

TITLE 1: GOVERNMENT
DIVISION 7: PLANNING, BUDGETING AND AUDITING

§ 7404. Bidding Preference.

(a) The requirements of this section are in addition to any other applicable requirements provided by law. Provided however that this section shall not apply to the procurement of independent services contractors, consultants, and professional services contractors by any of the mayor or municipal councils, and by the Legislature.

(b) The preference in this section shall not be utilized in combination with any other preference otherwise available to a bidder under Commonwealth or federal law.

(c) In contracting for capital improvements, public works, or procurement of goods or services involving a contract amount of \$500,000 or less, a Commonwealth agency shall award a bidder or proposer who is a United States citizen or permanent resident and who, for three years prior to submitting a bid or proposal, continuously possessed a valid Commonwealth business license and whose business headquarters is located in the Commonwealth, or any state or territory of the United States. In the event that no such business qualified under this section submits a bid or proposal, a Commonwealth agency may award a bidder or proposer who is otherwise qualified under the particular solicitation but is not a United States citizen or permanent resident.

(d) In contracting for capital improvements, public works, or procurement of goods or services, a Commonwealth agency shall give preference for award to a bidder or proposer who is otherwise qualified for award under the particular solicitation and who for three successive years prior to submitting the bid or proposal has:

- (1) Continuously possessed a valid Commonwealth business license; and
- (2) Filed all required Commonwealth employment, excise tax, business gross revenue tax, and income tax returns and paid all amounts owing on such returns;

Provided, that the bid or proposal is more than \$500,000 and less than \$5,000,000 and is not more than 15 percent higher than the amount bid or proposed by any competing contractor not so qualified.

(e) In contracting for capital improvements, public works, or procurement of goods or services involving a contract amount of \$5,000,000 or more, a Commonwealth agency shall give preference for award to a bidder or proposer who is otherwise qualified for award under the particular solicitation and who for five successive years prior to submitting the bid or proposal has:

- (1) Continuously possessed a valid Commonwealth business license; and
- (2) Filed all required Commonwealth employment, excise tax, business gross revenue tax, and income tax returns and paid all amounts owing on such returns;

Provided, that the bid or proposal is not more than 15 percent higher than the amount bid or proposed by any competing contractor not so qualified.

TITLE 1: GOVERNMENT
DIVISION 7: PLANNING, BUDGETING AND AUDITING

(f) Contractors desiring a Commonwealth contractor preference under subsections (c), (d) or (e) of this section who are involved in a joint venture with any contractor not qualifying for the Commonwealth contractor preference must submit certification and evidence that at least 51 percent of the contract will be performed by the local contractor or contractors meeting the criteria set forth in subsections (c), (d) and (e) of this section. Such a preference shall not be granted unless it is determined that at least 51 percent of the contract will in fact be so performed. Determination of whether a contractor will be involved in a joint venture and whether the 51 percent requirement will be met is committed to the reasonable judgment of the contracting authority subject to review by the Attorney General.

(1) Relevant information in determining satisfaction of the requirement of this subsection includes the amount of revenue to be received by each of the parties, the amount of profit expected to accrue to each of the parties, subcontracting plans or arrangements, and other factors.

(2) Prior to granting a Commonwealth contractor preference, the contracting authority shall make an assessment of whether the contractor will be involved in a joint venture, and any significant difference in the manner in which a bidder or proposer anticipates performing the requirements of the contract, which difference involves a business that would not qualify under either subsection (c), (d) or (e) of this section, is a basis for a finding that a bidder or proposer intends to be involved in a joint venture.

(g) If two or more contractors qualifying under subsection (c), (d) or (e) of this section submit bids or proposals, the contract shall be awarded to the lowest responsible bidder/proposer qualifying for the Commonwealth contractor preference.

(h) No provision of this section shall apply to capital improvements or procurement of goods or services funded, in whole or in part, by grants or funds from an agency of the government of the United States upon certification by the agency that this section conflicts with such agency's regulations.

Source: PL 4-64, § 206; amended by PL 5-31, § 404; PL 6-5, § 303; repealed and reenacted by PL 11-87, § 2; (a) amended by PL 13-24, § 602(b); (c), (d), (e), (f), and (g) amended by PL 15-95, § 2; (c) amended and (h) added by PL 15-118, §§ 2 and 3, respectively, modified.

Commission Comment: PL 11-87 which repealed and reenacted this section took effect July 30, 1999. PL 11-87 contained findings and purpose, procurement regulations preserved, regulations, and severability clauses as follows:

Section 1. Findings and Purpose. The Legislature finds that the current requirement that the Commonwealth government procure goods and services from businesses which are 75% owned by U.S. citizens is not a permanent law as defined by Public Law 3-90 and principles of statutory construction and thus is without force and effect. Further, the grant of preference based on citizenship would be subject to potential constitu-

TITLE 1: GOVERNMENT
DIVISION 7: PLANNING, BUDGETING AND AUDITING

tional attack. The Legislature, however, endorses the concept of preference in bidding for public contracts to be given to local businesses.

The Legislature notes that the present bidding procedure for government contracts fails to consider whether the bidder is a local business within the Commonwealth of the Northern Mariana Islands. The Legislature further finds that public funds paid to local businesses benefit the local economy in the way of taxes, living expenses, and other expenditures by residents of the Commonwealth. Income remains in the economy and circulates with a multiplier effect instead of being remitted overseas. Local businesses also contribute to the community and support of the government in ways that nonresident firms do not. Moreover, local businesses (1) incur costs and burdens as a result of being resident in the Commonwealth which are not borne by firms which do not maintain offices and staff in the Commonwealth and (2) share the benefits and burdens of the community through the years in difficult times as well as good. It is in the public interest, when possible, to expend public funds in such a manner as to gain the maximum economic benefits from such expenditures within our local economy. In addition, government contracting policy should recognize and where appropriate seek to offset the competitive disadvantages local business may have as a result of being resident in the Commonwealth and independent of megacorporations with a multinational rather than local character. Therefore, it is the purpose of this Act to establish a local preference to bidders on Commonwealth government contracts.

...

Section 3. Procurement Regulations Preserved. Notwithstanding Section 2 of this Act, any procurement regulations validated by 1 CMC § 7404(a) as it existed prior to the effective date of this Act shall continue to the same extent to be lawful regulations following the effective date of this Act, subject to subsequent amendment, repeal, or other action according to law.

Section 4. Regulations. The Secretary of Finance shall promulgate rules and regulations for the implementation of this Act within 180 days of this Act becoming law. No local preference shall be granted or available pursuant to 1 CMC § 7404, as enacted by this Act, until valid regulations, duly promulgated in accordance with the Administrative Procedure Act, are in effect.

Section 5. Severability. If any provision of this Act or the application of any such provision to any person or circumstance should be held invalid by a court of competent jurisdiction, the remainder of this Act or the application of its provisions to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

PL 13-24 was enacted on September 10, 2002. PL 13-24 was an appropriations bill wherein § 602(b) was a rider. While appropriation bills are temporary law in nature, § 602(b) explicitly stated that the according amendment to 1 CMC § 7404(a) “shall remain in effect until subsequently amended,” therefore,

TITLE 1: GOVERNMENT
DIVISION 7: PLANNING, BUDGETING AND AUDITING

all implications aside, the Commission codified § 602(b), and similarly also § 602(a).

The Commission changed capitalization pursuant to the authority granted by 1 CMC § 3806(f). PL 13-24 was enacted on September 10, 2002. PL 13-24 was an appropriations bill wherein § 602(b) was a rider. While appropriation bills are temporary law in nature, § 602(b) explicitly stated that the according amendment to 1 CMC § 7404(a) “shall remain in effect until subsequently amended,” therefore, all implications aside, the Commission codified § 602(b), and similarly also § 602(a).

PL 15-95 was enacted into law by override on October 4, 2007, and contained the following findings in addition to severability and savings provisions.

Section 1. Findings. The Legislature finds that the Commonwealth continues to be in a state of economic decline and many businesses owned by United States citizens have been forced to shut down their establishments due to severe financial hardships and losses. Many of these business establishments provide unique and distinctive goods and services to [the] Commonwealth and have been doing business in the Commonwealth for over a decade.

The Legislature finds that the Commonwealth should promote and stimulate businesses owned by United States citizens by requiring that Commonwealth agencies to award contracts for capital improvements, public works, and procurement of goods and services involving a contract amount of \$500,000 or less to businesses that are owned by United States citizens. Many businesses owned by United States citizens maintain and expend their money in the Commonwealth thereby stimulating the economy. The Legislature further finds that restricting government procurement of \$500,000 or less to United States citizens is necessary to grow our economy and preserve businesses owned by United States citizens that have diligently served the Commonwealth for many years.

PL 15-118 was enacted into law December 14, 2007, and contained the following findings in addition to severability and savings provisions. The Commission designated the two subsections enacted by PL 15-118 as (c) and (h), instead of (i) and (i), respectively, as indicated in the text of PL 15-118, pursuant to its authority under 1 CMC § 3806.

Section 1. Findings and Purpose. The Legislature finds that the Commonwealth from time to time receives critical U.S. federal grants and assistance for capital improvements and procurement of goods and services. The use or disposition of these funds are governed by and large by applicable U.S. laws and regulations that may conflict with the Commonwealth’s local bidder preference laws and regulations. The purpose[s] of this act are to include United States permanent residents and citizens of any state or territory of the United States in the local bidder preference law, and to exempt capital improvements and procurement of goods and services funded in whole or in part with federal funds from the local bidder preference laws and regulations of the Commonwealth upon

TITLE 1: GOVERNMENT
DIVISION 7: PLANNING, BUDGETING AND AUDITING

certification by a federal agency that such preference law conflicts with federal regulations.