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STATE OF HAWAII | KA MOKU'ĀINA O HAWAII
DEPARTMENT OF LAW ENFORCEMENT

Ka 'Oihana Ho'okō Kānāwai

715 South King Street
Honolulu, Hawaii 96813

TESTIMONY ON SENATE BILL 3184

RELATING TO PROCUREMENT

Before the Senate Committee on Government Operations

Tuesday, February 6, 2024; 3:10 p.m.

State Capitol Conference Room 225, Via Videoconference

WRITTEN TESTIMONY ONLY

Chair McKelvey, Vice Chair Gabbard, and members of the Committee:

The Department of Law Enforcement (DLE) **supports** Senate Bill 3184.

This bill expands the use of emergency procurement to situations involving equipment failures, repairs to public property in order to protect against further loss of, or damage to, public property, or to prevent or minimize serious disruption in continued functioning of government services.

This is an important measure to allow departments to expedite the replacement or repair of equipment that has failed or property that has been damaged, or actions that are needed to prevent or minimize disruption of government services. From a law enforcement agency perspective, there are numerous systems, equipment, and property needed to provide for the safety of the community. This will would allow the department to expedite repair or replacement thereby protecting the public we serve.

Thank you for the opportunity to testify in support of this bill.



STATE OF HAWAII
HAWAII STATE PUBLIC LIBRARY SYSTEM
'OIHANA HALE WAIHONA PUKE AUPUNI O KA MOKU'ĀINA O HAWAII
OFFICE OF THE STATE LIBRARIAN
44 MERCHANT STREET
HONOLULU, HAWAII 96813

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Tuesday, February 6, 2024

3:10 p.m.

Conference Room 225

**By Stacey A. Aldrich
State Librarian**

S.B. 3184 RELATING TO PROCUREMENT

To: Sen. Angus L.K. McKelvey, Chair
Sen. Mike Gabbard, Vice Chair
Members of the Senate Committee on Government Operations

The Hawaii State Public Library System (HSPLS) **supports** S.B. 3184 which amends section 103D-307, HRS, to add equipment failures, repairs of public property to protect against further loss of, or damage to, public property, to prevent or minimize serious disruption in continued functioning of government services. The measure also replaces Chief Procurement Officer approval with an accounting report to the legislature within sixty days after the end of the fiscal year in which the procurement was made.

The proposed amendments allow the head of a purchasing agency to move forward with emergency procurements in order to expedite restoration of public services. Department and agency heads are better able to determine what repairs, equipment and services are necessary to maintain or restore public services.

Thank you for the opportunity to provide comments on S.B.3184.

LATE

DAVID Y. IGE
GOVERNOR



BONNIE KAHAKUI
ACTING ADMINISTRATOR

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS

February 6, 2024, 3:10 p.m.

SENATE BILL 3184
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Gabbard, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 3184. The State Procurement Office (SPO) opposes the additional language in Section 1, page 1, lines 10 to 15, because that language already exists in Chapter 103D, Hawaii Revised Statutes. The SPO offers the following comments and recommendation:

COMMENTS:

1. Heads of Purchasing Agencies can immediately manage their emergency procurements.

Section 3-122-88, Subchapter 10, Hawaii Administrative Rules, already allows the requester to submit their package before or after the emergency. This allows Heads of Departments to take immediate action and process the paperwork later using a form developed by the chief procurement officer.

In an emergency procurement, the goods or services to be purchased should only be what is necessary to address the immediate circumstance. The expectation is to conduct swift immediate action to negate any safety and life risks. It is a temporary measure that would require a full competitive procurement to deal with any longer-term needs.

2. Statutory Requirements – HRS Section 103D-307, Emergency Procurements

The statute allows the head of the purchasing agency to obtain goods, services, or construction when certain conditions exist:

- A situation or urgency that creates a threat to life, public health, welfare, or safety by reason of major disaster, epidemic, riot, fire, or other such reasons as determined by the head of the purchasing agency (HOPA)
- The emergency conditions create an immediate need that cannot be made through normal procurement methods, and the government would be injured if it was unable to obtain the goods, services, or construction.
- Without the needed goods, services, or construction the continued functioning of the government the preservation or protection of irreplaceable property, or the health and safety of any person will be seriously threatened.

3. Examples of Inappropriate Use of Emergency Procurement

In *Sloan v. Department of Transp.*, 666 S.E.2d 236, 379 S.C. 160 (Aug 25, 2008), DOT procured construction involved the widening of the road from two lanes to five lanes. The contract was ultimately terminated for consistently getting behind schedule on the project. Approximately two weeks after the DOT terminated the contractor, one of the existing subcontractors began finishing the prime contractor's work under an emergency contract with DOT.

The Courts decided safety concerns did not appear unexpectedly thereby suddenly creating a public safety risk. They also opined that any urgency felt by DOT was, in large part, due to the delays on the project and frustration by the affected community. The circumstances did not constitute an emergency and termination of a contract cannot reasonably view as a sudden or unexpected occurrence.

In *Sloan v. School District of Greenville County*, No. 98-CP-23-2816 (Greenville, S.C., Ct. Common Pleas, July 15, 2003), the District's Procurement Code requires that the emergency be 'an immediate threat.' An immediate threat is one that is at hand, not an anticipated threat, but one that arose suddenly, with no delay or lapse of time in its generation." Also, "This factual record shows a clear lack of immediacy and suddenness," and "Failure to start on time does not make an emergency. Poor planning does not create a valid emergency."

In the *Protest of Homer L. Spires, Case No. 1988-6*, the University of South Carolina solicited bids for construction of the Roost dormitory. The awarded contractor was later found to provide fraudulent payment and performance bonds and practiced bidding shopping in violation of state law. Subsequently another contractor was procured using an emergency procurement.

A panel found that while an emergency may have existed relative to the safety threat of certain drainage areas and slope containment, the procurement went well beyond that necessary to meet the emergency. The emergency which existed did not justify procurement without competition of a \$3.629 Million contract for completion of the entire project. The Panel did not find this to be a true emergency condition.

4. Alternative relief for requesters in emergencies, specifically regarding repairs and maintenance: Indefinite Delivery Indefinite Quantity (IDIQ) contracts

Heads of Departments may consider putting in place indefinite quantity contracts for a period of time through a formal competition in anticipation of certain repair situations, with the understanding that the user agencies will purchase from the contract only if an emergency need exists.

5. Federal management of emergency procurements and repairs and maintenance.

The Federal Acquisition Regulations (FAR Chapter 18.001) on Emergency Acquisition only allows emergencies acquisition if determined by the HOPA if:

- Supporting a contingency operation
- Defense or recovery from cyber, nuclear, biological, chemical, or radiological attack
- International disaster assistance, or
- Presidential declared disaster

No day-to-day emergencies are recognized, requiring the Federal Agencies to competitively procure for those, inclusive of any threats to public health and repairs and maintenance.

2CFR200 Federal Grants regulations apply to any federal monies received, mandate that procurement is conducted according to the **State Procurement Code**, and specifically require cost and price analysis. If HOPAs are managing their own emergency procurements (whether for declared or non-declared emergencies) with no oversight on these matters, there is a high risk that federal monies could be at risk.

FTA-Federal Transit Administration Best Practices Procurement and Lessons Learned Manual, Oct. 2016, does not include using emergency acquisition for repairs and maintenance as a practice of any kind. The premise and expectation are that repairs and maintenance needs are procured.

6. Other states' management of emergency procurements and repairs and maintenance

According to the National Association of State Procurement Officials' 2018 Survey Executive Summary and online Survey Report, 60% of the jurisdictions responding to the survey indicated that they have adopted the provisions of the Model Code partially, or in its entirety.

The Model Code defines emergency procurements as the following:

“§3-206 Emergency Procurements. Notwithstanding any other provision of this Code, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.”

South Carolina

South Carolina's emergency procurement statute 19-445.2110 requires the following for Emergency Procurements:

1. Defines a qualifying emergency as a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a purchasing agency or a designee of either office. They have caveated this definition to note that “other reason as may be proclaimed” must be an "immediate and serious need", "cannot be met through normal procurement

methods", the lack of which would seriously threaten: (1) the functioning of State government; (2) the preservation or protection of property; or (3) the health or safety of any person."

2. Requires approval, written justifications, solicitation as much as is possible, and reporting.

New Jersey

The use of emergency purchasing pursuant to N.J.S.A. 40A:11-6 or 18A:18A-7 shall be subject to the following requirements:

1. An actual or imminent emergency must exist requiring the immediate delivery of the goods or the performance of the service.
2. As soon as reasonably possible, but within three days of declaring the emergency, the chief school administrator of a board of education shall notify the superintendent of education for the county of the nature of the emergency and the estimated needs for goods and services necessary to respond to it.
3. The emergency purchasing procedure may not be used unless the need for the goods or services could not have been reasonably foreseen or the need for such goods or services has arisen notwithstanding a good faith effort on the part of the contracting unit to plan for the purchase of any goods or services required by the contracting unit.
4. The contract shall be of such limited duration as to meet only the immediate needs of the emergency; and
5. Under no circumstances shall the emergency purchasing procedure be used to enter into a multi-year contract."

California

1. CA Regulation 12.13 states that after warranty period is completed the procurement officer must procure for repairs and maintenance.
2. CA Regulation 4.11.2/3 the responsibility for review and approval to their Chief Procurement Office of emergency purchases not in response to a natural disaster.

Virginia

1. For an emergency purchase required to protect personal safety or property, efforts should be directed to finding a source and directing the contractor to proceed; however, such procurement shall be made with such competition as is practicable under the circumstances (Code of Virginia, § 2.2-4303F). This does not relieve the agency from negotiating a fair and reasonable price and subsequently documenting the procurement action.
2. For other types of emergencies, competition should also be sought to the maximum extent practicable.

7. Effects of removing the SPO from oversight of emergency procurements and give review responsibility to the Legislature

The SPO’s research on federal and state practices shows that all government agencies containing procurement oversight over emergency procurements by the Federal Contracting Officer or the State Chief Procurement Office, whichever applies. We were not able to find a single exception to this rule in which emergency procurements are handed to Legislature for review.

Recommended best practices, and actual practices conducted across the nation as well as with the Federal Government, all require strict oversight on any procurements that require an exception to competition. NASPO stated that “Balancing the flexibility provided by exceptions to full competition with the need for proper administration requires central oversight, including the authority to establish strict conditions for the use of exceptions. That authority and oversight must reside solely with the Chief Procurement Officer. Central decision making by the Chief Procurement Officer means that there is a central repository for the documentation supporting the decision on the exception to competition. This, in turn, offers one place for auditors and others to find data about these types of procurements, including the justification for limiting or eliminating competition.”

Emergency procurements awards, for Executive Branch Departments, are posted onto the SPO’s Hawaii Award and Notices Database System. Removing the SPO authority of oversight over a specific procurement method, will remove any transparency and accessibility by the general public.

Removing oversight of emergency procurements, specifically over repairs and maintenance is a violation of Section 103D-205, HRS, which states that each Chief Procurement Officer is responsible for supervising the procurement of all goods, services and construction and ensure procurements are conducted in a fair and transparent procurement.

8. Historical Information

During the period of October 23, 2008, to December 6, 2010, the prior Administrator allowed Executive Departments to conduct emergency procurements without CPO review under the dollar threshold of \$50,000. After two years, the Administrator pulled back this allowance due to rampant abuse.

Emergency Procurement Metrics (FY21, FY22, and FY23)

FY 2021	FY 2021 Total Value	FY 2022	FY 2022 Total Value	FY 2023	FY 2023 Total Value
14: 8-Approved 4-No Action Required (Covid) 2-Disapproved	\$120,519.00	54: 46-Approved 3-No Action Required 5-Disapproved	\$1,555,448.55	55: 50-Approved 2-No Action Required 3-Disapproved	\$12,367,285.00

*Note: Total value of only requests approved.

During a typical fiscal year, the State Procurement Office received approximately 50 emergency requests. The turn-around time to respond to requests is about six days. If a “prior to” request is received the policy is to make a final determination within 24 hours.

RECOMMENDATION: The SPO recommends the removal of all the additional language that was inserted in the bill:

Section 1, page 1, lines 10-15:

Riot, fire, ~~or similar events and, to a lesser extent, by reason of equipment failures, repairs to public property in order to protest against further loss of, or damage to, public property, or to prevent or minimize serious disruptions in continued functioning of government services,~~

Section 1, page 2, lines 11-13:

[and, where practicable, approval from the chief procurement officer shall be obtained prior to the procurement].

Section 1, page 2, lines 17-21:

~~(c) The head of the purchasing agency that makes an emergency procurement pursuant to subsection (a) shall account for the money spend in making the procurement and report on that accounting to the legislature within sixty days after the end of the fiscal year in which the procurement was made.~~

Thank you.

SB-3184

Submitted on: 2/1/2024 5:50:01 PM

Testimony for GVO on 2/6/2024 3:10:00 PM

Submitted By	Organization	Testifier Position	Testify
Justin Silva	Individual	Support	Written Testimony Only

Comments:

Replaces Chief Procurement Officer approval with an accounting report to the legislature within sixty days after the end of the fiscal year in which the procurement was made.