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# A BILL FOR AN ACT

RELATING TO HAWAII PUBLIC PROCUREMENT CODE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1                                   **PART I - PROCUREMENT EXEMPTIONS**

2           SECTION 1. Chapter 103D, Hawaii Revised Statutes, is  
3 amended by adding a new section to part III to be appropriately  
4 designated and to read as follows:

5           "§103D-       Exemption for General Services Administration-  
6 approved sole source vendor. (a) A bidder or offeror who is a  
7 United States General Services Administration-approved sole  
8 source vendor shall be exempt from complying with section  
9 103D-302, 103D-303, or 103D-304, as applicable, in any  
10 procurement funded by state and federal matching funds.

11           (b) Subsection (a) shall apply only if the United States  
12 General Services Administration-approved sole source vendor was  
13 responsible for obtaining the federal funding."

14           SECTION 2. Section 103D-305, Hawaii Revised Statutes, is  
15 amended to read as follows:

16           "**§103D-305 Small purchases; prohibition against parceling.**

17 (a) Procurements of less than [~~\$50,000~~] \$100,000 for goods[~~7~~]

1 or services, or \$250,000 for construction shall be made in  
2 accordance with procedures set forth in rules adopted by the  
3 policy board that are designed to ensure administrative  
4 simplicity and as much competition as is practicable; provided  
5 that multiple expenditures shall not be created at the inception  
6 of a transaction or project so as to evade the requirements of  
7 this chapter; and provided further that procurement requirements  
8 shall not be artificially divided or parceled so as to  
9 constitute a small purchase under this section.

10 (b) Each construction contract under subsection (a) shall  
11 require security by a performance bond delivered to the  
12 purchasing agency that is:

13 (1) In a form prescribed by the rules of the policy board;

14 (2) Executed by a surety company authorized to do business  
15 in this State; and

16 (3) In an amount equal to one hundred per cent of the  
17 price specified in the contract;

18 or otherwise secured by a performance bond in a manner  
19 satisfactory to the purchasing agency.

20 [~~(b)~~] (c) Procurements of \$25,000 to less than [~~\$50,000~~]  
21 \$100,000 shall be made in accordance with small purchase

22 procedures; provided that small purchase procurements through an

1 electronic system shall be required after the policy board has  
2 adopted rules for electronic procurement and provided training  
3 to the affected agency."

4 **PART II - PROCUREMENT PREFERENCES**

5 SECTION 3. Chapter 103D, Hawaii Revised Statutes, is  
6 amended by adding a new section to part X to be appropriately  
7 designated and to read as follows:

8 "§103D- Failure to adequately verify, deliver, or supply  
9 Hawaii products. If the administrator or procurement officer  
10 who has awarded a contract under section 103D-1002, finds that  
11 in the performance of that contract there has been a failure to  
12 comply with section 103D-1002, the contract shall be voidable  
13 and the findings shall be referred for debarment or suspension  
14 proceedings under section 103D-702."

15 SECTION 4. Section 103D-1001, Hawaii Revised Statutes, is  
16 amended as follows:

17 1. By adding two new definitions to be appropriately  
18 inserted and to read:

19 ""Hawaii component" means those articles, materials,  
20 supplies, and labor incorporated directly into the products  
21 acquired for public use under the contract.

22

1       "Hawaii input" means the part of the cost of a product  
2 having a Hawaii component that is attributable to production,  
3 manufacturing, or other expenses arising within the State.

4 "Hawaii input" includes but is not limited to:

5       (1) The cost to mine, excavate, produce, manufacture,  
6 raise, or grow the materials in Hawaii;

7       (2) The added value of that portion of the cost of  
8 imported materials that is incurred after landing in  
9 Hawaii, including but not limited to other articles,  
10 materials and supplies added to the imported  
11 materials;

12       (3) The cost of labor, variable overhead, utilities, and  
13 services incurred in the production and manufacturing  
14 of materials or products in the State; and

15       (4) Fixed overhead cost and amortization or depreciation  
16 cost, if any, for buildings, tools and equipment  
17 situated and located in the State and utilized in the  
18 production or manufacturing of a product."

19       2. By amending the definitions of "Hawaii products" and  
20 "products" to read:

21       ""Hawaii products" means products that are mined,  
22 excavated, produced, manufactured, raised, or grown in the State

1 and where the [~~input constitutes no less than twenty-five~~] cost  
2 of the Hawaii input towards the product exceeds fifty per cent  
3 of the [manufactured] total cost[~~;~~] of the product; provided  
4 that:

5 [~~(1) Where the value of the input constitutes twenty-five~~  
6 ~~per cent or more, but less than fifty per cent, of the~~  
7 ~~manufactured cost, the product shall be classified as~~  
8 ~~class I;~~

9 ~~(2)]~~ (1) Where the value of the input [constitutes]  
10 exceeds fifty per cent [or more, but less than  
11 seventy-five per cent,] of the [manufactured] total  
12 cost, the product shall be classified as class [II~~;~~]  
13 I; and

14 [~~(3) Where the value of the input constitutes seventy-five~~  
15 ~~per cent or more of the manufactured cost, the product~~  
16 ~~shall be classified as class III.]~~

17 (2) Where any agricultural, aquacultural, horticultural,  
18 silvicultural, floricultural, or livestock product is  
19 raised, grown, or harvested in the State, the product  
20 shall be classified as class II.

1 "Products" include materials, manufactures, supplies,  
2 merchandise, goods, wares, products, and foodstuffs[-] acquired  
3 for public use under the contract."

4 SECTION 5. Section 103D-1002, Hawaii Revised Statutes, is  
5 amended to read as follows:

6 "**§103D-1002 Hawaii products.** (a) A purchasing agency  
7 shall review all specifications in a bid or proposal for  
8 purchase from [~~the~~] Hawaii products [~~list~~] where these products  
9 are available[~~;~~ ~~provided that the products:~~

10 ~~(1) Meet the minimum specifications and the selling price~~  
11 ~~f.o.b. jobsite;~~

12 ~~(2) Unloaded including applicable general excise tax and~~  
13 ~~use tax does not exceed the lowest delivered price in~~  
14 ~~Hawaii f.o.b. jobsite; and~~

15 ~~(3) Unloaded, including applicable general excise tax and~~  
16 ~~use tax, does not exceed the lowest delivered price of~~  
17 ~~a similar non-Hawaii product by more than:~~

18 ~~(A) Three per cent where class I Hawaii products are~~  
19 ~~involved;~~

20 ~~(B) Five per cent where class II Hawaii products are~~  
21 ~~involved; or~~

1           ~~(C) Ten per cent where class III Hawaii products are~~  
2           ~~involved].~~

3           (b) All invitations for bids and requests for proposals  
4 shall ~~[include]~~:

5           (1) Include a description of the products that are listed  
6           in the Hawaii products list established pursuant to  
7           this section, ~~[and their established classes,~~] which  
8           may be used to complete the scope of work specified in  
9           the invitation for bids or request for proposals~~[~~  
10           ~~where the products are]~~; or

11           (2) Allow self-certification as part of the offer that the  
12           Hawaii products qualify for preference;  
13 provided that the offer can be evaluated along with any other  
14 published criteria in the solicitation, including but not  
15 limited to considerations such as specific nutritional content  
16 or equivalent, timing of delivery, quality or freshness, and  
17 past performance, if applicable.

18           All Hawaii products in any bid or request for proposal  
19 shall be made available ~~[and meet]~~ for inspection or additional  
20 information may be requested to verify that the Hawaii product  
21 meets the minimum specifications.

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

5 (d) Where a bid or proposal contains both Hawaii and non-  
6 Hawaii products, then for the purpose of selecting the lowest  
7 bid or purchase price only, the price or bid [~~or~~] offered for a  
8 Hawaii product item shall be decreased by subtracting  
9 [~~therefrom: three per cent, five per cent, or~~] ten per cent for  
10 [~~the~~] class I [~~, class II, or class III~~] Hawaii product items bid  
11 or offered [~~, respectively.~~] or fifteen per cent for class II  
12 Hawaii product items bid or offered. The lowest total bid or  
13 proposal, taking the preference into consideration, shall be  
14 awarded the contract unless the bid or offer provides for  
15 additional award criteria. The contract amount of any contract  
16 awarded, however, shall be the amount of the bid or price  
17 offered, exclusive of the preferences.

18 (e) Upon receipt and approval of application for Hawaii  
19 products preference, the administrator shall include within the  
20 Hawaii products list, the names of producers and manufacturers  
21 in the State who are authorized to supply locally manufactured  
22 soil enhancement products to state agencies under subsection



1 ~~[(h)-]~~ (k). The administrator of the state procurement office  
2 shall maintain and distribute copies of the list to the  
3 purchasing agencies of the various governmental agencies.

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

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

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

19 (g) Solicitations shall contain a provision notifying  
20 offerors who request application of the preference that in the  
21 event of any change that materially alters the offeror's ability  
22 to supply Hawaii products, the offeror shall immediately notify

1 the chief procurement officer in writing and the parties shall  
2 enter into discussions for the purposes of revising the contract  
3 or terminating the contract for convenience.

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

9 [~~f~~] (i) This section shall not apply whenever its  
10 application will disqualify any governmental agency from  
11 receiving federal funds or aid.

12 [~~g~~] (j) Any purchase made or any contract awarded or  
13 executed in violation of this section shall be void and no  
14 payment shall be made by any purchasing agency on account of the  
15 purchase or contract.

16 [~~h~~] (k) For the purposes of this section, "soil  
17 enhancement product" means any nonchemical soil preparation,  
18 conditioner, or compost mixture designed to supplement aeration  
19 or add organic, green waste, or decaying matter to the soil;  
20 provided that the term does not include any plant fertilizer  
21 intended to stimulate or induce plant growth through chemical  
22 means. All state agencies shall include in their solicitations,

1 when required, the soil enhancement products identified on the  
2 Hawaii products list pursuant to subsection (e)."

3 SECTION 6. This part does not affect rights and duties  
4 that matured, penalties that were incurred, and proceedings that  
5 were begun, before its effective date.

6 **PART III - PROCUREMENT PROTECTS AND DISPUTES**

7 SECTION 7. Section 103-32.1, Hawaii Revised Statutes, is  
8 amended to read as follows:

9 **"§103-32.1 Contract provision for retainage;**

10 **subcontractors.** (a) Any retainage provided for in this section  
11 or requested to be withheld by the contractor shall be held by  
12 the procurement officer.

13 (b) A dispute between a contractor and subcontractor of  
14 any tier shall not constitute a dispute to which the State or  
15 any county is a party, and there is no right of action against  
16 the State or any county. The State and a county may not be  
17 interpleaded in any judicial or administrative proceeding  
18 involving such a dispute.

19 (c) Any public contract may include a provision for the  
20 retainage of a portion of the amount due under the contract to  
21 the contractor to ensure the proper performance of the contract;  
22 provided that:

- 1 (1) The sum withheld by the procurement officer from the  
2 contractor shall not exceed five per cent of the total  
3 amount due the contractor and that, after fifty per  
4 cent of the contract is completed and progress is  
5 satisfactory, no additional sum shall be withheld;  
6 provided further that if progress is not satisfactory,  
7 the procurement officer may continue to withhold, as  
8 retainage, sums not exceeding five per cent of the  
9 amount due the contractor; and
- 10 (2) The retainage shall not include sums deducted as  
11 liquidated damages from moneys due or that may become  
12 due the contractor under the contract.
- 13 (d) Where a subcontractor has provided evidence to the  
14 contractor of:
- 15 (1) A valid performance and a payment bond for the project  
16 that is acceptable to the contractor and executed by a  
17 surety company authorized to do business in this  
18 State;
- 19 (2) Any other bond acceptable to the contractor; or
- 20 (3) Any other form of collateral acceptable to the  
21 contractor,

1 the retention amount withheld by the contractor from its  
2 subcontractor shall be not more than the same percentage of  
3 retainage as that of the contractor. This subsection shall also  
4 apply to the subcontractors who subcontract work to other  
5 subcontractors.

6 (e) This section shall not be construed to impair the  
7 right of a contractor or a subcontractor at any tier to  
8 negotiate, and to include in their subcontract, provisions that:

- 9 (1) Permit the contractor or subcontractor to retain,  
10 without cause, a specified percentage of no more than  
11 ten per cent of each progress payment otherwise due to  
12 a subcontractor for satisfactory performance under the  
13 subcontract, without incurring any obligation to pay a  
14 late payment interest penalty, in accordance with  
15 terms and conditions agreed to by the parties to the  
16 subcontract, giving such recognition as the parties  
17 deem appropriate to the ability of a subcontractor to  
18 furnish a performance bond and a payment bond, subject  
19 however, to the limitations of subsection (d); and
- 20 (2) Permit the contractor or subcontractor to make a  
21 determination that part or all of the subcontractor's  
22 payment request may be withheld by the procurement

1 officer in accordance with the subcontract agreement,  
2 without incurring any obligation to pay interest or a  
3 late payment penalty if [÷

4 ~~(A) A notice conforming to the standards of~~  
5 ~~subsection (f) has been previously furnished to~~  
6 ~~the subcontractor; and~~

7 ~~(B) A copy of any notice issued by the contractor or~~  
8 ~~subcontractor pursuant to subparagraph (A) has~~  
9 ~~been furnished to the procurement officer.~~

10 ~~(f)~~ A] a written notice of any withholding [~~shall be~~] is  
11 issued to a subcontractor, with a copy to the procurement  
12 officer, specifying the following:

13 [~~(1)~~] (A) The amount to be withheld;

14 [~~(2)~~] (B) The specific causes for the withholding under the  
15 terms of the subcontract; and

16 [~~(3)~~] (C) The remedial actions to be taken by the  
17 subcontractor to receive payment of the amounts  
18 withheld.

19 [~~(g)~~] (f) A contractor may not request payment from the  
20 procurement officer of any amount withheld or retained in  
21 accordance with subsection (e) until such time as the contractor

1 has determined and certified to the procurement officer that the  
2 subcontractor is entitled to the payment of such amount.

3 [~~(h)~~] (g) The provisions of this section shall not be  
4 construed to require payment to subcontractors of retainage  
5 released to a contractor pursuant to an agreement entered into  
6 with the procurement officer meeting the requirements of section  
7 103-32.2."

8 SECTION 8. Section 103D-302, Hawaii Revised Statutes, is  
9 amended by amending subsection (g) to read as follows:

10 "(g) Correction or withdrawal of inadvertently erroneous  
11 bids before or after award, or cancellation of invitations for  
12 bids, awards, or contracts based on such bid mistakes, shall be  
13 permitted in accordance with rules adopted by the policy board.  
14 After bid opening, no changes in bid prices or other provisions  
15 of bids prejudicial to the interest of the public or to fair  
16 competition shall be permitted. Except as otherwise provided by  
17 rule, all decisions to permit the correction or withdrawal of  
18 bids, or to cancel awards or contracts based on bid mistakes,  
19 shall be supported by a written determination made by the chief  
20 procurement officer or head of a purchasing agency.

21 If a protest under section 103D-701 is based upon the bid  
22 amount of a competitive sealed bid submitted by a competing

1 bidder, the procurement officer shall dismiss the protest if the  
2 amount of the bid of the competing bidder is due to inadvertent  
3 error amounting to not more than one per cent of the bid amount  
4 of the competing bidder."

5 SECTION 9. Section 103D-701, Hawaii Revised Statutes, is  
6 amended by amending subsection (b) to read as follows:

7 "(b) The chief procurement officer or a designee, prior to  
8 the commencement of an administrative proceeding under section  
9 103D-709 or an action in court pursuant to section 103D-710, may  
10 settle and resolve a protest concerning the solicitation or  
11 award of a contract. This authority shall be exercised in  
12 accordance with rules adopted by the policy board.

13 If a protest involves the challenge of a bid amount that is  
14 the result of inadvertent error, the protest shall be subject to  
15 section 103D-302."

16 SECTION 10. Section 103D-709, Hawaii Revised Statutes, is  
17 amended to read as follows:

18 "**§103D-709 Administrative proceedings for review.** (a)  
19 The several hearings officers appointed by the director of the  
20 department of commerce and consumer affairs pursuant to section  
21 26-9(f) shall have jurisdiction to review and determine de novo,  
22 any request from any bidder, offeror, contractor, or person



1 aggrieved under section 103D-106, or governmental body aggrieved  
2 by a determination of the chief procurement officer, head of a  
3 purchasing agency, or a designee of either officer under section  
4 103D-310, 103D-701, or 103D-702.

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

16 (c) Only parties to the protest made and decided pursuant  
17 to sections 103D-701, 103D-709(a), 103D-310(b), and [†]103D-  
18 702(g) [†] may initiate a proceeding under this section. The  
19 party initiating the proceeding shall have the burden of proof,  
20 including the burden of producing evidence as well as the burden  
21 of persuasion. The degree or quantum of proof shall be a  
22 preponderance of the evidence. All parties to the proceeding

1 shall be afforded an opportunity to present oral or documentary  
2 evidence, conduct cross-examination as may be required, and  
3 argument on all issues involved. The rules of evidence shall  
4 apply.

5 (d) As used in this subsection, "estimated value of the  
6 contract" means the lowest responsible and responsive bid under  
7 section 103D-302, or the bid amount of the responsible offeror  
8 whose proposal is determined in writing to be the most  
9 advantageous under section 103D-303, as applicable. Any bidder,  
10 offeror, contractor, or person that is a party to a protest of a  
11 solicitation or award of a contract under sections 103D-302 and  
12 103D-303 that is decided pursuant to section 103D-701 may  
13 initiate a proceeding under this section, provided that:

14 (1) The protest concerns a matter that is equal to no less  
15 than ten per cent of the total estimated value of the  
16 contract; and

17 (2) The party initiating the proceeding shall pay to the  
18 department of commerce and consumer affairs a cash or  
19 protest bond in an amount equal to one per cent of the  
20 total estimated value of the contract if the total  
21 estimated value of the contract is \$1,000,000 or more;

1           provided that in no event shall the required amount of  
2           the cash or protest bond be more than \$50,000.

3           If the initiating party prevails in the administrative  
4 proceeding, the cash or protest bond shall be returned to that  
5 party. If the initiating party does not prevail in the  
6 administrative proceeding, fifty per cent of the cash or protest  
7 bond shall be deposited into the compliance resolution fund  
8 established under section 26-9(o), and fifty per cent of the  
9 cash or protest bond shall be deposited into the general fund.

10           ~~(d)~~ (e) The hearings officers shall ensure that a record  
11 of each proceeding which includes the following is compiled:

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

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

4           ~~[(f)]~~ (g) The hearings officer shall decide whether the  
5 determinations of the chief procurement officer or the chief  
6 procurement officer's designee were in accordance with the  
7 Constitution, statutes, rules, and the terms and conditions of  
8 the solicitation or contract, and shall order such relief as may  
9 be appropriate in accordance with this chapter.

10           ~~[(g)]~~ (h) The policy board shall adopt such other rules as  
11 may be necessary to ensure that the proceedings conducted  
12 pursuant to this section afford all parties an opportunity to be  
13 heard."

14           SECTION 11. Section 103D-710, Hawaii Revised Statutes, is  
15 amended as follows:

16           1. By amending subsection (c) to read:

17           "(c) Within ~~[twenty]~~ ten calendar days of the filing of an  
18 application for judicial review, the hearings officer shall  
19 transmit the record of the administrative proceedings to the  
20 circuit court of the circuit where the case or controversy  
21 arises."

22           2. By amending subsection (e) to read:

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

9           (1) In violation of constitutional or statutory  
10           provisions;

11           (2) In excess of the statutory authority or jurisdiction  
12           of the chief procurement officer or head of the  
13           purchasing agency;

14           (3) Made upon unlawful procedure;

15           (4) Affected by other error of law;

16           (5) Clearly erroneous in view of the reliable, probative,  
17           and substantial evidence on the whole record; or

18           (6) Arbitrary, or capricious, or characterized by abuse of  
19           discretion or clearly unwarranted exercise of  
20           discretion[~~-~~];

21 provided that if a request for hearing or an application for  
22 judicial review is not resolved by the thirtieth day from the

1 filing of the request or application the administrative body or  
2 court shall lose jurisdiction, and the award of the procurement  
3 shall not be disturbed. All time limitations on actions, as  
4 provided for in section 103D-712, shall remain in effect."

5 SECTION 12. Statutory material to be repealed is bracketed  
6 and stricken. New statutory material is underscored.

7 SECTION 13. This Act shall take effect on July 1, 2050;  
8 provided that sections 1 and 2 shall be repealed on July 1, 2012  
9 and section 103D-305, Hawaii Revised Statutes, shall be  
10 reenacted in the form in which it read on the day before the  
11 effective date of this Act.

**Report Title:**

Procurement Code Exemption; Sole Source; Federal Government

**Description:**

Enacts procurement exemption for GSA-approved sole source vendor; increases small purchases limit; defines "Hawaii input" for preferences; clarifies definition of "Hawaii products" and "products" for preferences; allows self-certification for Hawaii products list; imposes time limits on rendering decisions from administrative and judicial review; requires dismissal of protests for inadvertent errors of less than a specified amount of the bid amount of competing bidder; clarifies procedures for administrative review. Effective 7/1/2050. (SD1)