



LINDA LINGLE
GOVERNOR



RUSS K. SAITO
Comptroller

BARBARA A. ANNIS
Deputy Comptroller

**STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES**
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

TESTIMONY
OF
RUSS K. SAITO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
FINANCE
ON
February 27, 2009

H.B. 861

RELATING TO ELECTIONS

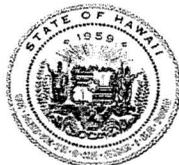
Chair Oshiro and members of the Committee, thank you for the opportunity to testify on H.B. 861.

DAGS opposes this bill. It proposes to exempt the Office of Elections from the Procurement Code requirements relating to cost or pricing data. This relieves the Chief Elections Officer of the responsibility to ensure that the public's interest in spending its tax dollars in the most beneficial way is fulfilled. This is not in the best public interest.

DAGS recommends that this bill be held.

Thank you for the opportunity to testify on this matter.

LINDA LINGLE
GOVERNOR



PROCUREMENT POLICY BOARD
DARRYL W. BARDUSCH
LESLIE S. CHINEN
DARYLE ANN HO
KEITH T. MATSUMOTO
RUSS K. SAITO
PAMELA A. TORRES

AARON S. FUJIOKA
ADMINISTRATOR

STATE OF HAWAII
STATE PROCUREMENT OFFICE
P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4700 Fax: (808) 587-4703
www.spo.hawaii.gov

TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE
HOUSE COMMITTEE
ON
FINANCE

February 27, 2009

2:00 PM

HB 861

RELATING TO ELECTIONS.

Chair Oshiro, Vice Chair Lee and committee members, thank you for the opportunity to testify on HB 861. This bill exempts the Office of Election's procurements from complying with HRS §103D-312 requiring cost or pricing data.

The State Procurement Office (SPO) does not support the intent of this bill to exempt the Office of Elections from obtaining cost or pricing data. Cost or pricing data provides a Procurement Officer with factual information to make a determination on whether prices being offered are fair and reasonable. The purpose of requiring cost and pricing data is to support pricing in certain situations where the procurement may result in awarding to a single vendor and there is no basis as to whether the price being offered is fair and reasonable. Under these circumstances, it would be prudent for all agencies, including the Office of Elections to require cost or pricing data in order to make this determination.

If an agency, including the Office of Elections, believes that cost or pricing data should not be applicable to a particular procurement, HAR §3-122-124(c) provides for a waiver of this requirement based on a written determination by either the Chief Procurement Officer or the Head of the Purchasing Agency.

The SPO recommends this bill be held. Thank you.



**STATE OF HAWAII
OFFICE OF ELECTIONS**

802 LEHUA AVENUE
PEARL CITY, HAWAII 96782
www.hawaii.gov/elections

KEVIN B. CRONIN
CHIEF ELECTION OFFICER

AARON H. SCHULANER
GENERAL COUNSEL

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON FINANCE
ON HOUSE BILL NO. 861
RELATING TO ELECTIONS

February 26, 2009

Chair Oshiro and members of the House Committee on Finance, thank you for the opportunity to testify in support of House Bill No. 861. The purpose of this bill is to exempt the Office of Elections (OE) from the requirements of a cost price analysis found in the procurement code and its administrative rules.

This bill proposes to address an unresolved problem found in the procurement code in 2008 when the OE processed its request for proposals (RFP) for a multi-year voting system contract for the 2008 and later elections. Specifically, this problem addresses the unclear language and resulting unsettled understanding of what is required in terms of a cost price analysis as it applies to the procurement of election voting and counting equipment for the state.

The bill proposes to exempt the Office of Elections from the requirement of a cost price analysis until such time as: (1) the State Procurement Office establishes a training and education program not now available that explains in detail, with real life examples, of what constitutes a satisfactory cost price analysis; (2) the statute or administrative rules are amended to clarify what is required for a cost or price analysis for interactive equipment; (3) the court system clarifies what is required under the current law; or (4) the legislature recognizes that a cost or price analysis does not apply to a voting and counting system that is both a piece of equipment and an interactive device that serves hundreds of thousands of voters and not quantifiable only in dollars.

The need to procure a voting system for the 2008 elections and beyond required a RFP process given the qualitative nature of the voting experience and, as such, the need to compare and make trade offs between the quality of the products and services of the

various proposals that were expected be made.¹ Based upon years of experience servicing Hawaii's voters, a detailed RFP was developed. The RFP allocated 15 points toward price and 85 points toward technical requirements. This value and weight was based on the collective judgment of the state's election officials who know elections best, recognizing the state's needs for its elections to best serve the greatest number of voters with the least inconvenience and disruption. Of the 85 points, 25 were based on an on-site demonstration of the voting systems. The on-site demonstration was considered critical as hundreds of thousands of state voters would use the selected voting system, and simply procuring a system without taking the opportunity to interact with and properly evaluate from the perspective of the election officials' many years of combined election experience could result in unforeseen election problems. This allocation of points between the technical requirements and price is within the range typically assigned for most RFPs involving technology.

Given the judgmental evaluation component of this voting equipment procurement, the scoring/evaluation of the proposals was conducted by an RFP Evaluation Committee composed of the state's four county clerks, the interim chief election officer, and two members of the disabled community. These 7 evaluators and total 100 points that each evaluator could award created the overall possibility of 700 points be given to a vendor's proposal.

The Evaluation Committee scored each proposal. Hart InterCivic, Inc. (Hart), received the highest score, but its score benefited from scoring the highest on the RFP's technical requirements. Election Systems & Software (ESS), the vendor with the lowest overall score, had the lowest price but also the lowest score on the technical requirements. Specifically, the evaluation panel scored the proposals as follows: Hart -- 532.5, ESS -- 479.5, and Premier -- 474. In terms of the technical scores only, without considering price, the scores were as follows: Hart -- 497.5, Premier -- 425, and ESS -- 374.5. As for price the scores were as follows: ESS -- 105, Premier -- 49, and Hart -- 35.

¹ The background of this bill arises from the fundamental difference between the Invitation for Bids (IFB) and the Request for Proposals (RFP) processes. The IFB process and the RFP processes I note are the main processes used for state procurements. These two processes are fundamentally different as described below:

Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. *Under competitive sealed proposals, the quality of competing products or services offered may be compared and trade-offs made between and quality of the products or services offered (all as set forth in the solicitation).* Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].

See "2000 Model Procurement Code for State and Local Governments," (Commentary to § 3-203 Competitive Sealed Proposals), at 26 (italics supplied).

In other words, in an IFB process, an award is made to the bidder meeting the requirement of the IFB offering the lowest price. In contrast to an IFB based on price alone, an RFP award is tied into a judgmental evaluation of the various proposals based on the criteria provided in the RFP, which result in award to the vendor whose proposal is the most advantageous to the state which is not necessarily the lowest priced proposal. In short, an IFB award is based only on price; a RFP award is based on judgment of the merit of factors deemed most suitable to the needs of the state.

Based on these informed evaluation scores, the Evaluation Committee recommended to the chief election officer the selection of the Hart proposal to provide the voting and counting equipment system to the state.

The award was protested by ESS. It contended the OE had not conducted a cost price analysis as required by the procurement law and administrative rules. The OE argued, based on its discussion with the State Procurement Office, that the cost price analysis is met by the evaluation panel reviewing the proposals and assigning points as provided for in the RFP. In other words, the frame work of the cost price analysis for an RFP is laid out by the procuring agency in the distribution of points in the RFP, i.e. 15 points for price, 85 for technical requirements. The analysis occurs when the evaluation panel reviews the proposals and assigns the points pursuant to compliance with the RFP criteria.

The hearing officer disagreed with the state that this constituted a cost price analysis. He required it to conduct a new cost price analysis. The OE was then forced into uncharted waters never before entered in the history of the state's procurements to develop a cost price analysis that would satisfy the hearings officer's interpretation of the law.

Given that OE is administratively attached to the Department of Accounting and General Services (DAGS), OE sought out the assistance of the DAGS-Accounting Division. The chief election officer himself was informed that DAGS was not able to conduct a cost price analysis and that it was unaware of anyone in the state who could do one for voting and counting machines. The Office of Elections made inquiries across the country for an individual who could conduct the cost price analysis. The responses were consistent in that those contacted said it essentially could not be done given the qualitative differences between voting systems. In fact those who know best the needs of Hawaii's voters to vote on voting equipment at elections are the county clerks and staff and OE staff whose jobs are to organize and conduct the state's elections.

In the very short time given to him the chief election officer, who is not an accountant, did the best he could to develop a cost price analysis. He considered a variety of factors such as (1) the offers made by the other vendors in the RFP (ESS & Premier), (2) Hart's prior contracts with the state of Hawaii, (3) Hart's prices published in catalogues or price lists, (4) Hart's prior contracts with other jurisdictions, and (5) the OE's own in house estimate of the cost of conducting an election. In terms of the chief election officer's good faith consideration of the cost of the competing vendors' offers, he recognized and factored in the same qualitative differences between the voting systems that the evaluation panel had found and which no accountant in or outside state service could know or understand. In the end, the chief election officer found that the cost of the Hart proposal itself was not clearly unreasonable for what it was to provide to the state of Hawaii.

The hearing officer found that the chief election officer's consideration of the qualitative differences between the voting systems was of little relevance. Despite this, the hearing officer spent a significant amount of time in his decision disagreeing with the judgmental evaluation that was made by the evaluation panel and subsequently the chief

election officer, despite having little if any experience in the technical field of elections. Any deference to be given to the administrative agency and its statutory duty appears not to have been provided in this case.

While the hearing officer's decision speaks for itself, the decision appears to equate a cost price analysis as simply a comparison of the prices of various voting systems, *without a consideration of the qualitative differences between the competing systems*. Such a cost price analysis runs completely counter to an RFP in which those qualitative differences are relevant in choosing a proposal, i.e. it is similar to comparing apples to oranges.

The OE agrees that it is important to guard against unnecessary expenditures of public funds, while at the same time recognizing the purpose of the RFP process to obtain the most advantageous goods and services for the state. It is during the evaluation process that the state makes a judgment by those entrusted and charged to do so as to what proposal is most advantageous for the state. In terms of the cost price analysis stage, OE sees it as a process by which one focuses on whether the price quoted for the goods and services offered is reasonable in comparison to the price of similar goods and services out in the market place.²

The litigation in this case dragged on until a decision was issued August 7, 2008. Because we were only a little more than a month away from the Primary Election, the hearing officer allowed Hart to provide services until December 31, 2008, but canceled the remaining portion of the contract. Preparations for the 2008 elections were greatly impacted by the litigation because a significant part of the necessary preparation and training of poll workers is related to knowing what voting system will actually be used as soon before an election as possible.

The hearing officer's decision has been appealed by the state, Hart, and ESS to the circuit court in Honolulu. A hearing on the matter will not be held until August 19, 2009, and a decision is not expected until possibly October 2009. In addition, there could

² For example, assuming an RFP issues for a public transit system and the proposals range from a low cost trolley system to a more expensive monorail system. The RFP evaluation process might eventually award the contract to the monorail system because the evaluation panel composed of experts and others knowledgeable and experienced in the field considers a variety of relevant factors such as the speed of the system, maintenance costs, safety issues, and a whole host of other factors as part of its decision making process.

When the cost price analysis occurs, it would be unfair to simply say that the monorail system is more expensive than the trolley system and as such the monorail system is clearly unreasonable. Instead, one would look at (1) the offers made by the other vendors who may have proposed a monorail system; (2) the monorail company's prior contracts with the State of Hawaii; (3) the monorail company's prices published in catalogues or price lists; (4) the monorail's prior contracts with other jurisdictions, and (5) the state's own in house estimate of the cost for such a system. In considering the proposals by other vendors, the state would also consider the judgmental evaluation process conducted by the original evaluation panel in comparing the prices of the transportation systems by the different vendors, i.e. the cost of the trolley system in comparison to the monorail system would not carry a lot of weight, in determining if the cost of the monorail system is clearly unreasonable, if qualitatively there is a significant difference in the eyes of the evaluation panel between the two proposals.

In other words, one would not compare apples to oranges. Instead, it would carry more weight if the vendor charged significantly less in other jurisdictions or if there were other vendors of comparable monorail systems that charged significantly less. If so, then there might be a basis to decide not to award the contract at the quoted price and to instead renegotiate. If the renegotiation was unsuccessful, the solicitation might be canceled and a new RFP would be issued.

always be an appeal to the Intermediate Court of Appeals. This means that we will not obtain closure or guidance in the near future as to what is necessary for a cost price analysis. In the meantime, the state has no voting and counting system for the 2010 elections at this time, and with each passing day, the elections draw near, leaving less time to obtain a voting system.

As the Office of Elections needs to procure a voting system for the 2010 elections, it wishes to avoid what happened in the prior procurement. Specifically, the present legislation would exempt the Office of Elections from the requirements of a cost price analysis due to the current legal uncertainty as to what is required in a cost price analysis.

If the Committee is not inclined to exempt the Office of Elections, it would request that any cost price analysis of any future election procurement not be allowed to be delegated from the state's chief procurement officer to the comptroller and subsequently to the chief election officer. This is critical given that the hearing officer has already ruled that the chief election officer was not competent to conduct the last cost price analysis.

Specifically, Haw. Rev. Stat. §103D-208 would need to be amended to disallow the chief procurement officer from delegating the responsibility for conducting a cost price analysis in regards to a procurement for a voting system. In the alternative, the law could be amended to only allow the chief procurement officer to delegate the cost price analysis to the comptroller who has accounting responsibility for the Office of Elections that is attached to DAGS for administrative purposes and to disallow any further delegation to the OE. Another option would be to add a new section to the election code, specifically saying that chief procurement officer or comptroller shall conduct any cost price analysis involving the procurement of a voting system.

We make this final suggestion, in recognition of the fact that what is required in a cost price analysis has still not been resolved. Specifically, the hearing officer has already ruled that the chief election officer was not competent to conduct a cost price analysis. While it is our understanding that the State Procurement Office disagrees with the hearing officer's decision, the reality is that procurements will still need to go forward while this matter is being resolved by the legal system, and the requirement of a cost price analysis will continue.

As such, until it is firmly established as to what is required in a cost price analysis and how a cost price analysis should be done in this state, the implementation and preparation of such analysis should be left with the chief procurement officer or arguably the comptroller. In other words, the delegation of the requirement of a cost price analysis should not be delegated by the chief procurement officer to the comptroller to be subsequently delegated to the chief election officer whose job is to organize and conduct elections and whose position is not to perform accounting functions recognized in law. The Office of Elections as a small agency relies on the State Procurement Office for guidance on procurement and relies on the Department of Accounting and General Services for administrative matters.

I would encourage the State Procurement Office to develop extensive training and materials on this topic which could be provided to the Office of Elections and arguably to other agencies and departments who now face the risk of being required to perform a technical cost price analysis for which each may at best be ill equipped to perform, not to mention the significant costs involved. As it stands now, there appears to be very little training and materials on this topic, which is clearly understandable given that the hearing officer's interpretation is markedly different from the previous understanding of what was required in a cost price analysis in the state of Hawaii.³

I believe my position regarding delegation is further supported by the chief procurement officer's own memo regarding the general delegation of procurement authority to department heads and their authority to further delegate the authority to appropriate individuals, which states the following:

Delegation of procurement authority to a procurement officer is based on their expertise, knowledge and proficiency to carry out procurement duties, while seeking economy and efficiency to achieve program operations. Careful consideration shall be taken when granting procurement authority, as you (department head) remain ultimately responsible to the CPO for this procurement delegation to authorized procurement officers.

See "Procurement Delegation No. 2008-01," (October 23, 2008).

Thank you for the opportunity to testify on House Bill No. 861.

Respectfully submitted,

Kevin B. Cronin

³ About December 23, 2008, the Office of Elections wrote to the State Procurement Office (SPO) seeking such materials but did not receive any materials from the SPO, perhaps because the issue of cost or price analysis is unsettled.

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 24, 2009 8:31 PM
To: FINTestimony
Cc: babsonb001@hawaii.rr.com
Subject: Testimony for HB861 on 2/27/2009 2:00:00 PM

Testimony for FIN 2/27/2009 2:00:00 PM HB861

Conference room: 308
Testifier position: oppose
Testifier will be present: No
Submitted by: Bob Babson
Organization: Individual
Address: 3371 Kaha Drive Kihei, HI 96753
Phone: 808 874-1166
E-mail: babsonb001@hawaii.rr.com
Submitted on: 2/24/2009

Comments:

It would be absurd to give the Chief Elections Officer or any agency a blank check to spend all the money they want with no oversight. In this time of rescission/depression, please vote no on this bill. Further, I believe this would violate the Hawaii State Constitution which I believe states all spending bills must start in the House of Representatives. There can be no exceptions.