

Legislative Brief



State Procurement Office

SPO Administrator Sarah Allen: 808-587-4700

1151 Punchbowl Street, Room 416 ♦ Honolulu, Hawai'i 96813

E-mail: state.procurement.office@hawaii.gov

Website: <http://spo.hawaii.gov/>

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Legislative Initiatives and Procurement Rule Changes

The State Procurement Office (SPO) has submitted three proposed bills through the Department of Accounting and General Services (DAGS) for consideration by the State Legislature during the 2015 Session.

The full text of the legislative initiatives and justification for each are posted on at <http://spo.hawaii.gov> in SPO News.

♦ A BILL FOR AN ACT RELATING TO PROCUREMENT OF PROFESSIONAL SERVICES (Amend 103D-304, HRS)

Authorizes the Procurement Policy Board (PPB) to adopt administrative rules to provide an effective procurement process when a review committee receives less than three qualified submittals to provide professional services under specific selection criteria. Procurement officers will be authorized to proceed with an alternative method of procurement with less than three qualified persons.

This is a result of the Hawaii Supreme Court decision in *Asato v. Procurement Policy Board* (2014), which invalidated HAR §3-122-66. The Court found that there was legislative intent to require a "minimum of three persons" to respond to a solicitation for procurement of professional services under HRS §103D-304.

In October 2014, the PPB voted to repeal HAR §3-122-66 through interim rules pursuant to HRS §103D-202.

♦ A BILL FOR AN ACT RELATING TO RESPONSIBILITY UNDER THE STATE PROCUREMENT CODE (Amend sections 103D-104 and 103D-3109(b), HRS)

Increases accountability and transparency in state procurement by clarifying that past performance is part of responsibility determination and a procurement officer must consider available, relevant and recent contractor past performance prior to an award for any state contract.

This also provides a legislative mandate for the PPB to adopt administrative rules to implement past performance accountability measurements and clarify appropriate applications of past performance information.

♦ A BILL FOR AN ACT RELATING TO COMMUNICATIONS DURING PROCUREMENT (Amend sections 103D-104 and 103D-303, HRS)

This bill addresses the problem of offerors being left out of the pool of potential awardees because of situations such as an apparent clerical error or unclear relevancy of information provided by an offeror, which currently prevents the offeror from progressing into the pool of responsible offerors eligible to proceed with "discussions."

Rules were amended by the PPB's interim rulemaking authority pursuant to section 103D-202, HRS. In addition to the interim rules pertaining to professional services as previously stated, two other interim rules were filed with the Lieutenant Governor's Office on October 31, 2014, and became effective on November 10, 2014. The SPO will begin rulemaking pursuant to HRS chapter 91 for the following administrative rule changes:

♦ "Etc." and Exemption (Amend HAR §3-120-4 and Exhibit A)

HAR section 3-120-4 and Exhibit A were amended through interim rulemaking to avoid ambiguity from the previous inclusion of "Etc.," as well as to clarify ethical requirements for exemption.

♦ Exemption Language (Amend HAR §3-122-14)

The Board amended HAR §3-122-14 to clarify remaining ethical and contractual obligations of procurements exempted from HRS chapter 103D. An exempt procurement still requires a contract per contract law, due diligence and ethical accountability for the State's fiduciary responsibilities to safeguard taxpayers' money. A rule change regarding exemption language provides clarity that regardless of being exempt from HRS chapter 103D, there are always ethical and contractual requirements.

If you have any questions regarding these proposals, please contact the SPO at 587-4700.



SPO's Past Performance Report



The SPO submitted its Past Performance Report to the State Legislature in response to House Concurrent Resolution 176 (2014). This report was on the study of the feasibility, necessary processes, and costs relative to requiring the consideration of past performance as a factor in awarding public contracts, including low-bid contracts. The entire report and its appendices are found at <http://spo.hawaii.gov> in SPO News.

The SPO presents this past performance report for consideration of past performance initiatives in the future.

As a result of its study, the SPO ascertains that, per Hawaii Revised Statutes (HRS) 103D-310(b), past performance is a responsibility consideration, as all contractors, in requiring ethical procurements, must be responsible regardless of the method of solicitation. However, the procurement Statute does not specifically mandate past performance and corresponding Rules do not provide clear guidance on implementation. The study found varying interpretations of past performance requirements and allowances among Hawaii's procurement jurisdictions.

The SPO researched Federal requirements and other state's programs, which are outlined in the report.

Implementation of Past Performance

Implementing a statewide past performance consideration process for all government contracts in Hawaii is feasible and will require time for process development and funding to develop and maintain tools and infrastructure. In addition, the following would be necessary:

- 1) A clear legislative mandate to include past performance considerations;
- 2) Administrative Rules developed from the Procurement Policy Board (PPB) to implement comprehensive past performance evaluation and consideration procedures;
- 3) Evaluation processes for all procurements consistent across CPO jurisdictions;
- 4) A centralized database for past performance information collection and retrieval; and
- 5) Resources for agency implementation (agency rule promulgation, evaluation tool development, and training for effective implementation).

The SPO welcomes dialogue with state legislators as you consider past performance initiative.

Budget Requests to Improve Procurement

In addition to legislative initiatives, the SPO has submitted budget requests to the 2015 State Legislature.

Budget Restoration

Restoration of \$80,000 in funding, which was removed due to legislative adjustment during the 2011 Legislative Session, is being requested in order fill the SPO's remaining vacant positions and serve the State's procurement needs.

Within the last 10 years, the SPO's working environment has changed dramatically with new initiatives, added responsibilities and resource reductions. New initiatives capitalized on the capabilities of the Internet, email, software advancements and improved business processes. Development and implementation of the Purchasing Card program, the Procurement Notice System, Hawaii Compliance Express, Awards Reporting System, the State of Hawaii Electronic Procurement System, On-Demand training and other Internet and process innovations significantly changed the procurement landscape. This requires the SPO to rebuild and reinforce its workforce.

Remaining within the paradigms of archaic paper-based processes (such as small purchases, competitive sealed

bidding, competitive sealed proposals, professional services procurement, price and vendor lists, information distribution, and data sharing) is no longer a viable option.

Training

Establishment of the Acquisition Academy and Center on Excellence (Academy) in the SPO will provide Acquisition training for our procurement workforce statewide in a readily available and on-demand format. The request is for \$74,000 to \$200,000 over six step phases.

Hawaii must catch up with new technology in procurement, in some ways more than other states. "What" and "how" the state purchases tremendously impacts our economy. The SPO needs to be an incubator of Acquisition innovation, leveraging cutting-edge ideas to enhance the overall business environment and economic growth of Hawaii.

The SPO proposes the development of a training division within the SPO to establish and implement the Academy. The training division will consist of a Training and Development Director and three Training and Development Officers with expertise in both training and Acquisition/Procurement.