



**STATE OF HAWAII
OFFICE OF ELECTIONS**

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SCOTT T. NAGO
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**TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON JUDICIARY
ON HOUSE BILL NO. 1901**

RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT

January 21, 2010

Chair Karamatsu and members of the House Committee on Judiciary, thank you for the opportunity to testify in support of House Bill No. 1901. The purpose of this bill is to establish an alternative public procurement process for the procurement of voting equipment systems.

The Office of Elections agrees with the purposes of the procurement code and its administrative rules. Namely, the promotion of a fair and open process by which the "best value" can be obtained for the State. We believe that the proposed alternative procurement process will accomplish this while avoiding the delays and difficulties with previous election procurements that have threatened the conduct of our elections.

Much has been said in the media by those who claim we should simply award a contract to the lowest bidder and that they do not understand why there is so much litigation regarding election procurements. Such comments fail to recognize what constitutes "best value" and that most awards rest on a qualitative analysis, which will always be subject to attack by disappointed vendors.

As part of the background of this bill, we would note generally that most procurements occur either through the Invitation for Bids (IFB) or Request for Proposals (RFP) processes. These two (2) 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].**

2000 Model Procurement Code for State and Local Governments at 26
(Commentary to § 3-203 Competitive Sealed Proposals) (emphasis added).

In regards to the procurement of a voting system, the request for proposals process is utilized given the qualitative nature of the voting experience and as such, the need to compare and make tradeoffs between the quality of the products and services of the various proposals that are expected be made by the vendors. The criteria typically include technical requirements, an on-site demonstration, and price. The technical requirements make up the most points, then the on-site demonstration, and finally price. The on-site demonstration, which clearly involves a judgmental evaluation, is considered critical as all of the State of Hawaii's voters would be utilizing the selected voting system, and simply procuring a system without taking the opportunity to interact with the system could result in unforeseen problems.

As the judgmental evaluation component of the procurement involves the majority of points, a vendor might have a low score for price but high scores for technical requirements and on-site demonstration, which would cause the vendor to be considered the "best value" for the State, as opposed to a vendor who has the highest score for price but the lowest scores for the technical criteria and on-site demonstration.

Given the important judgmental evaluation component of the voting system in the RFP process, the Office of Elections has consistently made sure that election officials such as the Chief Election Officer and the four county clerks, or their designees, were part of the evaluation committee making the decision.

As most RFPs are decided on the basis of the scores involving a judgmental evaluation, disappointed vendors frequently protest and contend that they should have received a higher score on the judgmental component. Others do not even acknowledge the judgmental evaluation component of the RFP process and instead insist that if they had the lowest price they are the "best value" for the State.

This has resulted in contentious litigation in the past. This coupled with the fact that unlike other procurements, the goods and services requested cannot be delayed, as the election dates are fixed by both federal and state law, results in our elections being held hostage by the uncertain litigation process.

The present bill avoids this uncertainty by creating a process by which election official and relevant stakeholders from the executive branch, legislature, and disability community will share in the decision making process for selecting a voting system which constitute the "best value" for the State.

We would note that given the bill provides for members to be chosen by various appointing authorities, there should be a mechanism to address by when the appointment needs to be made, and if no appointment is made how a vacancy in the selection committee will be addressed.

Thank you for the opportunity to testify on House Bill No. 1901.



County of Hawaii



County of Maui



County of Kauai



City & County of Honolulu

Testimony of the County Clerks
in Support of HB 1901
Relating to Procurement of Voting System Equipment
Committee on Judiciary
January 22, 2010
2:00 p.m.

Written Testimony Only

Chair Karamatsu and Members of the Committee:

The Clerks of all four counties collectively support the proposal of creating an alternative procurement process for procuring voting system equipment and services.

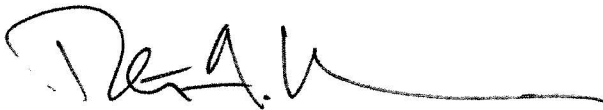
We appreciate the bill introducers' recognition that the procurement of a voting system is unique and necessitates a process to allow state and local governments the flexibility to conduct effective negotiations similar to that in the private sector.

In brief, some of the factors that contribute to necessity for this bill include:

- Local litigation that has delayed procurement of Hawaii's 2010 voting system;
- Very limited number of vendors that provide voting system equipment suitable for Hawaii's elections;
- 65% control of market share by one major voting system vendor; and
- Litigious practices within the entire voting system industry following procurements that increases costs for the State and Counties.

We believe that this bill establishes a framework for effective negotiations with all voting system vendors to obtain the best system at the best price for the State of Hawaii.

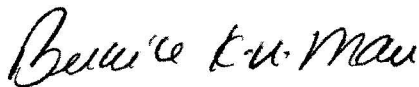
Thank you for the opportunity to testify.



PETER NAKAMURA
County Clerk, County of Kauai



JEFFREY KUWADA
County Clerk, County of Maui



BERNICE K.N. MAU
City Clerk, City & County of Honolulu



KENNETH GOODENOW
County Clerk, County of Hawaii

From: Bart Dame [dameb001@hawaii.rr.com]
Sent: Thursday, January 21, 2010 2:12 PM
To: JUDtestimony
Subject: Testimony HB1901 for Fri JUD Hearing

Bart Dame
710 West Hind Drive
Honolulu, HI 96821

COMMITTEE ON JUDICIARY
Rep. Jon Riki Karamatsu, Chair
Rep. Ken Ito, Vice Chair

Friday, January 22, 2010 , 2:00 p.m.
Conference Room 325

Testimony in **OPPOSITION to HB 1901**, RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT

Aloha Chair Karamatsu, Vice-Chair Ito and members of the committee:

My name is Bart Dame and I am testifying today as an individual in opposition to this bill.

I appreciate the desire of members of the Legislature to facilitate the operations of the Office of Elections. There is a new Acting Chief Elections Officer and I join others in wanting to come together and create optimal conditions for his success and for the common goal of well-run, accurate and secure elections in 2010, a year where voters will be deciding some very important races.

But I think this bill is a mistake. It would exempt procurement of voting systems from laws which govern procurement by government agencies for other goods and services. It claims the regular procurement code is "is ill-suited to the State's procurement of voting equipment systems," but does not explain how election systems are so unique that carefully developed procurement safeguards should be discarded in favor of this alternative system which is sketched out here in brief detail.

What is the problem this legislation seeks to resolve? The bill correctly notes that "protests and appeals" have been "routinely filed by the unsuccessful vendor," but what conclusion should we draw from that? Should we assume the vendor is simply "litigious by nature" and prone to filing frivolous lawsuits? Or perhaps the Office of Elections has made serious errors in how they handled the procurement process?

Fortunately, our busy Legislature is not forced to judge such disputes based upon second hand accounts. There is a formal appeal's process under Hawaii's existing Procurement Code, where challenges of this sort can be thoroughly adjudicated. Why the Legislature should seek to shortcut this process and remove the ability of a vendor to appeal a wrongful procurement decision is not understandable to me.

We are told such challenges lead to delays and higher costs.

Let's look at the specific examples. In September 2007, the Office of Elections issued an RFP seeking to

procure voting services, including the lease of voting machines, for a ten year, five election cycle, covering elections from 2008, 10,12,14 and 2016.

They awarded the contract to Hart InterCivic for \$52 million. Another vendor, ES&S, had offered to do the job for \$18 million. (The HART price was later revised down to \$43 million after an "error" was detected.). ES&S challenged the award, claiming the OE had failed to do a final Cost or Price Analysis (COPA) to determine if the price was justified. An administrative hearings officer agreed with ES&S, but recognizing the State's need to proceed with the elections, reduced the contract from ten years to a contract that only covered the 2008 election.

Had the "fair alternative procurement process" in this legislation been in effect, the State would be locked into a grossly over-priced multi-year contract with Hart. The right of the unsuccessful vendor, ES&S, to challenge the award, protected their interests, but it also protected the interests in Hawaii taxpayers in protecting us from such an extravagant award for a grossly overpriced system.

The Office of Elections IS behind schedule in acquiring the voting system for this year's elections. But let's examine the actual reason and see if this legislation would have helped. In July 2008, a lawsuit was filed against the Office of Elections, claiming the Office had failed to promulgate administrative rules for the use of "direct record electronic voting machines." In September 2009, the judge agreed, forcing the State to interrupt its procurement process until they promulgated the Administrative Rules. Once the Rules were properly adopted, the Office restarted the procurement process.

So the State does not yet have a voting system, but the delay was NOT caused by the ongoing litigation over the voting system award.

Perhaps we should amend this bill to not only exempt the OE from the Procurement Code, but also from the requirement they promulgate Administrative Rules for the running of elections?

In conclusion, I do not believe it serves the public interest to exempt the Office of Elections from our normal Procurement Code. The problems plaguing the OE do not arise from problems with the procurerment code but from the inability of the OE to follow the same restrictions which safeguard the procurement for other agencies. A case has not been made why the needs of the OE are unique.

The Office of Elections is currently trying to procure election services for a six year, three election cycle. They should not be allowed to follow more casual, less stringent rules in awarding that multi-year, multi-million dollar contract. They should, instead, learn to follow the law.

Thank you for this opportunity to testify.