

PROCUREMENT POLICY BOARD (PPB)
1151 Punchbowl Street, Conference Room 410
Honolulu, Hawaii 96813

Regular Meeting
November 18, 2010
1:00 pm

AGENDA

- I. Call to Order.
- II. Approval of Minutes - Meeting of August 19, 2010.
- III. Proposed amendment to Hawaii Administrative Rules (HAR) chapter 3-124, *Preferences*, for consideration as interim rules due to Act 175, SLH 2009 - Part II on Procurement Preferences. HAR changes are to sections in Subchapter 1 - Hawaii Products.
- IV. Status update on HAR chapter 3-124, Subchapter 9 - Small Business Preference Rules (Interim), effective August 24, 2009.
- V. Announcements.
- VI. Adjournment.

Agenda and available agenda items may be viewed at <http://hawaii.gov/spo/procurement-policy-board-minutes-of-meeting>. Individuals may present testimony on matters on the Procurement Policy Board's agenda when the agenda item is taken up by the Board. Individuals intending to testify should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting. Written testimonies will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, November 16, 2010. Testimonies received after the November 16, 2010 deadline will be forwarded to the board as time permits. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., November 15, 2010 to discuss accommodation arrangements.

Agenda Item III

§3-124-1.01 Applicability. (a) These rules shall apply to all solicitations made pursuant to sections 103D-302 and 103D-303, HRS, issued by a ~~[purchasing agency]~~ procurement officer when a registered and qualified Hawaii product is available ~~[where the product is required]~~.

(b) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff and comp 11/17/97; comp 11/25/02; am and comp 5/20/04; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

JUSTIFICATION:

- Non-substantial amendments for clarity, consistency and style.

§3-124-2 Definitions. Definitions are in section 103D-1001, HRS. The following definitions apply to this chapter:

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

- ~~(1) The cost to mine, excavate, produce, manufacture, raise, or grow the materials in Hawaii;~~
- ~~(2) The added value of that portion of the cost of imported materials that is incurred after landing in Hawaii;~~
- ~~(3) The cost of labor, variable overhead, utilities, and services incurred in the production and manufacturing of materials or products in the State;~~
- ~~(4) Fixed overhead cost and amortization or depreciation cost, if any, for buildings, tools and equipment situated and located in the State and utilized in the production or manufacturing of a product.]~~

"Hawaii products list" means the list ~~[published]~~ compiled by the administrator ~~[itemizing those]~~ of products ~~[that have been found]~~ qualified as Hawaii products, the names and addresses of the manufacturers, the classes and preference percentages ~~[that]~~ the products will be allocated ~~[if they]~~ to meet the requirements for which offers are solicited.

"Non-Hawaii product" means a product that is not registered or qualified ~~[on the]~~ as a Hawaii ~~[products list]~~ product.

"Registered Hawaii product" means a Hawaii product ~~[that is registered on the]~~ certified as a Hawaii ~~[products list]~~ product.

"Qualified Hawaii product" means a Hawaii product reviewed, qualified. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp 5/20/04; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

JUSTIFICATION:

- Definition for "Hawaii input" deleted as Act 175, SLH 2009 already provides for the definition.
- Definitions amended to be aligned with Act 175. Pursuant to HB 1470 HD1, SD 1, CD1 Section 6, page 12, line 15, allows the offeror to submit with the offer a self-certification from the manufacturer or producer of the product.
- Definition for "qualified Hawaii product" is added to provide clarity. The procurement officer has the authority to determine if the product qualifies for Hawaii product preference for that particular solicitation.
- Non-substantial amendments for clarity, consistency and style.

§3-124-3 Qualification procedure. (a) A Hawaii product requires over fifty percent Hawaii input towards the total cost of the product for:

- (1) Class I products mined, excavated, produced, manufactured, in the state; or
- (2) Class II products are agricultural, aquacultural, horticultural, silvicultural, floricultural, or livestock product raised, grown, or harvested in the state.

(b) The responsibility for obtaining qualification shall rest upon the person desiring the preference by either submitting an application to the administrator or to the procurement officer of a specific solicitation. Any person desiring a preference pursuant to this subchapter, ~~[must]~~ shall have the product(s) qualified and registered on the Hawaii products list~~[-]~~by:

- (1) An application for Hawaii product preference may be submitted to the procurement officer at the time a solicitation is issued, provided the product meets the solicitation requirements or any other criteria, prior to the due date specified in the solicitation. An addendum, if applicable, shall be issued to notify potential offerors of qualified Hawaii product for the solicitation which the certification was requested; or
- (2) ~~[The responsibility for qualification shall rest upon the person desiring the preference. The product(s) shall be found qualified and on the Hawaii products list before a preference may be granted.]~~ Persons desiring to qualify their product(s) by registering with the state procurement office shall complete ~~[an application according to instructions]~~ the application and file with the administrator.

(c) Financial information submitted ~~[to the administrator pursuant to these rules]~~ for the purpose of determining classification of a product shall be treated as confidential ~~[when a person has made a written request for confidentiality]~~. In accordance with chapter 92F, HRS, the administrator or the procurement officer, shall properly safeguard such information and shall not make it available to the public.

~~[(b)]~~ (d) ~~[A single application may be submitted for more than one product; however, separate data sheets shall be submitted for each product for which registration is requested. Further, it is necessary that each]~~ Each product shall be specified clearly and not by broad category of product.

~~[(c)]~~ (e) Cost data for each product shall reflect the product's actual total production cost per unit. ~~[for the most recent full accounting period. If a product has not been in production during the full accounting period, approval may be granted based on cost data representing that shorter period.]~~

~~[(d)]~~ (f) ~~[If upon]~~ Upon completion of the certification review as a qualified Hawaii product, if the ~~[administrator]~~

procurement officer finds that a product has qualified as a Hawaii product, the ~~[administrator]~~ procurement officer shall ~~[so]~~ notify the approved applicant in writing of the qualified Hawaii product(s), and submit the approved application to the state procurement office within five working days of the approved date [7]. Within five working days of receiving the approved application from the procurement officer, the administrator shall list the qualified Hawaii product on the Hawaii products list as a registered Hawaii product[7] with its effective date, unless upon further review by the administrator the product is determined not qualified. ~~[and notify the chief procurement officers and heads of purchasing agencies or designees of the decision].~~ Applicants whose products do not qualify as a Hawaii product for a solicitation, or for the Hawaii products list shall be notified in writing of the decision and the reasons ~~[therefor].~~

(g) Non-approved applicants may appeal the decision of the administrator or the procurement officer:

- (1) [Any applicant whose product was determined not to qualify for registration on the Hawaii products list or who contests the classification may resubmit their application within thirty days addressing the reasons therefore] The applicant shall file a written request for reexamination of facts to the administrator within five working days of the notification date. The administrator shall respond to the applicant within thirty days and shall have the sole discretion in determining qualification for the preference [-]; or
- (2) The applicant shall file a written request for reexamination of facts to the procurement officer for a specific solicitation within five working days of the notification date. The procurement officer shall respond to the applicant within five working days and shall have the sole discretion in determining the preference qualification.

~~[(e)]~~ (h) Should the administrator receive a ~~[protest]~~ request challenging the validity of the qualification, classification, or reexamination of a Hawaii product, the administrator may request an audit of the information provided should the need arise to determine if the ~~[proper classification of the]~~ product is qualified as defined under Hawaii product in section 103D-1002, HRS. A request for audit shall be sent to the person having requested registration of the product on the Hawaii products list, and the person shall bear the cost of the audit. The administrator or procurement officer may also request any additional information determined necessary in order to qualify or determine proper classification. ~~[The administrator shall approve or reject the classification for each Hawaii product and advise the applicant or contractor within thirty days after receipt of information.]~~

(i) Should the procurement officer receive a request to challenge the validity of the qualification, classification, or reexamination of a Hawaii product, the request shall be received not later than five working days after the issuance of the written notification, and shall contain a specific statement of the factual grounds upon which reversal is sought. The

determination required by this section shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law.

~~[(f)]~~ **(j)** Application, renewal, and other forms required shall be provided by the administrator. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; comp **5/20/04; am and comp**] (Auth: HRS §103D-202) (Imp: HRS §§92F-14, 103D-1002)

JUSTIFICATION:

- Act 175, SLH 2009 allows the manufacturer, as part of the offer, to self-certify their products, which may be submitted to a procurement officer for a specific solicitation or directly to the SPO. Form SPO-038, *Hawaii Product Preference*, replaced three SPO forms to simplify the self-certification process for the manufacturer and the procurement officer.
- The Act reduced the number of Hawaii product classes from three to two, for products mined, excavated, produced, manufactured, raised, or grown in the state, and require over fifty percent Hawaii input counted towards the total cost of the product.

Class I 10% preference

Class II* 15% preference

*Any agricultural, aquacultural (aqua-farming), horticultural, silvicultural (forestry), floricultural (flower farming), or livestock product that is raised, grown, or harvested in the state.

HAR §3-124-3(e) - Previously the cost data submitted on the Hawaii product application reflected the product's actual total production cost for the full accounting period or for a lesser period if in production for less than a year. Manufacturers found this method of calculating Hawaii input and non- Hawaii input confusing or difficult to calculate, prefer to calculate based on the unit cost per item.

HAR §3-124-3(f) - When the form SPO-038 is approved, the qualified Hawaii product shall be posted to the Hawaii product list on the SPO website within 5 working days of receiving the approved application from the Procurement Officer, to improve efficiency and transparency for agencies and companies to view. No longer is it necessary to send notices of updates or amendments to the Hawaii product list to all CPOs and heads of purchasing agencies.

Disapproval of product(s) language has been added as authorized by the Act to lessen any procurement delays. Agencies handling a request for reexamination do not have the time necessary to have an audit completed, as in SPO's case; therefore, their process of resolving a qualification dispute is shortened, where by the procurement officer makes the final decision.

- Non-substantive amendments for clarity, consistency, and style.

§3-124-4 Solicitation procedure. (a) Solicitations to which this preference is applicable shall refer to this subchapter and shall also contain a notice ~~[referring to the place]~~ where the Hawaii products list ~~[may be examined]~~ is available.

(b) To be eligible for preference, a product shall be qualified and registered on the Hawaii products list.

(1) [The] A Hawaii product approved by the state procurement office shall have an effective date of ~~[when a product is determined to be qualified and registered on the Hawaii products list is]~~ one month after the product has been approved ~~[by the state procurement office].~~

(2) The procurement officer shall specify in the public notice and solicitation the application due date and instructions for submittal. The due date shall be at least five working days after the public notice release date for bids pursuant to section 103D-302, HRS, and at least ten working days after the public notice release date for proposals pursuant to section 103D-303, HRS. The procurement officer shall issue addenda of new qualified Hawaii product(s).

(c) To be listed in a solicitation, the effective date when a product was qualified and registered on the Hawaii products list shall be no later than the date a solicitation is first publicly advertised.

~~(d) [The classification of a registered Hawaii product on the date a solicitation is first publicly advertised shall determine the preference allowed the product.]~~

~~[(e)]~~ Prospective offerors shall be informed of the registered Hawaii product and its established class that meets the requirements for which offers are being solicited.

(1) When more than one registered Hawaii product meeting minimum requirements is available, a schedule describing all registered Hawaii products and their established classes shall be included in the solicitation.

(2) ~~[Purchasing agencies]~~ Procurement officer shall provide in the solicitation appropriate space(s) for offerors to indicate selection of the Hawaii products preference and to list the Hawaii product and its price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp 5/20/04; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

JUSTIFICATION:

- According to Act 175 amendments, the offeror may submit a Hawaii product self-certification with their offer, which is problematic for the State when all potential offerors do not have equal access to updated qualified Hawaii products. Therefore, the procurement officer is encouraged to set an earlier date and time to receive such applications and issue an addendum indicating any new qualified Hawaii products for their solicitation. Allowing 5 working days for IFB's and 10

working days for RFP's to submit the application is adequate time for the offeror to adjust their offer before it's due. For example, if an application is submitted with their offer, the agency has no choice but to accept the application and make a qualifying determination during evaluation period. In this situation, no addendum can be issued because the solicitation has already closed, and other potential offerors were not given notice of these new qualified products.

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§3-124-5 Evaluation procedure and contract award. (a) ~~[In any expenditure of public funds resulting from a contract award, a purchasing agency shall purchase any required product from the Hawaii products list where the registered Hawaii product is available, provided the product meets the specifications and the selling price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax and does not exceed the lowest delivered price in Hawaii f.o.b. jobsite, unloaded, including applicable general excise tax and use tax, of a similar non-Hawaii product by more than three per cent, where class I registered Hawaii products are involved, or five per cent where class II registered Hawaii products are involved, or ten per cent where class III registered Hawaii products are involved.]~~ An application submitted with the offer shall be accepted by the procurement officer for determination review as prescribed in §3-124-3.

(b) For evaluation purposes, no preference shall be considered when only registered Hawaii products are offered.

(c) Where offers include both registered Hawaii products and non-Hawaii products, for the purpose of determining the lowest evaluated offer, the offer for the Hawaii product shall be decreased by its applicable ~~[three per cent, five per cent, or]~~ ten per cent or fifteen per cent classification preference

(d) The contract amount shall be the amount of the price offered, exclusive of any preference.

(e) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
- (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
- (4) Recycled products, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
- (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
- (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.

(f) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical total prices, award shall be made to the offeror offering a registered Hawaii product in preference to a non-Hawaii product.

(g) For proposals submitted pursuant to section 103D-303, HRS, and after taking into consideration all applicable preferences, the procurement officer shall award the contract pursuant to section 3-122-57. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp 5/20/04; am and comp

] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

JUSTIFICATION:

- Sub-section (a) is deleted to be aligned with the amendments in Act 175. The procurement officer is only obligated to list a Hawaii product that meets the requirements of the solicitation for consideration of a preference.
- Non-substantive amendments for clarity, consistency, and style.

§3-124-6 Change in class status. (a) A person whose product is on the Hawaii products list shall be responsible for informing the administrator of:

- (1) A change to the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of the product(s), which could affect the product(s) classification;
- (2) Discontinuation of product; or
- (3) [any] Any change affecting the classification or qualification of the product [~~within sixty days of the change~~].

(b) [~~If, since the original application, there has been a~~ Any [~~change~~] changes affecting [~~in~~] either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of the product(s), which could affect the product(s) classification, a new application [~~must~~] shall be submitted to the administrator within [~~sixty~~] five working days of the change. The administrator shall make a determination within fifteen working days of submittal of new application of product classification.

(c) Any change on a product application submitted as part of an offer that materially alters the offeror's ability to supply the Hawaii product:

- (1) The offeror shall notify the procurement officer of the change no later than five working days from when the offeror knows of the change by submitting a letter to the procurement officer, explaining why the Hawaii product is not available, the estimated date it will be available, and if applicable, attach a confirmation letter from the manufacturer or producer of the Hawaii product.
- (2) The procurement officer shall notify the administrator within five working days of the receipt of the offeror's letter indicating the discontinuation of the Hawaii product or its availability. Upon receipt of the offeror's letter, the administrator shall review the letter and update the Hawaii product list accordingly.

[Eff 12/15/95; comp 11/17/97; comp 11/25/02;

comp 5/20/04; am and comp

] (Auth: HRS

§103D-202) (Imp: HRS §103D-1002)

JUSTIFICATION:

- Recommend notification to the SPO and the procurement officer no later than five working days of any change, due to Act 175, page 15, line 8, that states, "...the offeror shall immediately notify the chief procurement officer in writing..." and since solicitations could potentially award a project based on applying a preference for a product that no longer is qualified to be a Hawaii product, requiring a quicker notification by the person responsible for the application is necessary.
- Non-substantive amendments for clarity, consistency, and style.

~~§3-124-7 [Biennial Product renewal. (a) All persons whose product(s) is registered on the Hawaii products list will be notified by the State thirty days prior to the date for biennial renewal or if a new application is required. A sixty day grace period is allowed for both the renewal and the new application after the preference expiration date which normally will be the end of an accounting period.~~

~~— (b) An affidavit for renewal shall be submitted if, since the filing of the original application, there has been no change in either the method of production or the relative values of the Hawaii and non Hawaii inputs to the production cost affecting the product classification. Provided the administrator is satisfied that the classification of a registered Hawaii product is not changed, the administrator shall renew the registration and classification of the product.~~

~~— (c) Failure to complete the biennial renewal or to provide any further information requested by the administrator shall be grounds for rejecting an application or for disqualification of the product.~~

~~— (d) Any person receiving a notice for renewal for Hawaii products list qualification shall advise the administrator immediately if there is any reason why the person cannot comply within the sixty day grace period.] [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp 5/20/04; R] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)]~~

JUSTIFICATION:

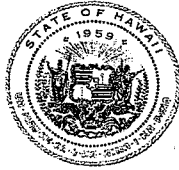
- Repeal this section. Product renewal is not necessary because §3-124-6 is clear, the person whose product is on the Hawaii products list is responsible for informing the administrator of any change that will affect the products qualification or if the product is discontinued. The SPO no longer has the resources to implement the biennial product renewal process.

§3-124-8 Termination. If change of status is not reported as required in section 3-124-6 [~~, or if the biennial renewal is not provided as required by section 3-124-7~~], the administrator shall terminate the registration of the product effective at the end of the sixty day grace period allowed. Any person terminated that desires to be reinstated on the Hawaii products list shall submit a new application. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp 5/20/04; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

JUSTIFICATION:

- Non-substantive amendments for clarity, consistency, and style.

Agenda Item IV




**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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Tel: (808) 587-4700 Fax: (808) 587-4703
www.hawaii.gov/spo

SPO 11-064

November 12, 2010

TO: Procurement Policy Board
FROM: Aaron S. Fujioka 
SUBJECT: Status Update on HAR chapter 3-124, Subchapter 9
Small Business Preference Rules (Interim)

The Small Business Preference Rules (Interim) was adopted and effective on August 24, 2009. As an interim rule, this subchapter is due to expire on February 23, 2011, 18-months after the effective date.

To provide background on this issue, attached is Attachment A, the SPO *Comment and Recommendations* dated December 20, 2007 that contains the initial history on this issue. Attachment B is an updated Chronology of the Implementation of Act 50, SLH 2005. The Attachment C is a compiled listing of questions/comments provided by the SPO to the Small Business Utilization Council (SBUC) at its 9/8/08 meeting.

According to the SBUC Annual Reports for years 2008 and 2009, one of the main points were that "...Contracting has yet to take place within the Small Business Preference program; therefore, to date, no amounts have been expended under this program". The SBUC and the Department of Business, Economic Development & Tourism (DBEDT) have not addressed the numerous questions that remain unanswered to advise the Board accordingly.

The rules are complicated and confusing, and agencies have not been able to apply the rules for the past three years, even after the Hawaii Procurement Institute's 2009 training was conducted.

The statute is not implementable without rules and although HAR chapter 3-124, Subchapter 9 (Interim) will not expire until February 23, 2011, it would not ensure any meaningful purpose to continue the existing rules.

The Board may want to consider requesting assistance from DBEDT in promulgating new rules as they are responsible for the subject matter.

attachments

LINDA LINGLE
GOVERNOR

AARON S. FUJIOKA
ADMINISTRATOR



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SPO-08-0136

December 20, 2007

TO: Procurement Policy Board
FROM: Aaron S. Fujioka *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.

12/20/07

ATTACHMENT A
Page 2

- 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.

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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,

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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

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§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:

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"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:

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§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

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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.

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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

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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.

STATE PROCUREMENT OFFICE
Chronology on the Implementation of Act 50, SLH 2005

- December 20, 2007
Procurement Policy Board (PPB) meeting, SPO 12/20/07 memo, *Comments and Recommendations* to HAR chapter 3-124, Subchapter 9 (Interim) was distributed to the PPB for its review; to be placed on PPB agenda for next meeting for discussion or consideration. PPB approved HAR §3-124-73.1 as interim.
- January 2008
Small Business Utilization Council (SBUC) Annual Report provided summary of 6 SBUC meetings; reported "Contracting has yet taken place within the Small Business Preference Program; therefore, no amounts have been expended under this program."
- January 17, 2008
PPB discussion on the SPO 12/20/07 memo on *Comments and Recommendation*. SPO directed to follow-up with SBUC on identifying targeted areas of emerging industries, geographic areas, and under utilized workforce resources. Discussion on applicability of HAR in chapter 3-124 or 3-127. HAR chapter 3-124, Subchapter 9 (Interim) was approved for compilation as interim; HAR became effective 3/3/08.
- February 21, 2008
PPB discussion on SPO memo to SBUC; was informed SBUC will place on agenda for next SBUC meeting. PPB approved moving HAR 3-124, Subchapter 9 to chap 3-127.
- May 20, 2008
Governor Lingle issued Executive Memorandum 08-02 to all State Departments to promote the growth and development of small business by requiring that no less than 20% of the State contracts be procured by either creating set-asides contracts for small businesses or by requiring the use of small businesses as subcontractors on large contracts. The directive made reference to HRS §103D-906, Preference for small businesses; set-asides; use as subcontractors.
- August 21, 2008
PPB accepted SBUC recommendation to use SBA guidelines for small business size determination; geographic area set asides for Waianae, Kau, and Puna Districts, and Hamakua Coast and the island of Molokai; and modify HAR §3-124-71(a)(5) to add SPO Administrator as voting member to SBUC. The PPB request to SBUC on clarification of target areas.

- September 8, 2008
SBUC meeting, SPO distributed compiled listing of questions/comments (Attachment C).
- October 6, 2008
SBUC welcomed SPO Administrator as a voting member.
- November 3, 2008
SBUC meeting discussion on proposed Hawaii Procurement Institute (HPI) training.
- December 18, 2008
PPB reviewed 10/8/08 SBUC memo to justification/recommendations; PPB approved 'custom computer programming/software development' as set-aside; defer 'alternate/renewable energy industry' sections for set-asides.
- January 2009
SBUC Annual Report provided summary of 7 SBUC meetings; reported "Contracting has yet to take place within the Small Business Preference program; therefore, to date, no amounts have been expended under this program."
- March 2, 2009
SBUC approval of final annual report.
- March 19, 2009
PPB review of SBUC recommendation for 'alternative renewal energy' to consider this sector as a targeted area; PPB request DBEDT/SBUC a rationalized list of NAICS codes for targeted types of procurement. DAGS executed an MOA/MOU with UH-HPI for workshops on the HAR for Small Business set-asides.
- March 20, 2009 and April 2, 2009
2009 HPI Small Business Preference Regulations Training held at UH-William Richardson School of Law.
- April 6, 2009
SBUC discussion; remaining discussion continued without any formal deliberation due to lack of quorum
- May 4, 2009
SBUC agreed to allow 'alternate members' to the Council; Ms. Wendy Imamura was approved as an 'alternate member' for City & County of Honolulu.
- May 21, 2009

PPB approved SBUC list of NAICS codes for energy efficiency, using 'target area – alternate energy'.

SPO provided status of interim HAR for small business will expire 9/2/09. As SBUC conducting on-going discussions on possible amendments, the SPO recommend the continuation of interim HAR chapter 3-124, Subchapter 9 to sustain continuing amendments to this subchapter. Compiled interim HAR would be presented to PPB at next meeting for consideration.

- July 6, 2009
At the SBUC meeting, Member Saito announced HPI conducting another workshop to be held on July 16.
[Note: As of the date of this document, no further SBUC meetings held since July 6, 2009.]
- July 16, 2009
PPB adopted the proposed amendments and compilation of the HAR chapter 3-124, Subchapter 9, Small Business Preference Rules (Interim) was approved; became effective 8/24/09. Incorporated §3-124-71, Small Business Utilization Council, amendment that was previously approved as interim; incorporated information provided in Procurement Directives on size determination, geographic areas for set-asides, and emerging industries; format and non-substantial changes; and compiled subchapter 9.
- August 24, 2009
Effective HAR chapter 3-124, Subchapter 9(Interim), compiled and amended. 18-month interim HAR period expires February 23, 2011.

SMALL BUSINESS SET-ASIDE RULES QUESTIONS/COMMENTS FROM AGENCIES/COUNTIES

Date	Question/Comment
6/30/08	<ol style="list-style-type: none"> 1. What is the definition of 'state contracts'? 2. Does the '20% of state contracts' apply to State pCards and purchase orders? 3. How is the '20% of state contracts' calculated? <ol style="list-style-type: none"> a. Meaning - does each Agency have to calculate 20% of its own contracts, or is the 20% calculated on an accumulated basis on the total state contracts? 4. Should agencies wait until they are trained in implementing the 'preference for small businesses' before they incorporate these preferences in order to avoid procurement challenges? 5. Step #2 in Section 3-124-73.1 mentions the head of the purchasing agency and subsection (1) states 'Procurements identified by the policy board for small business utilization.' Have these procurements been identified by the SBUC? 6. Step #2 also mentions '...industry or other targeted area approved by the policy board.' Has the SBUC identified such industries or areas? 7. Step #4 of the same section mentions the 'small business utilization plan' and allows for the inclusion of either the 'small business subcontracting incentive clause or liquidated damages.' Who is tasked with monitoring the compliance with the utilization plan and the incentive and/or liquidated damages clauses? <ol style="list-style-type: none"> a. Does the DBEDT director want to include the incentive clause or liquidated damages clause in the 'procurements for full and open competition'? Subsection 3-124-74(6) details both provisions and it may be in the State's best interest to have someone assigned to review all of the contracts for compliance. One can envision a big issue if one person invokes the liquidated damages provision while in a similar situation another person decides not to invoke the liquidated damages provision. Or likewise, with respect to the incentive, if one awards it and another does not. Furthermore, how will the incentive clause work based on the static contract budgets and DAGS requirements for encumbering funds? 8. When does the very-small business set-aside apply? Did the SBUC make any recommendations or the Board establish set aside criteria pursuant to subsection 3-124-74(4). Who makes the determination for DBEDT procurements? 9. Subsection (c) of the Small Business Subcontracting Plan (Jul 2005) clause states 'The Offeror, upon request by the procurement officer, shall submit and negotiate a subcontracting plan,...' With whom is the offerer negotiating the plan? The procurement officer? When does the negotiation take place, i.e. after the offerer is identified as the potential awardee? does the plan, which lists the probable sub-contractors count in determining who wins the bid? See subsection 3-124-74(5) which states the 'Chief Procurement Officer shall establish evaluation criteria to encourage subcontracting with small businesses.'? What about construction contracts which require selecting the 'low-bid'? How do you establish evaluation criteria for low-bid contracts? 10. What is an acceptable goal for the offerer's subcontracting plan? 20%? 50%? More? 11. Does HePS have the ability to segregate the vendors based on its size and annual revenue? Is there any program or process set up to help 'heads of purchasing agencies' determine if there are available contractors/vendors to perform the scope of services and submit bids to ensure 'fair competition' during the procurement? 12. Is there a form contractors should sign to represent in good faith that it is small business at the time of the written representation? If not, will one be generated? 13. What happens if it is determined that the work can be done by a small business but none submit a bid? Do we re-issue the invitation for bids with the same preference or do we then open it up to anyone? If we open to anyone, do the bidders have to include the small business utilization plan? 14. Has the AG Office drafted the specific provisions that must be incorporated in the Contracts for Goods and Services and/or Contract for Professional Services? 15. How would it be handled when a 'small business' subcontracts to a firm that is not 'small' and does most of the work? 16. In section 3-124-74(a)(3)(a), what is the proper wording for the size standard criteria to use for filling in the blank?
7/15/08	Am glad you understand that it will be a tough proposition to incorporate these small business preferences in our upcoming procurements because the Small Business Utilization Council (SBUC) is in the process of adopting guidelines and procedures.

SMALL BUSINESS SET-ASIDE RULES QUESTIONS/COMMENTS FROM AGENCIES/COUNTIES

Date	Question/Comment
7/1/08	<p>1) When will the rules become permanent? Do you or the SBUC expect any material changes to such rules before they are adopted?</p> <p>2) You mentioned the next SBUC meeting is in August. How often does the SBUC meet? What will the SBUC be acting on at that meeting?</p> <p>3) You mentioned training on this matter will be scheduled. Should we wait until we are trained in implementing the "preference for small businesses" before we incorporate these preferences in order to avoid procurement challenges?</p> <p>4) For DBEDT's attached agencies (rules state "head of the purchasing agencies"), who determines the size (either # of employees or annual revenue) of the contractor that can complete the scope of services? Who in DBEDT will make this determination?</p> <p>5) Step #1 in Section 3-124-73.1 mentions a "... size standard set by the policy board. ..." Has this size standard been set?</p> <p>6) Step #2 in the same section mentions the head of the purchasing agency and subsection (1) states "Procurements identified by the policy board for small business utilization." Have these procurements been identified by the SBUC?</p> <p>7) Step #2 also mentions "... industry or other targeted area approved by the policy board. ..." Has the SBUC identified such industries or areas?</p> <p>8) Step #4 of the same section mentions the "small business utilization plan" and allows for the inclusion of either the "small business subcontracting incentive clause or liquidated damages." Who is tasked with monitoring the compliance with the utilization plan and the incentive and/or liquidated damages clauses? Does the DBEDT director want to include the incentive clause or liquidated damages clause in the "procurements for full and open competition"? Subsection 3-124-74 (6) details both provisions and it may be in the State's best interest to have someone assigned to review all of the contracts for compliance. One can envision a big issue if one person invokes the liquidated damages provision while in a similar situation another person decides not to invoke the liquidated damages provision. Or likewise, with respect to the incentive, if one awards it and another does not. Furthermore, how will the incentive clause work based on the static contract budgets and DAGS requirements for encumbering funds?</p> <p>9) When does the very-small business set-aside apply? Did the SBUC make any recommendations or the Board establish set aside criteria pursuant to subsection 3-124-74 (4). Who makes that determination for DBEDT procurements?</p> <p>10) Subsection (c) of the Small Business Subcontracting Plan (Jul 2005) clause states "The Offeror, upon request by the procurement officer, shall submit and negotiate a subcontracting plan, ..." With whom is the offerer negotiating the plan? The procurement officer? When does the negotiation take place, i.e. after the offerer is identified as the potential awardee? Does the plan, which lists the probable sub-contractors count in determining who wins the bid? See subsection 3-124-74 (5) which states the "Chief Procurement Officer shall establish evaluation criteria to encourage subcontracting with small businesses."? What about construction contracts which require selecting the "low-bid"? How do you establish evaluation criteria for low-bid contracts?</p> <p>11) What is an acceptable goal for the offeror's subcontracting plan? 20%? 50%? More?</p> <p>12) Does HePS have the ability to segregate the vendors based on its size and annual revenue? Is there any program or process set up to help "heads of purchasing agencies" determine if there are available contractors/vendors to perform the scope of services and submit bids to ensure "fair competition" during the procurement?</p> <p>13) Is there a form contractors should sign to represent in good faith that it is a small business at the time of the written representation? If not, will one be generated?</p> <p>14) What happens if it is determined that the work can be done by a small business but none submit a bid? Do we re-issue the invitation for bids with the same preference or do we then open it up to anyone? If we open to anyone, do the bidders have to include the small business utilization plan?</p> <p>15) Has the Attorney General's Office drafted the specific provisions that must be incorporated in the Contracts for Goods and Services and/or Contract for Professional Services?</p> <p>16) Has DBEDT initiated any procurements or solicitations since May 23, 2008 with the small business set-aside or preference? If so, could you send me a sample that we can use?</p>
3/6/08	<p>What is a size standard</p> <p>Set asides are more appropriate for the grant process.</p> <p>These procedures open the door to price escalation and restricted competition. This is equivalent to reverse discrimination.</p> <p>Requirement for subcontracting plan will escalate cost</p>

SMALL BUSINESS SET-ASIDE RULES QUESTIONS/COMMENTS FROM AGENCIES/COUNTIES

Date	Question/Comment
	<p>Rules are very complicated and will require additional staff to interpret, monitor and report</p> <p>Counties do not have the capability to automatically track small purchase dollars. Even though Honolulu has the capability in our new ERP, it will take much effort to classify vendors.</p> <p>Who polices DBEDT and their designation decisions? Is there a public hearing process?</p> <p>Fluff--vendors self certify. Do you really believe we will do due diligence to validate? We will be open to protests and challenges.</p> <p>Rules add more requirements to an already strained workforce.</p> <p>Restricts competition and may jeopardize the quality of services.</p>
3/6/08	<p>Is there going to be any further guidance coming in regards to the implementation of these small business set asides before we will need to actually start applying them? Standard formatted verbiage to be used in bid documents, particular forms potential bidders claiming small business status will need to fill-out, etc.?</p> <ol style="list-style-type: none"> 1. The process for implementation is much too vague at this point, hindering any possibility of appropriate application. 2. Set asides, I agree, are more appropriate through a granting mechanism and not the procurement process. 3. Increased protests and challenges would be inevitable, along with increased staffing requirements. 4. Aaron Fujioka's letter to the Procurement Policy Board, dated December 20, 2007, references some of the original concerns expressed by Hawaii County as well.
3/4/08	<p>Briefly reviewed the interim rules disappointed that the rules continue to be written in a very confusing manner so as to elude a clear understanding on how the process or procedure should flow.... guess esoteric is the proper term to be applied.</p> <p>As it stands am not clear on how this process is to be integrated in the solicitations for goods, services, and construction. If I am unable to get a grasp on how this program should work, how am I to explain this to staff and user agencies?</p> <p>Refer to 3-124-72 (b) ... provide" ..size standards, .." I do not believe that this information has been provided.</p> <p>Refer to 3-124-73.1(a)(1) ..."the applicable small business size set by the policy board for the type of work to be solicited."</p>
3/5/08	<p>-Completely agree that the rules are confusing, and that the rules are a "work in progress". A couple of months ago, a couple of board members made the case that we needed to get something going on this right away because it had been a while since the law had been passed, and that certain members of the small business community ere in dire need of getting these rules passed, to the point where an additional month of deliberations could be harmful to various companies.....should have taken into considerations SPO's comments and proposed changes.</p> <p>-As I understand it, the rules have two basic premises:</p> <ol style="list-style-type: none"> 1. An agency may (emphasis on my) target 20% of their annual expenditures towards small business as defined (this part isn't in the procurement directive or the interim rules-you'll find it in the original law). 2. The Small Business Utilization council, of which your Finance Director is one of the members, is working on specific targeting of industries or areas (e.g. Molokai) that need economic development attention. These targeted procurements will be subject to the small business interim rule procedures. <p>-So while onerous, if this thing works correctly the implementation of these rules will be completely controlled by your CPO in the case of the 20% option, or heavily influenced by your CPO with respect to the SBUC recommendations. My thought is that you should hopefully have some input with your CPO as to how the scale of this program will negatively affect your operations, and I hope the CPO's will employ laser like targeting and keep the number of procurements subjected to these rules to a minimum. In the case of the 20% option, I believe that all of the counties clearly exceed the 20% threshold without batting an eye, and I'm hoping that we don't have to subsequently "prove it", because that would shut down my operation from doing anything productive. In my case, it would require an extra body to keep track of all. As it is, the subcontracting plan mentioned for targeted construction projects will be a pain in the okole, especially for the contractor who has to develop and implement it. for the Molokai example, we already have problems finding someone to go over there to work, and now if we target that area they have to write and follow a subcontracting plan?</p> <p>-Overall my opinion is that economic development initiatives have no place being tied into procurement law. That's why they have grants for. But</p>

SMALL BUSINESS SET-ASIDE RULES QUESTIONS/COMMENTS FROM AGENCIES/COUNTIES

Date	Question/Comment
	<p>the law was passed and we have to deal with it.</p> <p>-Finally, the size standards that you're referring to are copied from the US Small Business Administration. I recall seeing a chart somewhere.</p> <p>-I try to represent the viewpoint of the counties, especially with respect to our resource constraints.</p>
6/16/08	<p>Why small business set-aside cannot be implemented</p> <p>Section 16 - Contracts, Paragraph 1, Page 14</p> <p>Interim HAR 3-124-73 and 74 written for Small Business Practices or Utilization of Small Business concerns are not implementable as this stage and therefore it is recommended that it be removed from the budget execution policies.</p> <p>It is my understanding that the rules which require certain actions by certain bodies have not been done and therefore, cannot be implemented. Attached are comments. (Attachment A)</p>
7/22/08	<p>Upon review of the applicable sections of HAR Subchapter 9, Chap 3-124 on Small Business Preference Rules, the following are required to implement the small business program:</p> <p>HAR 3-124-73.1 Implementation of Small Business Preference by Heads of Purchasing Agencies</p> <p>This section requires:</p> <ol style="list-style-type: none"> 1. Step #1 - Identify the applicable small business size standard set by the PPB for the type of work to be solicited in the RFP document The PPB has not issue the applicable small business 'size standards' 2. Step #2 - Procurements identified by PPB...industry or targeted area susceptible of performance by a small business The PPB has not identified the targeted areas of emerging industries, geographic areas within the state, and under-utilized workforce resources. If HOPA set-asides a procurement not identified by the PPB, requires justification how the set aside will further the achievement of any small business utilization goals and whether set aside will promote the development of future competition work. 3. Step #3 - RFP shall include provisions provided in HAR 3-124-74(a)(1), (2), (3), (7) Various provisions need to be included in the RFP 4. Step #4 - If determine the procurement is not susceptible of performance by a small business, contractor shall develop/implement a small bus. Utilization plan and requires provision provided in HAR 3-124-74(s)(5); subcontracting incentive clause or liquidated charges clause (requires CPO or delegee approval); requires provision provided in HAR 3-124-74(a)(6) Various provisions need to be included in the RFP <p>Note: The following provisions shall be included:</p> <p>HAR 3-124-74(a)(1)"Notice to Offeror" shall be included in RFP</p> <p>3-124-74(a)(2)"Meaning of Representation by Offeror & Protest Against Status"</p> <p>3-124-74(a)(3)"Small Business Program Representations", and require Offeror to disclose its number of employees and gross revenues</p> <p>3-124-74(a)(7)"Limitations on Subcontracting"</p> <p>3-124-74(a)(5)"Utilization of Small Business Concerns" requires the prime contractor (Offeror) to submit and negotiate a subcontracting plan (plan made part of the contract), includes goals, total dollars planned to be subcontracted; description of types of supplies and services. Requires PPB small business eligibility criteria, to be published in PPB Directive; PPB has not determined this criteria</p> <p>HAR 3-124-74(a)(6)"Incentive Subcontracting Program" or "Liquidated Damages--Subcontracting Plan"</p> <p>HAR 3-124-74 Procedures and Clauses.</p> <ul style="list-style-type: none"> • Requires a Notice to Offerors be included in the solicitation, and various provisions (see Note above) • CPO shall establish evaluation criteria to encourage subcontracting with small business. • "Small Business Subcontracting Plan" applies to the entire contract period, has goals that are based on the Offeror's planned subcontracting in support of the contract. Plan shall be negotiated and made part of the contract prior to award, and shall include: <ul style="list-style-type: none"> • Goals, expressed in percentages of total planned subcontracting dollars; • Statement of total dollars planned to be subcontracted • Description of the principle types of supplies and services to be subcontracted and the types planned for subcontracting to small bus.

SMALL BUSINESS SET-ASIDE RULES QUESTIONS/COMMENTS FROM AGENCIES/COUNTIES

Date	Question/Comment
	<ul style="list-style-type: none"> • Description of the method used to develop the subcontracting goals • Description of the method used to identify potential sources • Name of individual employed by Offeror who will administer the subcontracting plan • Description of efforts the Offeror will make to assure small bus concerns have an equitable opportunity to compete for subcontracts • Assurance that the Offeror will require all subcontractors that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction work) to adopt a subcontracting plan that complies • Assurance that Offeror will cooperate in any studies or surveys • CPO to determine whether to include a "Incentive Subcontracting Program" or "Liquated Damages --- Subcontracting Plan" <p>Based on the above HAR requirements, various aspects of the small business program require planning and determinations by the HOPA and CPO, and HARs need clarification/determination by the PPB prior to the purchasing agency being able to apply to a solicitation. At a minimum, to implement the subcontracting requirements will need the PPB to define small business concern and issue the eligibility criteria (ref. HAR 3-124-74, page 15-16). As this is pending, no action can be taken by the purchasing agency.</p>
8/1/08	<ul style="list-style-type: none"> • Section 3-12471(b)-The Small Business Utilization Council was to provide utilization goals; adopt size standard criteria to identify business as qualified to participate in the program; identify emerging industries, geographic areas within the State, and under-utilized workforce resources where government purchases using small business preferences would promote the purposes of the subchapter; and coordinate with purchasing agencies to promote and encourage set-asides for small businesses of such contracts as are appropriate for performance by small business. If this was done, the University has not received any of this information. • Section 3-124-71.(b) - Procurement Policy Board actions on Council recommendations were to be implemented through issuance of procurement directives and circulars to inform purchasing agencies of goals, size standards, and procedures under the program. This has not been done. • Section 3-124-73.1.(a)(1) - Purchasing agencies were to identify in each proposed procurement the applicable small business size standard set by the policy board for the type of work to be solicited. The policy board has not set the applicable small business size standard for the different types of work. • Section 3-124-74.1(a)(2)(i) - The Council was to recommend to the policy board for its approval the identification of targeted areas of emerging industries, geographic areas within the state, and under-utilized workforce resources where government purchases from small businesses would promote the purposes of HRS Section 103D-906. Has this been done? • Section 3-124-74(a)(3) - This section requires that the following provision be included in solicitations: Small Business Program Representations (a) The small business eligibility criteria for this is ____ (The procurement officer shall insert size standard, geographic location of headquarters or other criteria as published in Board directives). Size standards, geographic locations of headquarters or other criteria has not been published in Board directives. • Section 3-124-74(a)(5) - This section requires that the following clause be included in the solicitation: (a) Definitions. As used in this contract, a small business concern is a firm which ____ (state small business eligibility criteria as published in Board directives). Small business eligibility criteria has not been published in Board directives. Unless clarifications or directives are issued to address the above areas, it will not be possible or it will be very difficult for purchasing agencies to utilize these rules. In addition, it would be very helpful if training sessions were to be conducted to assist purchasing agencies in utilizing these rules.

S3-124-74

UTILIZATION OF SMALL BUSINESS CONCERNSPART 1 - GENERAL REQUIREMENTS1.01 SMALL BUSINESS CONCERNS

- A. ~~It is the policy of the State of Hawaii that~~
~~small~~ Small business concerns shall have the maximum practicable opportunity to participate in performing contracts let by any state agency, including contracts and subcontracts for design professionals, construction, subsystems, assemblies, components, materials, supplies and related goods and services.

I added the italicized wording in blue, but I am not clear on what small business concerns in relation to subcontracting are. Therefore, this needs to be verified by SPO and AG.

Is it appropriate to write policy into rules? Seems sort of contradictory since rules have the effect of law, but policies do not have the effect of law.

~~It is further the policy of the State of Hawaii that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns~~

I don't think this last sentence should be included since we have a law in Act 91 for prompt payment and not a policy.

- B. The Contractor ~~hereby agrees to~~ shall carry out ~~this policy~~ the requirements of the contract in the awarding of subcontracts to the fullest extent consistent with efficient contract performance.

- C. The Contractor ~~further agrees to~~ shall cooperate in any studies or surveys as may be conducted by agencies of the State of Hawaii as may be necessary to determine the extent of the Contractor's compliance with this clause section.

~~(a) (c) Definitions. As used in this contract,~~

- D. The definition of a small business concern is a firm which _____ [state small business eligibility criteria as published in Board directives].

PPB needs to publish the small business eligibility criteria even if it is using or reference criteria established by others such as the federal small business eligibility criteria. If the PPB does refer to the federal criteria, we need to get a copy of the criteria. Request copy from SPO.

Action: Request copy of federal criteria from SPO

~~(b) (d)~~

- E. Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern.

~~(End of clause)~~

Insert the above clauses into the RFP documents.

Action: PMB

1.02 LIMITATIONS ON SUBCONTRACTING

~~(7)) In all small business set-asides, the Chief Procurement Officer shall include a clause in the solicitation and contract to prevent the small business concern receiving award from~~

~~passing the work to other contractors through
subcontracts.~~

(3/17/08) Based on the above paragraph, the limitations on subcontracting only apply to small business set-asides in which the PPB has published set criteria or the HOPA has determined that the project is susceptible to performance by small business. However, was this the intent? Where the project is not susceptible to performance by small business, but is required to implement a small business utilization plan as required in Step #4, what limitations or what prevents the subcontracted small business from passing on work to others through a sub-subcontract? See my comments/questions below.

Is a rule change required if it was also intended to apply to set-asides and utilization of small business concerns?

Action: Opinion requested of SPO

LIMITATIONS ON SUBCONTRACTING

~~By submission of its offer, the The Contractor agrees that shall in performance of the contract in the case of a contract for - implementing its small business subcontracting plan:~~

- ~~(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.~~

(3/17/08) I assume this clause does not apply to Utilization of Small Business Concerns and it only applies to projects determined to be set-aside.

Action: Opinion requested of SPO, AG

A. ~~(2)~~Supplies (other than procurement from a nonmanufacturer of such supplies). The subcontracted small business concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3/17/08) Was this also intended to apply to Utilization of Small Concerns?

Action: Opinion requested of SPO, AG

B. ~~(3)~~—General construction. The subcontracted small business concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

Need to better define "General construction." Contractors holding a "A" or "B" license who are subcontracted to do the installation of the PV system and who will sub-subcontract specialty contractors who are not covered under an "A" or "B" contractors license?

(3/17/08) Was this intended also apply to Utilization of Small Concerns? In addition, was this intended only to be applied to construction procurement or for services procurement that may also have construction work as part of the services contract such as our CSD Photovoltiac project?

Action: Opinion requested of SPO, AG

C. ~~(4)~~—Construction by special trade contractors. The subcontracted small business concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

(3/17/08) Was this intended also

apply to Utilization of Small Concerns? In addition, was this intended only to be applied to construction procurement or for services procurement that may also have construction work as part of the services contract such as our CSD Photovoltiac project?

Action: Opinion requested of SPO, AG

PART 2 - SMALL BUSINESS SUBCONTRACTING PLAN

2.01 DEFINITIONS

- A. ~~(a)~~ Definitions. As used in this clause, a subcontracting plan means a plan that covers the entire contract period (including option periods), applies specifically to this contract, and has goals that are based on the ~~Offerer's~~ proposer's planned subcontracting in support of the contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract. What does the last part of sentence "except that indirect costs incurred..." mean?

Action: Opinion requested of SPO, AG

- B. ~~(b)~~ Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by the prime Contractor or its lower-tier subcontractors calling for supplies or services required for performance of the contract or subcontract.

2.02 SMALL BUSINESS SUBCONTRACTING PLAN REQUIREMENTS

~~(a) The Offeror, upon request by the procurement officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business concerns. The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the procurement officer. Failure to submit and negotiate the subcontracting plan shall make the Offeror ineligible for award of a contract.~~

It is not appropriate to allow for negotiation of the plan as this can be abused. Not sure why there would be a need for negotiation since it would just be a requirement to meet certain conditions such as percentage of small business utilization which needs to be spelled out in the solicitation documents. The percentage can be set as minimum requirement such as 70% like the federal contracts, or as being an evaluation factor, or as a preference factor possibly. Therefore, suggest deleting the above and replace with the following:

A. ~~(e)~~ The Offeror Proposer shall submit with their offer proposal a subcontracting plan that separately addresses subcontracting with small business concerns. The plan shall be

included and made a part of the resultant contract. Failure to submit a subcontracting plan shall ~~(or may?)~~ be cause for rejection of the ~~offer~~ proposal.

Would the interim rules need to be amended officially by the PPB?

Action: Opinion requested of SPO, AG on change and question.

Action: PPB if required in order to change language.

Time Factor: 1-2 months for PPB action.

B. The ~~Offerer's~~ Proposer's subcontracting plan shall include the following:

1. Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns as subcontractors. The ~~Offerer~~ Proposer shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs. Please explain what the last part of the last sentence "may include a proportionate share of products and services..." means.

Action: Opinion requested of SPO, AG

2. A statement of total dollars planned to be subcontracted to small business concerns.
Is this or will this be the basis for

determining the percentage of total planned small business concerns for subcontracting? What happens if a small business subcontractor is listed and then the small business subcontractor subcontracts someone else to the work and is does not qualify as a small business contractor.

For example: What if a small business PV installer is subcontracted on the project by the prime contractor, but because the small business PV installer does not have access to obtain or purchase PV panels that can meet the demands of the project schedule, the small business PV installer subcontracts with a major PV installer such as Sun Edison? Sun Edison is probably a big business who may have PV panels in stock and readily available to meet the project schedule demands. Would this be allowed? Or would this be a reason for disqualification or termination?

Action: Opinion requested of SPO, AG

3. A description of the ~~principal~~ types of business (construction, materials, supplies and services, and other applicable business) to be subcontracted, and an ~~identification of the types planned for~~ and a list of small business companies or firms to be subcontract to meet the requirements for ~~subcontracting to~~ small business concerns.

The rule as written seems to be very general in nature. Not sure how an evaluation or determination if the plan has any validity without more detailed information. Therefore suggested

revisions noted above.

Would the interim rules need to be amended officially by the PPB?

Action: Opinion requested of SPO, AG on change and question.

Action: PPB if required in order to change language.

Time Factor: 1-2 months for PPB

4. A description of the method used to develop the subcontracting goals in above paragraph 1.(d)(1) of this clause.
5. A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Department of Defense Central Contract Registration data base ("CCR") "Dynamic Small Business Search" function at <http://www.ccr.gov/>, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in the CCR "Dynamic Small Business Search" function as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of the CCR as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance,

counseling, or publicizing subcontracting opportunities) in this clause.

Recommend training be provided to procurement officials, agencies, and the others in the industry to explain the CCR on what is, how to get onto it, and how it is used, etc. Request SPO or DBEDT provide the training to take the lead in getting the trainer.

Action: SPO or DBEDT

Time Factor: 4-6 months

6. The name of the individual employed by the ~~Offeror~~ Proposer who will administer the ~~Offeror's~~ Proposer's subcontracting program, and a description of the duties of the individual.
7. A description of the efforts the ~~Offeror~~ Proposer will make to assure that small business concerns have an equitable opportunity to compete for subcontracts.
8. Assurances that the ~~Offeror~~ Proposer will require all subcontractors that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction of any public work) to adopt a subcontracting plan that complies with the requirements of this clause.
Not sure I understand this. Recommend training.
9. Assurances that the ~~Offeror~~ Proposer will cooperate in any studies or surveys as may be required and provide requested information so that the Government can determine the extent of compliance by the ~~Offeror~~ Proposer with the subcontracting plan.

~~(End of clause)~~

2.03 xxxxxxx