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SPO 22-093

October 22, 2021

**MEMORANDUM**

TO: The Honorable Sharon Y. Moriwaki, Chair  
Senate Special Committee on Procurement (SCP)

FROM: Bonnie Kahakui, Acting Administrator *Bonnie A Kahakui*

SUBJECT: Senate Special Accountability on Procurement Information Briefing  
Follow-Up Questions

The following is in response to inquiries brought up by the SCP during the October 12, 2021, briefing.

**1. Roles, responsibilities, and authority of the SPO Administrator over the executive branch to ensure consistent and fair procurement and contracting by all departments.**

**SPO Response:** The answer to this is a summary of the responses contained in this memorandum. The SPO Administrator requires staffing and funding resources and authority to:

- Create standards and criteria for determining change orders beyond the original scope of work
- Allow for standards & safeguard to exempt construction contracts
- Conduct periodic procurement reviews of departments
- Create an eProcurement system, and assess administrative fees to be deposited into a special fund to fund the system, if not appropriate funds by the legislature
- Create SPO training section and implement classes for a certified training program
- Change Hawaii Administrative Rules to preclude vendors from receiving government contracts who have received unsatisfactory performance reviews, for three years
- Impose penalties that are not related to misdemeanor charges
- Adopt, amend, and repeal administrative rules, without the Procurement Policy Board

**2. Statutory amendment to strengthen the role, responsibilities, and authority of the SPO Administrator to audit and take action against procurement officers for violations of the procurement and contracting law and rules.**

**SPO's Response:** Please see responses for Items #8 and #10.

**3. Procedures or policy amendments to address procurements in which fewer than three responses are received.**

**SPO Response:** Currently, Professional Services, pursuant to Chapter 103D-304, Hawaii Revised Statutes (HRS), requires the purchasing agency to submit a minimum of three (3) qualified persons to the head of the purchasing agency. At times this may be difficult, resulting in delayed project awards. The SPO recommends a revision to the statutory language, which is as follows:

*§103D-304 (g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. If the purchasing agency fails to get a minimum of 3 qualified persons, the agency may submit a request for alternative procurement approval from the chief procurement officer, or designee. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause.*

If adopted, the SPO would revise the existing process through use of Form SPO-015 (or similar for other jurisdictions), "Request for Alternative Procurement," that agency shall use to request Chief Procurement Officer (CPO) approval to include alternative procurement for professional services. This would require the head of the purchasing agency (HOPA) to make a written justification/determination why the agency was unable to obtain the minimum three (3) responses. The approved SPO-015 would become a part of the procurement file.

**4. Standards and safeguards for proper departmental use of emergency procurement.**

**SPO Response:** The SPO has concerns that expanding the definition to include repairs and maintenance could lead to misapplication of the statute. SPO does not recommend statutory language changes. However, SPO is open to relaxing the policy to allow the HOPA, of the executive branch departments (optional for DOE, UH, OHA) to approve emergency procurements of less than \$100,000, on the condition that the agency submits to the SPO an approved copy of the emergency procurement using SPO form SPO-002 (or similar for other jurisdictions) and any award greater than \$2,500 be posted on the Hawaii Awards and Notices Data system (HANDS). This process will allow SPO to monitor emergency procurements, of the executive branch departments, and take appropriate action if necessary.

**5. Standards and criteria for determining change orders beyond the original scope of work that require issuing a new bid.**

The State Procurement Office recommends procuring the services of a consultant who will review federal procurement laws, particularly Federal Acquisition Regulations (FAR), Subpart 43.2-Change Orders, and compare it to the Hawaii Procurement Code, Chapter 103D, and current government practices.

The consultant will conduct the following tasks, specifically related to Change Orders:

- Compare the similarities and differences between the construction provisions of the Hawaii Public Procurement Code and federal construction procurement laws;
- Provide an analysis of whether closer alignment of construction procurement provisions of the Hawaii Public Procurement Code to federal construction procurement laws would be beneficial to the State;
- The length of time and effort required by the State to implement changes to better align the construction procurement provisions of the Hawaii Public Procurement Code with federal construction procurement laws; and
- Any costs, including personnel costs, to the State should the construction procurement code be amended to more closely align with federal construction procurement laws relating to change orders.

Deliverable (Outcome): Submit a report of its findings and recommendations, including any legislation, if any.

Anticipated cost: \$400,000 one-time fee.

#### **6. Standards and safeguards for proper use of construction exemptions.**

**SPO Response:** If the statute is changed to allow for construction exemptions, as indicated below, the SPO would recommend that the agency be required to submit form SPO-007 (or similar for other jurisdictions), *Notice and Request for Exemption from Chapter 103D, HRS*, signed by the Head of Purchasing Agency (HOPA) and approved by the Chief Procurement Officer, pursuant to §3-120-5, Hawaii Administrative Rules (HAR). The HOPA shall determine that a situation exists where procurement by competitive means would not be practicable or not advantageous to the state and submit the request for CPO determination. Form, SPO-007, Notice & Request for Exemptions are publicly posted (10 days for construction) to allow for public input, before an affirmative action can be taken by the CPO. Also recommend changes to Section 3-120-5, HAR to include additional criteria for construction exemptions (i.e. cost/price reasonableness determination, independent cost estimate, additional approvals etc.)

*103D-102(b)(4)(L) states, "Any other goods, services, or construction, which the policy board determines by rules or the chief procurement officer determines in writing is available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State;"*

#### **7. Models from federal or other states to improve the state's procurement and contract management policies and procedures to ensure fair, consistent and efficient organization and functions throughout the state, including but not limited to centralized procurement in SPO and departmental offices; type of required staffing, including a construction procurement officer; and dedicated training and auditing staff.**

**SPO Response:**

- **eProcurement System:** To ensure consistency, efficiency, and transparency to contractors/vendors, SPO recommends the use of a comprehensive, full-service eProcurement system.

Some of the benefits of an eProcurement system include but not limited to:

- Increased administrative efficiency (one stop shop for buyers and vendors)
- Increased competition (more competition... lower costs)
- Manage all spend (leverage buying power, monitor compliance)
- Government policy automated (built in adaptable technology to keep compliant with policy)
- Transparency and accountability

The cost would be approximately \$5 million for implementation, plus an additional \$500,000 to \$1 million for annual licenses.

- **Training:** The State would also benefit from a certified training program to ensure all procurement staff have taken the necessary training to conduct procurement correctly. The SPO recommends a dedicated training section within its office with the following staff members, at minimum:
  - Training section chief/supervisor
  - Two (2) professional training instructors
  - One (1) support staff

The training certification program would be multi-tiered based on methods of dollar thresholds and number of classes or contact hours. For example:

<b>Tier</b>	<b>Dollar Threshold</b>	<b>Method of Procurement</b>	<b>Types of Class (for example)</b>
<i>Basic</i>	<i>\$100K for goods &amp; services \$250K for construction</i>	<i>Small Purchase 103D Sole Source 103D Exemptions Emergency Professional Services</i>	<ul style="list-style-type: none"> <li>● Ethical Procurements</li> <li>● Fundamentals of each procurement method</li> </ul>
	<i>\$100K for health &amp; human services (assuming legislative change from \$25K to less than \$100K)</i>	<i>Small Purchase 103DF Restrictive Crisis</i>	<ul style="list-style-type: none"> <li>● Market Research</li> <li>● Strategic Sourcing</li> <li>● eProcurement</li> <li>● Contract Management</li> <li>● Specification Writing</li> </ul>
<i>Intermediate</i>	<i>\$100K to less than \$2M</i>	<i>Competitive Sealed Bids Competitive Seals Proposals Sole Source(103D)/Restrictive Purchase of Service (103F) Exemptions Emergency (103D)/Crisis Purchase of Service (103F) Professional Services Competitive Purchase of Service (103F) Treatment of Service (103F)</i>	<ul style="list-style-type: none"> <li>● Elements of RFP Development</li> <li>● Elements of IFB Development</li> <li>● Vendor Performance</li> <li>● Exempt Procurements</li> <li>● Pre-approved Sole Sources</li> <li>● Cost &amp; Price Analysis</li> <li>● Understanding &amp; Detecting Anti-Trust</li> <li>● Contract law</li> </ul>

<i>Advanced</i>	<i>\$2M and above</i>	<i>Competitive Sealed Bids          Competitive Seals          Proposals          Sole Source/Restrictive          Purchase of Service (103F)          Exemptions          Emergency(103D)/Crisis          (103F)          Professional Services          Competitive Purchase of          Service (103F)          Treatment of Service          (103F)</i>	<ul style="list-style-type: none"> <li>• <i>Hawaii Compliance Express</i></li> <li>• <i>Cooperative Purchasing</i></li> <li>• <i>Green Purchasing</i></li> <li>• <i>Prevailing wages</i></li> <li>• <i>Request for Information</i></li> <li>• <i>Request for Interest</i></li> <li>• <i>CPO Requests</i></li> </ul> <p><i>NOTE: Some of these classes already exist. Others would have to be developed by the training team.</i></p>
<p><i>Note: Renewal period every 5 years.</i></p>			

The State Procurement Office anticipates the following costs:

- \$400,000 for salaries (excluding fringe)/per year
- \$18,000 per year for eLearning software
- \$35,000 Learning Management System (LMS). Currently the SPO partners with DHRD for a Learning Management System (LMS-Captivate), however, that only covers the executive branch departments (excluding DOE, UH, and OHA).

The State would benefit from the services of a professional training consultant to provide their industry knowledge to address the needs of the State’s certified training program and building a customized and efficient program. Approximate one-time cost of \$200,000.

- **Procurement Environment:** The SPO is also recommending a change to the procurement environment of executive branch departments (excluding DOE, UH, OHA) from decentralized to centralized. Eighty-six percent (86%) of responding states (36 states) have a central procurement office with authority for all areas of procurement, except construction and institutions of higher learning, within their state. The remaining fourteen percent (14%) do not have authority across all areas.

Benefits of centralized governance of state procurement:

- Improved leveraging of the volume of the state’s purchasing power
- Creation of key strategic categories
- Provision of more efficient application of procurement and contracting expertise
- Building of centers of excellence (category managers)
- Better coordination for disaster response activities
- More effective response in tackling large scale supply chain disruptions

Note: SPO would recommend small purchase procurements remain within the respective departments.

Negative effects of centralization would include, but are not limited to, departments' belief the following will occur:

- Departments would lose control of procurement
- Goods, services priority will decline
- Departments will lose vendor/contractor relationships

Note: States with centralized procurement environment have separate offices that handles construction procurements, due to the special nature and expertise of the building industry.

Centralization will be a long-term goal of 8-10 years, therefore, recommending a transition period. Departments would reorganize to create a central procurement office of certified staff to handle all the department's procurement requirements. This partial centralization, along with a strong training program, will provide a foundation for the final transition towards a fully centralized procurement environment, which does not include construction and institutions of higher learning.

#### **8. Procedure, anticipated outcome, staffing, and costs to conduct annual random audits of departments.**

**SPO Response:** This auditing function already exists in the Office of the Auditor, pursuant to §103D-107, HRS, Compliance audit unit; establishment and purpose, which says the following:

"There is established a **compliance audit unit within the office of the auditor**. The purpose of this unit shall be to:

- (1) Periodically review and audit procurement practices within government to ensure compliance with this chapter and all applicable rules; and
- (2) Advocate competition, fairness, and accountability in the procurement process."

§103D-108, HRS, Compliance audit unit; duties and responsibilities, states the following:

"The compliance audit unit shall:

- (1) Review and assess applicable innovations in procurement methods or processes in other governmental jurisdictions or as described in national or regional publications;
- (2) Review current or proposed statutes and rules to determine whether they promote fairness, efficiency, and accountability in the procurement process;
- (3) Review selected contracts awarded pursuant to section 103D-304;
- (4) Conduct studies, research, and analyses, and make reports and recommendations with respect to existing and new methods of procurement and other matters within the jurisdiction of the policy board;
- (5) Establish and maintain a procurement library;
- (6) Report to the appropriate agency and the chief procurement officer stating the areas of noncompliance and recommendations for remedial action; and
- (7) Be present at legislative hearings and policy board meetings to present the findings of the unit."

The SPO recommends the "procurement audit" function remain with the Office of the Auditor, since that office is already tasked with the responsibility, per statute. The Legislature could require the Office of the Auditor to conduct an audit of any department or jurisdiction.

Currently, §103D-206, HRS, allows the SPO Administrator to **perform periodic reviews** of the procurement practices and procedures for all government bodies, in collaboration with the Procurement Policy Board. However, due to the lack of resources, periodic reviews have not been accomplished. The SPO does respond and has investigated situations that appeared to be inconsistent with the Hawaii Procurement Code.

If the SPO is to **perform periodic reviews** of the procurement practices of departments, the SPO would be equipped to initiate a review process if provided with additional resources. Every 12 months, the SPO would randomly select two (2) departments and advise them that they will undergo a procurement review, during which the SPO will:

- Randomly select awards made from each of the six methods of procurements,
- Review the procurement practices,
- Provide a summary of findings to the department/agency, with recommendations for corrective action, if applicable, and
- Follow up with the department to determine if corrective action has been taken.

The SPO anticipates it will require a minimum of two additional staff members dedicated to performing procurement reviews for a total of \$150,000 (excluding fringe benefits) per year. If the statute were to change to include “periodic audits” by the SPO, the cost would be much higher as auditors require specialized skills sets in accounting and/or auditing policy and procedures.

**9. Policies and procedures to address problems of competitive bids requiring departments to obtain the lowest bid rather than making decisions on past performance, qualifications of personnel, management approach, responsive and responsible bidder, etc.**

**SPO Response:** In addition to Act 188, 2021, Past Performance Database, the SPO recommends changing the statute to require past performance evaluation be completed for all contracts, including those procured through the **Professional Services** method of procurement, pursuant to §103D-304, HRS.

Currently, the law requires agencies to “consider” past performance before making an award. However, this “consideration” lacks any real enforcement. To be effective, the SPO recommends the statute and rules be changed to include a statement in Competitive Sealed Bids (§103D-302), Competitive Sealed Proposals (§103D-303), Professional Services (§103D-304), and Sole Source (§103D-306)

The SPO suggests that the following language be inserted:

“Bidders/Offerors/Vendors who have one (1) or more unsatisfactory performance evaluations on any government contract, shall be precluded from an award for three (3) years from the date of the contract evaluation.”

**10. Procedures and penalties to address non-compliant department chief procurement officers, e.g., stronger penalties than removing delegation? More rigorous training and certification? Dedicated certified procurement staff?**

**SPO Response:** Chapter 103D-106, HRS, addresses the penalties of any person who intentionally violates Chapter 103D or any rules adopted pursuant to this chapter. However, it is unclear if it was the Legislature's intent that the person be charged with a **misdemeanor**, which is punishable in Hawaii with a maximum sentence of one year of jail time, and shall be:

- (1) Subject to removal from office;
- (2) Liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county; and
- (3) Subject to imposition of an administrative fine under subsection (b).

Also, the person charged will be liable to the state for any sum paid in connection with the violation and will be subject to administrative fees of five thousand dollars (\$5,000). According to the Department of the Attorney General, intentional violation of Chapter 103D, HRS, will be very difficult to prove. Therefore, the SPO will work with its assigned Deputy Attorney General to develop recommendations both for statutory changes and Hawaii Administrative Rules. The SPO will also review the Ethic Commission fines, pursuant to §84-39, HRS, to ascertain if there are any commonalities.

**11. Assess the effectiveness of the state procurement council -- its functions and responsibilities, scope of work and authorities, accomplishments during the past five years; and whether it should be continued.**

**SPO Response:** Since 2015, the Procurement Policy Board's activities have included the following:

1. Adopted, amended, and repealed Hawaii Administrative Rules (HAR) to carry out and effectuate the purpose and provisions of Chapter 103D, HRS, in 2016 through Procurement Directive r No. 2017-01.
  - Amended HAR Section 3-120-4  
The amendments to HAR section 3-120-4, Procurement exempt from Chapter 103D, HRS, clarifies the procurement roles for purchasing agencies
  - Amended Exhibit A, HAR Chapter 3-120  
The amendments to Exhibit A reflects additional language added by the PPB to remind State employees that they are still bound by ethical and contractual responsibilities, regardless if their procurement is exempt from the Chapter 103D, HRS, process. The word "etc." was removed to avoid ambiguity.
  - Amended 3-122-14, HAR  
Exempts items, adds language to exercise due diligence, and reminds purchasing specialists to be responsible and act ethically when preparing specifications for procurements exempted from Chapter 103D, HRS.



- Amended HAR chapter 3-122-66 – Source Selection, and Section 3-122-14 – Exempted Items. Chapter 3-122-66 can no longer be utilized to secure professional services as a result of the Hawaii Supreme Court decision in *Asato v. Procurement Policy Board* (2014). A rule change regarding exemption language provides clarity that regardless of being exempt from Chapter 103D, HRS, there are always ethical and contractual requirements.
  - Amended HAR Chapter 3-130 – Inventory Services, to align the inventory responsibility with the HRS, which states that each department head is responsible for that department's inventory.
2. Will review pending amendments to HAR on Purchases of Health and Human Services
    - Chapter 3-141, General Provisions
    - Chapter 3-142, Planning
    - Chapter 3-143, Competitive Purchase of Service
    - Chapter 3-144, Restrictive Purchase of Service
    - Chapter 3-146, Small Purchase of Service
    - Chapter 3-147, Crisis Purchase of Service
    - Chapter 3-148, Protest and Request for Reconsideration
    - Chapter 3-149, Contracting
  3. Will review pending amendments to HAR on Procurement of Goods, Services and Construction
    - Chapter 3-120, General Provisions
    - Chapter 3-121, Procurement Organization
    - Chapter 3-122, Source Selection
    - Chapter 3-125, Modifications and Termination of Contracts

However, the PPB has not been active since May 2019 due to lack of quorum. The SPO had previously recommended reducing the PPB to five (5) members, eliminating the PPB Nominating Committee, and reducing the minimum number of applicants for vacant positions from three (3) to two (2).

The continuous vacancies and the inability for the PPB to meet quorum has become cumbersome and an impediment to the process. The SPO recommends that 103D-201 and 103D-202, HRS, be repealed to eliminate the PPB. The SPO Administrator would have sole responsibility to adopt, amend, or repeal any administrative rules associated with Chapter 103D, HRS, the Hawaii Public Procurement Code. Any adoption or changes will be in accordance with Chapter 91, HRS, and therefore provide the balance necessary to ensure fair and equitable treatment to government entities and vendors.

Note: All administrative rules with reference to the PPB would have to be amended.

Thank you for the opportunity to provide responses to the committee's questions and to continued dialogue to help improve procurement in the State of Hawaii. Should you have any further questions, please contact me at 587-4702 or [bonnie.a.kahakui@hawaii.gov](mailto:bonnie.a.kahakui@hawaii.gov).