

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

Interim
Hawaii Administrative Rules

April 11, 2025

Historical Note: This amendment of Chapter 3-122,
Hawaii Administrative Rules:

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 Replaces rules effective 08/21/2016 (file no. 3193) which amended section 3-122-14; and repealed section 3-122-66.

SUBCHAPTER 6

COMPETITIVE SEALED PROPOSALS

1. §3-122-41, Hawaii Administrative Rules, is amended to read as follows:

§3-122-41 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed proposal method of source selection ~~[when it is determined that competitive sealed bidding is neither practicable nor advantageous to the State.].~~ [Eff 12/15/95; comp 11/17/97; comp 3/21/2008; am _____] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

2. §3-122-43, Hawaii Administrative Rules, is amended to read as follows:

§3-122-43 ~~[When competitive sealed bidding is not practicable or advantageous. (a) Unless the nature of the procurement permits award to a low~~

~~bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids, competitive sealed bidding is not practicable or advantageous.]~~

~~[(b) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not practicable, even though advantageous. Factors to be considered in determining whether competitive sealed bidding is not practicable include:~~

- ~~—— (1) Whether the primary consideration in determining award may not be price;~~
- ~~—— (2) Whether the contract needs to be other than a fixed-price type;~~
- ~~—— (3) Whether the specifications for the goods, services, or construction, or delivery requirements cannot be sufficiently described in the invitation for bids;~~
- ~~—— (4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;~~
- ~~—— (5) Whether offerors may need to be afforded the opportunity to revise their proposals, including price; and~~
- ~~—— (6) Whether award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.]~~

~~[(c)] (b) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not advantageous, even though practicable. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:~~

- ~~(1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and~~

~~(2) Whether the factors listed in subsection (b) (4) through (b) (6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous.~~

~~— [(d)] The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.]~~

Procurement planning for competitive sealed proposals. (a) A strategic procurement plan for competitive sealed proposals should at the minimum, include the following determinations:

- (1) Requirements definition;
- (2) Market research to substantiate requirements definition;
- (3) Period of performance;
- (4) Type of contract;
- (5) Analysis of the relative importance of price and other evaluation criteria; and
- (6) Oral or written discussions, as applicable, with offerors concerning technical and price aspects of their proposals. [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/2008] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-303, 103D-318)

3. §3-122-45, Hawaii Administrative Rules, is repealed:

~~[§3-122-45 Determinations. (a) Pursuant to section 103D-303(a), HRS, the procurement policy board may approve a list of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency.~~

~~(b) The list, entitled "Procurements Approved for Competitive Sealed Proposals," shall be reviewed biennially by the procurement policy board and issued by procurement directive. Although the good, service,~~

~~or construction is listed, purchasing agencies may use the competitive sealed bidding process under section 103D-302, HRS.~~

~~(c) If the procurement is not listed pursuant to subsection (a), the head of a purchasing agency shall then determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous. The determinations may be made for categories of goods, services, or construction rather than by individual procurement.~~

~~(d) When it is determined that it is more practicable or advantageous to the State to procure construction by competitive sealed proposals:~~

~~(1) A procurement officer may issue a request for proposals requesting the submission of proposals to provide construction in accordance with a design provided by the offeror; and~~

~~(2) The request for proposals shall require that each proposal submitted contain a single price that includes both design and build.~~

~~(e) The head of the purchasing agency who made the determination pursuant to subsection (c) or (d) may modify or revoke it at any time and the determination shall be reviewed for current applicability on the next procurement for the goods, services, or construction. The head of the purchasing agency may also request that the procurement of the goods, services, or construction by competitive sealed proposals be added to or deleted from the list in subsection (b).~~

~~(f) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/17/97; am 07/06/99; am and comp 3/21/2008] (Auth: HRS §§103D-202, 103D-303, 103D-318) (Imp: HRS §§103D-303, 103D-318)]~~

§3-122-45 REPEALED. [R _____]

**4. §3-122-45.01, Hawaii Administrative Rules,
is amended to read as follows:**

§3-122-45.01 Evaluation committee. (a) Prior to the preparation of the request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals. ~~[A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.]~~ The document identifying all committee members, approved by the procurement officer, shall be placed in the contract file. Subsequent changes, approved by the procurement officer, shall also be filed.

(b) Evaluation committee members are encouraged to participate in the development of the solicitation.

- (1) The evaluation committee shall consist of at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured;
- (2) Private consultants may also serve on the committee and shall:
 - (A) Have sufficient knowledge to serve on the committee;
 - (B) Serve without compensation, unless justified and determined in writing by the head of the purchasing agency that compensation is justified; and
 - ~~[(C) Sign an affidavit:]~~
- (3) All evaluation committee members shall sign an affidavit:
 - (i) Attesting to having no personal, business, or any other relationship that will influence their decision in the evaluation process;
 - (ii) Agreeing not to disclose any information on the evaluation

- process to other than an employee of a governmental body; and
- (iii) Agreeing that their names will become public information upon award of the contract;
- (iv) The procurement officer may require participants to sign a non-disclosure agreement prior to reviewing any information;
- ~~[(3)]~~ (4) The contract administrator shall serve as a member of the committee;
- ~~[(4)]~~ (5) The contract administrator or a designee shall serve as chairperson, and the procurement officer or a designee shall serve as advisor. [Eff and comp 3/21/2008] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

5. §3-122-46, Hawaii Administrative Rules, is amended to read as follows:

§3-122-46 Preparing a request for proposals. The request for proposals ~~[is used to initiate a competitive sealed proposal procurement and]~~ shall include:

- (1) The specifications for the goods, services, or construction items to be procured, including a description of the performance or benefit required;
- (2) All contractual terms and conditions applicable to the procurement;
- ~~[(3) A statement as to when and in what manner prices are to be submitted;]~~
- ~~[(4)]~~ (3) A statement ~~[concerning]~~ whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;
- ~~[(5)]~~ (4) The term of the contract and conditions of renewal or extension, if any;
- ~~[(6)]~~ (5) Instructions and information to offerors, including pre-proposal

conferences, the location, date, and time
where proposals and pricing are to be
received~~[, and the date, time, and place~~
~~where proposals are to be received and~~
~~reviewed]~~;

~~[-(7)]~~ (6) ~~[The relative importance of price and~~
~~other evaluation criteria; and]~~ The specific
evaluation criteria to be used, including
relative importance of price, in evaluation
of proposals which may include but is not
limited to:

(A) Technical capability and approach for
meeting performance requirements;

(B) Price [€] competitiveness and
reasonableness~~[-of price]~~;

(C) Managerial capabilities; and

(D) Best value factors;

(E) Past performance.

(i) Past performance information is one
indicator of an offeror's ability to
perform the contract successfully.
The currency and relevance of the
information, source of the
information, context of the data,
and general trends in contractor's
performance shall be considered.

(ii) The solicitation shall describe the
approach of evaluating past
performance, including evaluating
offerors with no relevant
performance history, and shall
provide offerors an opportunity to
identify past or current contracts
(including Federal, State, and local
government and private) for efforts
similar to the Government
requirement. The agency shall
consider this information, as well
as information obtained from any
other sources, when evaluating the
offeror's past performance. The
evaluation committee shall determine

the relevance of similar past performance information.

(iii) In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance;

~~[(7)]~~ (7) A statement that discussions may be conducted with "priority-listed offerors" pursuant to section 3-122-53, but that proposals may be accepted without discussions; ~~[and]~~

~~[(8)]~~ (8) A statement that offerors shall designate in writing those portions of the unpriced proposal that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-58; that the material designated as confidential shall be readily separable from the proposal ~~[in order]~~ to facilitate inspection of the nonconfidential portion of the proposal~~[-]~~;

(9) The proposal shall be signed by an authorized agent of the vendor and may be submitted with a digital or original signature.

[Eff 12/15/95; am and comp 11/17/97; am and comp 03/21/2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

6. §3-122-51, Hawaii Administrative Rules, is amended to read as follows:

§3-122-51 Receipt and registration of proposals.

(a) Proposals and modifications shall be date and time-stamped upon receipt and held in a secure place by the procurement officer, unless submitted via an electronic procurement system, until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

- (1) Proposals and modifications shall not be opened publicly, but shall be opened in the presence of two or more state officials. If conducted electronically, proposals and modifications shall not be opened publicly and not required to be opened in the presence of two or more state officials;
 - (2) Proposals and modifications shall be shown only to members of the evaluation committee and state personnel or their designees having legitimate interest in them.
- (b) After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals:
- (1) The name of each offeror;
 - (2) The number of modifications received, if any; and
 - (3) A description sufficient to identify the good, service, or construction item offered.
- (c) The register of proposal shall be open to public inspection as provided in section 3-122-58.
- (d) Proposals shall be open to public inspection as provided in section 3-122-58. [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/2008] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

7. §3-122-52, Hawaii Administrative Rules, is amended to read as follows:

§3-122-52 Evaluation of proposals. (a) Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered.

(b) A numerical rating system shall be used. The relative priority to be applied to each evaluation factor shall also be set out in the request for proposals.

(c) The points to be applied to each evaluation factor shall be set out in the request for proposals.

- (1) The procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing which shall be placed in the procurement file;
- (2) The written ranking evaluations or explanations shall be available for public inspection after the award of the contract is posted.
- (d) ~~[When applicable, cost]~~ Price shall be an evaluation factor.
- (1) The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost;
- (2) The points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price.
- (e) Past performance shall be an evaluation factor.

~~[(e)]~~ (f) An evaluation factor must be included which takes into consideration whether an offeror qualifies for any procurement preferences pursuant to chapter 3-124.

~~[(f)]~~ (g) Evaluations may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation of the offeror. [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

8. NEW §3-122-52.5, Hawaii Administrative Rules, is added to read as follows:

§3-122-52.5 Clarifications with Offerors After Receipt of Proposals. (a) Clarifications are limited exchanges, between the agency and offerors prior to priority

listing. Clarifications may occur with or without further discussions as defined in 3-122-53.

(b) Agencies may give offerors the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past (e.g., the relevance of an offeror's past performance information and adverse past performance information) or to resolve minor or clerical errors which shall not affect price, quantity, quality, delivery, or contractual conditions. Such clarifications may be considered in rating proposals for the purpose of establishing the priority list. All clarifications shall be documented by the procurement officer or evaluation committee at the evaluation stage.

(c) Clarifications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. [Eff] (Auth: HRS §103D-) (Imp: HRS §103D-303)

9. §3-122-53, Hawaii Administrative Rules, is amended to read as follows:

§3-122-53 Discussions with offerors. (a) Before conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

- (1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable based on the criteria outlined in the solicitation;
- (2) All responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list;
- (3) If numerous acceptable and potentially acceptable proposals have been submitted, the procurement officer or the evaluation committee may rank the proposals and limit the priority list to at least three

responsible offerors who submitted the highest-ranked proposals;

- (4) Those responsible offerors who are selected for the priority list are referred to as the "priority-listed offerors".

(b) Discussions will be limited to only "priority-listed offerors" and are held to:

- (1) Promote understanding of a state agency's requirements and priority-listed offerors' proposals; and
- (2) Facilitate arriving at a contract that will provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals.

The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the discussions, date, time, place, purpose of meetings, and [those attending] attendees.

(c) Proposals may be accepted on evaluation without discussion.

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

- ~~(1) Any substantial oral clarification of a proposal shall be reduced to writing by the priority-listed offeror;~~

~~[(2)]~~ (1) If during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended by an addendum to incorporate the clarification or change.

- (2) Limits on discussions. Government personnel involved in the procurement shall not engage in conduct that:

- (i) Favors one offeror over another;
- (ii) Reveals an offeror's technical solution, include unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another

offeror; or
(iii) Reveals the names of individuals
providing reference information about an
offeror's past performance.

- (e) Addenda to the request for proposals shall be distributed only to priority-listed offerors.
- (1) The priority-listed offerors shall be permitted to submit new proposals or to amend those submitted;
- (2) If in the opinion of the procurement officer or the evaluation committee, a contemplated amendment will significantly change the nature of the procurement, the request for proposals shall be canceled and a new request for proposals issued.
- (f) The contents of any proposal shall not be disclosed so as to be available to competing offerors during the discussion process. [Eff 12/15/95; comp 11/17/97; am and comp 3/21/2008] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

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

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

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

I certify that the forgoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on April 11, 2025, by the Procurement Policy Board and filed with the Office of the Lieutenant Governor.

LISA MARUYAMA
Chairperson
Procurement Policy Board

KEITH REGAN
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General