




HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

February 17, 2010

TO: Finance Chair, Representative Marcus Oshiro
Finance Vice-Chair, Representative Marilyn Lee

FROM: Vice-Speaker Representative Michael Magaoay 
Consumer Protection and Commerce Chair, Representative Robert Herkes 
Majority Leader, Representative Blake Oshiro 

Re: Testimony: House Bill 2057

We write to express our serious procedural and substantive concerns to this measure. Haw. Rev. Stat. ("HRS") Chapter 103D, or the Procurement Code, was enacted in 1993 based on the Model Procurement Code adopted by most states. It was the concerted effort on the part of many of the best and brightest procurement experts and contracting officers to create a model act for states.

The changes proposed by this bill, appear to be misguided and flawed attempts to "streamline" the law and code with little understanding as to the basic and important principles of procurement. Without the input, perspective and expertise of the Procurement Policy Board, nor the Hawai'i Procurement Institute, this bill should be deferred for further review by these designated procurement bodies.

I. PROCUREMENT POLICY BOARD AND HAWAII PROCUREMENT INSTITUTE

The contents of this bill appear to be initiated from a similar House Bill HB2506, introduced as part of the Governor's package, and apparently generated from the State Procurement Office ("SPO"). It is important to note that this bill failed to be heard and failed to move from the first committee, Economic Revitalization, Business, and Military Affairs.

In addition to our concerns about circumventing the public hearing process and depriving the public of a right to comment, it is also suspect whether these proposals were properly vetted as required by law.

Under HRS 103D-202 - "*The policy board shall consider and decide matters of policy within the scope of this chapter*" including those referred to it by a chief procurement officer."

Having reviewed the board's previous four agendas (from the summer of 2009 through January 2010) it does not appear that the contents of this bill were discussed.

<http://hawaii.gov/spo/procurement-policy-board-minutes-of-meeting>

Therefore, this raises a question as to whether these changes should first be considered and commented upon by the Procurement Policy Board.

In addition, in 2006, the Legislature created the Hawai'i Procurement Institute, housed in the William S. Richardson School of Law. This was codified as HRS § 304A-1352.

The Hawai'i Procurement Institute, as the recognized experts in the field of procurement and good government contracting practices, also has a recognized stake in these proposed changes. Nonetheless, their input also does not appear to have been sought, nor provided, with regard to these changes.

Therefore, unless and until there is proper review and evaluation by the Procurement Policy Board and the Hawai'i Procurement Institute to determine whether these changes are in the best interest of the state, this committee may want to consider changing these provisions and the study of them, into a task force convened through a resolution.

II. SUBSTANTIVE CHANGES ARE MISGUIDED

It is inaccurate to contend that the changes proposed in this bill merely "streamline" or "simplify" the Procurement Code; rather it contains substantive changes that are most disconcerting and appear to disadvantage the state economically.

These changes appear unwise and will lead to unintended consequences - usually related to price.

In specific, we recommend that the committee scrutinize the following provisions. Upon our initial review, and without the benefit of comment from the procurement bodies referenced above, these provisions are seriously concerning. Therefore, if the committee considers moving this forward, we recommend that these provisions be deleted.

A. HRS §§ 103D-301 & 302.

The changes to the first sentences of each section remove the requirement that sealed bidding be used unless the government has a good reason to use one of the other source selection methods.

Sealed *bids* are awarded to the low price, responsive offer by a responsible bidder. The sealed *bid* method is designed to ensure low price to the government. Unlike sealed *bids*, the sealed *offers* allow the procurement officer to award by affording price a lower weight in the evaluation of offers and award to a higher priced offeror. Consequently, sealed proposals present greater price risks to the government.

Sealed proposals (and the emergency or sole source methods) also present a greater risk of manipulation by the procurement officer to direct award to a favored contractor -- through subjective evaluations and discounting of price. Manipulation in sealed bids is much harder because the "low price" award factor is objective and eliminates the potential for subjective scoring.

These changes will present greater risks of higher prices and manipulation of subjective evaluations. The only savings would be relieving the procurement officer of the duty to explain in writing why sealed bidding is not in the best interests of the government before using sealed proposals (or other method).

B. HRS § 103D-302.

The bill proposes to change "bid opening" to "bid due date." The effect is to change the time when the state can accept changes to bid prices.

The "bid opening" is the point where prices are exposed publically. Consequently, that is the point where the federal government and the Model Code restrict the competitors' ability to change their prices.

Usually the "bid due date" is the date set for bid opening, but "date" is less precise than the time when bids are actually opened and made public. Literally, bidder may rush in minutes before the opening to change their price. That is the nature of competition, and it is to the government's advantage.

If you use "date" instead of the "bid opening" time, you will cut off the last minute changes that can push down prices.

This change appears to be the product of lack of education and understanding. It is an unnecessary change without justification.

C. HRS § 103D-302(j)

This changes licensing and tax clearance from a responsibility determination that can be decided at the time of award to a "responsiveness" issue that must be determined at the time of bid submission.

Our statute currently has the subcontractor licensing for construction – see *Okada Trucking* case - and it has resulted in many lower bids being rejected because of contractor omissions in the bid. This change will extend the *Okada Trucking* rejection of construction bids to all other requirements (i.e. goods and services contracts) - with its accompanying requirement that the bid be rejected even though it may be lowest solely because of some omission of tax clearance and licensing info.

Note also that there is a recommended addition "provided that this requirement shall not include bonding." As a result, the government can accept a sealed bid where the bidder failed to provide a bid bond (guaranteeing the bid), but reject another lower bid because the contractor forgot to include its tax clearance or license.

This does not make much sense. It can only lead to more hassles and rejection of low bids because of a technicality that could be corrected in the responsibility review.

D. HRS § 103D-306(a)(1)-(3) &(b)

This change restricts who can object to a sole source notice, causes a shortened time for objections, and thereby deprives the government of notices to the state from contractors who believe they can perform the work subject to a sole source notice.

Subparagraph (2) allows the head of purchasing agency to justify a proposed sole source award on the grounds that earlier solicitations did not result in competition from responsible offerors. Then down at (b), "previous offerors" in the earlier competitions are allowed to object "within 5 days of the notice posting" (which is supposed to be posted for 30 days).

The idea of the posting and objections process is to allow ANYONE who thinks they can do the work to object to the sole source award. The SPO's change makes only prior offerors eligible to object - and the result will be to exclude others who have not competed before but want to compete. In addition, the time for objections is only 5 days after posting - even though the posting is to last 30 days.

This is another unexplainable change. The Procurement Code should encourage anyone who wants to compete to object and push for full and open competition. The advocates for this change should be compelled to explain this - it can only lead to bad results, less competition, and more sole sources.

E. HRS § 103D-312.

The certification of cost and pricing data is to protect the government from unreasonable prices. The federal government requires certification of cost and pricing data as a "best practice" routine. The federal Department of Defense requires certification of cost and pricing even for Requests for Equitable Adjustments over \$100K.

Elimination of this section means the state cannot demand a contractor certify the basis for its pricing. It is clearly disadvantageous to the government, and there is no justification for removing this protection for the taxpayer.

The advocates for this change should be compelled to explain why there is any justification to remove this basic protection for the taxpayer.

III. CONCLUSION

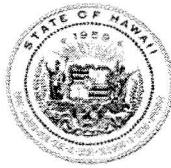
The State's Procurement Code, while it has been characterized as cumbersome, is actually designed to protect Hawai'i's taxpayers from fraudulent misuse of public funds. It also protects the private sector's right to challenge government actions.

In these times of our significant budgetary deficit, it appears imprudent to ease agency's purchase of goods and services, in the name of "streamlining" – especially when these proposals do nothing to ensure that the price which will be paid is in the best interest of the State. Rather, these changes only serve to undermine our Legislative role in controlling the "purse strings."

Unless and until the Procurement Policy Board and the Hawai'i Procurement Institute sign-off on the proposed changes, we recommend that no further action be taken on the bill. If the subject matter Committee wants to expedite government projects it is suggested that they consider an in-depth review of the permitting process.

Please feel free to contact us should you have further questions or concerns regarding our testimony.

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
<http://hawaii.gov/spo>

**TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE
HOUSE COMMITTEE
ON
FINANCE**

February 18, 2010

10:00 a.m.

HB 2057, HD1

RELATING TO PUBLIC PROCUREMENT.

Chair Oshiro, Vice Chair Lee, and committee members, thank you for the opportunity to testify on HB 2057, HD1.

This bill has several proposed amendments to the procurement code, Chapter 103D. The following comments are provided by sections.

SECTION 1 to 5 amendments are similar or same as HB 2506 (Administration Bill), which the State Procurement Office (SPO) supports.

SECTION 6 amends §103D-302 to add a new subparagraph (j) to require submittal of documents such as tax clearance, 'At the time a bid is submitted...' which is in conflict with §103D-310 that states in part, '...upon award of contract, shall comply with all laws....'. The §103D-310 requirement has been problematic to obtain the proper documents timely, however, if the intent is to require timely submittal at time of offer, then this requirement should be applicable to the other procurement methods for §103D-303, 103D-304, and 103D-306, and not limited to only §103D-302 procurement method.

SECTION 7 amendments are similar as HB 2506 amendments, which the SPO supports.

SECTION 8 amendments are contrary to SECTION 10 of HB 2506, the SPO does not support the amendments.

SECTION 9 amendments delete the requirement for electronic procurement for specific dollar levels for small purchase procurements. The SPO advocates electronic procurement whenever possible in order to provide transparency, openness and fairness to all potential businesses. The small purchase process without the electronic procurement feature is inherently unfair because no public notice is provided and only the purchaser decides who to contact for price quotations, this practice creates the mechanism for abuse to occur. The SPO does not support SECTION 9 amendments.

SECTION 10 amends the sole source procurement method to add provisions to award when not a true sole source, but because no offer was qualified. Current rules provide for a waiver to competitive sealed bid process to allow award when no bids are received or there were no responsive, responsible bidders. This amendment is not necessary.

SECTION 11 to 14 amendments are similar or same as HB 2506 amendments, which the SPO supports.

SECTION 17 to 23 amendments are similar or same as HB 2506 amendments, which the SPO supports.

Thank you.