduct their business, or in any manner authorized by law to serve summons.

(e) Every suit instituted under subsection (d) shall be brought in the circuit court of the circuit in which the project is located, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied for the work provided in the contract. The obligee named in the bond need not be joined as a party in any such suit.

The terms "labor" and "material" have the same meanings in this section as the terms are used in section 507-41. [L Sp 1993, c 8, pt of §2; am L 1997, c 349, §2 and c 352, §23]

§103D-325 Bond forms and copies. (a) The policy board shall specify the form of the bonds required by this chapter by procurement directive.

(b) Any person may request and obtain from the State a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §12]

[§103D-326] Fiscal responsibility. Every contract modification, change order, or contract price adjustment under a contract shall be subject to prior written certification by the appropriate fiscal officer for funding the project or the contract, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer discloses a resulting increase in the total project budget or the total contract budget, the procurement officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with this section. [L Sp 1993, c 8, pt of §2]

[§103D-327] Safety and health programs for construction. Contracts awarded for construction in excess of \$100,000 shall comply with section 396-18. [L 1995, c 199, §1]

[§103D-328] Tax clearances; setoff for due and unpaid taxes. (a) Unless the director of taxation determines that waiver of the Internal Revenue Service tax clearance requirement is necessary to expedite or facilitate the procurement process and is in the best interest of the State, and waives the Internal Revenue Service tax clearance requirement, no contract shall be binding or effective until the contractor secures and the purchasing agency receives a tax clearance from the director of taxation and the Internal Revenue Service to the effect that

all tax returns due have been filed, and all taxes, interest, and penalties levied or accrued, under title 14 that are administered by the department of taxation and under the Internal Revenue Code, against the contractor have been paid.

(b) During the term of a contract, if a lien is imposed against the contractor for a tax debt under section 231-33 or the contractor fails to timely file all tax returns and pay all taxes, interest, and penalties due to the Internal Revenue Service, the comptroller or respective county director of finance, upon request of the director of taxation, shall set off the amount of the tax debt against any payment due to the contractor until the tax debt is paid in full.

(c) All state and county procurement officers or agents shall withhold final payment of a contract until the receipt of tax clearances from the director of taxation and the Internal Revenue Service. Notwithstanding sections 40-57 and 40-58, if a contractor fails to provide the requisite tax clearances within six months of the completion of the contract, the state or county procurement officer or agent shall first notify the department of taxation which in turn will notify the Internal Revenue Service, of amounts payable to the contractor on completed contracts. The department of taxation and the Internal Revenue Service, within thirty days, shall request the procurement officer or agent to set off the amount of taxes due against any payment due to the contractor until the tax debt is paid in full to the State or the Internal Revenue Service, or both. No final bill or invoice from the contractor shall be required as a condition to the setoff. Any remaining contract balance shall revert to the appropriation under which it was encumbered.

(d) This section shall not apply to any contract of less than \$25,000 or any contract entered into pursuant to section 103D-305 or 103D-307.

(e) This section shall not apply to a contractor who the director of taxation certifies is:

- (1) Contesting the validity of a tax debt, or that any tax, penalty, or interest is due and owing the Internal Revenue Service in an administrative or judicial appeal; or
- (2) In good standing, having entered into a plan or plans in which the tax debt, or any tax, penalty, or interest due and owing the Internal Revenue Service is being paid to the department of taxation or the Internal Revenue Service. [L 1997, c 352, §1]

PART IV. SPECIFICATIONS

§103D-401 Duties of the policy board. The policy board shall adopt rules governing the preparation, maintenance, and content of specifications for goods, services, and construction required by the State. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

[§103D-402] Duties of the chief procurement officer. The chief procurement officer shall prepare, issue, revise, maintain, and monitor the use of specifications for goods, services, and construction required by the State. [L Sp 1993, c 8, pt of §2]

[§103D-403] Exempted items. Specifications for goods, services, or construction items procured under section 103D-209, or those exempted pursuant to section 103D-210, may be prepared by a purchasing agency in accordance with this chapter and rules adopted hereunder. [L Sp 1993, c 8, pt of §2]

Cross References

Section 103D-210, referred to in text, is repealed. For similar provisions, see §103D-102(b)(4).

[§103D-404] Relationship with using agencies. The chief procurement officer shall obtain expert advice and assistance from personnel of using agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications. [L Sp 1993, c 8, pt of §2]

[§103D-405] Maximum practicable competition. (a) All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive.

(b) Specifications, to the extent practicable, shall emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State.

(c) The State shall procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

(d) Outside contractors may be utilized to prepare specifications and work statements in the development of a solicitation. Contractors paid for those services shall be precluded from bidding on or receiving a contract when they

participated in any way in the development of the solicitation package or any resulting contract. [L Sp 1993, c 8, pt of §2]

[§103D-406] Specifications prepared by architects and engineers. The requirements of this part regarding the purposes and nonrestrictiveness of specifications shall apply to all specifications, including, but not limited to, those prepared by architects, engineers, designers, and drafting professionals for public contracts. [L Sp 1993, c 8, pt of §2]

§103D-407 Construction projects, roadway materials; recycled glass content requirements. (a) When purchasing roadway materials or other high-value, end-use applications for public projects, state and county agencies may purchase materials with minimum recycled glass content meeting specifications adopted by the policy board which, at a minimum, shall provide for:

- (1) A minimum recycled glass content of ten per cent crushed aggregate in treated or untreated basecourse in paving materials that shall not reduce the quality standards for highway and road construction; and
- (2) The use of one hundred per cent aggregate in nonstructural capital improvement applications.

(b) All highway and road construction and improvement projects funded by the State or a county or roadways that are to be accepted by the State or a county as public roads may use a minimum of ten per cent crushed glass aggregate as specified by the department of transportation in all basecourse (treated or untreated) and subbase when the glass is available to the quarry or contractor at a price no greater than that of the equivalent aggregate.

(c) All state and county construction projects calling for nonstructural backfill shall utilize one hundred per cent crushed glass when available at a cost equal to or lower than the equivalent aggregate.

(d) As used in this section:

"Basecourse" means the layer or layers of specified material or selected material of a designed thickness to support a surface course.

"Environmental management special fund" means the fund established by section 342G-63.

"Nonstructural backfill" means use as fill in areas not subject to structural loading, including but not limited to utility line bedding, drainage backfill behind retaining walls, drainage line backfill in leachfields or french drains, and similar uses. [L 1994, c 201, §3; am L 1997, c 92, §2; am L 1998, c 11, §7; am L 2011, c 22, §1]

Cross References

Glass container recovery, see §§342G-81 to 87.

Preference for recycled products, see §103D-1005.

§103D-408 Hawaiian plants; use in public

landscaping. *[Section effective June 30, 2016. For section effective until June 29, 2016, see below]* (a) Subject to exceptions as established under subsection (d), and pursuant to the timetable described in subsection (c), all plans, designs, and specifications for new or renovated landscaping of any building, complex of buildings, facility, complex of facilities, or housing developed by the State with public moneys shall incorporate Hawaiian plants; provided that:

- (1) Suitable cultivated plants can be made available for this purpose without jeopardizing wild plants in their natural habitat; and
- (2) Wherever and whenever possible, Hawaiian plants shall be used for landscaping on, and sourced from, the island and ahupua'a in which the species was found or known to occur prior to European contact.

(b) Each plant or group of plants used pursuant to subsection (a) shall be clearly identified with signs for the edification of the general public.

(c) The timetable for the incorporation of Hawaiian plants pursuant to subsection (a) shall be as follows:

- (1) By January 1, 2019, Hawaiian plants shall constitute a combined minimum of ten per cent of the total plant footprint for landscaping plans, designs, and specifications;
- (2) By January 1, 2025, Hawaiian plants shall constitute a combined minimum of twenty-five per cent of the total plant footprint for landscaping plans, designs, and specifications;
- (3) By January 1, 2030, Hawaiian plants shall constitute a combined minimum of thirty-five per cent of the total plant footprint for landscaping plans, designs, and specifications.

(d) Notwithstanding chapter 91, for the purposes of satisfying the percentage footprint requirements under subsection (c), the purchasing agency may exclude from total plant footprint calculations those areas where available Hawaiian plant species are not appropriate for the particular landscaping needs or environmental conditions of such areas. The exclusion of such areas shall be determined by procedures, standards, or guidelines established by the policy board at the time of issuance of the invitation for bids, requests for proposals, or other solicitation under this chapter. Procedures, standards, or guidelines established pursuant to this subsection may be established by board action notwithstanding chapter 91.

(e) For purposes of this section, "Hawaiian plants" means any endemic or indigenous plant species, including land, freshwater, and marine plant species, growing or living in Hawaii without having been brought to Hawaii by humans; or any plant species, including land, freshwater, and marine plant species, brought to Hawaii by Polynesians before European contact, such as kukui, kalo, wauke, niu, noni, and kamani. [L 1999, c 149, pt of §2; am L 2015, c 233, §2]

[§103D-408] Indigenous and Polynesian introduced plants; use in public landscaping. *[Section effective until June 29, 2016. For section effective June 30, 2016, see above.]* (a) Wherever and whenever feasible, all plans, designs, and specifications for new or renovated landscaping of any building, complex of buildings, facility, complex of facilities, or housing developed by the State with public moneys shall incorporate indigenous land plant species as defined in section 195D-2, and plant species brought to Hawaii by Polynesians before European contact, such as the kukui, noni, and coconut; provided that:

- (1) Suitable cultivated plants can be made available for this purpose without jeopardizing wild plants in their natural habitat; and
- (2) Wherever and whenever possible, indigenous plants shall be used for landscaping on the island or islands on which the species originated.

(b) Each plant or group of plants used pursuant to subsection (a) shall be clearly identified with signs for the edification of the general public. [L 1999, c 149, pt of §2]

[§103D-409] Provisions for pollution control. All contracts shall make provisions for control of pollution when encountered in the performance of the contract. [L 1999, c 149, pt of §2]

[§103D-410] Energy efficiency through life-cycle costing. (a) The procurement practices of the State shall include energy efficient standards and policies, including life-cycle costing.

(b) In implementing life-cycle costing, the purchasing agency shall be guided by energy efficiency standards and policies for purchasing various items developed and promulgated by the United States Department of Energy and other federal agencies, and nationally recognized trade associations, including but not limited to the National Association of State Purchasing Officials, the National Institute of Governmental

Purchasing, Inc., the National Association of Purchasing Management, and the Air Conditioning and Refrigeration Institute. The purchasing agency shall notify bidders of information, procedures, and forms required in implementing energy efficiency standards and policies. The information required shall include purchasing standards and policies developed by federal agencies and by nationally recognized agencies and associations, as well as energy consumption and life-cycle cost data.

(c) The purchasing agency shall consider purchasing via the life-cycle costing method those classes of items for which nationally recognized energy efficiency data have been developed. These items shall include but not be limited to automobiles and air conditioning systems. The watt-saving variety of common-sized fluorescent lamps shall be purchased except where standard wattage of those lamps is specifically required by the using agency. [L 1999, c 149, pt of §2]

[\$103D-411] Value engineering clauses. The State shall insert clauses providing for value engineering incentives in all public works contracts for amounts in excess of \$250,000. The clauses shall provide:

- (1) That cost reduction proposals submitted by contractors:
 - (A) Must require, in order to be applied to the contract, a change order thereto; and
 - (B) Must result in savings to the State or county, as the case may be, by providing less costly items than those specified in the contract without impairing any of their essential functions and characteristics such as service life, reliability, substitutability, economy of operation, ease of maintenance, and necessary standardized features; and
- (2) That accepted cost reduction proposals shall result in an equitable adjustment of the contract price so that the contractor will share a portion of the realized cost reduction. [L 1999, c 149, pt of §2]

[\$103D-411] Value engineering clauses. The State shall insert clauses providing for value engineering incentives in all public works contracts for amounts in excess of \$250,000. The clauses shall provide:

- (1) That cost reduction proposals submitted by contractors:
 - (A) Must require, in order to be applied to the contract, a change order thereto; and

- (B) Must result in savings to the State or county, as the case may be, by providing less costly items than those specified in the contract without impairing any of their essential functions and characteristics such as service life, reliability, substitutability, economy of operation, ease of maintenance, and necessary standardized features; and
- (2) That accepted cost reduction proposals shall result in an equitable adjustment of the contract price so that the contractor will share a portion of the realized cost reduction. [L 1999, c 149, pt of §2]

§103D-412 Light-duty motor vehicle requirements. (a) The procurement policy for all agencies purchasing or leasing light-duty motor vehicles shall be to reduce dependence on petroleum for transportation energy.

(b) Beginning January 1, 2010, all state and county entities, when purchasing new vehicles, shall seek vehicles with reduced dependence on petroleum-based fuels that meet the needs of the agency. Priority for selecting vehicles shall be as follows:

- (1) Electric or plug-in hybrid electric vehicles;
- (2) Hydrogen or fuel cell vehicles;
- (3) Other alternative fuel vehicles;
- (4) Hybrid electric vehicles; and
- (5) Vehicles that are identified by the United States Environmental Protection Agency in its annual "Fuel Economy Leaders" report as being among the top performers for fuel economy in their class.

(c) For the purposes of this section:

"Agency" means a state agency, office, or department.

"Alternative fuel" means alcohol fuels, mixtures containing eighty-five per cent or more by volume of alcohols with gasoline or other fuels, natural gas, liquefied petroleum gas, hydrogen, biodiesel, mixtures containing twenty per cent or more by volume of biodiesel with diesel or other fuels, other fuels derived from biological materials, and electricity provided by off-board energy sources.

"Covered fleet" has the same meaning as contained in 10 Code of Federal Regulations Part 490 Subpart C.

"Excluded vehicles" has the same meaning as provided in 10 Code of Federal Regulations section 490.3.

"Light-duty motor vehicle" has the same meaning as contained in 10 Code of Federal Regulations Part 490, not including any vehicle incapable of traveling on highways or any

vehicle with a gross vehicle weight rating greater than eight thousand five hundred pounds.

(d) Agencies may apply to the chief procurement officer for exemptions from the requirements of this section to the extent that the vehicles required by this section are not available or do not meet the specific needs of the agency; provided that life cycle vehicle and fuel costs may be included in the determination of whether a particular vehicle meets the needs of the agency. Estimates of future fuel costs shall be based on projections from the United States Energy Information Administration.

(e) Vehicles acquired from another state agency and excluded vehicles are exempt from the requirements of this section.

(f) Nothing in this section is intended to interfere with the ability of a covered fleet to comply with the vehicle purchase mandates required by 10 Code of Federal Regulations Part 490 Subpart C. [L 2005, c 216, §2; am L 2006, c 96, §28; am L 2009, c 156, §6]

Note

Electric vehicles; registration, parking, HOV lane use, and rules (repealed June 30, 2020). L 2012, c 168, §2.

PART V. MODIFICATION AND TERMINATION OF CONTRACTS

§103D-501 Contract clauses and their administration. (a) The policy board shall adopt rules requiring the inclusion of contract clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

- (1) The unilateral right of the governmental body to order in writing:
 - (A) Changes in the work within the scope of the contract; and
 - (B) Changes in the time of performance of the contract that do not alter the scope of the contract work;
- (2) Variations occurring between estimated quantities of work in a contract and actual quantities;
- (3) Suspension of work ordered by the governmental body; and
- (4) Site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses established by these rules need not be included in a contract:
 - (A) When the contract is negotiated;

- (B) When the contractor provides the site or design;
or
 - (C) When the parties have otherwise agreed with
respect to the risk of differing site conditions.
- (b) Adjustments in price permitted by rules adopted under subsection (a) shall be computed in one or more of the following ways:
- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - (2) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (3) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (4) In any other manner as the contracting parties may mutually agree upon before commencement of the pertinent performance; or
 - (5) In the absence of agreement by the parties:
 - (A) For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or
 - (B) For change orders with value exceeding \$50,000 by a unilateral determination by the governmental body of the costs attributable to the events or situations under clauses with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the rules adopted under section 103D-601 and subject to the provisions of part VII. When a unilateral determination has been

made, a unilateral change order shall be issued within ten days. Costs included in the unilateral change order shall allow for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral change order. Failure to file a protest within the time specified shall constitute agreement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral change order.

A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 103D-312. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraphs (1) through (4) shall be issued within ten days after agreement on the method of adjustment.

(c) The policy board shall adopt rules requiring the inclusion in contracts of clauses providing for appropriate remedies and covering the following subjects:

- (1) Liquidated damages as appropriate;
- (2) Specified excuses for delay or nonperformance;
- (3) Termination of the contract for default; and
- (4) Termination of the contract in whole or in part for the convenience of the governmental body.

(d) The chief procurement officer or the head of a purchasing agency may vary the clauses that may be required to be included in contracts under the rules adopted under subsections (a) and (c); provided that:

- (1) Any variations are supported by a written determination that states the circumstances justifying such variations; and
- (2) Notice of any such material variation be stated in the invitation for bids or request for proposals when the contract is awarded under section 103D-302 or 103D-

303. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 2000, c 164, §3; am L 2006, c 291, §4]

PART VI. COST PRINCIPLES

§103D-601 Cost principles rules required. The policy board shall adopt rules setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that if a written determination is approved at a level above the procurement officer, such cost principles may be modified by contract. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

PART VII. LEGAL AND CONTRACTUAL REMEDIES

§103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

(b) The chief procurement officer or a designee, prior to the commencement of an administrative proceeding under section 103D-709 or an action in court pursuant to section 103D-710, may settle and resolve a protest concerning the solicitation or award of a contract. This authority shall be exercised in accordance with rules adopted by the policy board.

(c) If the protest is not resolved by mutual agreement, the chief procurement officer or a designee shall promptly issue a decision in writing to uphold or deny the protest. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the protestor of the protestor's right to an administrative proceeding as provided in this part, if applicable.

(d) A copy of the decision under subsection (c) shall be mailed or otherwise furnished immediately to the protestor and any other party intervening.

(e) A decision under subsection (c) shall be final and conclusive, unless any person adversely affected by the decision commences an administrative proceeding under section 103D-709.

(f) In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.

(g) In addition to any other relief, when a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not, then the protestor shall be entitled to the actual costs reasonably incurred in connection with the solicitation, including bid or proposal preparation costs but not attorney's fees. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 1999, c 162, §1; am L 2003, c 52, §7]

Case Notes

A "substantial interest determination" pursuant to subsection (f) must specifically identify the state interests involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay. 85 H. 431, 946 P.2d 1.

Award and performance of library automation services contract violated subsection (f) where award of contract without delay was not necessary to protect any substantial state interest. 85 H. 431, 946 P.2d 1.

Chief procurement officer authorized under §§103D-203 and 103D-204 (pre-1997) to make substantial interest determination under subsection (f) for public library system was superintendent of education and not administrator of state procurement office. 85 H. 431, 946 P.2d 1.

Substantial interest determination improper and did not satisfy subsection (f) to the extent determination was based on assessment of merits of unsuccessful bidder's protest. 85 H. 431, 946 P.2d 1.

Where the evaluation process is so fundamentally flawed that determination of who should have been awarded the contract was not, and cannot be, made, and the contract has already been awarded in bad faith and in violation of subsection (f), a successful protester who was not awarded the contract is

entitled to recover bid preparation costs under subsection (g). 85 H. 431, 946 P.2d 1.

Where timely protest made by unsuccessful bidder, award and execution of contract by agency head with successful bidder without substantial interest determination by chief procurement officer was violation of subsection (f) and in bad faith. 85 H. 431, 946 P.2d 1.

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

This section, the "exclusive remedy" provision of chapter 103D, the public procurement code, barred plaintiff, a sub-consultant, from bringing a lawsuit against the defendant city seeking damages sounding in tort for injury suffered as a result of the city's alleged violations of the code; plaintiff was on notice under the code that it could not, in its own right, bring a direct challenge to the procurement process in the event it disputed the actions of the procurement agency; the legislative scheme encompassed the notion that challenges would be brought by the primary parties in the process--the contractor or prospective bidder or offeror. 121 H. 527 (App.), 221 P.3d 505.

No exception for petitioner unsuccessful bidder to the general rule barring a protester from recovering bid or proposal preparation costs where the project had been canceled and the contract award terminated where department of transportation--airports division did not act in bad faith or arbitrarily and capriciously in canceling the project in question, but rather acted properly in making its decision. 129 H. 335 (App.), 300 P.3d 601 (2013).

Petitioner bidder was not entitled to have a hearings officer determine the underlying merits of its protest and whether it should have been awarded the contract, even though the contract in question could no longer be awarded, so that it can pursue its request for proposal preparation costs under subsection (g); cancellation of the underlying project and termination of the protested contract rendered moot bidder's protest of the contract award; further, and for the same reasons, bidder's claim for attorney's fees did not survive the cancellation of the project in question or render the dismissal of its case improper. 129 H. 335 (App.), 300 P.3d 601 (2013).

The phrase "no further action shall be taken on the solicitation or the award of the contract" in subsection (f)

precludes actions in furtherance of establishing or completing the contract, and not actions to terminate or cancel the contract; this is consistent with the Hawaii supreme court's view that subsection (f) was designed to prevent work on a project from proceeding so far that effective remedies are prevented due to expense and impracticality; termination of an awarded contract does not implicate the concerns that subsection (f) was designed to address. 129 H. 335 (App.), 300 P.3d 601 (2013).

[§103D-701.5] Procurement statistics. The state procurement office shall keep statistics on solicitations and awards protested under section 103D-701 for the purpose of improving procurement procedures. The statistics shall include information on protests involving inadvertent errors. [L 2012, c 173, §1]

§103D-702 Authority to debar or suspend. (a) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the chief procurement officer, after consultation with the using agency and the attorney general or corporation counsel, may debar a person for cause from consideration for award of all public contracts and from performance on any public contract. The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for a governmental body's protection and not for the purpose of punishment. An agency shall impose debarment or suspension to protect a governmental body's interests and only for cause and in accordance with this section. The debarment period shall not exceed three years. The same officer, after consultation with the using agency and the attorney general or corporation counsel, may suspend a person from consideration for award of all public contracts and from performance on any public contract if there is probable cause for debarment. The suspension period shall not exceed three months. The authority to debar or suspend shall be exercised in accordance with the procedures prescribed by rules adopted by the policy board and shall be applied only to causes, convictions, and violations under subsection (b) after the effective date of the rules adopted by the policy board.

(b) The causes for debarment or suspension include the following:

- (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;
- (2) Conviction under state or federal statutes relating to embezzlement, theft, forgery, bribery, falsification

or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a contractor;

- (3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (4) Violation of contract provisions, as set forth below, of a character that is regarded by the chief procurement officer to be so serious as to justify debarment action:
 - (A) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (B) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
- (5) Any other cause the chief procurement officer determines to be so serious and compelling as to affect responsibility as a contractor, including debarment by another governmental entity for any cause listed in the rules of the policy board; and
- (6) Violation of the ethical standards set forth in chapter 84 and its implementing rules, or the charters and ordinances of the several counties and their implementing rules.

(c) The existence of a cause for debarment does not necessarily require that a contractor be debarred. The seriousness of a contractor's acts or omissions and any remedial measure or mitigating factors shall be considered in making any debarment decision. Before arriving at any debarment decision, the chief procurement officer shall consider factors such as the following:

- (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity constituting cause for debarment or had adopted those procedures prior to any government investigation of the activity cited as the cause for debarment;
- (2) Whether the contractor brought the activity cited as the cause for debarment to the attention of the appropriate government agency in a timely manner;

- (3) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and made the result of the investigation available to the chief procurement officer;
- (4) Whether the contractor cooperated fully with government agencies during the investigation and any court or administrative action;
- (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for improper activity, including any investigative or administrative costs incurred by the governmental body, and has made or has agreed to make full restitution;
- (6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity constituting the cause for debarment;
- (7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the governmental body or the chief procurement officer;
- (8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs;
- (9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment; and
- (10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent its recurrence.

The existence or nonexistence of any mitigating factors or remedial measures such as those set forth in this subsection shall not necessarily be determinative of a contractor's present responsibility. If a cause for debarment exists, the contractor has the burden of demonstrating to the satisfaction of the chief procurement officer the contractor's present responsibility and that debarment is not necessary.

(d) The chief procurement officer shall issue a written decision to debar or suspend. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the debarred or suspended person involved of the person's rights to review as provided in this part.

(e) A copy of the decision under subsection (d) shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(f) The chief procurement officer shall transmit a copy of the decision to debar or suspend a contractor to the state procurement office, which shall distribute a list to all governmental bodies containing the names of persons or firms debarred or suspended from consideration for award of all public contracts and from performance on any public contract.

(g) Upon written notification under subsection (f), the chief procurement officer shall make a written determination whether to allow the debarred or suspended person or firm to continue performance on any contract awarded prior to the effective date of the debarment or suspension.

(h) A decision under subsection (d) shall be final and conclusive, unless the debarred or suspended person commences an administrative proceeding under section 103D-709. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 1999, c 162, §2; am L 2004, c 216, §2]

§103D-703 Authority to resolve contract and breach of contract controversies. (a) This section applies to controversies between a governmental body and a contractor which arise under, or by virtue of, a contract between them, including, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(b) The chief procurement officer or a designee is authorized, prior to commencement of an action in a court brought pursuant to section 103D-711, to settle and resolve a controversy described in subsection (a). This authority shall be exercised in accordance with rules adopted by the policy board.

(c) If such a controversy is not resolved by mutual agreement, the chief procurement officer or a designee shall promptly issue a decision in writing. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the contractor of the contractor's right to initiate a judicial action as provided in this part.

(d) A copy of the decision under subsection (c) shall be mailed or otherwise furnished immediately to the contractor.

(e) The decision under subsection (c) shall be final and conclusive unless the contractor commences a judicial action in accordance with section 103D-711.

(f) If the chief procurement officer or a designee does not issue the written decision required under subsection (c) within ninety days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse

decision had been received. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 1999, c 162, §3]

Case Notes

Where it appeared that the procedure established in this section was the exclusive means available for plaintiff to resolve the retainage controversy based on a breach of contract, and plaintiff did not avail itself of these exclusive means, the circuit court lacked jurisdiction to decide plaintiff's claim for retainage. 122 H. 60, 222 P.3d 979.

§103D-703.5 Settlement of default by contractor. Upon default of a contractor, the purchasing agency may accept moneys in satisfaction of the contractor's obligation on a contract whether the moneys are realized from the performance surety's obligation on its bond, an insurer's obligation on the contractor's policy, or any other source of moneys paid to satisfy a contractor's default. Such moneys shall be deemed to be trust moneys and shall be deposited into a trust account with and under the control of the purchasing agency. These moneys and the interest earned thereon shall be used for the completion of such contract. Upon completion of the contract, any excess moneys shall be deposited in the general fund unless otherwise restricted. [L 1997, c 167, §1; am L 1999, c 149, §17]

§103D-704 Exclusivity of remedies. The procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension or debarment proceeding, or in connection with a contract controversy, to resolve their claims or differences. The contested case proceedings set out in chapter 91 shall not apply to protested solicitations and awards, debarments or suspensions, or the resolution of contract controversies. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

Case Notes

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

A protester is entitled to recover attorney's fees incurred in prosecuting its protest if the protester has proven the solicitation was in violation of this code, the contract was awarded in violation of §103D-701(f), and award of contract was in bad faith. 85 H. 431, 946 P.2d 1.

This section, the "exclusive remedy" provision of chapter 103D, the public procurement code, barred plaintiff, a sub-consultant, from bringing a lawsuit against the defendant city seeking damages sounding in tort for injury suffered as a result of the city's alleged violations of the code; plaintiff was on notice under the code that it could not, in its own right, bring a direct challenge to the procurement process in the event it disputed the actions of the procurement agency; the legislative scheme encompassed the notion that challenges would be brought by the primary parties in the process--the contractor or prospective bidder or offeror. 121 H. 527 (App.), 221 P.3d 505.

§103D-705 Solicitations or awards in violation of

law. The provisions of section 103D-706 and section 103D-707 apply where it is determined by the chief procurement officer or a designee under section 103D-701 or 103D-703 or where it is determined administratively under section 103D-709, or upon judicial review under section 103D-710 or judicial action under section 103D-711, that a solicitation or award of a contract is in violation of the law. [L Sp 1993, c 8, pt of §2; am L 1999, c 162, §4]

Case Notes

Where, if after award of contract, chief procurement officer finds no violation of law, but after de novo review pursuant to §103D-709, hearings officer finds otherwise, this section requires hearings officer to determine whether to ratify or terminate contract as provided in §103D-707(1)(A) and (B). 85 H. 431, 946 P.2d 1.

[§103D-706] Remedies prior to an award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (1) Canceled; or
- (2) Revised to comply with the law. [L Sp 1993, c 8, pt of §2]

Case Notes

Term "revise" includes remand and reconsideration; where cancellation of solicitation was contrary to purposes underlying procurement code, hearings officer's selection of cancellation of solicitation was abuse of discretion. 87 H. 147, 952 P.2d 1210.

§103D-707 Remedies after an award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
 - (A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or
 - (B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination;
- (2) If the person awarded the contract has acted fraudulently or in bad faith:
 - (A) The contract may be declared null and void; or
 - (B) The contract may be ratified and affirmed, or modified, if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate. [L Sp 1993, c 8, pt of §2; am L 1999, c 162, §5]

Case Notes

To determine whether ratification of an unlawfully awarded contract is in State's best interests, consideration must be given to State's interest in achieving the purposes of the procurement code. 85 H. 431, 946 P.2d 1.

Where, if after award of contract, chief procurement officer finds no violation of law, but after de novo review pursuant to §103D-709, hearings officer finds otherwise, §103D-705 requires hearings officer to determine whether to ratify or terminate contract as provided in paragraph (1)(A) and (B). 85 H. 431, 946 P.2d 1.

Whatever considerations may have driven the governmental body to terminate the contract, the hearings officer did not fail to carry out the officer's responsibilities under the procurement code because the officer did not need to consider the best interest of the State in accepting the parties' termination of the contract. 93 H. 155, 997 P.2d 567.

§103D-708 Interest. Interest on amounts ultimately determined to be due to a contractor or the governmental body shall be payable at the statutory rate applicable to judgments against the State under chapter 662 from the date the

governmental body receives notice of the written claim through the date of decision or judgment, whichever is later; except that if an action is initiated in circuit court pursuant to section 103D-711, interest under this section shall only be calculated until the time such action is initiated. [L Sp 1993, c 8, pt of §2; am L 1999, c 162, §6]

§103D-709 Administrative proceedings for review. (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

(b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision, not later than forty-five days from the receipt of the request under subsection (a), that shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710.

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g) may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and present argument on all issues involved. Fact finding under section 91-10 shall apply.

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

- (1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or
- (2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;

- (2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

(f) The hearings officers shall ensure that a record of each proceeding which includes the following is compiled:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings of fact;
- (5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710.

(g) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103D-701(f).

(h) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract and shall order such relief as may be appropriate in accordance with this chapter.

(i) The policy board shall adopt other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard.

(j) As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract, means the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 1999, c 162, §7; am L 2001, c 251, §2; am L 2007, c 142, §2; am L 2009, c 175, §§9, 14(2); am L 2010, c 107, §1; am L 2012, c 173, §§3, 5]

Case Notes

Where, if after award of contract, chief procurement officer finds no violation of law, but after de novo review pursuant to this section, hearings officer finds otherwise, §103D-705 requires hearings officer to determine whether to ratify or terminate contract as provided in §103D-707(1)(A) and (B). 85 H. 431, 946 P.2d 1.

Where nothing in procurement code or this section gave hearings officer authority to remand award of contract to agency for reevaluation of proposals, remand was in excess of statutory authority. 85 H. 431, 946 P.2d 1.

Under the express terms of subsection (c), petitioner could not seek review of the chief procurement officer's decision on a chapter 103F health and human services contract pursuant to this chapter unless the protest was decided under one of the sections listed in subsection (c); subsection (c) thus foreclosed petitioner from seeking review of the chief procurement officer's decision made pursuant to §103F-501 under the procedures of this section. 127 H. 76, 276 P.3d 645 (2012).

§103D-710 Judicial review. (a) Only parties to proceedings under section 103D-709 who are aggrieved by a final decision of a hearings officer under that section may apply for judicial review of that decision. The proceedings for review shall be instituted in the circuit court of the circuit where the case or controversy arises.

(b) An application for judicial review shall not operate as a stay of the decision rendered under section 103D-709.

(c) Within ten calendar days of the filing of an application for judicial review, the hearings officer shall transmit the record of the administrative proceedings to the circuit court of the circuit where the case or controversy arises.

(d) The review shall be scheduled as expeditiously as practicable. It shall be conducted on the record of the administrative proceedings, and briefs and oral argument. No new evidence shall be introduced, except that the circuit court may, if evidence is offered which is clearly newly discovered evidence and material to the just decision of the appeal, admit the same.

(e) No later than thirty days from the filing of the application for judicial review, based upon review of the record the circuit court may affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; provided that if an application for judicial review is not resolved by the thirtieth day from the filing of the application, the court shall lose jurisdiction and the decision of the hearings officer shall not be disturbed. All time limitations on actions, as provided for in section 103D-712, shall remain in effect.

(f) Any party aggrieved by the decision of the circuit court may appeal in accordance with part I of chapter 641 and the appeal shall be given priority. [L Sp 1993, c 8, pt of §2; am L 1999, c 162, §8; am L 2001, c 251, §3; am L 2009, c 175, §§10, 14(2); am L 2010, c 107, §1; am L 2012, c 173, §§4, 5]

Case Notes

Supreme court has jurisdiction under this section to review decisions by hearings officer. 85 H. 431, 946 P.2d 1.

§103D-711 Judicial action. (a) Only parties to the contract aggrieved by a decision issued pursuant to section 103D-703 by a state chief procurement officer or a designee may initiate an action under section 661-1.

(b) A person aggrieved by a decision issued pursuant to section 103D-703 by a county chief procurement officer or a designee may initiate an action under, or by virtue of, the contract in controversy in the circuit court.

(c) A governmental body aggrieved by a decision issued pursuant to section 103D-703 by a state or county chief procurement officer or a designee may initiate an action under, or by virtue of, the contract in controversy in the circuit court.

(d) To the extent the remedies provided in this part, including provisions for interest, differ from the remedies available against the State under chapter 661, the remedies shall be as provided in this part. Only the attorney general may settle and resolve a matter filed in the courts against the State pursuant to this section. [L Sp 1993, c 8, pt of §2; am L 1999, c 162, §9]

§103D-712 Time limitations on actions. (a) Requests for administrative review under section 103D-709 shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs within seven calendar days of the issuance of a written determination under section 103D-310, 103D-701, or 103D-702.

(b) Requests for judicial review under section 103D-710 shall be filed in the circuit court of the circuit where the case or controversy arises within ten calendar days after the issuance of a written decision by the hearings officer under section 103D-709.

(c) Complaints to initiate judicial actions under section 103D-711 shall be filed in the circuit court within six months of the issuance of a written determination under section 103D-703. [L Sp 1993, c 8, pt of §2; am L 1999, c 162, §10; am L 2001, c 251, §4]

Case Notes

The term "issuance" as used in subsection (a) means the date of mailing, as evidenced by the postmark. 103 H. 163, 80 P.3d 984.

[§103D-713] Defense of a governmental body. (a) No contract of less than \$1,000,000 that is entered into on or after July 1, 2007, by any governmental body, and is exclusively for services that may only lawfully be provided by a person licensed under chapter 464, may require the contractor to defend the governmental body, or its officers, employees, or agents, from any liability, damage, loss, or claim, action, or proceeding arising out of the contractor's performance under the contract.

(b) Subsection (a) notwithstanding, the contract may require the contractor providing the services to indemnify and hold harmless the governmental body and its officers, employees, and agents from and against any liability, damage, loss, cost, and expense, including reasonable attorneys' fees, and all claims, suits, and demands therefor arising out of or resulting from the negligent, reckless, intentional, or wrongful acts, errors, or omissions of the contractor, the contractor's employees, officers, agents, or subcontractors in the performance of the contract or the contractor's professional services, and the provisions may remain in full force and effect notwithstanding the expiration or early termination of the contract.

(c) No person licensed under chapter 464 that has agreed in any contract to defend a governmental body, including those contracts entered into before or after July 1, 2007, shall be required to defend the governmental body in a lawsuit filed more than ten years beyond the substantial completion of the project, except that this subsection shall not apply to any lawsuit that has been filed prior to July 1, 2007.

(d) As used in this section, "person" means any person, partnership, corporation, or other entity conducting business in the State. [L 2007, c 246, §2]

PART VIII. GOVERNMENTAL RELATIONS AND COOPERATIVE PURCHASING

Note

Part heading amended by L 1997, c 352, §13.

§103D-801 Definitions. As used in this part, unless the context requires otherwise:

"Cooperative purchasing" means procurement conducted by a public or external procurement unit with one or more public procurement units, external procurement units, or nonprofit private procurement units, pursuant to this chapter.

"External procurement unit" means any buying organization not located in this State which, if located in this State, would qualify as a public procurement unit. An agency of the United States is an external procurement unit.

"Local public procurement unit" means any county of the State or public agency of any county, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of goods, services, and construction.

"Nonprofit private procurement unit" means a nonprofit health or human services organization that receives public funds to provide services to the public.

"Public procurement unit" means either a local public procurement unit or a state public procurement unit.

"State public procurement unit" means the office of the chief procurement officer and any other purchasing agency of this State. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §12; am L 1997, c 352, §§14, 21]

§103D-802 Cooperative purchasing authorized. A public procurement unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of goods, services, or construction with one or more public procurement units, external procurement units, or nonprofit private procurement units pursuant to rules adopted by the policy board and an agreement entered into between the participants. The cooperative purchasing may include, but shall not be limited to, joint or multi-party contracts between public procurement units, and state public procurement unit requirements contracts which are made available to local public

procurement units. Cooperative purchasing agreements may be exempt from preferences pursuant to part X. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §13; am L 1997, c 352, §15]

§103D-803 Sale, acquisition, or use of goods by a public procurement unit. Any public procurement unit may sell to, acquire from, or use any goods belonging to another public procurement unit or external procurement unit independent of the requirements of parts III and XII. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §14; am L 1998, c 11, §8]

§103D-804 Cooperative use of goods or services. A public procurement unit may enter into an agreement, independent of the requirements of parts III and XII, with any other public procurement unit, external procurement unit, or nonprofit private health and human services organizations for the cooperative use of goods or services under the terms agreed upon between the parties pursuant to rules adopted by the policy board. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §15; am L 1997, c 352, §23; am L 1998, c 11, §9]

§103D-805 Joint use of facilities. Any public procurement unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit or an external procurement unit under the terms agreed upon between the parties. [L Sp 1993, c 8, pt of §2; am L 1998, c 11, §10]

§103D-806 Supply of personnel, information, and technical services. (a) Any public procurement unit is authorized, in its discretion, upon written request from another public procurement unit or external procurement unit, to provide personnel to the requesting public procurement unit or external procurement unit. The public procurement unit or external procurement unit making the request shall pay the public procurement unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.

(b) The informational, technical, and other services of any public procurement unit may be made available to any other public procurement unit or external procurement unit provided that the requirements of the public procurement unit tendering the services shall have precedence over the requesting public procurement unit or external procurement unit. The requesting public procurement unit or external procurement unit shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

(c) Upon request, the chief procurement officer may make available to public procurement units or external procurement units, any of the following services, among others:

- (1) Standard forms;
- (2) Printed manuals;
- (3) Product specifications and standards;
- (4) Quality assurance testing services and methods;
- (5) Qualified products lists;
- (6) Source information;
- (7) Common use commodities listings;
- (8) Supplier prequalification information;
- (9) Supplier performance ratings;
- (10) Debarred and suspended bidders lists;
- (11) Forms for invitations for bids, requests for proposals, instructions to bidders, general contract provisions, and other contract forms; and
- (12) Contracts or published summaries of contracts, including price and time of delivery information.

(d) The State, through the chief procurement officer, may provide the following technical services, among others:

- (1) Development of product specifications;
- (2) Development of quality assurance test methods, including receiving, inspection, and acceptance procedures;
- (3) Use of product testing and inspection facilities; and
- (4) Use of personnel training programs.

(e) The chief procurement officer may enter into contractual arrangements and publish a schedule of fees for the services provided under subsections (c) and (d). [L Sp 1993, c 8, pt of §2; am L 1998, c 11, §11]

§103D-807 Use of payments received by a supplying public procurement unit. All payments from any public procurement unit or external procurement unit received by a public procurement unit supplying personnel or services shall be available to the supplying public procurement unit as authorized by law. [L Sp 1993, c 8, pt of §2; am L 1998, c 11, §12]

§103D-808 Public procurement units in compliance with requirements of this chapter. Where the public procurement unit or external procurement unit administering a cooperative purchase complies with the requirements of this chapter, any public procurement unit participating in the purchase shall be considered to have complied with this chapter. Public procurement units shall not enter into a cooperative purchasing agreement for the purpose of circumventing this chapter. [L Sp 1993, c 8, pt of §2; am L 1998, c 11, §13]

[§103D-809] Review of procurement requirements. The chief procurement officer may collect information concerning the type, cost, quality, and quantity of commonly used goods, services, or construction being procured or used by state public procurement units. The chief procurement officer may also collect this information from local public procurement units. The chief procurement officer may make available all such information to any public procurement unit upon request. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §16]

[§103D-809] Review of procurement requirements. The chief procurement officer may collect information concerning the type, cost, quality, and quantity of commonly used goods, services, or construction being procured or used by state public procurement units. The chief procurement officer may also collect this information from local public procurement units. The chief procurement officer may make available all such information to any public procurement unit upon request. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §16]

[§103D-810] Contract controversies. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with part VII. [L Sp 1993, c 8, pt of §2]

PART IX. ASSISTANCE TO SMALL BUSINESSES

§103D-901 Definitions. As used in this part, unless the context clearly requires otherwise:

"Geographic bidding" includes the use of a competitive solicitation which provides for one or more contracts to be awarded on a regional or geographic basis with the State.

"Small business" means a business that is independently owned and defined by detailed criteria pursuant to rules adopted by the policy board. The policy board shall adopt rules defining "small business" through detailed criteria that may include the number of employees and similar factors used by the United States Small Business Administration. [L Sp 1993, c 8, pt of §2; am L 1994, c 186, §17; am L 1997, c 352, §23; am L 2005, c 50, §3]

§103D-902 Small business assistance. The policy board shall adopt rules to assist small businesses in learning how to do business with the State. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23]

§103D-903 Duties of the chief procurement officer. (a) The chief procurement officer may coordinate the implementation of this part with any similar programs offered by the department of business, economic development, and tourism or any other governmental body.

(b) The chief procurement officer may provide staff to provide service to designated state agencies to assist small businesses in learning how to do business with the State.

(c) In carrying out this part, the chief procurement officer may:

- (1) Give special publicity to procurement procedures and issue special publications designed to assist small businesses in learning how to do business with the State;
- (2) Compile, maintain, and make available source lists of small businesses for the purpose of encouraging procurement from small business;
- (3) Include small businesses on solicitation mailing lists;
- (4) Develop and conduct training programs to assist small businesses;
- (5) Reduce the level or change the types of bonding normally required or accept alternative forms of security;
- (6) Make special provisions for progress payments;
- (7) Establish the goal that twenty per cent of the State's annual purchasing expenditure be awarded to small business; and
- (8) Impose mandatory evaluation criteria designed to encourage the use of small business as subcontractors on large contracts not susceptible to performance by small business. [L Sp 1993, c 8, pt of §2; am L 2005, c 50, §4]

[§103D-904] Geographic bidding. The chief procurement officer may utilize geographic bidding in providing goods, services, and construction to best meet the needs of the State. [L Sp 1993, c 8, pt of §2]

§103D-905 REPEALED. L 1994, c 186, §26.

[§103D-906] Preference for small businesses; set-asides; use as subcontractors. The policy board shall adopt rules to promote the growth and development of small businesses that shall include:

- (1) Set-asides for small businesses in appropriate classifications of requirements suitable to performance by small businesses; and
- (2) Criteria designed to encourage the use of small businesses as subcontractors on large contracts. [L 2005, c 50, §2]

PART X. PREFERENCES

§103D-1001 Definitions. As used in this part, unless the context clearly requires otherwise:

"Direct labor" means all work required for preparation, processing, or packing of goods or performance of services, but not work relating to supervision, administration, inspection, or shipping.

"Fair market price" means the price of a product or service paid by a willing buyer to a willing seller, that is reasonably comparable to prices on the open market.

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

- (1) The cost to mine, excavate, produce, manufacture, raise, or grow the materials in Hawaii;
- (2) The added value of that portion of the cost of imported materials that is incurred after landing in Hawaii, including but not limited to other articles, materials, and supplies, added to the imported materials;
- (3) The cost of labor, variable overhead, utilities, and services, incurred in the production and manufacturing of materials or products in Hawaii; and
- (4) Fixed overhead cost and amortization or depreciation cost, if any, for buildings, tools, and equipment, situated and located in Hawaii and used in the production or manufacturing of a product.

"Hawaii products" means 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, aquacultural, horticultural, silvicultural, floricultural, or livestock product is raised, grown, or harvested in the State, the product shall be classified as class II.

"Hawaii software development business" means any person, agency, corporation, or other business entity with its principal place of business or ancillary headquarters located in the State and that proposes to obtain eighty per cent of the labor for software development from persons domiciled in Hawaii.

"Office paper" includes computer paper, bond paper, ledger paper, xerographic copier paper, envelopes, and other related types of paper on which printing, writing, or drawing is intended.

"Person" means every individual, partnership, firm, society, unincorporated association, joint venture, group, hui, joint stock, company, corporation, trustee, personal representative, trust estate, decedent's estate, trust, or other entities, whether the persons are doing business for themselves or in any agency or fiduciary capacity.

"Person with disabilities" means any person who is so severely incapacitated by any physical or mental disability that the person cannot engage in normal competitive employment because of the disability.

"Post-consumer material" means a material or finished product that has served its intended use and has been discarded for disposal or recovery, having completed its life as a consumer item, and is a part of the broader category of recovered material.

"Printed material" includes business forms, stationery, business cards, brochures, reports, publications, advertising and promotional collateral, and other related materials, including reports, publications, and related materials commissioned as part of any professional services contract.

"Produced or manufactured" includes the processing, developing, and making of a thing into a new article with a distinct character and use through the application of input within the State including Hawaii products, labor, skill, or other services. "Produced or manufactured" does not include the mere assembling or putting together of non-Hawaii products or material.

"Products" include materials, manufactures, supplies, merchandise, goods, wares, products, and foodstuffs.

"Public agency" means any agency of the State or county.

"Qualified community rehabilitation program" means a nonprofit community rehabilitation program for persons with disabilities that:

- (1) Is organized and incorporated under the laws of the United States or this State, and located in this State;
- (2) Is operated in the interest of and [employs] persons with disabilities;

- (3) Does not inure any part of its net income to any shareholder or other individual;
- (4) Complies with all applicable occupational health and safety standards required by the federal, state, and county governments; and
- (5) Holds a current certificate from the United States Department of Labor pursuant to the Fair Labor Standards Act, Title 29 United States Code section 214(c), and is certified by the state department of labor and industrial relations under section 387-9 and applicable administrative rules relating to the employment of persons with disabilities.

"Recovered material" means waste material and by-products that have been recovered or diverted from solid waste. "Recovered material" does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process.

"Software development" means any work related to feasibility studies, system requirements analysis, system design alternatives analysis, system external specifications, system internal specifications, programming, testing, debugging, or implementation for an electronic data processing system. [L 1994, c 186, pt of §1; am L 1999, c 149, §4; am L 2009, c 175, §5]

§103D-1001.5 Application of this part. The preferences in this part shall apply, when applicable, to procurements made pursuant to section 103D-302, or 103D-303, or both. [L 1997, c 352, pt of §2; am L 1999, c 149, §18]

§103D-1002 Hawaii products. (a) A purchasing agency shall review all specifications in a bid or proposal for purchase of Hawaii products where these products are available.

(b) All invitations for bids and requests for proposals shall:

- (1) Include a description of the products that are listed in the Hawaii products list established pursuant to this section, which may be used to complete the scope of work specified in the invitation for bids or request for proposals; or
 - (2) Allow as part of the offer, self-certification that the Hawaii products qualify for preference;
- provided that the offer may be evaluated along with any other published criteria in the solicitation, including but not limited to considerations such as specific nutritional content

or its equivalent, timing of delivery, quality or freshness, and past performance, if applicable.

All Hawaii products in any bid or request for proposal shall be made available for inspection, or additional information may be requested to verify that the Hawaii product meets the minimum specifications.

(c) All persons submitting bids or proposals to claim a Hawaii products preference shall designate in their bids which individual product and its price is to be supplied as a Hawaii product.

(d) Where a bid or proposal contains both Hawaii and non-Hawaii products, then for the purpose of selecting the lowest bid or purchase price only, the price or bid offered for a Hawaii product item shall be decreased by subtracting ten per cent for class I Hawaii product items bid or offered, or fifteen per cent for class II Hawaii product items bid or offered. The lowest total bid or proposal, taking the preference into consideration, shall be awarded the contract unless the bid or offer provides for additional award criteria. The contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of the preferences.

(e) Upon receipt and approval of application for Hawaii products preference, the administrator shall include within the Hawaii products list, the names of producers and manufacturers in the State who are authorized to supply locally manufactured soil enhancement products to state agencies under subsection (k). The administrator of the state procurement office shall maintain and distribute copies of the list to the purchasing agencies of the various governmental agencies.

(f) Any person not on the Hawaii products list desiring a preference pursuant to this section shall certify the Hawaii product when submitting a response to a solicitation; provided that the person certifies under penalty of sanctions that the offered Hawaii products meet the requirements for the preference.

The procurement officer may request additional information deemed necessary to qualify a product and shall have sole discretion in determining qualification for the preference.

Any offeror whose product is deemed not qualified for the preference may appeal by filing a written request for reexamination of facts to the procurement officer. Upon determining that the offeror is qualified for the preference, the procurement officer shall notify the administrator and the administrator shall place the offeror on the Hawaii products list.

(g) Solicitations shall contain a provision notifying offerors who request application of the preference that in the

event of any change that materially alters the offeror's ability to supply Hawaii products, the offeror shall immediately notify the chief procurement officer in writing and the parties shall enter into discussions for the purposes of revising the contract or terminating the contract for convenience.

(h) Nothing in this section shall limit, restrict, or preclude a Hawaii product from any preferences, set-asides, or criteria that may be applied under section 103D-906, and this section shall operate instead to mutually enhance the purpose of this section and section 103D-906.

(i) This section shall not apply whenever its application will disqualify any governmental agency from receiving federal funds or aid.

(j) Any purchase made or any contract awarded or executed in violation of this section shall be void and no payment shall be made by any purchasing agency on account of the purchase or contract.

(k) For the purposes of this section, "soil enhancement product" means any nonchemical soil preparation, conditioner, or compost mixture designed to supplement aeration or add organic, green waste, or decaying matter to the soil; provided that the term does not include any plant fertilizer intended to stimulate or induce plant growth through chemical means. All state agencies shall include in their solicitations, when required, the soil enhancement products identified on the Hawaii products list pursuant to subsection (e). [L 1994, c 186, pt of §1; am L 1996, c 228, §2; am L 1997, c 352, §16; am L 2009, c 175, §6]

[§103D-1002.5] Failure to adequately verify, deliver, or supply Hawaii products. If the administrator or procurement officer who has awarded a contract under section 103D-1002, finds that in the performance of that contract there has been a failure to comply with section 103D-1002, the contract shall be voidable and the findings shall be referred for debarment or suspension proceedings under section 103D-702. [L 2009, c 175, §4]

§103D-1003 Printing, binding, and stationery work. (a) All bids submitted for a printing, binding, or stationery section 103D-302 contract in which all work will be performed in-state, including all preparatory work, presswork, bindery work, and any other production-related work, to include storage and shipping costs, shall receive a fifteen per cent preference for purposes of bid evaluation.

(b) Where bids are for work performed in-state and out-of-state, then for the purpose of selecting the lowest bid submitted only, the amount bid for work performed out-of-state

shall be increased by fifteen per cent. 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. [L 1994, c 186, pt of §1; am L 1997, c 352, §17; am L 1999, c 149, §19]

§103D-1004 Reciprocity. (a) To ensure fair and open competition for Hawaii businesses engaged in contracting with other states, the chief procurement officer may impose a reciprocal preference against bidders from those states which apply preferences. The amount of the reciprocal preference shall be equal to the amount by which the non-resident preference exceeds any preference applied by this State.

In determining whether a bidder qualifies as a resident bidder, the definition used by the other state in applying a preference shall apply.

(b) The policy board shall adopt rules to implement this section.

(c) This section shall not apply to any transaction if the provisions of the section conflict with any federal laws. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

§103D-1005 Recycled products. (a) To encourage the use of recycled products, contracts shall be awarded to the lowest responsible and responsive bidders, with preference being given to the products containing recycled material. The policy board shall adopt rules in accordance with chapter 91 governing preference for recycled products. The rules shall establish percentages of preference and the method of determining the contents of recycled material to qualify various products for preference.

(b) The state procurement office, with the assistance of the office of solid waste management in the department of health as provided in section 342G-42, shall develop a recycled product procurement program that shall require state purchasing agencies and urge county purchasing agencies to:

- (1) Apply preference to the purchase of products with recycled content before purchasing products without any recycled content;
- (2) Be consistent with applicable federal specification standards incorporated in Executive Order No. 12873, signed by the President of the United States on October 20, 1993, and any subsequent amendments to that order; and

(3) Ensure, to the maximum extent economically feasible, the purchase of materials that may be recycled or reused when discarded, and to avoid the purchase of products deemed environmentally harmful.

(c) In addition to the requirements for the purchase of office paper and printed material under subsection (e), and when appropriate, purchase specifications shall include, but not be limited to, paper, paper products, glass and glass by-products, plastic products, mulch and soil amendments, tires, batteries, oil, paving materials and base, subbase, and pervious backfill materials. Paving materials to be considered shall include, but are not limited to, asphalt, tires, crushed concrete for base, subbase, and paving materials. The standards and specifications shall provide for the use of recycled materials and shall not reduce the quality standards for highway and road construction.

(d) The chief procurement officers shall periodically review their specifications to determine whether discrimination against procured goods with recycled contents exists and shall revise these specifications to eliminate any such discrimination.

(e) When purchasing office paper and printed material, state purchasing agencies shall, and county purchasing agencies are urged to, purchase only office paper and printed material with recycled content, except when statutory, regulatory, or contractual requirements preclude the purchase of office paper or printed material with recycled contents of the same type and quantity as the office paper or printed material without recycled content. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

§103D-1006 Software development businesses. (a) In any expenditure of public funds for software development, the use of Hawaii software development businesses shall be preferred. Where a package bid or response to a request for proposal contains both Hawaii and non-Hawaii software development businesses, then for the purpose of selecting the lowest bid or purchase price only, the bid or offer by a non-Hawaii software development business shall be increased by a preference percentage pursuant to rules adopted by the policy board.

(b) This section shall not apply when precluded by federal requirements for competitive bidding. [L 1994, c 186, pt of §1; am L 1997, c 352, §18]

§103D-1007 REPEALED. L 2003, c 52, §8.

[\$103D-1008] Taxpayer preference. For evaluation purposes, the bidder's tax-exempt price shall be increased by the applicable retail rate of general excise tax and the applicable use tax. For competitive sealed bids, the lowest responsive, responsible bidder, taking into consideration the above increase, shall be awarded the contract, but the contract amount of any contract awarded shall be the amount of the price offered and shall not include the amount of the increase. [L 1999, c 149, pt of §3]

[\$103D-1009] Preference for qualified community rehabilitation programs. When a governmental body contracts for services, a five per cent preference shall be given to services to be provided by nonprofit corporations or public agencies operating qualified community rehabilitation programs in conformance with criteria established by the department of labor and industrial relations pursuant to chapter 91; provided that contracts awarded under this section shall be exempt from the wages provision of section 103-55. The policy board shall adopt rules under chapter 91 to establish the preference for nonprofit corporations or public agencies operating qualified community rehabilitation programs consistent with this section. [L 1999, c 149, pt of §3]

Note

Annual reports to legislature on §76-77(16) expenditures by department of human resources development. L 2008, c 213, §2.

Cross References

County civil service exemption for services up to a year and costs of no more than \$850,000, see §76-77(16).

[\$103D-1010] Purchases from qualified community rehabilitation programs. (a) Any governmental body, without advertising or calling for bids, may purchase goods or services provided by qualified community rehabilitation programs serving persons with disabilities that have indicated an interest in supplying the goods or services and on an equitable basis may apportion the business among the interested programs; provided that the goods and services meet the specifications and needs of the purchasing agency and are purchased at a fair market price as determined by the appropriate public agency; and provided further that the programs comply with the following:

- (1) Meet all of the requirements of a qualified community rehabilitation program under section 103D-1001; and

- (2) Maintain a disabled to non-disabled employee ratio equal to or in excess of three-to-one for work hours of direct labor at all times on the work contracted.
- (b) The purchasing agency shall:
 - (1) Receive and review proposals submitted by qualified community rehabilitation programs to provide goods or services and determine if they are suitable for purchase by the agency;
 - (2) Negotiate the conditions and terms for the purchase, including the price of the offer, between the agency and the qualified community rehabilitation program; provided that the price of the offer shall not exceed the fair market price and there is assurance that the qualified community rehabilitation program proposal is in compliance with all administrative rules related to purchasing; and
 - (3) Ensure that any goods or service purchased from a qualified community rehabilitation program shall not be placed on the Hawaii products list under section 103D-1002. [L 1999, c 149, pt of §3]

[\$103D-1011] Qualified community rehabilitation program; proposal to provide goods and services. A qualified community rehabilitation program shall be allowed to sell only goods or services, also to include building custodial and grounds maintenance services, to a governmental body. A proposal shall be submitted to the purchasing agency containing the following information:

- (1) A description of the goods or service;
- (2) The price of the goods or service; and
- (3) Documents and information necessary to qualify as a qualified community rehabilitation program under section 103D-1001. [L 1999, c 149, pt of §3]

[\$103D-1012] Biofuel preference. (a) Notwithstanding any other law to the contrary, contracts for the purchase of diesel fuel or boiler fuel shall be awarded to the lowest responsible and responsive bidders, with preference given to bids for biofuels or blends of biofuel and petroleum fuel.

(b) When purchasing fuel for use in diesel engines, the preference shall be five cents per gallon of one hundred per cent biodiesel. For blends containing both biodiesel and petroleum-based diesel, the preference shall be applied only to the biodiesel portion of the blend.

(c) When purchasing fuel for use in boilers, the preference shall be five cents per gallon of one hundred per cent biofuel. For blends containing both biofuel and petroleum-

based boiler fuel, the preference shall be applied only to the biofuel portion of the blend.

(d) As used in this section, "biodiesel" means a vegetable oil-based fuel that meets ASTM International standard D6751, "Standard Specification for Biodiesel (B100) Fuel Blend Stock for Distillate Fuels", as amended.

(e) As used in this section, "biofuel" means fuel from non-petroleum plant or animal based sources that can be used for the generation of heat or power. [L 2006, c 240, §4]

PART XI. FEDERAL AND STATE SURPLUS PROPERTY

[§103D-1101] Definitions. As used in this part, unless the context clearly requires otherwise:

"Personal property" means all tangible goods, including equipment, materials and supplies, except land, buildings, and improvement to the land.

"Surplus personal property" means any personal property that no longer has any use to this State or personal property acquired from the United States government. "Surplus personal property" includes obsolete, scrap, and excess personal property that has completed its useful life cycle. [L 1994, c 186, pt of §1]

§103D-1102 State agency for surplus property. The state procurement office shall be the state agency for federal and state surplus personal property unless otherwise specified in this chapter or rules adopted pursuant to chapter 91.

The administrator of the state procurement office shall appoint and prescribe the duties of a surplus property director and other personnel pursuant to chapter 76 and the appropriate collective bargaining agreement, executive order, executive directive, or rule and this chapter. [L 1994, c 186, pt of §1; am L 2002, c 148, §9]

§103D-1103 Authority and duties. The state procurement office may:

- (1) Acquire from the United States under and in conformance with section 203(j) of the Federal Property and Administration Services Act of 1949, as amended, hereinafter referred to as the "Federal Act", any personal property under the control of any executive agency of the United States which has been determined to be surplus property under the Federal Act, warehouse the property, and distribute the property within the State to eligible recipients, as set forth in the Federal Act;

- (2) Receive applications from eligible health and educational institutions for the acquisition of federal and state surplus personal property, investigate, review, make recommendations and otherwise assist, supervise, and direct the processing of these applications for acquisition of federal personal property of the United States under section 203(k) of the Federal Act and state personal property under rules adopted by the policy board;
- (3) Appoint advisory boards or committees;
- (4) Take any action including making certifications, expenditures, contracts, agreements, and other undertakings, necessary in connection with the disposal of personal property hereunder;
- (5) Act as a clearinghouse of information for the eligible recipients referred to in paragraph (1) and other public and private nonprofit institutions, organizations, and agencies eligible to acquire federal or state surplus personal property; locate personal property available for acquisition from the United States or state agencies; ascertain the terms and conditions under which the property may be obtained; receive requests from eligible recipients, institutions, organizations, agencies, and counties and transmit to them all available information in reference to the property; and assist eligible recipients, institutions, organizations, agencies, and counties in every way possible in the consummation of acquisitions or transactions hereunder;
- (6) Cooperate to the fullest extent, consistent with the provisions of the Federal Act, with the departments or agencies of the United States; file a state plan of operation, operate in accordance therewith, and take any action that may be necessary to meet the minimum standards prescribed in the Federal Act; make any reports that the United States may from time to time require; and comply with the laws and regulations of the United States governing the allocation, transfer, use, or accounting for property donated or to be donated to the State;
- (7) Purchase from any other state the services of the agency responsible for the distribution of surplus property and sell to any other state the services of the state procurement office to ensure and promote the effective administration of this chapter and of the surplus property program. The purchase or sale of services shall be made on a fee-for-service or other

equitable and reasonable basis; provided that the fee or other basis of payment for services purchased or sold shall be computed to include the costs of salaries, travel, supplies, and equipment and any other item properly related to the cost of the service; and

- (8) Make certifications, take action, make expenditures, and enter into contracts and undertakings for and in the name of the State (including cooperative agreements with any federal agencies providing for utilization by and exchange between them of the property, facilities, personnel, and services of each by the other), require reports and make investigations that the agency may deem necessary or proper for the administration of this part, or that may be required by law or regulation of the United States in connection with the disposal of real property and the receipt, warehousing, and distribution of personal property received by the agency from the United States. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

[§103D-1104] Delegation of authority; bond. The administrator of the state procurement office may:

- (1) Delegate to any employee any power and authority deemed reasonable and proper for the effective administration of this part; and
- (2) Bond any employee of the agency handling money, signing checks, or receiving or distributing property from the United States or state agencies under authority of this part. [L 1994, c 186, pt of §1]

§103D-1105 Authorized donee representatives. Any other law to the contrary notwithstanding, the governing board, or in case there is none, the chief procurement officer or the head of a purchasing agency, or their respective designees, by written order or resolution, may confer upon any officer or employee the continuing authority to secure the transfer, to the state procurement office or the purchasing agency, of surplus property under this part through the state agency for surplus property under section 203(j) of the Federal Property and Administrative Services Act of 1949, as amended, and rules adopted by the policy board, and to obligate the State or county and its funds to the extent necessary to comply with the terms and conditions of the transfers. The authority conferred upon the officer or employee by the order or resolution shall remain in effect until the order or resolution is duly revoked and written notice of

the revocation is received by the state agency for surplus property. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

[§103D-1106] Transfer charges. Any charges or fees assessed by the surplus property director shall be limited to those reasonably related to the costs of care and handling with respect to the acquisition, receipt, warehousing, distribution, or transfer. The charges and fees shall be limited to the reasonable administrative costs the surplus property director incurred in effecting transfer. [L 1994, c 186, pt of §1]

§103D-1107 Revolving fund. There shall be in the state treasury a surplus federal property revolving fund, which shall be maintained in an amount adequate to defray the costs of procuring, storing, handling, and disposing of surplus property donated to the State under any federal act or rules adopted by the policy board making surplus federal and state property available. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

PART XII. INVENTORY MANAGEMENT; STATE AND COUNTY PROPERTY

§103D-1201 Definitions. As used in this part, unless the context clearly requires otherwise:

"Administrator of the state procurement office" means the chief procurement officer for the governmental bodies of the executive branch of the State, other than the University of Hawaii, department of education, the several counties, and those governmental bodies administratively attached thereto.

"Excess property" means any property which has a remaining useful life but which is no longer required by the using agency in possession of the property.

"Expendable property" means all property other than nonexpendable property.

"Nonexpendable property" means all property having a unit cost and useful life which is set by rules adopted by the policy board.

"Property" means all goods, including equipment, materials, supplies, land, buildings, and other improvements to the land, also non-tangible items such as patents, inventions, and copyrights.

"Surplus property" means any property that no longer has any use to the State. "Surplus property" includes obsolete, scrap, and nonexpendable property that has completed its useful life cycle. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

§103D-1202 Rules. The policy board shall adopt rules in accordance with chapter 91 governing:

- (1) The management of properties during their entire life cycle;
- (2) The classes of property, whether expendable or nonexpendable;
- (3) The action to be taken in case of lost, stolen, damaged, unserviceable, or unsuitable property;
- (4) The sale, lease, trade-in, or disposal of surplus property by public auction, competitive sealed bidding, or other appropriate method designated by rules; provided that no employee of the owning or disposing agency shall be entitled to purchase this property; and
- (5) The transfer of excess property. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

§103D-1203 Administrator of the state procurement office; duties. The administrator of the state procurement office shall:

- (1) Perform a periodic review of the inventory management system of all governmental bodies;
- (2) Enforce rules adopted by the policy board governing the management of state property;
- (3) Assist, advise, and guide governmental bodies in matters relating to the inventory management of state property; and
- (4) Establish, manage, and maintain a centralized property inventory record file for each department, board, commission, or office of the State having the care, custody, or control of any state property, other than the University of Hawaii, the department of education, the several counties, and those governmental bodies administratively attached thereto, unless otherwise specified in this chapter or in rules adopted pursuant to chapter 91. [L 1994, c 186, pt of §1; am L 1997, c 352, §23]

[\$103D-1204] Others' responsibilities. The head of the department, or the head of any board, commission, agency, bureau, or office of the State shall be responsible for the accountability, protection, maintenance, and proper use of all state property pertaining to their office or department, whether they issue receipts for the same or not, and shall not transfer their responsibility to a successor during short periods or absence unless with the written consent of the governor. Shortages occurring during the administration of one person shall not be the responsibility of the person's successor. The new officer shall be responsible only for the

property the office actually receives or for which the officer issues a receipt. [L 1994, c 186, pt of §1]

[\$103D-1205] Internal control. The head of the department, or the head of any board, commission, agency, bureau, or office of the State and any county having the care, custody, or control of any state property is responsible for maintaining an adequate system of internal control to ensure the accountability, safekeeping, maintenance, and proper use of state property and verify that the internal control system continues to function effectively as designed. [L 1994, c 186, pt of §1]

§103D-1206 Annual inventory reporting by state officers. The chief procurement officers for their respective jurisdictions, the administrative heads of the executive departments, and all other persons, offices, and boards of a public character which are not by law under the control and direction of any of the officers specifically named in this section, before September 16 of each year, shall prepare and file with the administrator of the state procurement office an annual inventory return of state property in the possession, custody, control, or use of the officer making the return, or of the department or office of the government over which the officer presides. Any officer, agent, or employee serving in a department or under a returning officer shall file an annual inventory return to the department head or the returning officer. The officer making the return shall similarly file a copy with the administrator of the state procurement office. The annual inventory return shall contain the following:

- (1) A summary and list by detailed item description and carrying value of all nonexpendable state property on hand as of July 1 of the year for which the return is made;
- (2) A summary and list by detailed item description and carrying value of all nonexpendable state property acquired and disposed of during the year elapsed since the return made as of the preceding July 1; and
- (3) A sworn statement certifying the information on the return, property listings, and carrying values provided with the return to be full, true, and correct to the best knowledge, information, and belief of the officer making the return. [L 1994, c 186, pt of §1; am L 1999, c 149, §21]

§103D-1207 Annual inventory reporting by county mayors to administrator of the state procurement office. Each county mayor, before September 16 of each year, shall prepare and file with the administrator of the state procurement office an annual inventory return of all nonexpendable state property in the use, custody, or possession for the time being of the county or any of its officers. The annual inventory return shall contain the following:

- (1) A summary and list by detailed item description and carrying value of all nonexpendable state property on hand as of July 1 of the year for which the return is made;
- (2) A summary and list by detailed item description and carrying value of all nonexpendable state property disposed of during the year elapsed since the return made as of the preceding July 1; and
- (3) A sworn statement certifying the information on the return, property listings, and carrying values provided with the return to be full, true, and correct to the best knowledge, information, and belief of the officer making the return. [L 1994, c 186, pt of §1; am L 1999, c 149, §22]

§103D-1208 Annual inventory reporting by county officers to council. Every officer, head of department, agent, employee, and other person in the employ of the county, having in their custody or under their control or using property belonging to the county, each year within forty-five days following the close of the county's fiscal year, shall prepare and file with the council of the county an annual inventory return of all nonexpendable county property in the possession, custody, control, or use of the officer, head of department, agent, employee, or other person making the annual inventory return, or of the offices or departments over which the officer presides. The annual inventory return shall contain the following:

- (1) A summary and list by detailed item description and carrying value of all nonexpendable county property on hand as of the close of the county's fiscal year for which the return is made;
- (2) A summary and list by detailed item description and carrying value of all nonexpendable county property acquired and disposed of during the year elapsed since the return made as of the preceding close of the fiscal year; and
- (3) A sworn statement certifying the information on the return, property listings, and carrying values

provided with the return to be full, true, and correct to the best knowledge, information, and belief of the officer making the return. [L 1994, c 186, pt of §1; am L 1999, c 149, §23]

[§103D-1209] Authority to withhold salary. The administrator of the state procurement office and the director of finance of each county shall ascertain if inventories have been filed as required by sections 103D-1206 and 103D-1208 respectively. If any officer, head of department, agent, employee, or other person fails to file the required inventory within the time prescribed, the administrator of the state procurement office or director shall withhold the salary or wage due the officer, head of department, agent, employee, or other person until the inventory is filed; provided that at the discretion of administrator of the state procurement office or director the delay in filing the required inventory return within the time prescribed was for good cause. [L 1994, c 186, pt of §1]

[§103D-1210] Penalty; jurisdiction. Any officer, member of a public board, assessor, or other person who fails to perform any of the duties imposed upon the person by this part shall be fined no more than \$500 or imprisoned not more than six months. District judges shall have jurisdiction to hear and determine all cases of alleged violations of this part committed within the circuit for which the judge was appointed. [L 1994, c 186, pt of §1]

[§103D-1211] Forms for annual inventory return. The administrator of the state procurement office shall prepare and print a general form upon which the inventories required under sections 103D-1206 and 103D-1207 shall be made, and before June 1 of each year, shall mail to each officer required under sections 103D-1206 and 103D-1207 to file an annual inventory return, as many forms as necessary to enable the officer to make a proper return. The administrator of the state procurement office, at the same time, shall call to the attention of the officer, in writing, the requirements of this part. [L 1994, c 186, pt of §1]

[§103D-1211] Forms for annual inventory return. The administrator of the state procurement office shall prepare and print a general form upon which the inventories required under sections 103D-1206 and 103D-1207 shall be made, and before June 1 of each year, shall mail to each officer required under sections 103D-1206 and 103D-1207 to file an annual inventory

return, as many forms as necessary to enable the officer to make a proper return. The administrator of the state procurement office, at the same time, shall call to the attention of the officer, in writing, the requirements of this part. [L 1994, c 186, pt of §1]

[§103D-1212] Duties of the State and county. (a) The administrator of the state procurement office shall examine each inventory return filed as required by sections 103D-1206 and 103D-1207 and the director of finance of each county shall examine each inventory return filed as required by section 103D-1208, and they shall add, if any, items of property which should have been included with their full cash value, correct and alter the valuations as may be required by truth and accuracy, and enter in one or more books to be kept for the purpose and to be available at all times for inspection by any taxpayer, all of the property and valuations named in the inventories, as added to, revised, corrected, and classified for convenience.

(b) The administrator of the state procurement office or county director of finance shall charge the amounts of the inventories to proper accounts on the general ledgers of the State or county so that the values of the properties shall be shown and appear at all times in the balance sheet of the books of the State or county.

(c) The director of taxation at all times shall advise or assist the administrator of the state procurement office in the valuation of all state property.

(d) The county engineers shall advise or assist the director of finance of their respective counties as to the valuation of the property belonging to the county. [L 1994, c 186, pt of §1]

[§103D-1213] Sale of produce, etc.; disposition of proceeds; exceptions. Except as otherwise provided by law or rules adopted by the governor, the sale by any governmental office, department, board, establishment, institution, or agency (hereafter referred to as "agency") of domestic animals such as hogs, poultry, etc.; of the produce of animal husbandry; of fruits, vegetables, and other agricultural produce; of manufactured articles; or the like (hereafter referred to as "products") where the raising, production, or manufacture of the same is a part of the usual or authorized activities of the agency, may be made by the agency in a manner to be determined by the head of the agency. The proceeds of the sales, where not otherwise provided by law, shall be paid into the general fund as state realizations. If any of the products are sold from one agency to any other agency, a reasonable sale price may be paid

to the selling agency by the purchasing agency and credited to the current expense appropriation of the selling agency, subject to re-expenditure during the fiscal or other period in which the current expense appropriation is available, and any unexpended balance shall lapse at the end of the period. This section shall not apply to public school activities, such as the sale of food in public school cafeterias, the proceeds of which are not considered as public funds payable into the treasury of the State, nor shall the same apply to activities of the University of Hawaii. Nothing in this section shall be deemed to prohibit a transfer from one agency to another of the products without charge, if so ordered by the selling agency. [L 1994, c 186, pt of §1]

[§103D-1214] Proceeds. Except as otherwise provided in section 103D-1213 or by any other law, all moneys received from the sale of any state property by any office, department, board, establishment, institution, or other agency shall be deposited with the director of finance to the credit of the general fund where the operation of the agency is financed from the general fund; provided that where any state property has been purchased with moneys in a special fund, the proceeds of the sale shall be paid into or credited to the special fund. In any case of doubt as to the application of any such proceeds, the administrator of the state procurement office shall determine the fund or appropriation to which the proceeds shall be credited pursuant to this section, and the administrator's decision shall be final. [L 1994, c 186, pt of §1]

[PART XIII.] PREFERENCE FOR OIL PRODUCTS WITH GREATER RECYCLED CONTENT

[§103D-1301] Short title. This part shall be referred to as the "Recycled Oil Act". [L 1999, c 53, pt of §2]

[§103D-1302] Definitions. As used in this part:

"Industrial oil" means any compressor, turbine, or bearing oil, hydraulic oil, metal working oil or refrigeration oil.

"Lubricating oil" means any oil intended for use in an internal combustion crankcase, transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equipment, or machinery powered by an internal combustion engine.

"Procuring agency" means any state or county agency or any person contracting with that agency in respect to work performed under a contract for lubricating oil, industrial oil or involves the use of lubricating oil or industrial oil.

"Recycled oil" means used oil that has been prepared for reuse as a petroleum product by refining, reclaiming, reprocessing or other means provided that the preparation or use is operationally safe, environmentally sound and complies with all laws, rules, and regulations.

"Virgin oil" means oil which has been refined from crude oil and which has not been used or contaminated with impurities. [L 1999, c 53, pt of §2]

[\$103D-1303] Preference for oil products with greater recycled content. Notwithstanding any law to the contrary, any procurement officer that purchases lubricating oil and industrial oil under this [part] shall purchase the oil from the seller who certifies the oil product containing the greatest percentage of recycled oil. The procurement office may purchase an oil product containing a lower percentage of recycled oil provided that the specific oil product containing recycled oil is:

- (1) Not available within a reasonable period of time or in quantities necessary to meet an agency's needs;
 - (2) Not able to meet the performance requirements or standards recommended by the equipment or vehicle manufacturer, including any warranty requirements;
 - (3) Available only at a cost greater than the cost of comparable virgin oil products; or
 - (4) Likely to breach an existing warranty that requires the purchase of virgin oil products for exclusive use in vehicles or equipment whose warranties expressly prohibit the use of products containing recycled oil.
- [L 1999, c 53, pt of §2]

[\$103D-1304] Affirmative program for procuring oils with recycled content. (a) Each chief procurement officer shall establish and maintain an affirmative program for procuring oils containing the maximum content of recycled oil.

- (b) An affirmative program shall include:
- (1) Placement of descriptions of the preference of recycled oil products in publications used to solicit bids from suppliers or vendors;
 - (2) Descriptions of the recycled oil procurement program at the bidders' conferences;
 - (3) Discussion of the preference program in lubricating oil and industrial oil procurement solicitations, invitations for bids, requests for proposals, or other solicitations for offers under this chapter; and
 - (4) Efforts to inform trade associations about the preference program. [L 1999, c 53, pt of §2]