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SPO-08-0136

December 20, 2007

TO: Procurement Policy Board
FROM: Aaron S. Fujioka
SUBJECT: Comments and Recommendations

The State Procurement Office (SPO) provides the following comments and recommendations, on HAR Chapter 127, Small Business Preference Rules (Interim).

As background Attachment A is a Chronology of Act 50/SLH 2005 reflecting the numerous events and processes that have occurred to-date related to this mandate.

The following are comments and concerns of the SPO and other jurisdictions on HAR Chapter 3-124, Subchapter 9, Small Business Preference Rules.

- HAR Chapter 3-124, Subchapter 9, Small Business Preference Rules are not applicable to the preference chapter. Chapter 3-124 was established for preferences where offeror's bid prices are either increased or decreased by the percentage of the preference. Act 50, small business assistance program established a set aside where a percentage of contracts would be awarded to small businesses. For that reason, these small business rules are not a preference and should be in chapter 3-127, which is the chapter designated for small business.
- Potential competition on the neighbor islands is considerably less than on Oahu. A solicitation limited to only small business may result in creating inadequate competition where no responses are received, or at best only a single or very limited competition.
- Section 3-124-74(a)(2) will add another point of contention for participating bidders.....potential for awards being delayed while resolving these concerns could increase precipitously....and negatively impact the timeliness of awards, thereby decreasing the effectiveness of the procurement process...
- The Chapter 3-124, Subchapter 9, Small Business Preference Rules do not provide a protest process but only refers agencies to chapter 3-126.

- The HAR are difficult to follow in terms of formulating a mental process as to how this program is to play itself out. It appears to require significant restructuring of solicitations, if not creation of a special one for the program. Jurisdictions have stated they may need position(s) to implement and manage.

These comments and concerns leans toward the thinking that the current rules require further details before a purchasing agency is able to use and implement, and a small business is awarded a contract solely through a set-aside program. When developing administrative rules relating to procurement, the SPO keeps in mind that the user, our purchasing agencies and business community, need to be able to clearly and easily understand the processes and steps in order to comply and participate.

Attachment B is offered as proposed amendments to the current interim rules, HAR Chapter 3-124, Preferences. The proposed amendments are a compilation of the current interim rules and the SPO proposed HAR Chapter 3-127, Small Business Assistance submitted to the PPB at its Oct. 5, 2006 meeting. This proposed draft HAR Chapter 3-127 will assist to set the basic requirements, however, further rules or amendments will still be required to enhance the details and processes for the purchasing agency and small business to implement a small business program.

c: SBUC

attachments

ATTACHMENT A

STATE PROCUREMENT OFFICE (SPO) **Chronology of Act 50/SLH 2005**

- July 1, 2005, Act 50/SLH 2005 (HB 162) became effective
- July 6, 2005
Small Business Roundtable met to discuss Act 50 to develop the starting points for a small business preference program.
- August 11, 2005
At the Procurement Policy Board (PPB) meeting, the board was informed that Act 50 was passed this legislative session and that the board will need to develop rules for small business preferences, set-asides, including its maintenance and compliance. The chair expressed the concern on the definition of a small business will be determined. Mr. Russ Saito explained that the certification will be patterned after the Federal regulations.
- September 2, 2005
Small Business Roundtable meeting to discuss the goals of a small business preference program, implementation/oversight of a small business preference program, and the establishment of rules by the SPO.
- July 13, 2006
At the PPB meeting, both the Small Business Roundtable proposed HARs and the SPO initial draft HARs for Chapter 3-127, Assistant to Small Business, were presented. The SPO proposed draft HARs was based on a conceptual proposal for a small business program. PPB members raised concerns on the small business definition, therefore the SPO agreed to consult with the Small Business Administration (SBA) in defining small business.
- September 22, 2006
At the PPB meeting, the SPO proposed HARs agenda item was continued to 10/5/06 PPB meeting due to lack of time.
- October 5, 2006 PPB
At the PPB meeting, the SPO proposed HAR, Chapter 3-127, Small Business Assistance, was withdrawn by PPB member, Mr. Russ Saito.
- October 27, 2006
At the PPB meeting, Hawaii Procurement Institute (HPI) representatives proposed HARs, and after a lengthy discussion in which the SPO had concerns with the proposed HARs, the PPB adopted HAR Chapter 3-124.

SPO concerns: It is not feasible to adopt the entire draft rules in its current version, as the procedures, format, and language need to be simplified for ease of use by agencies and businesses. The rules as written would be an added burden to purchasing agencies and the program needed to be streamlined. The draft rules are for HAR, Chapter 3-124 on preferences, however SPO had proposed to place the rules within the Small Business Assistance Program (HAR, Chapter 3-127), as Act 50 amended sections in the Small Business Assistance part of HRS.

Motion to pass the draft rules: The vote was four in favor and three against.

ATTACHMENT A

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- January 6, 2007
Interim HAR Chapter 3-124, Preferences, Subchapter 9, Small Business Preference Rules became effective.
- May 16, 2007
The Small Business Utilization Council (SBUC) inaugural meeting that included a review of the HAR 3-124 rules pertaining to small business set-asides and establishment of the SBUC.
- June 12, 2007
SBUC meeting that included a discussion on the differences between a “preference” and a “set-aside”, HPI’s proposal for size standard/criteria, and sending a request to the PPB for the adoption of the SBA’s Table of Small Business Size Standards.
- June 21, 2007
PPB meeting for the consideration of SBUC’s recommendation on definition of small business. After discussion, the PPB approved the SBUC’s recommendation.
- July 16, 2007
SBUC meeting on the proposal for adoption of SBA Table of Small Business Size Standards and evaluation criteria for subcontracting to small businesses.
- August 6, 2007
SBUC meeting on the clarification of additional procedural guidelines on SBA size standards, follow-up letters sent to the County Mayors for representation on the SBUC, and suggestions for potential pilot sectors.
- August 16, 2007
PPB meeting for the consideration of SBUC proposal to adopt SBA size criteria for creating set asides and subcontracting requirements; and nomination of Ms Mary Patricia Waterhouse as a voting member.

Ms. Ann Murata and Mr. Larry Orr of the Small Business Administration (SBA) explained the enrollment process for small businesses with the SBA the process federal agencies go through in utilizing the Federal Acquisition Regulations (FAR). PPB member Ms. Torres voiced her concerns on adopting the entire FAR, Subchapter D, Socioeconomic Programs, Part 19 as part of the rules. Ms. Jessica Horiuchi said on behalf of the HPI, she would volunteer the institute to redraft the amendment to specify which sections of the FAR be incorporated.

- October 18, 2007
PPB meeting where Deputy Attorney General Pat Ohara informed the PPB that Mr. Terry Thomason called her to say that because Ms. Jessica Horiuchi left the firm of Alston Hunt Floyd and Ing, he would assist with drafting the guidelines on which sections of the FAR, Subchapter D, Socioeconomic Programs, Part 19 that should be incorporated into the SBUC size standard rules.

ATTACHMENT A

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- November 5, 2007
SBUC meeting regarding the PPB's approval of Ms. Mary Patricia Waterhouse as a voting member of the SBUC, recommendation to the PPB to approve Mr. Kalbert Young, William Takaba and Wallace Rezentes as voting members of the SBUC, recommendation of the PPB regarding the adoption of the SBA guidelines of the FAR size standards, follow-up and discussion from the SBA on the Federal process of determining set asides for small business, discussion on potential pilot sectors, and budgetary issues.
- November 15, 2007
PPB meeting where Mr. Kalbert Young, William Takaba, and Wallance Rezentes were approved as voting members of the SBUC,

ATTACHMENT B

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Adoption of Chapter 3-127
Hawaii Administrative Rules

Xxxxxxx xx, 2007

1. Chapter 127 of Title 3, Hawaii Administrative Rules, entitled "Small Business Assistance Preference Rules" (Interim) is adopted to read as follows: _____

"HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 127

SMALL BUSINESS ASSISTANCE PREFERENCE RULES (INTERIM)

~~§3-124-70 Purpose~~

~~§3-124-71 Small Business Utilization Council~~

~~§3-124-72 Administrator of the State Procurement Office~~

~~§3-124-73 Chief procurement officers and heads of purchasing
_____ agencies~~

~~§3-124-74 Procedures and Clauses~~

§3-127-1 Purpose

§3-127-2 Applicability

§3-127-3 Definitions

§3-127-4 Small Business Utilization Council

§3-127-5 Qualification procedure

§3-127-6 Solicitation procedure

§3-127-7 Evaluation and contract award

§3-127-8 Disputes and challenges

12/20/07

§3-127-1

§3-127-9 Record of small business procurements

~~§3-127-1 3-124-70~~ Purpose. The purpose of this subchapter is to establish procedures to implement the Hawaii Small Business Preference program. The procedures are intended to be flexible to allow for ongoing assessment and modification to promote the growth and development of small businesses to:

- (1) Strengthen and nurture emerging Hawaii industries;
- (2) Increase competition by broadening the ~~local~~ small business contractor base;
- (3) Develop and enhance the ability of ~~local~~ small businesses to ~~win~~ obtain and successfully perform federal, state, and local government governmental contracts;
- (4) Provide increased employment opportunities for ~~local~~ workers in high-skill trades and technical fields;
- (5) ~~Ensuring the Small Business Preference program is implemented so as to maximize~~ Maximize competition and obtain quality goods, services, and construction at ~~reasonable prices;~~
- (6) Assist small businesses in learning how to do business with the State; and
- (7) Assist and enable state and county agencies to achieve a goal that twenty percent of their annual purchases of goods, services, or construction are awarded to small business. [Eff _____] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

Justification:

The purpose of Act 50 is to create set-asides for the growth and development of small businesses and not to establish a preference program.

§3-127-2 Applicability. (a) These rules shall apply to solicitations made pursuant to chapter 103D issued by a governmental body.

(b) The procurement policy board by rules, or the chief procurement officer or designee by written determination, shall determine which solicitation shall be subject to this chapter.

(c) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff _____] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-3 Definitions. Definitions are in section 103D-901, HRS. The following definitions also apply to this chapter:

"Disadvantaged Business Enterprise (DBE) Program" is a program to assist disadvantaged businesses under the State of Hawaii Department of Transportation (DOT).

"Small Business" means a for-profit business that is independently owned and defined and qualified as a small business under one of the SBA programs of the United States Small Business Administration (SBA), and the disadvantaged business enterprise under the State of Hawaii Department of Transportation (DOT).

"Small Business Administration (SBA)" is the agency of the federal government whose function is to aid, counsel, and assist small businesses and help small businesses receive a fair portion of government contracts and sales of surplus property.
[Eff] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-901 and 103D-902)

§3-127-4 ~~3-124-71~~ Small Business Utilization Council. (a) As provided by subchapter 4 of chapter 3-121, Hawaii Administrative Rules, the procurement policy board may establish an advisory council to assist with development of rules and other criteria for this chapter. There is established a Small Business Utilization Council. The Council shall consist of:

Voting Members

(b) Voting members of the small business utilization council shall consist of:

- (1) [Chair — Director,] Department of Business, Economic Development and Tourism, the director or designee, shall serve as chair;
- (2) [Vice-Chair — Director,] Department of Accounting and General Services, the director or designee, shall serve as vice-chair;
- (3) [Member — Director,] Department of Transportation, the director or designee; and
- (4) [Member — Such other agencies as many be nominated by the designated members and approved by the Board.] Any other agencies as may be nominated by the voting members and approved by the Procurement Policy Board.

Non-voting Members:

(c) Non-voting members of the small business utilization council shall consist of:

- ~~(5) Non-voting Member — Administrator of the State Procurement Office; and~~
- ~~(6) Such other non-voting members as may be nominated by the voting members and approved by the Board.~~
- (1) State Procurement Office, the Administrator; and
- (2) Any other agencies as may be nominated by the voting members and approved by the Procurement Policy Board.

~~[(b)]~~ (d) The council shall provide the Procurement Policy Board specific recommendations to:

- (1) Set annual small business utilization goals;
- (2) Adopt, and modify as needed, size standard criteria to identify business as qualified to participate in the program. As the initial program size standard criteria, the council may recommend the standards set under federal Small Business Administration programs and include as eligible contractors all those enrolled in Small Business Administration programs;
- (3) Identify emerging industries, geographic areas within the State, and under-utilized workforce resources where government purchases using small business preferences will promote the purposes of this subchapter and the improve the welfare of Hawaii's businesses and workers; and
- (4) Coordinate with purchasing agencies to promote and encourage set-asides for small businesses of such contracts as are appropriate for performance by small businesses.

~~[(e)]~~(e) The council shall monitor and analyze the results of the ~~[Hawaii]~~ Small Business ~~[Preference]~~ assistance program and prepare for the Procurement Policy Board, an annual small business utilization report suitable for public release ~~[and submission to the legislature and the governor]~~. The report shall contain data and analysis addressing:

- (1) The total dollar amount of expenditures on contracts awarded to small businesses under this program by purchasing agency;
- (2) Industries, geographic areas, labor pools or other groups targeted for assistance under the program;
- (3) Assessments of success achieved and short-comings identified in the operation of the program; and
- (4) Recommendations for program improvements.

~~[(d)]~~(f) In performing its obligations, the council may consult with ~~DBEDT~~ the department of business, economic development and tourism, and any other state or ~~local~~ county agency, industry groups, labor organizations, federal purchasing agencies, the federal Small Business Administration, and other organizations or groups the council deems helpful in achieving the goals of the program. [Eff _____] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

Justification:

Clarification is made that the procurement policy board with the assistance of the utilization council develops rules and other criteria for this chapter. Clarification is also made that this chapter is about a small business assistance program and not a preference program, and that it is not necessary to

§3-127-4

send the annual small business utilization report to the legislature and the governor.

§3-127-5 Qualification procedure. To be classified as a small business pursuant to this chapter a business must be certified a small business through the Small Business Administration (SBA) or the Disadvantaged Business Enterprise (DBE) Program. The responsibility for qualification and certification shall rest upon the business desiring the certification. [Eff] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-6 Solicitation procedure. (a) Solicitations shall include a reference to this chapter.

(b) Procurements determined to be appropriate for small businesses shall be solicited from only small businesses that are certified as a small business. Offers received from businesses that are not certified as a small business shall be considered non-responsive and will be rejected.

(c) The chief procurement officer or designee shall also encourage the use of small business as subcontractors on large contracts that are not susceptible to performance by a small business. Contract amounts awarded to a certified small business subcontractors may be included in meeting a purchasing agency's goal of small business awards.

(d) The contractor shall clearly identify the portions of its offer that are awarded to certified small business subcontractors. [Eff] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-7 Evaluation and contract award. a) To be eligible for an award in accordance with this chapter, a business shall be certified in accordance with section 3-127-5 no later than the date set for receipt of offers for the solicitation.

(b) A contractor or subcontractor shall provide or make available to the purchasing agency, their applicable small business certification to qualify as a small business.

(c) Contract award shall be made to the responsive and responsible offer meeting the requirements of the solicitation and this chapter. [Eff] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

§3-127-8 Disputes and challenges. (a) A dispute or challenge of a small business certification may be filed with the purchasing agency. The agency shall check the validity of

the business's certification and may request additional information to determine the validity of the certification.

(b) Within fifteen calendar days of receiving the dispute or challenge, the purchasing agency shall approve or reject the certification in question and advise the small business and business challenging the certification of the determination.

(c) If the dispute or challenge is denied, the challenger within seven calendar days of the denial may file a request for review by the chief procurement officer. The chief procurement officer shall review the facts pertinent to the challenge and issue a final determination within twenty calendar days of receipt of the request for review.

(d) Any business that is found to have deliberately falsified their small business certification shall be subject to the debarment and suspension provisions of Chapter 126 of the Hawaii administrative rules. [Eff] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

Justification:

This section is required to help avoid delays as a result of a dispute or challenge of a small business certification.

§3-127-9 Record of small business procurements. (a) The chief procurement officer or designee shall maintain a record of all awards made pursuant to this chapter. The record shall contain at a minimum the total dollar value of contracts awarded to small businesses and name of awardee.

(b) Awards under this chapter shall be posted electronically within seven calendar days of the award, on the State Procurement Office webpage provided for this purpose. [Eff] (Auth: HRS 103D-202, 103D-902) (Imp: HRS 103D-902)

Justification:

This process will allow for the ease of collection of data from all agencies and jurisdictions.

§3-124-72 Administrator of the state procurement office.
This section not necessary.

HRS §103D-201 on creation and membership of the procurement policy board (PPB) provides for support and staffing to the PPB.
HAR §3-121-2 on procurement directives provides for issuance by the PPB.

HRS §103D-212 on collection of data concerning public procurement allows for the collection of data by CPOs and heads of agencies.

12/20/07

HRS §103D-213 on procurement advisory groups allows for advisory groups to assist in the development of procurement in specific areas, and any other matters.

Justification:

For administration of statutes and its rules, the SPO policy, and as directed by the Office of the Lt Governor, the office responsible for rules, has been to streamline the HARs so as not to replicate the statutory requirements in rules.

§3-124-73 Chief procurement officers and heads of purchasing agencies.

This section not necessary.

HRS §103D-205 on authority and duties of the CPO requires adherence to the provisions of all chapters and rules adopted by the PPB.

HRS §103D-212 on collection of data concerning public procurement allows for the collection of data by CPOs and heads of agencies.

Justification:

For administration of statutes and its rules, the SPO policy, and as directed by the Office of the Lt Governor, the office responsible for rules, has been to streamline the HARs so as not to replicate the statutory requirements in rules.

§3-124-74 Procedures and clauses.

Comment:

This section needs to be simplified and made user friendly, to enable agencies and businesses to step through each process. As written, this section is difficult to follow, the wording is not easy to comprehend, and not easily applied to the solicitation process. To assist users of these rules, both governmental and businesses, will need to reword this section to simplify the language, processes, and steps so it can be fully understood by all levels of agencies and businesses.

Examples:

1. Section 3-124-74 is 16 pages; should be simplified for user to easily comprehend and implement. Recommend further discussions with user agencies and other organizations.
2. The provision in section 3-124-74(a)(2) regarding "Meaning of Representation by Offeror & Protest Against Status" are not clear. Challenges to a small

business representation must follow applicable protest procedures in HAR Chapter 3-126. A more appropriate challenge process is proposed in section 3-127-8 of Attachment B.

3. The various provisions throughout section 3-124-74 that shall be included in solicitations such as "Notice of Small Business Set-Aside", "Meaning of Representation by Offeror & Protest Against Status", "Small Business Program Representations", "Very Small Business Set-aside", needs to be clear on how a purchasing agency is to implement and apply to a solicitation.
4. Paragraphs in Section 3-124-74 (5) on "Utilization of Small Business Concerns" seems to establish policies, but as stated in the HAR, it is not clear what is the intent of these clauses, or are they listed only as examples.
5. The procedures and provisions of sections "Small Business Subcontracting Plan (Jul 2005)", "Incentive Subcontracting Program", "Liquidated Damages-Subcontracting Plan", and "Limitations on Subcontracting" should be simplified and made easier to understand; needs to be clear on how a purchasing agency is to implement and apply to the procurement process.