



JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

STATE OF HAWAII'Ī | KA MOKU'ĀINA O HAWAII'Ī
PROCUREMENT POLICY BOARD

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4701

Email: procurement.policy.board@hawaii.gov
<http://spo.hawaii.gov>

PROCUREMENT POLICY
BOARD
RICHARD HELTZEL
LANCE INOUE
LISA MARUYAMA
DIANE NAKAGAWA
KEITH REGAN

Procurement Policy Board Meeting
Monday, June 5, 2023, 1:30 pm – 3:30 pm HST

Virtual Meeting Using Interactive Conference Technology – Zoom

<https://hawaii-gov.zoom.us/j/2070656735?pwd=bGNmdDVPMTXVPYmRGYVUzQlZROHM5dz09>

Meeting: 207 065 6735

Passcode: 014729

One tap mobile

+12532158782,,2070656735#,,,,,0#,,014729# US (Tacoma)

+13462487799,,2070656735#,,,,,0#,,014729# US (Houston)

Dial by your location

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

+1 669 444 9171 US

+1 669 900 6833 US (San Jose)

+1 719 359 4580 US

+1 253 205 0468 US

+1 564 217 2000 US

+1 646 558 8656 US (New York)

+1 646 931 3860 US

+1 689 278 1000 US

+1 301 715 8592 US (Washington DC)

+1 312 626 6799 US (Chicago)

Meeting: 207 065 6735

Passcode: 014729

Find your local number: <https://hawaii-gov.zoom.us/u/adLvuCsTbG>

Join by SIP

[2070656735@zoomcrc.com](https://hawaii-gov.zoom.us/j/2070656735@zoomcrc.com)

Join by H.323

162.255.37.11 (US West)

162.255.36.11 (US East)

Meeting: 207 065 6735

Passcode: 014729

Physical Location

Kalanimoku Building, 1151 Punchbowl Street, Room 410, Honolulu, is available to the public and is guaranteed to be connected to the remote virtual meeting.

In the event that audiovisual communication cannot be maintained by all participating board members and quorum is lost, the meeting will automatically be recessed for 30 minutes, during which time an attempt to restore audiovisual communication will be made. If such attempt to restore is unsuccessful within said 30 minutes, all board members, members of the public, staff and other interested individuals shall log on again to the Zoom link on this Notice, whereby audio communication will be established for all participants and the meeting will continue. If reconvening the meeting is not possible because audio and visual communication cannot be re-established, the meeting will be terminated.

Written Testimony

Written testimony may be submitted by one of the methods listed below:

- By email to: procurement.policy.board@hawaii.gov
- By United States Postal Service to: 1151 Punchbowl Street, Room 416, Honolulu, HI 96813
- By facsimile to: (808) 587-4703

Written testimony will only be accepted for the items listed on the meeting agenda. Written public testimony submitted to the Procurement Policy Board will be treated as public record and any information contained therein may be available for public inspection and copying.

Please include the word “Testimony” and the subject matter following the address line.

Copies of the Board Packet will be available on-line for review at <https://spo.hawaii.gov/procurement-policy-board/procurement-policy-board-meeting-agenda-minutes/>. An electronic draft of the minutes for this meeting will also be made available at the same location when completed.

Procurement Policy Board Meeting
Agenda
Monday June 5, 2023, 1:30 p.m. – 3:30 p.m.

- I. **Call to Order, Public Notice**
- II. **Roll Call, Quorum**
- III. **Approval of Minutes**
[Meeting of April 20, 2023](#)
[Meeting of May 18, 2023](#)
- IV. **Past Performance Assessment – Survey of Stakeholders**
- V. **Proposed Amendments to Hawaii Administrative Rules HAR §3-122 - Source Selection and Contract Formation**
 - i. [Subchapter 2 – General Provisions](#)
 - ii. [Subchapter 3 – Specifications](#)
 - iii. [Subchapter 4 – Methods of Source Selection and General Guidance](#)
 - iv. [Subchapter 4.5 – Source Selection for Federal Grants](#)

VI. Announcements

Future Meeting Date/Time: Tuesday, July 11, 2023, 1:30 p.m.

VII. Executive Session: Discussion of personnel matters in the recruitment for Administrator, State Procurement Office

The Procurement Policy Board anticipates the need to meet in executive session pursuant to Section 92-5(a)(2) and (4), Hawaii Revised Statutes, to discuss personnel matters and to consult with the Board's attorney on questions and issues pertaining to the Board's powers and duties.

VIII. Adjournment

If you need an auxiliary aid/service or other accommodation due to a disability, contact Ruth Baker at (808) 587-4701 or at ruth.a.baker@hawaii.gov as soon as possible, preferably by COB May 31, 2023. Requests made as early as possible have a greater likelihood of being fulfilled.

Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

III.

Approval of Minutes



JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

PROCUREMENT POLICY
BOARD
RICHARD HELTZEL
LANCE INOUE
LISA MARUYAMA
DIANE NAKAGAWA
KEITH REGAN

STATE OF HAWAI'I | KA MOKU'ĀINA O HAWAI'I
PROCUREMENT POLICY BOARD

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4701
Email: procurement.policy.board@hawaii.gov
<http://spo.hawaii.gov>

Procurement Policy Board

Minutes of Meeting

Date/Time: Thursday, April 20, 2023, 1:30 p.m.

Location: Comptroller's Conference Room
Kalanimoku Building, Room 410
1151 Punchbowl Street
Honolulu, Hawaii 96813

Virtual Meeting Using Interactive Conference Technology – Zoom

Members Present: Rick Heltzel
Lance Inouye
Lisa Maruyama
Diane Nakagawa
Keith Regan

Department of
the Attorney General: Stella Kam, Deputy Attorney General

State Procurement
Office Staff: Bonnie Kahakui, Acting Administrator
Christopher Amandi
Ruth Baker
Matthew Chow
Stacey Kauleinamoku
Jittima Laurita
Shannon Ota
Mei Phillips
Carey Ann Sasaki
Donn Tsuruda-Kashiwabara
Kevin Takaesu

Other State Staff: Chris Butt, Department of Education
Lois Mow, Department of Education

Guests: Pane Meatoga
Gregg Serikaku
Tim Lyons
JSM3201

I. Call to Order, Public Notice

Chair Lisa Maruyama called the Procurement Policy Board (PPB) meeting to order at 1:30 p.m.

II. Roll Call, Quorum

All Procurement Policy Board members were present. There was quorum.

The Deputy Attorney General assigned to DAGS and staff of the State Procurement Office were introduced.

III. Approval of Minutes of February 16, 2023, Meeting

Keith Regan made a motion and Rick Heltzel seconded the motion to accept the minutes of the February 16, 2023, meeting as presented. Since there were no objections, the minutes were approved.

IV. Hawaii Administrative Rules

A. Update on Rulemaking Pursuant to Chapter 91, Hawaii Revised Statutes

Kevin Takaesu of the State Procurement Office provided a brief on the Hawaii Administrative Rule (HAR) process. One of the responsibilities of the PPB is to adopt administrative rules pursuant to Chapters 103D and 103F, Hawaii Revised Statutes (HRS). All rules shall be adopted in accordance with Chapter 91, HRS, which addresses the permanent rule making process. Mr. Takaesu stated that only the PPB has an interim rule process.

Mr. Takaesu stated that Act 188, SLH 2021, authorized a Past Performance Database and requires that the SPO adopt rules on the Past Performance Database no later than December 31, 2023. Mr. Takaesu stated that the SPO believes that first establishing interim rules is the best path, pursuant to Section 103D-202, HRS, "...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..." He continued to explain that after the PPB approves the interim rules, the rules then go to the Lieutenant Governor's office for final approval. To make the rules permanent, within this 18-month interim rule period, the PPB can review and revise the rules as needed before holding a public hearing on the rules. If there are no changes to the rules after the public hearing, the PPB can approve the rules, which are then sent to the Governor's office for final approval to become permanent.

Mr. Takaesu stated that the SPO's proposed amendments to HAR §3-122 – "Source Selection and Contract Formation," were provided to the PPB in Ramseyer format; word deletions are shown as strike outs and additions are underlined. Mr. Takaesu stated that after all the sections of the revised rules are reviewed and approved by the PPB, the rules are then signed by the PPB Chair, the Comptroller, and the Deputy Attorney General.

Chair Maruyama asked for clarification on holding a public hearing and the benefit of having interim rules. Mr. Takaesu clarified that pursuant to Chapter 91, HRS, the public hearing is held by the SPO and is only for changes to the HAR, which is different from a Legislative hearing. The public hearing is advertised, and the public can provide testimony on the rule changes. The benefit of having interim rules streamlines the rule-making process.

SPO Acting Administrator Bonnie Kahakui added that because the rules are needed to launch the Past Performance database by the end of this year.

There were no questions by other PPB members.

B. Proposed Amendments to Hawaii Administrative Rules HAR §3-122 - Source Selection and Contract Formation

Ms. Kahakui explained that the SPO staff reviewed and is proposing revisions to the HAR. The SPO explained the proposed changes to the Hawaii Administrative Rules as outlined in this agenda and invited the PPB members to ask questions. Deputy Attorney General Stella Kam will also provide comments on the proposed rule changes.

PPB member Lance Inouye asked if there is an entity similar to the Legislative Reference Bureau (LRB) to make sure that the changes to the rules are consistent throughout the HAR. Deputy AG Kam said that in the interim rule-making process, the Deputy AG reviews the proposed changes to ensure that the rules do not conflict with each other or with Chapter 103D, HRS. Mr. Takaesu added that the LRB review the rules for formatting.

SPO staff Carey Ann Sasaki explained the proposed changes to HAR Chapter 3-122, subchapters 1 to 4.5 relate to the Hawaii Public Procurement Code ("Code"), Chapter 103D, HRS, and that those proposed changes are to implement the Code. The purpose of the Code is to promote economy, efficiency, effectiveness, and consistency in all procurements by the State and the several counties.

i. Subchapter 1 – Definitions

Ms. Sasaki explained that three items were added in Subchapter 1 Definitions. "Non-disclosure agreement (or NDA)", definition for "Recent" and definition for "Relevant" are added to provide clarity and amended for housekeeping purposes. These terms are related to past performance in IFBs, RFPs, and Sole Source procurements.

Mr. Heltzel expressed his concern that the term "or some" in the definition of "recent" is vague and suggested replacing the term "or some" with one that is more definitive. Mr. Inouye and Mr. Heltzel suggested that "or some" be replaced with "fully completed." Mr. Inouye also suggested that "or some" be deleted. Mr. Regan agreed. Mr. Heltzel said that the definitions are related to Past Performance, not experience. In order to complete a Past Performance evaluation, the project would have to be completed. He recommended that for clarity, the definition would have the word "completed," reference Past Performance evaluation, and describe what "recent" and "relevant" mean.

Mr. Inouye also asked clarifying questions, and also asked if the PPB is going to approve the proposed HAR during this meeting, or will the PPB members and the public be given the chance to review the proposals before approval. Ms. Kahakui explained that the PPB is able to make modifications to the HAR. When the process arrives at the final rules, a public hearing will be held. Mr. Regan clarified the interim rule-making process, that the PPB meeting is a public hearing, and members of the public had the opportunity to participate in this public meeting and provide input and testimony on the proposed amendments to the HAR, which were posted online. As part of Chapter 91, HRS, in moving to finalize the rules, a formal public hearing will be held to gather and accept public input.

Ms. Kahakui stated that there are members of the public and other government entities participating in this PPB meeting via Zoom. She explained that §3-122 Source Selection

is large and will take multiple meetings. Mr. Inouye explained wanted to make sure that the PPB gets public input before making a decision. Chair Maruyama acknowledged Mr. Inouye's comments about the PPB's due diligence and stated how the interim rule-making process allows the SPO staff to move forward on its initiatives and the PPB to make changes to and obtain public feedback on the interim rules.

Chair Maruyama asked if there are many instances in which a contract is not completed, but is still considered recent if the contract takes longer than five years. Mr. Heltzel commented that Federal contracts use reference points that an offeror has successfully performed a project of similar scope, size, and relevancy within a certain period. He said that he feels that it is important for an agency to decide what is a fair lookback period. The Federal government has a lookback period of 15 years. He said he is ok with five years, but feels that the definition is vague. He suggested to give the agencies the flexibility to have a longer lookback period. Ms. Kahakui agrees that agencies be given that flexibility, especially with Information Technology (IT) procurements; and has concerns about the work "completed within the last five years" for large-scale projects that will take more than five years; should performance be based on some of the performance.

Ms. Nakagawa agreed that the phrase "or some" can be confusing and would support deleting that. The phrase "as determined by the procurement officer" gives flexibility to make some of these changes that is more related to a particular bid. Mr. Regan, Mr. Inouye, and Mr. Heltzel discussed the definition and past performance evaluation. Ms. Kahakui explained that the Past Performance questionnaire allows agencies to evaluate the contractor's performance and provide some guidance.

Deputy Attorney General Kam suggested that to meet the deadline for the Past Performance rules, the SPO and PPB consider doing interim rules specifically for the sections needed to implement the Past Performance database, with the idea that within 18 months, these rules will be finalized. She recommended that discussion continue on §3-122 Source Selection. Mr. Inouye and Chair Maruyama agree that the PPB be given additional time to continue to review these rules.

ii. Subchapter 2 – General Provisions

In the interest of time, this agenda item was deferred.

iii. Subchapter 3 – Specifications

In the interest of time, this agenda item was deferred.

iv. Subchapter 4 – Methods of Source Selection and General Guidance

In the interest of time, this agenda item was deferred.

v. Subchapter 4.5 – Source Selection for Federal Grants

In the interest of time, this agenda item was deferred.

vi. NEW Subchapter 13.5 – Contractor Past Performance Assessment Form

SPO Purchasing Specialist Stacey Kauleinamoku explained Hawaii Administrative Rules Chapter 3-122's new Subchapter 13.5, Contractor Past Performance Assessment Form, which was created pursuant to Act 188, Session Law of Hawaii 2021, requiring the State Procurement Office to establish and administer a Past Performance database and adopt rules regarding information and procedures associated with the Past Performance

database. Act 188, SLH 2021, was enacted by the State Legislature to provide clear direction on awarding contracts to responsible bidders or offerors to increase accountability, enhance performance and utilize taxpayer dollars more efficiently. Currently some contracts may be awarded to the lowest bidder or offeror without regard to that

vii. §3-122-115.01 - Contract Past Performance Assessment

Ms. Kauleinamoku explained HAR section 3-122-115.01, Contractor Past Performance Assessment, that was created pursuant to Act 188, Sessions of Laws 2021, requiring the State Procurement Office to establish and administer a past performance database and adopt rules regarding information and procedures associated with the past performance database.

1. §3-122-115.05 subsections (a) and (b) were added to establish the information required to be included in the past performance database and references back to the requirements listed in Act 188, SLH 2021; which includes:
 - a. The name of the state contractor;
 - b. The date of the project;
 - c. The size of the project;
 - d. A brief description of the project;
 - e. The responsible managing employees for the project;
 - f. Whether or not the project was timely completed;
 - g. The project's authorized budget; and
 - h. The positive and negative differences between the final cost of the project and the project's authorized budget, including the reason(s) for the differences.

This information can also be found in §103D-329, Hawaii Revised Statutes, Past Performance Database, as well as on the Contractor Past Performance Assessment Form. This form is available in an electronic format to be completed by the purchasing agency, the contractor being assessed, and the procurement officer to review and finalize, which will be kept in a statewide contractor Past Performance Database located on SPO's Hawaii Awards & Notices Data System (HANDS). This complies with §103D-320, HRS, Retention of Procurement Records Evaluations. Once the assessment is finalized and posted, it will be accessible to government entities to use in conducting meaningful and consistent performance evaluations for future projects when the procurement officer needs to determine a contractor's responsibility to help address issues of repeated contractor inefficiencies and substandard work as required in §103D-310(b), Hawaii Revised Statutes, Responsibility of Offerors.

2. §3-122-115.01 subsection (c)(1) was added to explain the contractor past performance assessment process; to include when the procurement officer shall begin preparing the contractor past performance assessment, which would be at the end of the contract or more frequently as designated by the chief procurement officer or designee; the procedures on how a contractor is informed of the information contained in the past performance database about the contractor, which includes an electronic notification to the contractor that the assessment is ready for comment. Upon notification, the contractor has 10 working days to review, submit comments, rebuttals, or additional information to the purchasing agency making the assessment. The contractor's past performance assessment form can also be considered accepted by the contractor. The assessment is then returned to the purchasing agency, whose procurement officer will receive an email notification to review the

assessment. The procurement officer will have five working days to submit the final assessment into the database. To ensure that the procurement officer completes the final assessment, pursuant to Act 188, SLH 2021, the final contractor past performance assessment form is required prior to making a final payment. If the procurement officer does not submit the final assessment after five days, they will receive a reminder daily until they submit the final assessment.

3. §3-122-115.01 subsection (c)(2) was added to establish the process for a contractor to correct or respond to the information contained in the past performance database about the contractor. The contractor shall submit a request with substantial evidence to the procurement officer for reconsideration within 10 working days from the date of notification of the past performance assessment has been posted to HANDS. If there are any changes required, the procurement officer shall update the past performance database system taking into consideration any contractor comments. The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee.

Ms. Kauleinamoku addressed a recurring question: "What happens if a contractor is still not satisfied with the assessment even after reconsideration?" The SPO acknowledges that not everyone will be satisfied or please with some of their reviews, which may lead to a lengthy interaction between the purchasing agency and the contractor, while keeping in mind that §103-10, HRS, Payment for Goods and Services, requires payment to the vendor no later than 30 calendar days following receipt and satisfactory delivery of goods or performance of service, otherwise the vendor is entitled to late interest payment. Final payment cannot be made until the final assessment is completed. The SPO also acknowledges that the heads of the purchasing agencies and the procurement officers would be the most knowledgeable of the solicitations. The language in §3-122-115.01 subsection (c)(2) hopefully expedites this resolution process.

Mr. Heltzel asked if there is language regarding the time limit for the procurement officer to complete the initial past performance assessment and has concerns that without this, the contractor may end up waiting for final payment.

Ms. Kauleinamoku responded to Ms. Kam's inquiry as to whether the procurement officer has ability to withhold final payment to the contractor and said that the SPO added this language with the hope to have the agency complete the past performance assessment. Ms. Kam will confer with staff at the Department of the Attorney General and cautioned that withholding payment can be an overreach beyond the authority given by Act 188, SLH 2021, and about the application of §103-10, HRS, about payment of interest to a vendor. Ms. Kam also suggested some revisions:

- Consider changing the title of Subchapter 13.5, "Contractor Past Performance Assessment Form," to a generic title. Ms. Kahakui suggested to change the title to "Contractor Past Performance Assessment" and leave out the word "Form."
- Instead of referencing Act 188, SLH 2021, reference §103D-329, unless there is other information to be referenced in Act 188, SLH 2021.
- Other non-substantive revisions for clarity, consistency, and style.

Mr. Heltzel suggested changing rules to state that the procurement officers can start the final evaluation after there is substantial completion of a project, setting a time

limit on when the assessment must be completed, determining a trigger date that initiates that time period, and integrating the rebuttal statement into the final record. Ms. Kahakui said confirmed that the rebuttal is part of the final record.

Mr. Regan asked for clarification on the meaning of “more frequently” in (c)1: “(1) Procurement officers shall prepare the contractor past performance assessment form at the end of the contract, or **more frequently** as designated by the CPO or designee.” Ms. Kahakui explained that in the case of a multi-year, multi-phase contract, the assessment can be done more often. Mr. Regan said that this information is beneficial. Mr. Heltzel stated that the Federal government requires interim annual evaluations, and final evaluations, which are allows evaluation on an interim period. A contractor is also given the opportunity to correct performance.

Chair Maruyama asked for any suggestions on modifying “more frequently” in (c)(1). Ms. Kahakui said the SPO can provide guidance through procurement circular to all the individual jurisdictions to conduct interim evaluations for multi-year contracts.

Mr. Inouye expressed his concerns that the determination lies with the purchasing agency and would prefer that the assessment includes the contractor’s comments, including both sides of the story. He expressed concerns about ratings.

Ms. Kauleinamoku displayed and explained the Past Performance Assessment Form, specifically the portions that pertain to the Hawaii Administrative Rules. The form includes the functionality of notifying the contractor to comment and/or submit a rebuttal to the assessment, and the ability to capture contractor performance information in a structured and uniform method. Act 188, SLH 2021, amended HRS sections 103D-302, Competitive Sealed Bidding, Subsection F; 103D-303, Competitive Seal Proposals, Subsection E; and 103D-306, Sole Source, Subsection A; by requiring that Past Performance, if available, be used for evaluation.

Ms. Kauleinamoku displayed and explained the following sections of the form:

- Contractor Past Performance Assessment Guidance, which was developed by a subject matter expert and will be part of the procurement circular on Past Performance
- Assessment to be completed as objectively as possible.
- Contractor Comments allows the contractor to add comments, rebuttals, or additional information.

Ms. Kahakui explained that the SPO looked at various rating models and determined that the rating of Satisfactory – Unsatisfactory – N/A was the most objective. Mr. Inouye commented that this is a step in the right direction, but is more concerned with its implementation, how it will be used to evaluate a bidder, what goes into the record, and who does the rater, because there are a variety of factors that go into the rating.

Ms. Kam analyzed what is statutorily required to go into the assessment, if the project was completed on time, if there was a difference in the estimated and final cost, factual descriptions of problems that arose during the project, issues during the performance, and contractor’s rebuttal. The next procuring agency can review this information and make their own judgement. Ms. Kam said that the Legislature attempted to provide a database that all agencies can access in the consideration of contractors. Ms. Kahakui explained that the SPO tried to standardize the past performance assessment.

Ms. Nakagawa asked if the SPO received comments from the agencies. Ms. Kauleinamoku responded that in February 2022, the SPO issued Procurement Circular 2022-10 to request the Executive Branch departments and other Chief Procurement Officer jurisdictions agencies to provide feedback on the proposed amendments to the HAR and assessment form for Past Performance. The SPO received input from the Department of Public Safety, The Department of Education the Department of Accounting and General Services – Public Works Division, Hawaii County Department of Water Supply, City & County of Honolulu – Department of Budget and Fiscal Services, the University of Hawaii Systems, and State Department of Transportation – Highway Division.

Ms. Nakagawa expressed her concern from government perspective, the Past Performance database's rollout, resources required for the database, additional steps to the procurement process, and the withholding of payment to vendors. and stated that more communication is needed. She asked how the Past Performance rating will be used by procurement staff, and training on and access to the database by staff. Ms. Kahakui responded that the SPO started a training guide with a flow chart showing the process, adding that the SPO would like to roll out the database early for testing, obtaining feedback, and refinement before the December 2023 deadline. There will be multiple trainings, circulars.

Mr. Inouye asked if the SPO received any comments from the contractors, general contractors, and subcontractors. Ms. Kauleinamoku responded that the SPO requested feedback but did not receive any. Mr. Takaesu added that several years ago, a House Resolution requested a Past Performance study. A consultant hired to conduct the study met with various stakeholders. Mr. Inouye also noted that there was also a task force, which found that it is difficult to do a past performance. He reiterated Ms. Kam's suggestion that the assessment questionnaire include only facts required by the statute and exclude a subjective rating. Ms. Kahakui stated that the intent is to standardize the questionnaire.

Ms. Maruyama asked Ms. Kahakui and Mr. Inouye if the assessment questionnaire can be modified to satisfy both sides, and if there are any technical modifications that would require comments before moving on to the next assessment question.

In the interest of time, Chair Maruyama consulted with Ms. Kam on board procedures regarding the agenda. Ms. Kam recommended that the Chair can defer agenda items to the next meeting and go into Executive Session. Ms. Maruyama asked that SPO prioritize action items for consideration by the PPB so the SPO can move forward with its initiatives. She expressed her appreciation for the dialogue on the proposed rules for the Past Performance database.

V. Announcements

The next Procurement Policy Board meetings will be held on Thursday, May 18, 2023, at 1:30 p.m., and Monday, June 5, 2023, at 1:30 p.m. The meetings will be hybrid on Zoom and in person at the physical location of Room 410 at 1151 Punchbowl Street.

VI. Executive Session: Discussion of personnel matters in the recruitment for Administrator, State Procurement Office

Mr. Regan made a motion to go into Executive Session. Ms. Nakagawa seconded the motion. There were no objections. At 3:30 p.m., the Board recessed its regular meeting and went into

Executive Session pursuant to Section 92-5(a)(2) and (4), Hawaii Revised Statutes, to discuss personnel matters and to consult with the Board's attorney on questions and issues pertaining to the Board's powers and duties.

The Board reconvened its regular meeting at 4:00 p.m. Ms. Maruyama reported that the Board met in Executive Session to discuss the recruitment of a permanent SPO Administrator and reported that interviews will take place.

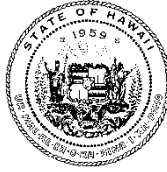
VIII. Adjournment

Since there was no new business, Mr. Inouye moved to adjourn the meeting; and Mr. Heltzel seconded the motion. There were no objections. The meeting adjourned at 4:01 p.m.

Respectfully submitted,

Diane Nakagawa
Secretary, Procurement Policy Board

Revised 051823



JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

PROCUREMENT POLICY
BOARD
RICHARD HELTZEL
LANCE INOUE
LISA MARUYAMA
DIANE NAKAGAWA
KEITH REGAN

STATE OF HAWAII | KA MOKU'ĀINA O HAWAII
PROCUREMENT POLICY BOARD

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4701
Email: procurement.policy.board@hawaii.gov
<http://spo.hawaii.gov>

Procurement Policy Board

Minutes of Meeting

Date/Time: Thursday, May 18, 2023, 1:30 p.m.

Location: Comptroller's Conference Room
Kalanimoku Building, Room 410
1151 Punchbowl Street
Honolulu, Hawaii 96813

Virtual Meeting Using Interactive Conference Technology – Zoom

Members Present: Lance Inouye
Lisa Maruyama
Diane Nakagawa
Keith Regan

Members Excused: Rick Heltzel

Department of
the Attorney General: Stella Kam, Deputy Attorney General

State Procurement
Office Staff: Bonnie Kahakui, Acting Administrator
Christopher Amandi
Ruth Baker
Matthew Chow
Stacey Kauleinamoku
Jittima Laurita
Shannon Ota
Margaret Phillips
Donn Tsuruda-Kashiwabara
Kevin Takaesu

Other State Staff: Chris Butt, Department of Education
Lois Mow, Department of Education

County Staff: Mahealani M. Krafft, County of Kauai
Paula Youngling, City & County of Honolulu Purchasing Administrator

Guests: Laura Barzilai
Matt Bracken
Hugo Cabrera

Christopher Delaunay, Pacific Resource Partnership
David Imanaka, Building Industry Association of Hawaii
Mark L. Ishmael
Aaron Larrimore
Tim Lyons, Subcontractors Association of Hawaii
Jeff Masatsugu
Pane Meatoga III
Ryan Sakuda, General Contractors Association of Hawaii
Gregg Serikaku
Cameron Takamura
Jenna
Teresa

I. Call to Order, Public Notice

Chair Lisa Maruyama called the Procurement Policy Board (PPB) meeting to order at 1:32 p.m., held on Zoom and in-person. The meeting was recorded.

II. Roll Call, Quorum

Roll call was taken of the Procurement Policy Board members. Member Rick Heltzel was excused. There was quorum.

The Deputy Attorney General assigned to DAGS and staff of the State Procurement Office were introduced.

III. Approval of Minutes of April 20, 2023, Meeting

Keith Regan made a motion and Diane Nakagawa seconded the motion to accept the minutes of the April 20, 2023, meeting as presented. Lance Inouye asked for clarification of the minutes. Following discussion about amended the minutes for clarity, Mr. Regan withdrew his motion. Approval of the minutes was deferred until the next meeting.

IV. Proposed Amendments to Hawaii Administrative Rules (HAR) Section 3-122 – Source Selection and Contract Formation

Chair Maruyama reported that the Board received written testimony on this matter. (For the record, testimony is from the General Contractors Association of Hawaii and the Building Industry Association of Hawaii.)

Acting Administrator Bonnie Kahakui took the agenda items in a different order from they are listed:

- i. Subchapter 13.5 - Contractor Past Performance Assessment
- ii. Subchapter 1 – Definitions
- iii. Section 3-122-33 – Bid evaluation and award

Ms. Kahakui acknowledged that during the previous Board meeting, concerns were expressed about the evaluation questions on the Past Performance assessment form. She cited that [Act 188, SLH 2021](#), listed a few criteria should be included on the form. However, it is clear to the SPO that the legislature intended to have evaluation criteria and ratings on the past performance assessment form for the Past Performance Database. Ms. Kahakui referred to Section 1, of [Act 188, SLH 2021](#), which states as follows:

The legislature finds that the State's procurement process requires clear legislative direction to award contracts to responsible bidders or offerors to increase accountability, enhance performance, and utilize taxpayer dollars more efficiently. Currently, some public contracts may be awarded to the lowest bidder or offeror without regard to that bidder's or offeror's poor past performance. Specifically, these bidders or offerors may be considered qualified despite their poor past performance on public contracts, which may result in repeated inefficiencies and substandard work.

The legislature further finds that considering a contractor's past performance in the procurement process and creating and maintaining a past performance database, which routinely captures contractor performance information in a structured and uniform way and is accessed and utilized when future procurements need to determine a contractor's responsibility, will help to address issues of repeated inefficiencies and substandard work.

Ms. Kahakui added that although the statute does not identify every criterion, it tasked the SPO to create the past performance database to reflect the legislative intent and create support administrative rules. Simply listing the following would NOT address the question of responsibility.

- The name of the state contractor;
- The date of the project;
- The size of the project;
- A brief description of the project;
- The responsible managing employees for the project;
- Whether or not the project was timely completed;
- The project's authorized budget; and
- The positive or negative difference between the final cost of the project and the project's authorized budget, including the reasons for the difference, if any;

Ms. Kahakui referenced Act 188, SLH 2021, Section 3, which adds the definition of "past performance," which means "available recent and relevant performance of a contractor, including positive, negative, or lack of previous experience, on contracts that shall be considered in a responsibility determination within the relevance of the current solicitation, including the considerations of section 103D-702(b)." The SPO's understanding of determining "positive" or "negative: past experience can only be done if the past performance assessment form includes criterion that can be given a positive or negative evaluation. The SPO determined that "satisfactory and unsatisfactory" will meet this requirement. Based on the Act's definition of past performance, the questionnaire must be able to conclude an assessment of either "positive" or "negative."

The Act also

- Requires past performance to be added as an evaluation factor in IFBs and RFP (Sections 4 and 5); and
- Further amends 103D-310(b), HRS: "For the purpose of making a responsibility determination,
- the procurement officer shall possess or obtain available information, including past performance, sufficient to be satisfied that a prospective offeror meets the applicable standards." (Section 7).

Ms. Kahakui cited Merriam-Webster, evaluation is defined as "determination of value, nature, character, or quality of something or someone." An agency cannot make evaluation based on an

assessment that only included vendor name, dates, size, description, project manager(s), timeliness, budget (positive/negative). She added that SPO would be doing a disservice to the agencies if the assessment form only included these few criteria.

Ms. Kahakui explained that not having a rating would be analogous to having a Yelp review of a restaurant that included only the restaurant's name, location, size, hours of operation, menu offerings, restaurant manager, and prices. But consumers also want to know if the food was good or bad, or if the service was satisfactory. Yelp, like Amazon and many other companies, gives star ratings. At the very minimum it gives potential users a preview of what to expect.

Ms. Kahakui explained that the SPO conducted extensive research on what other states and the federal government are doing for past performance.

- **Texas:** Vendor Performance Tracking System - requires that agencies submit a vendor performance report within 30 days of the reporting event. Letter grades used are A, B, C, D and F. Report grades of A, B, and C do not require a vendor response. A vendor may submit a response within 30 days of the report.
- **Pennsylvania:** Contractor Responsibility Program - a centralized system that collects from and disseminates to agencies information concerning a contractor's lack of responsibility and deficient performance.
- **Washington:** Contract monitoring process - measures contract performance, cost, service delivery quality and other standards.
- **Ohio:** Vendor performance survey - Includes product satisfaction, customer satisfaction, overall satisfaction. Rating: Outstanding, very satisfied, satisfied, somewhat dissatisfied, very dissatisfied. Forms may vary by county but have similar rating (exceptional, very good, satisfactory, marginal, unsatisfactory).
- **Arkansas:** Vendor Performance Reports – required of all state agencies. Categories include customer service, delivery, quality, pricing. Ratings include standard, below standard, above standard. Below standard requires explanation and documentation.
- **Nebraska:** Vendor Performance Program – “build history” of vendor performance over time allows agencies to consider past contractor performance when awarding a new contract. Performance areas: delivery, and quality (inferior service, unsatisfactory workmanship, failure to meet specs). Miscellaneous considerations include inaccurate invoices, failure to respond, and unauthorized changes.
- **Minnesota:** Vendor Performance – the goal is to maintain and improve the quality of the state's vendor base by 1) acknowledging excellent vendors, 2) recognizing poor performance; 3) resolving problems, and 4) removing poor quality vendors. Vendor performance report rating include exceptional and unsatisfactory.
- **Arizona:** Requires agencies to complete assessment for all statewide mandatory contracts. This assessment is more descriptive in nature; no ratings are assigned.
- **Montana:** Contractor Performance Assessments. Required contract manager report contractor performance using Total Contract Manager in eMACS. Accurately reporting Contractor performance allows Contract Managers to share Contractor information, which facilitates better oversight of State contracts (e.g., aids in identifying Contractors that have exceptional performance history, and protects the State from Contractors with unethical business practices).
- **Washington, DC:** Vendor Client Past Performance Evaluation (construction) – Elements include quality of work, timeliness, cost control, business relations, and customer satisfaction. Rating: Excellent, Good, Acceptable, Poor, Unacceptable.
- **Federal Government Services Administration:** Extensive categories include quality, schedule, cost control, management, compliance. Rating: Exceptional, very good, satisfactory, marginal,
- unsatisfactory. Past performance is used in source selection information.

Ms. Kahakui commented that the State of Hawaii is not the first state to establish a past performance database or reporting system and there is sufficient evidence that a rating system is essential to the process. She cited a webinar presented by with Dr. John Wilkinson, a subject matter expert in contracting with federal experience, confirmed that it is imperative that past performance must have an evaluation rating to be effective. The SPO understands the need to be objective as possible and thus chose to use a rating system that would have the least amount of controversy and yet still provide value for agencies when making a responsibility determination. She concluded that the SPO has to have database running by December 31, 2023.

Mr. Inouye stated he appreciated Ms. Kahakui's presentation and that he doesn't know how the other states are using Past Performance, which is usually used in the Request for Proposal (RFP) processes. He added that Act 188, SLH 2021, received a lot of negative comments on how it will be implemented, and its rating system may create angst among contractors. He acknowledged that the SPO is trying to prevent problems with the rating. He added that he doesn't want to rush into approval, and rather look at this matter carefully and weigh research done by stakeholders.

Ms. Kahakui responded by stating she is unsure if the SPO has information on how other states are using past performance but clarified that the statute requires that Past Performance be used to determine responsibility in Information for Bids (IFBs), Request for Proposals (RFPs), and Sole Source methods of procurement.

Mr. Inouye stated that in addition to the procurement officer and the contractor, other considerations such as planning professionals and change orders, are not factored into this form. There is concern about the procurement officer making the final rating, which will be subjective in spite of efforts to make this objective.

Ms. Kahakui understands the concern, stating that the procurement officer is ultimately responsible for that procurement and that completion of the form will require multiple people (procurement professionals, project manager, and onsite manager) involved in the project. The assessment form will capture information in a standardized format with the procurement officer considering all comments before signing the assessment.

Mr. Regan commented that Mr. Inouye brings up a good point about on placing this responsibility on an individual who may or may not have direct management or control over the contract. He asked if it would be more acceptable to have the assessment completed by the contract administrator then verified by the procurement officer. To address the concern about having the assessment completed by the procurement officer who may not have direct involvement with the contractor, he suggested a process in which the assessment is completed by the contract manager and is specific about who signs off on the form. He stated that he won't feel comfortable with the assessment form unless this is more specific.

Ms. Kahakui said that Past Performance applies to services as well as construction and asked if including the contract administrator would be satisfactory. She clarified that the intent of the discussion is to put forth the rules needed to post and support the Past Performance assessment form, adding that problems will arise if the assessment form has deficiencies.

Mr. Inouye said that one example of the non-subjective requirements, as listed in Act 188, SLH 2021, is whether or not a project was timely completed. There may be a case in which liquidated damages are assessed due to an unauthorized change order for time, which is a negative. This is not devoid of measures the contractor's performance. Ms. Kahakui responded that not all contractors have liquidated damages; a contractor can do a poor job and yet not be assessed liquidated damages.

Mr. Inouye stated that in evaluating the positive/negative cost of the final cost of the project, the cost of change orders that were justified and approved should be included in the budget. Some of the requirements will help the next procuring agency in evaluating a vendor. He said that not meeting the time requirement is a valid criterion, but it is not devoid of measures to be used by the next procuring agency. He added that he has difficulty relying on a final assessment by someone in the department that may not have an unbiased opinion.

Chair Maruyama asked if there a mechanism for the contractor to provide context to the contract administrator before that person completes this form via a written document. Mr. Inouye explained that the assessment can trigger a debate between the contractor and the agency and even create an environment in which contractors avoid refuting the assessment and retribution. He suggested the contractor add comments to the record.

Chair Maruyama asked Ms. Kahakui to confirm that there is an appeal process and an opportunity for the contractor to refute comments. Ms. Kahakui confirmed that the contractor's comments become part of the record. Mr. Regan asked if the contractor enters comments directly or if this is done by purchasing staff. Ms. Kahakui responded that the contract administrator and the contractor are able to enter and edit their own comments. Mr. Regan asked if contractors are concerned that change orders may be used against them or are perceived as negative. Mr. Inouye explained the complex appeal process for change orders from the perspective of a contractor. The contractor and the procuring agency can get into a debate about change orders, but the final determination is with the procuring agency.

Mr. Inouye commended the SPO staff who worked on the Past Performance database but is expressing the contractors' perspective in an effort to make the Past Performance as objective as possible. Chair Maruyama appreciates the SPO's work and intention to find the broadest and best utility of the assessment form to populate the Past Performance database, and that she understands the concerns that this process is exposed to retribution, subjectivity based on negative experience and relationships. She understands that Board members want to make the assessment form to be the fairest vehicle for Past Performance. She said that the rules need to be promulgated based on the aspects of this form and asked the Board members if they are prepared to vote on the rules.

Mr. Inouye suggested going from the very least subjective approach to be evaluated before getting into a more subjective approach and that the Board consider starting with what Section 2 of Act 188, SLH 2021 requires, which may be helpful.

Ms. Kahakui responded that [103D-310\(c\), HRS](#), requires that the agencies make a determination of responsibility, which may not be possible if the assessment is based only on whether or not the project was made in a timely manner.

Chair Maruyama asked Deputy Attorney General Stella Kam for insight in the law and making the assessment form less subjective. Deputy AG Kam sensed that the Board may be uncomfortable with approving rules and an assessment form that contains information in addition to what is listed in [103D-329 Subsection \(b\)\(1\), HRS](#). She understands both the concerns of contractors and the intent of the Legislature to have a more in-depth assessment form.

Mr. Regan asked Ms. Kahakui if the SPO had referenced the Legislative report on Past Performance and the required metrics. She responded that the SPO found that Act 188, SLH 2021, and all the legislative committee reports, consistently referenced the need to make a determination of responsibility, as already stated in [103D-310\(c\), HRS](#). Based on the analysis of the legislative reports and Past Performance programs of other states, the SPO came up with objective criteria for the assessment of contractors' performance and is open to input from the Board.

Mr. Regan asked if the form was sent to the counties for feedback. Ms. Kauleinamoku responded that the SPO sent the form via a procurement circular asking all state agencies in the Executive Branch and other government jurisdictions for feedback on the proposed HAR on Past Performance and the assessment form. The proposed HAR and form being presented is based on the feedback received. The SPO also sent the form to contractors for review but did not get any feedback until 24 hours prior to this Board meeting.

Mr. Regan noted that there are members of the public and staff of other government agencies present in the virtual meeting and that he would like to get their feedback and insight on this matter. Deputy AG Kam said that if the Board wishes, it can accept general comments from the public on Past Performance. Ms. Kahakui said that the SPO can send out a survey on the current proposed rules and the current proposed assessment form to government agencies.

Chair Maruyama opened the floor to meeting attendees to provide comments, which are as follows:

- Paula Youngling, Purchasing Administrator for the City & County of Honolulu. She acknowledged that Past Performance is one of the most difficult procurement issues to tackle and appreciates that the Board is taking serious consideration and hearing at all sides of this issue. Ms. Youngling commented that a myriad of issues come into play on components such as extensions of time, change orders (many of which are requested by a government agency), cost overruns, and timely completion. She and her staff will plan to complete the survey.
- Ryan Sakuda, representing the General Contractors Association of Hawaii (GCA), an organization made up of approximately 500 general contractors and construction-related firms, stated that its members work on a majority of public works projects. GCA submitted written testimony and would like an opportunity to for its members to review and provide feedback on the proposed rules and assessment form.
- David Imanaka, representing the Building Industry Association of Hawaii (BIA), a non-profit trade organization representing many contractors and builders, stated that BIA submitted written testimony. Their testimony mirrors GCA's concerns on the subjectivity in the Past Performance assessment form. They look forward to future discussions with the Board.
- Tim Lyons, General Contractors Association of Hawaii, asked for clarity on the flow of the comments entered by the purchasing agency and contractor, does the procurement officer have the ability to edit comments in the assessment? He cited an example of how the assessment form can be refined to address. In the "Definition" and "General Factors" sections of the proposed HARs for satisfactory rating, one criterion is whether or not the project stayed within the authorized budget, defined as the initial funds allocated. He pointed out that if a change order is approved, this is in excess of the initial funds, however, this is not a problem and should not be part of the assessment if the change order is under a supplemental budget.

Ms. Kahakui answered Mr. Lyons' questions. She said that the contract administrator and contractor can change their own but not each other's comments. She also explained that the statute states that a criterion is based on the authorized budget. The SPO will finetune details the assessment as best as possible.

Mr. Inouye asked how the previous Past Performance survey was distributed and what responses were received. Ms. Kauleinamoku responded that the SPO sent a procurement circular with the proposed HAR and assessment form on past performance asking all state agencies in the Executive Branch and other government jurisdictions for feedback. The SPO also sent the

proposed HAR and form via email to a list of interviewees on the construction policy review compiled in February 2022. Chair Maruyama asked the SPO to provide the previous distribution list, survey, and responses. She added that a new survey sent to a comprehensive list of stakeholders will provide feedback to enable the current Board in making an informed decision on the proposed HARS and assessment form on Past Performance. Ms. Kahakui stated that the survey of stakeholders will be on the rules and assessment form as currently proposed.

Mr. Regan asked for clarification on when the Board needs to complete its work on the proposed rules in order to meet the mandated deadline for the Past Performance database. Ms. Kahakui confirmed that the Legislature mandates that the Past Performance database must be implemented before December 31, 2023. Interim rules will be in effect 18 months upon Board approval. Ideally, the Board's review and approval of the interim rules and assessment form would be completed to allow for the refinement and finalization of the rules, response requirements, assessment form, and technological functions. The database and technology have been developed and now needs the assessment questions to be built into the online system. If the agencies and vendors can begin accessing and testing the database by September/October of 2023, the SPO would be able to meet the December 31, 2023, deadline.

Chair Maruyama asked the Board members for their input on starting fresh with a new survey and distribution list. Mr. Regan stated that he supports having the Board take fresh look at Past Performance and have the SPO staff focus its limited resources on a new survey and gathering input moving forward, rather than pulling up and presenting information on what was done previously. Chair Maruyama commented with the renewed attention of the contracting community, the Board and SPO anticipates a more robust response to the proposed HARs and assessment form.

Chair Maruyama recommended that the Board defer its decision on the proposed rules. She affirmed that the Board would support the survey of stakeholders and the work of the SPO staff to distribute the survey. She asked if the Board would like to offer its expectations for the survey.

Ms. Kahakui requested for Board input on the distribution of the survey to the contractors, recommending that the survey be distributed to GCA and other trade organizations for further distribution to its members, and to the State's Executive Branch and jurisdictions for distribution to purchasing staff. Mr. Regan agreed with this and asked for the support and assistance of Mr. Sakuda and Mr. Imanaka in distributing the survey to the members of GCA and BIA. Mr. Sakuda and Mr. Imanaka responded that they will assist. Mr. Lyons also stated that he can assist in communicating with the members of the Subcontractors Association of Hawaii, which represents nine different subtrades; the members also periodically act as general contractors. Ms. Kahakui said the proposed HAR on Past Performance applies to services, as well as construction. She added that the SPO has the ability to send announcements about the survey to all to all government jurisdictions through the Hawaii Awards and Notices Database System

Ms. Kahakui and Mr. Takaesu confirmed with Chair Maruyama that Act 188, SLH 2021, amends only Chapter 103D (Sections 103D-302, 103D-303, and 103D-306), HRS, and does not affect Chapter 103F, HRS; purchases under 103F will not be part of the Past Performance database.

Mr. Inouye noted that several of the attendees in his Board meeting represented subcontractors and participated in a Procurement Task Force.

Chair Maruyama affirmed that the stakeholders have a comprehensive plan for distribution of the survey. Further discussion will continue at the June meeting.

V. Executive Session: Discussion of personnel matters in the recruitment for Administrator, State Procurement Office

Mr. Regan made a motion to go into Executive Session. Mr. Inouye seconded the motion. There were no objections. At 3:08 p.m., the Board recessed its regular meeting and went into Executive Session pursuant to Section 92-5(a)(2) and (4), Hawaii Revised Statutes, to discuss personnel matters and to consult with the Board's attorney on questions and issues pertaining to the Board's powers and duties.

The Board reconvened its regular meeting at 3:15 p.m.

VI. Announcements

The next two Procurement Policy Board meetings will be held on Monday, June 5, 2023, at 1:30 p.m.; and Tuesday, July 11, 2023, at 1:30 p.m. The meetings will be hybrid on Zoom and in person at the physical location of Room 410 at 1151 Punchbowl Street.

VII. Adjournment

Since there was no new business, Mr. Inouye moved to adjourn the meeting; and Ms. Nakagawa seconded the motion. There were no objections. The meeting adjourned at 3:18 p.m.

Respectfully submitted,

Diane Nakagawa
Secretary, Procurement Policy Board

IV.
Past Performance Assessment
Survey of Stakeholders

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
Amendments to Chapter 3-122

Interim
Hawaii Administrative Rules

As of May 18, 2023

1. §3-122-1, Hawaii Administrative Rules, is amended to read as follows:

"§3-122-1 Definitions. Definitions for terms used in this chapter are in section 103D-104, HRS. The following definitions are also applicable to terms used in this chapter:

"Alternative procurement method" means a procurement method used due to a waiver from the competitive sealed bids or proposals process when one or no responsive, responsible offer is received.

"Award" means the written notification of the State's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror.

"Best value" means the most advantageous offer determined by evaluating and comparing all relevant criteria in addition to price so that the offer meeting the overall combination that best serves the State is selected. These criteria may include, in addition to others, the total cost of ownership, performance history of the vendor, quality of goods, services, or construction, delivery, and proposed technical performance.

"Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

"Brand name or equal specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet requirements, and which provides for the submission of equivalent products.

"Brand name specification" means a specification

limited to one or more items by manufacturers' names or catalogue numbers, commonly referred to as a restrictive specification.

"Capability" means capability at the time of award of contract.

"Chief financial officer" means, depending upon the purchasing agency, either the comptroller, a county's director of finance, or the respective chief financial officers of the University of Hawaii, the department of education, the judiciary, or the legislative branches of the State or county.

"Contract administrator" means the person designated to manage the various facets of contracts to ensure the contractor's total performance is in accordance with the contractual commitments and obligations to the purchasing agency are fulfilled.

"Contract price" means the amount designated on the face of the contract for the performance of the work including allowances for extras, if any.

"Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the State to consider whether the item meets its needs.

"Design specifications" means the dimensional and other physical requirements of the item being purchased, how a product is to be fabricated or constructed.

"Discussion" means an exchange of information to promote understanding of a state agency's requirements and offeror's proposal and to facilitate arriving at a contract that will be the best value to the State. Discussions are not permissible in competitive sealed bidding, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

"Opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

"Performance specifications" means the functional or performance requirements of the item, what a

product does and how well it performs.

"Practicable" and "Advantageous" shall be given ordinary dictionary meanings. "Practicable" means what may be accomplished or put into practical application. "Advantageous" means a judgmental assessment of what is in the State's best interest. The use of competitive sealed bidding may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the State's best interest.

"Qualified products list" means an approved list of goods, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirement.

"Quotation" means a statement of price, terms of sale, and description of goods, services, or construction offered by a prospective seller to a prospective purchaser, usually for purchases pursuant to section 103D-305, HRS.

"Recent" means performance information in which the performance has occurred within 5 years or as determined by the procurement officerⁱ that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated.

"Relevant" means performance information that is similar in size, scope, and complexity to the requirement being solicited or evaluated.

"Request for information" means a request soliciting information to obtain recommendations from suppliers for a procurement that cannot be described in sufficient detail to prepare a solicitation.

"Standard commercial product" means a product or material, in the normal course of business, is

ⁱ *"Recent" time periods for consideration may be different according to the type of requirement, however the Contractor Past Performance Assessment Report shall only be available on the database for three years. If the procurement officer determines that the requisition justifies seeking past performance information that is older than three years (i.e., by request of the offeror or the chief procurement officer), then they may seek specific contract files from the contracting agency which would contain the assessment report information.*

customarily maintained in stock or readily available by a manufacturer, distributor, or dealer for the marketing of the product." [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/08; am]
(Auth: HRS §103D-202) (Imp: HRS §§103D-104, 103D-202)

2. §3-122-33, Hawaii Administrative Rules, is amended to read as follows:

"§3-122-33 Bid evaluation and award. (a) The award shall be made to the lowest responsive, responsible bidder as determined by the procurement officer pursuant to Subchapter 13.5, Contractor's Past Performance Assessment and shall be based on the criteria set forth in the invitation for bids.

(b) Only objectively measurable criteria which are set forth in the invitation for bids shall be applied and may include but not be limited to:

- (1) Discounts;
- (2) Transportation costs; and
- (3) Total or life cycle costs.

(c) Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall:

- (1) Be reasonable estimates based upon information the government jurisdiction has available concerning future use; and
- (2) Treat all bids equitably.

(d) The invitation for bids shall set forth any evaluation criterion to be used in determining product acceptability:

- (1) The solicitation may require the submission of samples, descriptive literature, technical data, or other material to verify product acceptability;
- (2) The solicitation may also provide for accomplishing any of the following prior to award:
 - (A) Inspection or testing of a product for characteristics as quality or

- workmanship;
- (B) Examination of elements as appearance, finish, taste, or feel; or
- (C) Other examinations to determine whether product conforms to any other purchase description requirements;
- (3) The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the invitation for bids;

[5] (4) Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(e) The award shall be issued to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids and posted pursuant to section 103D-701, HRS, for five working days.

(f) In the event all bids exceed available funds, the provisions of section 1030-302(h), HRS, shall apply." [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/2008; am] (Auth: HRS §1030-202) (Imp: HRS §1030-302)

3. Subchapter 13.5, Hawaii Administrative Rules, is added to read as follows:

"SUBCHAPTER 13.5

Contractor Past Performance Assessment

§ 3-122-115.01 Contractor past performance assessment.ⁱⁱ (a) Except for any contract entered into

ⁱⁱ *Although it is not required, it is recommended that a new clause of consent to assessment and evaluation process should be included in the solicitation and the contract's general conditions, identifying the process by which the contractor specifically consents to the process of performance assessment, review, finalization, and posting of final Contractor Past Performance Assessment to be accessible for future solicitation*

pursuant to sections 103D-305 or 103D-307, HRS or as directed by the chief procurement officer, all state and county procurement officers or agents shall complete a contractor past performance assessment form approved by the procurement policy board.

(b) The contractor past performance assessment shall include information contained in Act 188, SLH 2021.

(c) The contractor past performance assessment process shall include the following:

(1) Procurement officers shall prepare the contractor past performance assessment form at the end of the contract, or more frequently as designated by the chief procurement officer or designee:

- (A) Procurement officer shall begin preparing the contractor past performance assessment form prior to contract completion and shall enter information into an electronic past performance database system;
- (B) Procurement officer who rates a vendor an unsatisfactory performance assessment is required to document the action (i.e., notice to cure) used to notify the vendor of the contractual deficiencies;
- (C) Agency assessments of contractor past performance shall be provided to the contractor as soon as practicable after completion of the assessment. The contractor shall receive a notification when an assessment is ready for comment;
- (D) Contractor shall review the contractor past performance assessment form within 10 working days from the date of notification of the contractor past performance assessment and submit comments, rebutting statements, or

evaluations as a condition of award for applicable methods of procurement.

- additional information, or the contractor past performance assessment form shall be considered accepted by the contractor;
- (E) Procurement officer shall submit a copy of the final contractor past performance assessment form in the agency's contract file and electronically in the past performance database system within five working days of receipt;
 - (F) The final contractor past performance assessment form is required prior to making a final payment.
- (2) Contractor's past performance assessment form dispute process:
- (A) Contractor shall submit a request with substantial evidence to the procurement officer for reconsideration within 10 working days from the date of notification of the past performance assessment;
 - (B) The procurement officer shall update the past performance database system taking into consideration any contractor comments;
 - (C) The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee." [Eff _____] (Auth: HRS§103D-202) (Imp: HRS §§103D-104, 103D-202)



CONTRACTOR PAST PERFORMANCE ASSESSMENT

Section 1. GENERAL INFORMATION - To be completed by each Procuring Agency.

Please complete form, by providing the information requested below, for whom the Contractor has provided or is currently providing products, services and/or construction specified herein.

PROCURING AGENCY INFORMATION	
Procuring Agency Department:	
Procuring Agency Division	Procuring Agency Jurisdiction
Procuring Agency Contact Name:	Procuring Agency Contact Title:
Procuring Agency Postal Address:	Procuring Agency Contact Phone:
Procuring Agency Contact Email:	Procuring Agency Contact Fax:
Procurement Officer Name:	
Procurement Officer Email:	
CONTRACTOR INFORMATION	
Contractor/Business Name:	Contractor Contact Name:
Contractor Contact Phone:	Contractor Contact Email:
Business Address:	
License Requirement(s) Placed on Bidders for Project, if applicable (i.e., A, B, C13, etc.):	
Name(s) of Responsible Managing Employees for Project:	
SOLICITATION/PROJECT INFORMATION	
Solicitation Title:	Term of Contract/Project Date(s), including all supplemental periods, if applicable:
Method of Procurement: <input type="checkbox"/> Competitive Sealed Bidding <input type="checkbox"/> Competitive Sealed Proposals <input type="checkbox"/> Sole Source	
Solicitation/Contract No.:	Original Awarded Amount (Size of the Project):
Notice of Award Date:	Notice to Proceed Date:
Brief Description of the Project:	

Estimated Start & Completion Dates:	From:		To:	
Actual Start & Completion Dates:	From:		To:	
Reason(s) for Difference Between Estimated and Actual Dates, if applicable:				
Project's Authorized Budget:			Project's Final Cost:	
Positive or Negative Difference, if applicable:				
Reason(s) for Change in Cost, if applicable:				

CONTRACTOR PAST PERFORMANCE ASSESSMENT GUIDANCE (to be used to best reflect your assessment of the contractor's performance):

Rating	Definition + General Factors	Notes
<p>Satisfactory (S)</p>	<p>Performance meets minimum contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.</p> <p><i>This rating represents contractors meeting expected performance to support the project.</i></p> <p>To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order:</p> <ul style="list-style-type: none"> • Meets standards, objectives, and all performance requirements. • Stayed within project's authorized budget. • Deliveries on-time. • Schedule not impacted. • Met expectations. • Adequate user satisfaction. • Met goals and expectations of the project. <p>NOTE: The term "authorized budget" is defined as the initial funds allocated to a project and encumbered.</p>	<p>There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.</p>
<p>Unsatisfactory (U)</p>	<p>Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains serious problems for which the contractor's corrective action appear or were ineffective (i.e., reports, letters, etc.).]</p> <p><i>This rating represents contractors whose performance consistently does not meet requirements defined in the contract.</i></p> <p>To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government:</p> <ul style="list-style-type: none"> • Work consistently fails to meet contract requirements. • Close supervision of the contractor was necessary to progress/complete the work. • Many performance requirements were not met. • Did not stay within project's authorized budget. • Missed multiple schedule deadlines which negatively impacted cost. • Lack of cooperation. • Unnecessary changes. 	<p>A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency).</p>

	<ul style="list-style-type: none"> • Delayed • Lack of user satisfaction. <p>NOTE: If a contractor is deemed “unsatisfactory,” the rating must be accompanied with multiple letters (department head) sent to the contractor to cure the problem. If no results occur by the contractor, it can be stated that the department will submit its recommendation to SPO for suspension and debarment.</p>	
Not Applicable (N/A)	No information or did not apply to contract requirements.	NOTE: Rating will be neither positive nor negative.

Section 2. ASSESSMENT - To be completed by each Procuring Agency.

Please provide an adjectival rating for the following questions (the adjectival rating is defined above. In addition, please provide comments to substantiate the assigned rating. At a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

1. Technical (Quality of Product and/or Service):			
	S	U	N/A
Quality of technical data/report preparation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Met quality standards specified for technical performance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Timeliness/effectiveness of contract problem resolution without extensive customer guidance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Adequacy/effectiveness of quality control program and adherence to contract quality assurance requirements (without adverse effect on performance)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			
2. Schedule/Timeliness of Performance (for Goods, Services, & Construction):			
	S	U	N/A
Complied with contract delivery/completion schedules including any significant intermediate milestones. (If liquidated damages were assessed or the schedule was not met, please address below)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			

3. Cost/Financial Management (for Goods, Services, & Construction):			
	S	U	N/A
Met the terms and conditions within the contractually agreed price(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor's timeliness and accuracy in submitting monthly invoices with appropriate back-up documentation, monthly status reports/budget variance reports, compliance with established budgets and avoidance of significant and/or unexplained variances (under runs or overruns)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor managed and tracked costs accurately	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rate Contractor's financial management abilities to pay subcontractors/suppliers timely	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			
4. Management/Personnel/Labor (for Goods, Services, & Construction):			
	S	U	N/A
Management of suppliers, materials, and/or labor force, including subcontractors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Managed Government-Owned Property	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Implemented changes in requirements and/or priority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Transitioned personnel and operations when taking over from the incumbent Contractor	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			
5. Customer Satisfaction (for Goods, Services, & Construction):			
	S	U	N/A
Contractor cooperated in dealing with your staff (including resolving disagreements/disputes; responsiveness to administrative reports, businesslike and communication)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overall customer satisfaction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

6. Safety/Security (for Goods, Services, & Construction):

	S	U	N/A
Contractor maintained and/or exceeded an environment of safety, adhere to its approved safety plan, and respond to safety issues? (Includes: following the user's rules, regulations, and requirements regarding housekeeping, safety, correction of noted deficiencies, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor complied with all security requirements for the project and personnel security requirements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

7. General (for Goods, Services, & Construction):

	S	U	N/A
Responded to emergency and/or urgent situations (including notifying HOPA, Project Manager, or Procurement Officer in a timely manner regarding urgent contractual issues)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

Section 3. CONTRACTOR COMMENTS - To be completed by the Contractor

Contractor Name:

Procuring Agency Name:

Comments, Rebuttals, or Additional Information by Contractor assessed in Section 2.

Comments, Rebuttals, or Additional Information from the Contractor
Please cite specific assessment criteria you are providing comments, rebuttals, or additional information to.
<i>Pursuant to HAR section 3-122-115.01(c)(1)(D), Contractor shall review the Contractor past performance assessment form within 10 working days, from the date of notification of the contractor past performance assessment, and submit comments, rebutting statements, or additional information, or the Contractor past performance assessment form shall be considered accepted by the contractor.</i>

Section 4. PROCUREMENT OFFICER DETERMINATION - To be completed by the Procuring Agency

Keep a copy of this assessment in your agency's procurement/contract file.

Validation of Referenced Project Data assessed herein.

Comments from Procuring Agency	
As a Buyer/Contract Administrator/Project Manager, etc. of the Procuring Agency listed above, I approve the responses to the statements and ratings about the performance of the Company/Contractor listed above on the project identified in Section 2 of this Contractor Past Performance Assessment.	
Name:	Title:
Signature:	Date:
<p><i>Pursuant to HAR sections 3-122-115.02(c)(2)(B), The procurement officer shall update the past performance database system with any contractor comments; (c)(2)(C), The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee.</i></p>	
As a Procurement Officer of the Procuring Agency listed above, I approve the responses to the statements and ratings about the performance of the Company/Contractor listed above on the project identified in Section 2 of this Contractor Past Performance Assessment.	
Name:	Title:
Signature:	Date:

Thank you for providing this valuable feedback. Please keep a copy of this assessment in your agency's procurement/contract file.

V.

Proposed Amendments to HAR

HAR §3-122 - Source Selection and Contract Formation

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-122
Hawaii Administrative Rules

June 5, 2023

1. Chapter 122 of Title 3, Hawaii Administrative Rules, entitled "Source Selection and Contract Formation (Interim)" is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 122

SOURCE SELECTION AND CONTRACT FORMATION

Subchapter 1 Definitions

§3-122-1 Definitions

Subchapter 2 General Provisions

§3-122-2 Extension of time for acceptance of
offer received in response to a
solicitation
§3-122-3 Extension of time on contracts
§3-122-4 Multiple or alternate offers

§3-122-5	Repealed
§3-122-6	Conditioning offers upon other contracts not acceptable
§3-122-7	Determination of contractual terms and conditions
§3-122-8	Purchase of items separately from construction contract
§3-122-9	Use of facsimile machines, electronic mail, or electronic procurement systems
§3-122-9.01	Disclosure of information
§3-122-9.02	Request for information

Subchapter 3 Specifications

§3-122-10	Purpose
§3-122-11	Authority to prepare specifications
§3-122-12	Duties of the administrator
§3-122-13	Development of specifications
§3-122-14	Exempted items
§3-122-15	(Reserved)

Subchapter 4 Methods of Source Selection and General Guidance

§3-122-16	Methods of source selection
§3-122-16.01	Procurement dollar thresholds
§3-122-16.02	Preparation time for offer
§3-122-16.03	Public notice
§3-122-16.04	List of potential offerors
§3-122-16.05	Pre-bid or pre-proposal conference
§3-122-16.06	Amendment and clarification to solicitation
§3-122-16.07	Pre-opening modification or withdrawal of offer
§3-122-16.08	Late offer, late withdrawal, and late modification
§3-122-16.09	Cancellation of solicitation and rejection of offer

Subchapter 4.5 Source Selection for Federal
Grants

- §3-122-16.30 Purpose
§3-122-16.31 Exception; request for interest

Subchapter 5 Competitive Sealed Bidding

- §3-122-17 Purpose
§§3-122-18 to 3-122-20 Repealed
§3-122-21 Preparing a competitive sealed bid
§§3-122-22 to 3-122-29 Repealed
§3-122-30 Receipt, opening, and recording of bids
§3-122-31 Mistakes in bids
§3-122-32 Repealed
§3-122-33 Bid evaluation and award
§3-122-34 Low tie bids
§3-122-35 Waiver to competitive sealed bid
process
§§3-122-36 to 3-122-40 (Reserved)

Subchapter 6 Competitive Sealed Proposals

- §3-122-41 Purpose
§3-122-42 Repealed
§3-122-43 [~~When competitive sealed bidding is not
practicable or
advantageous~~] Procurement planning
§3-122-44 Repealed
§3-122-45 [~~Determinations~~] REPEALED [R]
§3-122-45.01 Evaluation committee
§3-122-46 Preparing a request for proposals
§§3-122-47 to 3-122-50 Repealed
§3-122-51 Receipt and registration of proposals
§3-122-52 Evaluation of proposals
§3-122-52.5 Clarifications with offerors after
receipt of proposals
§3-122-53 Discussions with offerors
§3-122-54 Best and final offers
§§3-122-55 to 3-122-56 Repealed

§3-122-57 Award of contract
§3-122-58 Public inspection
§3-122-59 Waiver to competitive sealed proposal
process
§3-122-60 Debriefing
§3-122-61 (Reserved)

Subchapter 6.5 Multi-Step Competitive Sealed Bidding

§3-122-61.05 Purpose
§3-122-61.06 Preparing a multi-step invitation for
bids
§3-122-61.07 Phase one
§3-122-61.08 Phase two

Subchapter 7 Procurement of Professional Services

§3-122-62 Repealed
§3-122-63 General provisions
§§3-122-64 to 3-122-65 Repealed
§3-122-66 Repealed
§3-122-67 Small purchases of professional
services
§3-122-68 Repealed
§3-122-69 Review and selection committees
§3-122-70 Debriefing
§§3-122-71 to 3-122-72 (Reserved)

Subchapter 8 Small Purchases

§3-122-73 Definitions
§3-122-74 General provisions
§3-122-75 Goods, services, and construction
§3-122-76 Repealed
§3-122-77 Procurement file and disclosure of
information
§3-122-78 Electronic procurement

§§3-122-79 to 3-122-80 (Reserved)

Subchapter 9 Sole Source Procurement

§3-122-81 General provisions
§3-122-82 Sole source approvals and amendments
§§3-122-83 to 3-122-84 Repealed
§§3-122-85 to 3-122-87 (Reserved)

Subchapter 10 Emergency Procurement

§3-122-88 General provisions
§3-122-89 Repealed
§3-122-90 Procedures
§3-122-91 Repealed
§§3-122-92 to 3-122-94 (Reserved)

Subchapter 11 Cancellation of Solicitations and
Rejection of Offers

§3-122-95 Cancellation of solicitations and
rejection of offers
§3-122-96 Cancellation of solicitation
§3-122-97 Rejection of offer
§3-122-98 Disposition of offers
§§3-122-99 to 3-122-101 (Reserved)

Subchapter 12 Contract Not Binding Unless Funds
Available

§3-122-102 Contract not binding unless funds
available
§§3-122-103 to 3-122-104 Repealed
§§3-122-105 to 3-122-107 (Reserved)

Subchapter 13 Responsibility of Bidders and
Offerors

§3-122-108 Qualification of offeror or prospective offeror
§3-122-109 Questionnaire
§3-122-110 Repealed
§3-122-111 [~~Notice of intent to offer~~] REPEALED [R]
§3-122-112 Responsibility of offerors
§§3-122-113 to [~~3-122-115~~] 3-122-114 (Reserved)

Subchapter 13.5 Contractor Past Performance Assessment

§3-122-115.01 Contractor past performance assessment

Subchapter 14 Prequalification of Suppliers

§3-122-116 Conditions for prequalification of suppliers
§3-122-117 Repealed
§§3-122-118 to 3-122-120 (Reserved)

Subchapter 15 Cost or Pricing Data

§3-122-121 Scope and application
§3-122-122 Cost or pricing data defined
§3-122-123 Requirement for cost or pricing data
§3-122-124 Exceptions to the requirement for cost or pricing data
§3-122-125 Submission of cost or pricing data and certification
§3-122-126 Certificate of current cost or pricing data
§3-122-127 Defective cost or pricing data
§3-122-128 Cost analysis techniques
§3-122-129 Price analysis techniques
§3-122-130 Evaluation of cost or pricing data
§§3-122-131 to 3-122-132 (Reserved)

Subchapter 16 Types of Contracts

§3-122-133	Restrictive or prohibitive use of certain types of contracts
§3-122-134	Selection of contract types
§3-122-135	Types of contracts
§3-122-136	Fixed-price contract
§3-122-137	Cost-reimbursement contract
§3-122-138	Cost-incentive contract
§3-122-139	Performance incentive contract
§3-122-140	Time and materials contract
§3-122-141	Labor hour contract
§3-122-142	Definite quantity contract
§3-122-143	Indefinite quantity contract
§3-122-144	Incremental award contract
§3-122-145	Multiple award contract
§3-122-146	Geographic or regional award contract
§3-122-147	Lease contract
§3-122-148	Installment purchase payment contract
§3-122-149	Multi-term contract
§§3-122-150 to 3-122-154	(Reserved)

Subchapter 17 Repealed

§§3-122-155 to 3-122-165 Repealed

Subchapter 18 Right to Inspect Plant

§3-122-166	Inspection of plant or site
§3-122-167	Access to plant or place of business
§3-122-168	Inspection and testing of goods and services
§3-122-169	Conduct of inspections
§3-122-170	Inspection of construction projects
§§3-122-171 to 3-122-174	(Reserved)

Subchapter 19 Right to Audit Records

§3-122-175	Statutory authority to audit
------------	------------------------------

§3-122-176 Auditors' audit reports
§3-122-177 Cost or pricing data audit
§3-122-178 Cost or pricing data audit report
§3-122-179 Contract audit
§3-122-180 Contract audit report
§3-122-181 Retention of books and records
§3-122-182 Sanctions for lack of cooperation
§§3-122-183 to 3-122-185 (Reserved)

Subchapter 20 Repealed

§§3-122-186 to 3-122-190 Repealed

Subchapter 21 Reporting of Anticompetitive
Practices

§3-122-191 Anticompetitive practices
§3-122-192 Independent price determination
§3-122-193 Detection of anticompetitive practices
§3-122-194 Identical bidding and price fixing
§3-122-195 Other anticompetitive practices
§3-122-196 Reporting suspected anticompetitive
practices
§§3-122-197 to 3-122-200 (Reserved)

Subchapter 22 Retention of Procurement Records

§3-122-201 Retention of procurement records
§§3-122-202 to 3-122-210 (Reserved)

Subchapter 23 Repealed

§§3-122-211 to 3-122-220 Repealed

Subchapter 24 Bid Security, Contract Performance
and Payment Bonds

§3-122-221	General
§3-122-222	Acceptable bid security, contract performance and payment bonds
§3-122-223	Bid security
§3-122-224	Contract performance and payment bonds
§3-122-225	Reduction of contract performance and payment bond amounts
§3-122-226	Repealed
§3-122-227	Payment claims against the bond
§3-122-228	Bond forms
§§3-122-229 to 3-122-240	(Reserved)

Subchapter 25 Fiscal Responsibility

§3-122-241	Fiscal responsibility
§3-122-242	(Reserved)

Historical Note: This chapter 122, effective , subtitle 11 of title 3, Hawaii

Administrative Rules:

1. Replaces rules effective 03/21/2008 (file no. 2802) which compiled Chapter 122.
2. Replaces rules effective 08/21/2016 (file no. 3193) which amended section 3-122-14; and repealed section 3-122-66.

SUBCHAPTER 2

GENERAL PROVISIONS

§3-122-2 Extension of time for acceptance of offer received in response to a solicitation. After opening offers, the procurement officer may request offerors to extend the time during which the State may accept their offers, as stated in the terms and conditions of the solicitation, provided that, with regard to competitive sealed bids, no other change is permitted. The reasons for requesting the extension

shall be documented. [Eff 12/15/95; comp 11/17/97;
comp 03/21/08; comp] (Auth: HRS §103D-
202) (Imp: HRS §103D-202)

§3-122-3 Extension of time on contracts. (a)

If a contract has exhausted its provision for extension(s) of time of performance, or if the contract does not include a provision for extension(s) of time of performance, the contract may be extended upon approval of the chief procurement officer, provided:

- (1) The period of each extension is for one hundred eighty calendar days or less;
- (2) The procurement officer makes a written determination that it is not practical to award another contract at the time of the expiration of the contract for reasons to include but not be limited to the following:
 - (A) A new contract cannot be executed by the time the contract expires; or
 - (B) The need for the good or service is short term;
- (3) All parties agree to the extension of time of performance; and
- (4) The price(s) or conditions of the contract remain the same as the original contract, or as amended per the contract; or if not the same or as amended, they are fair and reasonable.

(b) If paragraph (2) of subsection (a) is met, but paragraph (3) or (4) of subsection (a) or both are not met and the procurement officer determines in writing that the need for the good or service continues, provided subchapters 8, 9, and 10 do not apply, the chief procurement officer, may upon request in writing, approve an alternative procurement method, including but not limited to direct negotiations with a party other than the contractor, subject to the maximum one hundred eighty calendar day contract period, and provided the prices are fair and reasonable.

(c) This section shall not apply to adjustments in performance time under chapter 3-125. [Eff 12/15/95; am and comp 11/17/97; comp 03/21/2008; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-4 Multiple or alternate offers. (a) Unless specifically provided for in the solicitation, multiple or alternate offers shall not be accepted and all such offers shall be rejected.

(b) If multiple or alternate offers are allowed, the solicitation shall specify their treatment. [Eff 12/15/95; comp 11/17/97; am and comp 03/21/08; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-5 REPEALED. [R 03/21/08]

§3-122-6 Conditioning offers upon other contracts not acceptable. Any offer which is conditioned upon receiving a contract other than as provided for in the solicitation shall be deemed nonresponsive and not acceptable. [Eff 12/15/95; comp 11/17/97; am and comp 03/21/08; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)n

§3-122-7 Determination of contractual terms and conditions. The chief procurement officer or the head of a purchasing agency is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts, provided the provisions, terms, and conditions are not contrary to statutory or chapter 91 administrative rule requirements governing the procurement. [Eff 12/15/95; comp 11/17/97; comp 03/21/08; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-8 Purchase of items separately from construction contract. The chief procurement officer or the head of a purchasing agency is authorized to determine whether a good item or group of good items shall be included as part of, or procured separately from, any contract for construction. [Eff 12/15/95; comp 11/17/97; comp 03/21/08; comp]
(Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9 Use of [~~facsimile machines, electronic mail, or electronic procurement systems~~] electronic communication. (a) Copies of documents transmitted by vendors via [~~facsimile machine, electronic mail, or an electronic procurement system~~] electronic communication may include the notice of intent to offer; the offer with required documentation for evaluation purposes; and modifications or withdrawal of offers and contract documents, pursuant to subsections (b) and (c).

(b) Notices of intent to submit an offer and modifications or withdrawal of an offer may be submitted [~~by facsimile machine, electronic mail, or an electronic procurement system~~] electronically pursuant to sections 3-122-111 and 3-122-16.07, respectively.

(c) An offer transmitted [~~via facsimile machine, electronic mail, or through an electronic procurement system~~] electronically shall be acceptable only when specifically allowed in the [~~invitation for bids or request for proposals~~] solicitation, provided:

- (1) The [~~facsimile or the~~] electronically submitted offer is received at the designated office by the time and date set for receipt of offers; and
- (2) The [~~facsimile or the~~] electronically submitted offer contains:
 - (A) The identification number of the [~~invitation for bids or request for proposals~~] solicitation;
 - (B) The item;
 - (C) The quantity;

- (D) The price for the offer;
- (E) All pages of the offer requiring an original signature;
- (F) The bid bond, if required; and
- (G) A signed statement that the offeror agrees to all the terms, conditions, and provisions of the ~~[invitation for bids or request for proposals]~~ solicitation; and
- (H) Any other requirement in the solicitation.

(d) Unless otherwise specified in the solicitation, if the ~~[facsimile or]~~ electronically submitted offer is the lowest responsive bid, or is the proposal determined in writing to provide the best value to the State, the offeror must submit the ~~[complete original offer, with the]~~ original bid bond, if required, so that it is received within five working days from the notification of intent to award. If the offeror fails to comply with this requirement, the procurement officer has the option to reject the ~~[facsimile or]~~ electronically submitted offer. [Eff 12/15/95; am and comp 11/17/97; am and comp 03/21/08; am and comp 03/21/08; am and comp]
 (Auth: HRS §§103D-202, 103D-302, 103D-303, 103D-310)
 (Imp: HRS §§103D-302, 103D-303, 103D-310)

§3-122-9.01 Disclosure of information. (a) A purchasing agency is not required to disclose information identifying the number or the names of organizations or persons that obtained a solicitation, attended a pre-offeror's conference, or submitted a notice of intent to offer; or an offer until:

- (1) ~~[The purchase order is issued or the purchasing card order is placed]~~ After the time and date set for receipt for quotes, in the case of a small purchase request for quotations pursuant to subchapter 8;
- (2) After the time and date set for receipt of priced bids, in the case of invitation for bids pursuant to subchapters 5 and 6.5; and

(3) The posting of the award in the case of a request for proposals pursuant to subchapter 6.

(b) A purchasing agency shall not disclose the ~~[name]~~names of ~~[members of an]~~the evaluation committee members established by section 3-122-45.01 prior to the posting of the award pursuant to section 3-122-57(a) for multi-step bids and competitive sealed proposals.

(c) In the case of procurement of professional services, a purchasing agency is not required to disclose the information specified in section 3-122-63(b) until after the contract is awarded. [Eff and comp 11/17/97; am and comp 03/21/08; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9.02 Request for information. When it is considered impractical to initially prepare a definitive purchase description or when discussions with vendors are not productive, the procurement officer may, prior to issuing a competitive sealed bid or proposal, issue a request for information which shall include but not be limited to:

- 1) The objective of the procurement;
- 2) That the response is to provide the purchasing agency with recommendations that will serve to accomplish the work required by the procurement;
- (3) That the purchasing agency reserves the right to incorporate in a solicitation, if issued, any recommendations presented in the response to the request for information; and
- (4) That neither the purchasing agency nor the supplier responding has any obligation under the request for information. [Eff and comp 11/17/97; am and comp 03/21/08; comp] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

SUBCHAPTER 3

SPECIFICATIONS

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. Purchasing agencies shall seek to procure standard commercial products, if practicable, and obtain the most advantageous prices. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. [Eff 12/15/95; comp 11/17/97; comp 03/21/08; comp] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-405)

§3-122-11 Authority to prepare specifications.

- (a) The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer.
- (1) The written delegation shall include a determination made by the chief procurement officer that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the State.
 - (2) Using agencies delegated the authority to prepare specifications may use any of the specifications defined herein.
- (b) If a specification for general or common use item or a qualified products list exists for an item to be procured under subchapter 8, for small purchases, it shall be used. If no specification

exists, purchasing agencies are hereby granted the authority to prepare specifications for use in such purchases.

(c) In an emergency under subchapter 10, any necessary specifications may be utilized by the purchasing agency without regard to the provisions of this subchapter. [Eff 12/15/95; comp 11/17/97; comp 03/21/08; comp] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-402)

§3-122-12 Duties of the administrator. (a) The administrator of the state procurement office shall serve as the central procurement officer to coordinate, guide, and distribute specifications used by purchasing agencies, including specifications on recycled products and the guidelines for purchasing energy-efficient vehicles. This effort will allow for the use of standard specifications by purchasing agencies on purchases for common or general use items or standard commercial products or energy-efficient vehicles.

(b) The administrator of the state procurement office shall review and establish purchase specifications to guide state and county purchasing agencies in the procurement of recycled products.

(1) The specifications shall:

- (A) Be consistent with applicable current federal specification standards on recycled products [~~incorporated in Presidential Executive Orders No. 12873, dated October 20, 1993, and any subsequent amendments to that order~~];
- (B) Include minimum standards of recovered material and post-consumer content; and
- (C) Ensure, to the maximum extent economically feasible, the purchase of materials which may be recycled or reused when discarded and avoid the purchase of products deemed environmentally harmful.

(2) The administrator [~~shall~~] may periodically

review its specifications to determine whether discrimination against procured goods with recycled content exists and [~~shall~~] may revise these specifications to eliminate any discrimination.

- (3) Purchase specifications [~~shall~~] may include, but not be limited to, office paper, printed material, paper products, paper, 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~~] may 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 any product or construction.

(c) Pursuant to section 103D-412, HRS, the procurement policy for all agencies purchasing or leasing motor vehicles shall be to obtain energy-efficient vehicles in accordance with the guidelines established by the department of business, economic development and tourism. [Eff 12/15/95; comp 11/17/97; am and comp 03/21/08; am and comp] Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-412)

§3-122-13 Development of specifications. (a) A specification should provide for the following:

- (1) Identify minimum requirements;
- (2) Allow for competition;
- (3) List reproducible test methods to be used in testing for compliance with specifications; and
- (4) Provide for an equitable award at the best value.

(b) Types of specifications include the following, and may be used in combination when developing the specification:

- (1) Design specification sets the requirements for the product, detailing the characteristics that the item must possess, how the item is to be manufactured;
- (2) Performance specifications describes the capabilities that the product must meet, use of test or criteria are developed to measure the item's ability to perform as required;
- (3) Brand name specification commonly referred to as restrictive specifications, may be used upon approval of the chief procurement officer after the purchasing agency makes a written determination that only the identified brand name item will satisfy the State's needs, and it is not practicable to use a less restrictive specification, provided that procurements pursuant to section 103D-305, HRS, [~~do not require~~]requires approval by the procurement officer and shall be placed in the procurement file;
- (4) Brand name or equal specification cites one or more brand names, model numbers, or other designations that identify the specific products as having the characteristics of the item desired; and
- (5) Qualified or pre-approved products list is a list of goods, services, or construction items, which, prior to the opening of the competitive solicitation, are examined, tested, and determined to meet the applicable specification requirements.

(c) To the extent practicable, the State may procure standard commercial products using accepted commercial specifications. Specifications shall emphasize functional or performance criteria. Design or other detailed physical descriptions may be used when necessary to meet the needs of the State. Specifications shall not discriminate against the use of recycled materials; and when purchasing or leasing motor vehicles; specifications shall be developed in compliance with section 103D-412, HRS, as follows:

- (1) Agencies are directed to the acquisition of motor vehicle guidelines established by the department of business, economic development and tourism. When acquiring new vehicles, agencies shall determine its motor vehicle fleet as defined by these guidelines; and
- (2) Motor vehicle fleets determined to be outside of the "covered fleet" definition, shall obtain energy-efficient vehicles in order to increase energy efficiency and use of renewable energy resources pursuant to section 103D-412(b), HRS, and further defined in the guidelines established by the department of business, economic development and tourism.

(d) The using agency shall submit advice and assistance in the development of specifications or plans pursuant to a request from the purchasing officer.

(e) A contractor paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation.

f) Specifications prepared by architects, engineers, consultants and others for public contracts, 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. [Eff 12/15/95; am and comp 11/17/97; am and comp 03/21/08; am and comp] (Auth: HRS §§103D-202, 103D-401, 103D-402) (Imp: HRS §§103D-401, 103D-404, 103D-405, 103D-406, 103D-412)

§3-122-14 Exempted items. Purchasing agencies are granted the authority to prepare specifications for goods, services, and construction procured under sections 103D-102 and 103D-304, HRS. However, all public employees are responsible for adhering to remaining ethical considerations in public procurement, as guided by section 103D-101, HRS, and section 3-131-1.02, HAR. [Eff 12/15/95; comp

11/17/97; comp 03/21/08; am 08/21/16; comp]
(Auth: HRS §§103D-202, 103D-403) (Imp: HRS §§103D-
102, 103D-304, 103D-403)

§3-122-15 (Reserved).

SUBCHAPTER 4

METHODS OF SOURCE SELECTION AND GENERAL GUIDANCE

§3-122-16 Methods of source selection. Unless authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to subchapters 5 and 6.5, except as provided in:

- (1) Subchapter 4.5 - Source selection for federal grants;
- (2) Subchapter 5 - Competitive Sealed Bidding;
- ~~[(2)]~~ (3) Subchapter 6 - Competitive sealed proposals;
- (4) Subchapter 6.5 - Multi-step Competitive Sealed Bidding;
- ~~[(3)]~~ (5) Subchapter 7 - Professional services procurement;
- ~~[(4)]~~ (6) Subchapter 8 - Small purchases;
- ~~[(5)]~~ (7) Subchapter 9 - Sole source procurements; and
- ~~[(6)]~~ (8) Subchapter 10 - Emergency procurements.
[Eff 12/15/95; comp 11/17/97; am and comp
03/21/08; am and comp]
(Auth: HRS §103D-202) (Imp: HRS §103D-301)

§3-122-16.01 Procurement dollar thresholds. Procurements exceeding the threshold of section 103D-305, HRS, shall be made pursuant to subchapters 5, 6, 6.5, 7, 9, and 10. [Eff and comp 03/21/08; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-305)

§3-122-16.02 Preparation time for offer. (a)

The minimum time period between the first date of the public notice of the solicitation and the date set for receipt of offers, except as provided by subsection (b) for construction, including design-build projects, shall be as follows:

- (1) For a single-step invitation for bids pursuant to subchapter 5, ten calendar days;
- (2) For competitive sealed proposals pursuant to subchapter 6, thirty calendar days, unless the procurement officer makes a written determination that a shorter time will provide for adequate competition; and
- (3) For multi-step invitation for bids pursuant to subchapter 6.5, fifteen calendar days for the phase one unpriced technical proposal, unless the procurement officer makes a written determination that a shorter time will be provided for adequate competition; and ten calendar days for the phase two priced bid.

(b) For construction, including design-build projects, a minimum of fifteen calendar days shall be provided between the date of the pre-bid conference pursuant to section 3-122-16.05(b) and the date set for receipt of offers. [Eff and comp 03/21/08; comp] (Auth: HRS §§103D-202, 103D-302, 103D-303) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.03 Public notice. (a) Public notice of the solicitation pursuant to subchapter 4.5, 5, 6, 6.5, or 7 shall be made for the purpose of securing competition.

(b) The public notice of the solicitation pursuant to subchapters 4.5, 5, 6, and 6.5 shall include the following information:

- (1) A brief description of the good, service, or construction desired; or for solicitations seeking providers for federal grant contracts, the title of the grant application or funding source and a brief

- description of the services being sought;
- (2) Where and when the solicitation will be available ~~[and a phone number or e-mail address where interested parties may request a copy]~~;
 - (3) ~~[How long the solicitation will be available, i.e., the]~~ The deadline for the responses to the solicitation;
 - (4) Other appropriate information, e.g., ~~[a notice of intention to offer pursuant to section 3-122-111 or]~~ contact information, the time, date, and location of the pre-bid or pre-proposal conference;
 - (5) For request for interest pursuant to section 3-122-16.31, a statement that the purpose of the request is to select a provider or providers for federal grants; and
 - (6) For a multi-step invitation for bids pursuant to subchapter 6.5, a general statement that the bid is multi-step and the due date(s) of the unpriced technical offer and priced offer.

(7) A copy of the solicitation ~~[shall]~~ may be made available ~~[for public inspection and pick up]~~ electronically, and may be picked up at the respective issuing office ~~[of the procurement officer issuing the solicitation]~~.

(c) Public notice for professional services pursuant to section 103D-304, HRS, and subchapter 7 shall include the requested professional class or category and shall invite persons to submit statements of qualifications that ~~[may include but not be limited to]~~ includes:

- (1) The name of the firm or person, the principal place of business, and location of all of its offices;
- (2) The age of the firm and its average number of employees over the past years;
- (3) The education, training, and qualifications of key members of the firm;
- (4) The names and phone numbers of up to five clients who may be contacted, including at

least two for whom services were rendered during the preceding year; and

- (5) Any promotional or descriptive literature which the firm desires to submit.

Firms or persons may amend statements of qualifications at any time by filing a new statement and shall immediately inform the head of the purchasing agency of any change in their submission that would disqualify the firm or person from being considered for a contract award.

- (d) The public notice under subsections (b) and (c) shall be publicized as follows:

- (1) At a minimum, statewide and countywide public notices shall be publicized on [~~a purchasing agency or provider~~] an internet site;

- (2) Optionally, and in addition to paragraph (1), the following may be used:

- (A) Newspaper publication:
 - (i) For statewide publication, a daily or weekly publication of statewide circulation; or separate daily or weekly publications whose combined circulation is statewide;
 - (ii) For countywide publication, a daily or weekly publication in the pertinent county;
- (B) Notice by mail [~~, electronic mail, or facsimile transmission~~] or electronically to persons on any applicable bidders mailing list, if any; and
- (C) Any other method the procurement officer deems effective for publicizing the solicitation. [Eff and comp 03/21/08; am and comp]
 (Auth: HRS §§103D-202, 103D-302, 103D-303, 103D-304) (Imp: HRS §§103D-302, 103D-303, 103D-304)

§3-122-16.04 List of potential offerors. (a) A

list may be compiled to provide the procurement officer with the names of businesses that may be interested in competing for various types of contracts.

(b) Unless otherwise provided, inclusion of the name of a business is discretionary and does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract; nor does it guarantee notification of each solicitation.

(c) Businesses that fail to respond to solicitations or notices of availability may be removed from the list.

(d) Names and addresses on the list shall be available for public inspection. [Eff and comp 03/21/08; comp] (Auth: HRS §§103D-202, 103D-302, 103D-303, 103D-304) (Imp: HRS §§103D-302, 103D-303, 103D-304)

§3-122-16.05 Pre-bid or pre-proposal conference.

(a) The purpose of a pre-bid or pre-proposal conference is to explain the procurement requirements and allow potential offerors to ask questions.

(1) An agency may hold a pre-bid or pre-proposal conference [~~and require or not require attendance by all prospective bidders as a condition for submitting an offer for solicitations that have special or unusual requirements, e.g., requiring physical inspection~~].

(2) For construction, including design-build projects, pursuant to section 103D-303.5, HRS, an agency shall hold a pre-bid or pre-proposal conference and invite all interested parties to attend.

~~[(b) If conference attendance is mandatory for submission of an offer, the requirement:~~

~~— (1) Shall be stated in the public notice issued pursuant to section 3-122-16.03; and~~

~~— (2) Prominently in the solicitation or if the decision to hold a mandatory pre-bid or pre-~~

~~proposal conference is made after the issuance of the solicitation, the mandatory requirement shall be announced in an addendum.]~~

~~[(e)]~~ (b) A pre-bid or pre-proposal conference shall be announced ~~[to all prospective offerors]~~ in the public notice issued pursuant to section 3-122-16.03 and in the solicitation, or if the decision to hold a pre-bid or pre-proposal conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.

~~[(d)]~~ (c) The conference should be held long enough after the solicitation has been issued to allow offerors to become familiar with the solicitation, but sufficiently before the deadline for receipt of offers to allow consideration of the conference results in preparing their offers.

~~[(e)]~~ (d) Unless a change is made by written addendum as provided in section 3-122-16.06, nothing stated at the pre-bid or pre-proposal conference shall change the solicitation.

~~[(f)]~~ (e) A summary of the conference, including questions and answers, in addition to any changes to the solicitation, ~~[shall]~~ may be issued by addendum ~~[and shall be supplied sufficiently]~~ before the deadline for receipt of offers ~~[to allow consideration of the summary results and changes to all those prospective offerors known to have received a solicitation]~~. [Eff and comp 03/21/08; am and comp] (Auth: HRS §§103D-202, 103D-303.5) (Imp: HRS §§103D-302, 103D-303.5)

§3-122-16.06 Amendment and clarification to solicitation. (a) An addendum shall be issued for amendments and clarifications to a solicitation prior to submission of offers, except as provided in subsection ~~[(f)]~~ (d).

- (1) Amendments include any material changes to the solicitation as in quantity, purchase descriptions, delivery schedules, scope of work, and opening dates. The addendum shall

- reference the portions of the solicitation it amends and detail the amendments;
- (2) Clarifications include pre-bid or pre-proposal communications other than amendments.
- (b) Addenda shall be used to:
- (1) Correct minor defects or ambiguities;
 - (2) Furnish to other offerors information given to one offeror if the information will assist the other offerors in submitting offers or if the lack of the information would prejudice the other offerors; and
 - (3) Provide any other information or clarification to the solicitation that will result in fair competition.

~~[(c) Addenda may require that offerors acknowledge receipt of the addendum issued.]~~

~~[(d) Addenda shall be issued to all prospective offerors known to have received a solicitation, or if issued after the deadline for submission of notice of intention to offer, to those persons who have submitted such notice.]~~

~~[(e)]~~ (c) Addenda for:

- (1) Amendments shall be ~~[distributed]~~ published within a reasonable time to allow prospective offerors to consider them in preparing their offers; however, if the time and date set for receipt of bids will not permit adequate time for preparation, the time shall be increased to the extent possible in the addendum or, if necessary, by facsimile or telephone and confirmed in the addendum;
- (2) Clarifications may be issued any time up to the scheduled deadline for receipt of offers.

~~[(f)]~~ (d) After submission of proposals, amendments may be made by addenda for solicitations pursuant to subchapters 6 and 6.5, subject to sections 3-122-53(d) and (e) and 3-122-54(b). [Eff and comp 03/21/08; am and comp] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.07 Pre-opening modification or withdrawal of offer. (a) ~~[Bids or proposals]~~ Offers submitted pursuant to subchapters 5, 6, and 6.5 may be modified or withdrawn prior to the established due date by submitting the following ~~[documents]~~:

- (1) ~~[Modification]~~ For modification of ~~[bids or proposals]~~ the offer:
 - (A) A written notice accompanying the ~~[actual]~~ offeror's modification received in the office designated in the solicitation, stating that a modification to the ~~[bid or proposal]~~ offer is submitted; or
 - (B) ~~[A facsimile or]~~ An electronic notice accompanying the ~~[actual]~~ offeror's modification submitted ~~[either by facsimile machine, electronic mail, or an electronic procurement system]~~ electronically pursuant to section 3-122-9 to the office designated in the solicitation; provided if other than through an electronic system, offeror submits the actual written notice and modification within two working days of receipt of the facsimile or the electronic transmittal.
- (2) Withdrawal of bids or proposals:
 - (A) A written notice received in the office designated in the solicitation; or
 - (B) A notice ~~[by facsimile machine or other electronic]~~ submitted ~~[electronic]~~ electronically ~~[method]~~ pursuant to section 3-122-9~~[, to the office designated in the solicitation].~~

For the purposes of this section and section 3-122-16.08, the established due date for proposals pursuant to subchapter 6 or 6.5 is either the time and date announced for receipt of proposals or as amended ~~[receipt of modifications to proposals]~~, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only priority listed offerors may submit

best and final offers.

(b) The documents shall be made a part of the [appropriate] procurement file. [Eff and comp 03/21/08; am and comp] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.08 Late offer, late withdrawal, and late modification. (a) Any [~~notice of withdrawal, notice of modification of a bid or proposal with the actual modification, or any bid or proposal is late when received at the place designated for receipt and opening of an offer after the established due date, additionally defined in section 3-122-16.06(a),~~] offer, withdrawal and modification submitted manually or digitally after the established due date, shall not be accepted, except when received before contract award and would have been timely but for the action or inaction of personnel, supported by a written determination by the head of the purchasing agency, within the [~~procurement activity~~] procuring agency.

(b) A late bid or proposal or late modification will not be considered for award and shall be returned to the offeror unopened as soon as practicable, accompanied by a letter from the [~~procurement activity~~] procuring agency stating the reason for its return.

(c) A late withdrawal request except as provided for in section 3-122-31, shall be responded to with a statement of the reason for non-acceptance of the withdrawal.

(d) Records of each late offer, late modification, or late withdrawal and any related correspondence shall be made a part of the appropriate procurement file, except for the late offer or late modification itself which shall be disposed of in accordance with subsection (b). [Eff and comp 03/21/08; am and comp] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

§3-122-16.09 Cancellation of solicitation and

rejection of offer. Cancellation of solicitations and rejection of bids or proposals shall be pursuant to subchapter 11 and section 103D-308, HRS. [Eff and comp 03/21/08; comp] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303, 103D-308)

SUBCHAPTER 4.5

SOURCE SELECTION FOR FEDERAL GRANTS

§3-122-16.30 Purpose. (a) The purpose of this subchapter is to provide rules for the selection of [~~providers~~]contractors for federal grants.

(b) The selection of [~~providers~~]contractors for federal grants shall be in accordance with the appropriate source selection methods in section 3-122-16. [Eff and comp 03/21/08; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-301)

§3-122-16.31 Exception; request for interest.

(a) "Request for [~~interest~~]federal grants" as used in this subchapter means all documents utilized for soliciting interest in providing goods, services, or construction under a federal grant, when applying or after receipt of a grant.

(b) Where time or economic situations preclude the use of other source selection methods in section 3-122-16, purchasing agencies may, with the approval of the head of purchasing agency, issue a request for interest to select a [~~provider or providers~~]contractor(s) for a federal grant.

(c) A public notice shall be publicized pursuant to section 3-122-16.03(d) and shall include but not be limited to the information in section 3-122-16.03(b).

(d) The request for interest may include but not be limited to the following:

- (1) Identification and purpose of the federal funding;

- (2) The target population [~~or clients~~] to be served;
- (3) A description of the good, service, or construction;
- (4) The evaluation criteria and their relative weights for selecting a [~~provider or providers~~]contractor(s);
- (5) The format, if any, and procedure for submitting responses to the request;
- (6) The deadline for submittal of written responses to the request which shall be a minimum of five working days from the date of public notice;
- (7) A statement that the purchasing agency reserves the right to incorporate or not incorporate in the State's application for federal grants any recommendations presented in response to the request; and
- (8) A statement that neither the purchasing agency nor the interested [~~provider~~]contractor has any obligation under the request.

(e) The selection of a [~~provider or providers~~]contractor(s) shall be based on the criteria established in the request for interest.

(f) A notice of the selected [~~provider or providers~~]contractor(s) shall be posted to a state governmental website [~~or~~]and all respondents shall be notified in writing.

(g) Nothing in this section shall be construed to disqualify a purchasing agency from receiving federal funds." [Eff and comp 03/21/08; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

2. Material, except source notes, to be repealed is bracketed. New material is underscored.

3. Additions to update source notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 3-122, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the forgoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on June 5, 2023, by the Procurement Policy Board and filed with the Office of the Lieutenant Governor.

LISA MARUYAMA
Chairperson
Procurement Policy Board

KEITH REGAN
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General