

**PROCUREMENT POLICY BOARD  
Meeting Minutes**

**Monday, September 29, 2014, 1:30 p.m.**

**Kalanimoku Building  
1151 Punchbowl Street, Conference Room 410, Honolulu, Hawaii 96813**

*web-video conference connection with:*  
**County of Maui Building  
South High Street, Room 616, Wailuku, Hawaii 96793**

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Members Present

Howard S. Garval, MSW  
Chair King King, Chair (via Adobe Connect)  
David Langille  
Dean Seki, Secretary

Staff

Sarah Allen, State Procurement Office (SPO)  
Ruth Baker, SPO  
Corinne Higa, SPO  
Bonnie Kahukui, SPO  
Stella Kam, Department of the Attorney General  
Hōukūlei Lindsey, SPO  
Andrew Lum, SPO  
Michael Ong, SPO  
Robyn Pfahl, SPO  
Mara Smith, SPO  
Donna Tsuruda-Kashiwabara, SPO  
Paula Youngling, SPO

Others

Shannon Alivado, General Contractors Association of Hawaii  
David Ching, Hawaii Procurement Institute  
Rina Chun, Hawaii State Legislature  
Ken Kakenaka, GCA

**I. Call to Order, Public Notice, Quorum**

Chair Greg King called the meeting to order at 1:35 p.m.

**II. Approval of Minutes of Meeting on August 4, 2014.**

PPB approved the minutes of its August 4, 2014, meeting (Attachment 1).

- David Langille made the motion to approve the minutes Dean Seki seconded the motion. The minutes were approved unanimously.

**III. Procurement Policy Board Operations**

**A. Vacancies and Status of PPB Nominating Committee**

Ruth Baker reported that the Governor recently named his two appointments to the PPB Nominating Committee (NC), Doug Murdock and Melissa Pavlicek, whose appointment is pending confirmation from the Governor. With these last two appointments, the NC can be activated to address PPB vacancies. The Boards and Commissions Office advised that both Howard Garval and Kathy Suzuki-Kitagawa are holdovers until the start of the 2015 Legislative Session and are eligible to serve another term, without a need to re-apply for their positions. Ms. Baker reported that Ms. Suzuki-Kitagawa has indicated interest in remaining on the PPB. Mr. Garval also stated his willingness to continue serving on the PPB. Ms. Baker stated that the NC will accept applications from individuals interested in serving on the PPB for all open vacancies, review qualifications, and make recommendations to the Governor.

Mr. Seki asked Ms. Kam of the Department of the Attorney General if the PPB can take up an initiative to amend the requirements of the board positions during the meeting or in new business. Mr. Seki asked if the SPO can make amendments to lessen the restrictions on the current PPB qualifications to open board membership up to more people. Ms. Allen said that the SPO and PPB can review and amend the positions descriptions, which can be reviewed at the next PPB meeting.

**B. Election of Officers Pursuant to HRS §103D-201E**

Ms. Pfahl stated that the PPB needs to vote on its slate of officers: Chair, Vice Chair and Secretary. She added that the PPB has a statutory requirement for a Chair, but a Vice Chair is also recommended in case the Chair is unable to attend a meeting. Mr. Seki said the position of Secretary usually defaults to Comptroller.

Mr. Seki made a motion to nominate Mr. King as Chair. David Langille seconded the motion. Motion passed unanimously.

Mr. Langille made a motion to nominate Howard Garval as Vice Chair. Mr. Seki seconded the motion. Motion passed unanimously.

Mr. Garval made a motion to nominate Dean Seki as Secretary. Mr. Langille seconded the motion. Motion passed unanimously.

Ms. Alivado, from GCA, asked the PPB for clarification on the two Health and Human Services positions that Mr. Garval and Ms. Suzuki-Kitagawa fill. Mr. Garval confirmed that he and Ms. Suzuki-Kitagawa represent the Health and Human Services. He noted that he believes both of their terms expire at the same time – the day before the start of the 2015 Legislative Session – so there will be no representation from Health and Human Services on the PPB after January 21, 2015, and asked the PPB to consider staggering the terms in the future.

Mr. Seki asked if Mr. Garval and Ms. Suzuki-Kitagawa can remain on the PPB in a temporary capacity and expressed his concern about having a gap until they are confirmed. Ms. Kam said that they are currently doing so and that there are no restrictions other than the limit of two terms. She will report back to the PPB at the next meeting on this issue. Mr. Seki commented that historically, the Legislature does not confirm until the end of the session.

**C. Procurement Policy Board Resources and Support**

As requested by the PPB at its last meeting, Ms. Pfahl is developing an internal PPB/SPO working document of mandated requirements and resource references for PPB operations. The impetus for this PPB request was the lack of institutional memory from the previous SPO administration, and the difficulty of changing administrations to reference PPB processes. She found that the PPB does not have official by-laws, however, the PPB is guided by numerous sections found in HRS, as well as policies from the Office of Boards and Commissions.

Ms. Pfahl found two issues regarding PPB support and resources that were mandated in statute yet not implemented by the previous SPO administration.. She found that per HRS 103D-201, relating to the creation of the PPB, provides for at least one designated full-time PPB support staff. The previous SPO Administrator had his private secretary handle tasks pertaining to the PPB. The SPO and Comptroller need to discuss whether to come up with that position or revise the statute.

**1) DAGS/SPO Employee Designated to PPB Support**

Ms. Allen reported that she spoke to Mr. Seki about HRS §103D-201 language that mandates the Department of Accounting and General Services (DAGS) to “provide at least one full-time support staff and funding necessary to support the policy board.” There is no established board administrator position. As with most boards, this position assists with logistics, events, planning and research, as well as preparing documents for board review and action. This position is usually filled by an attorney. Ms. Allen plans to request an immediate position creation and fulfillment of a Board Administrator to support the PPB with skills and focused support to effectively carry out its policy making duties, and relieve the Board's increasing burden on the SPO's resources, freeing other SPO employees to

focus on their individual positions. Ms. Allen reported that approximately 910 hours has been spent by numerous SPO staff on PPB support this year alone. Although the SPO is doing a wonderful job pulling together to serve the PPB, it can do an even better job with additional resources for a highly-specialized employee dedicated to the PPB.

Mr. Seki reported that Ms. Allen showed him the HRS about the position. He checked with DAGS Administrative Services Officer and informally with an in-house attorney, who said that their interpretation of the language is that the SPO staff is DAGS staff, although there is no designated position. Mr. Seki said that he will support the SPO if it wants to request funding for this additional staff, if it falls within the budget instructions. Mr. Seki stated that whatever the PPB can do to support the SPO is worthwhile.

**2) Compliance Audit Unit**

Ms. Pfahl also found that per HRS, the Office of the Auditor is charged with established and maintaining a procurement compliance audit unit. Ms. Pfahl spoke with the Acting State Auditor, who confirmed although the compliance audit unit is in statute, it is an unfunded mandate and she has not been able to establish a designated unit per se. The State Auditor is meeting the minimum requirements of selected contract review by risking procurement in all their audits involving procurement projects. HRS §§103d-107, -108, and -109 mandates a long list of responsibilities and actions for a compliance audit unit, including: reviewing and auditing procurement practices; review and assess innovations in procurement methods; advocate competition, fairness, and accountability; review and assess applicable procurement innovations; review current or proposed statutes and rules; review selected contracts; conduct studies, research, and analysis, and make reports and recommendations; establish and maintain a procurement library; report on noncompliance and make recommendations; and participate in legislative hearings and policy board meetings. Ms. Pfahl shared that such analysis and data that would be very helpful in metricing the policies that the PPB is implementing. The SPO has a planned meeting with the Acting State Auditor, who is willing to discuss the matter and ways that her Office of the Auditor can help.

**IV. Administrative Rules Overview**

**A. Overview of interim and permanent rulemaking procedures**

Ms. Pfahl provided a resource guide outlining the difference between interim and permanent rulemaking processes for the PPB. She has been working with DAGS staff on this timeline and checklist. HRS §103D-202 authorizes the PPB to issue administrative rules with two different methods of rulemaking, requiring that “[a]ll rules shall be adopted in accordance with chapter 91; provided that the [PPB] shall have the power to issue interim rules by procurement directives, which shall be exempt from the public notice, public hearing, and gubernatorial approval

requirements of Chapter 91. The interim rules shall be effective for not more than 18 months.”

Ms. Pfahl said that the PPB can decide to use the two processes in parallel. The interim rulemaking procedure allows the PPB to test, clarify and modify procurement policy while it considers making such rules permanent.

**B. Electronic HAR upgrade initiative**

Andrew Lum of the SPO reported that the Hawaii Administrative Rules on the SPO website are now searchable because of the use of optical character recognition (OCR) software. Users on the SPO website will be able to use the search command in large documents. The SPO will work on getting the HAR more user-friendly and more searchable. In the past, the HAR were scanned photocopy images and users could not use the search command.

Ms. Pfahl added that this will help the public in accessing, researching and understanding procurement process through more accessible rules. The Lieutenant Governor’s Office keeps the official, signed and time-stamped rules on file and the SPO is the custodian of the rules for the public, needing to have it available on its agency website.. Ms. Pfahl explained that although the official HAR versions are the stamped originals, and SPO will continue to provide scanned versions, also posting “unofficial” clean word docs converted to PDFs will increase efficiency.

**V. SPO Recommending HAR changes and Decision Making on Select Initiatives**

The SPO has been working on a number of initiatives that either require or would benefit from the Procurement Policy Board engaging in Hawaii Administrative Rule changes.

Ms. Allen reported that the PPB has already discussed items A) Inventory Services, B) Professional Services, and E) “Etc.” The SPO is now requesting the PPB to review and consider approving the aforementioned items. The PPB is also being presented with SPO suggested changes to items C) Past Performance, D) Communication During Source Selection, and F) Exemption Language for discussion.

**A. Inventory Services – amending HAR §3-130**

The PPB was provided information about the proposal to amend HAR §3-130 to align inventory accountability designations with statute and make other inventory management clarification, through interim rulemaking and rulemaking pursuant to HRS Chapter 91. HRS §103D-1204 delegates inventory responsibility to the department heads, while HAR §3-130-3 delegates inventory accountability to the CPOs. The purpose of this HAR §3-130 amendment is to clarify that inventory accountability is the responsibility of "the head of the department, or the head of the board or commission, agency, bureau, or office of the State."

Michael Ong, Inventory Specialist of the SPO, reported that the rules and the HRS need to be aligned. Several rules need to be revised and should name who is responsible and accountable for inventory in general. The SPO is also recommending changes, such as the repeal of rules that still mention inventory, and the streamlining of the management process.

Mr. Garval asked what the end result look like, and Mr. Seki asked how the SPO would be involved. Ms. Allen responded that if the HAR clearly reflects the legislative intention of the HRS, the department heads will be responsible for their own inventory and the SPO would remain involved in the overall Inventory system. Mr. Ong reported that the rules currently require all requests for inventory disposal be signed-off by the CPO. All executive agency disposals must receive the SPO Administrator's signature as the CPO, regardless of what department had control of the inventory item. The SPO's responsibilities are to maintain centralized inventory, enforce the rules and perform inventory reviews.

Mr. Seki proposed that the PPB vote on each item as it comes up. Mr. King and Mr. Garval voiced their agreement on the process. Ms. Pfahl clarified that the PPB will vote on authorizing interim rulemaking, which will be made through a procurement directive. Ms. Allen said that the PPB has been provided a draft rules and is asked to vote to facilitate the propagation of interim rules, then it can work on making this rule permanent.

Mr. Garval made a motion to authorize the propagation of interim rules for Inventory Services. Mr. Seki seconded the motion. Motion passed unanimously.

Ms. Pfahl stated that the procurement directive on this will be given to Ms. Kam for review, then to Chair King for signature and Mr. Seki as comptroller of DAGS.

**B. Professional Services – repealing HAR §3-122-66**

The PPB was provided information about the proposal to repeal HAR §3-122-66, "Waiver to requirement for procurement of professional services," which has been invalidated by the Hawaii Supreme Court in Asato v. Procurement Policy Board, Hawaii, 2014. The purpose is to align HAR with current law, clarifying that HAR §3-122-66 is no longer able to be utilized when procuring professional services,

Ms. Allen reported that this is to repeal the rule (HAR §3-122-66) that allows for an option in procurement of professional services pursuant to HRS §103D-304(g), for situations where a review committee receives less than three qualified persons' submittals to provide professional services under specific selection criteria. She added that repealing HAR §3-122-66 is through interim rules only. The SPO does not intend on making this a permanent rule change because the SPO is requesting the legislature to review HRS §103D-304(g) and change the statute to specifically allow for the PPB to promulgate rules to address situations of less than three qualified submittals, which would then authorize the PPB to reinstate HAR §3-122-66.

The SPO has drafted this Legislative request through DAGS. If the Legislature does not approve the statutory change, the PPB will have to decide how to address this very specific issue in the event that there less than three qualified submittals. SPO Procurement Specialist Donn Tsuruda-Kashiwabara said that in the current situation, the proposal will have to be resolicited, as explained in a recent Procurement Circular..

Mr. Langille made a motion to authorize the propagation of interim rules regarding Professional Services. Mr. Garval seconded the motion. Motion passed unanimously.

**C. Past Performance - amending HAR §3-122**

Ms. Allen reported that the SPO has been conducting research and a feasibility study, as requested by HCR 176 (Session Laws of Hawaii 2014), on requiring past performance to be a consideration factor in all public contracts. The SPO has conducted a survey, assembled focus groups, looked at benchmarking across the state, and reviewed what the federal government is doing to address past performance in procurement. The SPO recognizes that there are many issues of how to deal with past performance during procurement, and what kind of infrastructure is needed for collection in a fair method after a contract has been awarded.

Ms. Allen stated that the rules that are being now being presented to the PPB for consideration clarifies that past performance is a part of responsibility and adds a definition of past performance. She added that this does not affect request for proposal or invitation to bid because the SPO recognizes that they are more complex issues.

Ms. Pfahl added that this is part of a step-by-step process in addressing government and contractor accountability. She explained the proposed revisions as outlined in a handout provided to the PPB.

- 1) Amend HAR §3-122-1 -establishes definitions of: past performance, responsibility determination, and clarification communication;
- 2) Add HAR §3-122-9.03 -Clarifies that due diligence is a general provision requirement for making responsibility determinations;
- 3) Add HAR §3-122-52.1 - Allows for clarification communication during the initial evaluation process to address relevance issues of an offeror's performance information for responsibility determinations. This is already in statute;
- 4) Amend HAR §3-122-108 -clarifies responsibility determinations include consideration of relevant and recent past performance and creates opportunity for clarification communication; through interim rulemaking and rulemaking pursuant to HRS Chapter 91.

Mr. Garval asked for clarification on “responsibility” means. Ms. Pfahl explained that responsibility is outlined in the HRS and in the HAR, stating that a contractor has to be responsible and responsive. Responsibility of offerors is outlined in HRS §103D-310, requiring that “the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work.” Ms. Allen added that a contractor is asked about responsibility with finances, tax payments, and labor laws. Procurement officers may also request financial statements for certain procurements to ensure that a contractor is financially strong so they don’t fail the day that they are awarded a contract.

Ms. Pfahl pointed out the proposed language establishing a clear definition of “responsibility” in HAR § 3-122-9.03 “Responsibility determination. The procurement officer shall make a determination of responsibility for any awardees. In making a responsibility determination, the procurement officer shall possess or obtain information sufficient to be satisfied that a prospective offeror meets the applicable standards set forth in the solicitation and pursuant to the designated method of procurement. The procurement officer shall consider recent and relevant past performance of the contractor as it applies to a responsibility determination for the current solicitation.”

Mr. Seki asked for the definition of “responsiveness.” Ms. Tsuruda-Kashiwabara read the definition from HRS §103D-104 “Responsive bidder” means a person who has submitted a bid which conforms in all material respects to the invitation for bids.” Ms. Allen added that while this definition is under invitation for bids, however, all types of procurements are to be responsive.\

Ms. Kam pointed out that two statutes are worded differently. For bids, the definition includes “responsive” and “responsible,” while the definition for competitive seals proposals in the request for proposals process, the definition states that the award should be made to the one who is “responsible” offeror. Ms. Kam reported that one of the hearings officers at the Department of Commerce and Consumer Affairs did address and include responsiveness in one of his decisions, stating that responsiveness is not a criterion is for disqualifying an offeror.

Ms. Pfahl stated that any criteria established for responsiveness in the Invitation for Bid (IFB) process has to be objective. The problem of including past performance in IFBs now is that it will never be viewed as objective. This is not a problem for Request for Proposals (RFP) because proposals can, and often do, create more detailed criteria that do not need to meet the same restrictions of IFB criteria. The SPO will work towards making proposed guidelines for past performance evaluation and application as objective as possible. Ms. Allen added that the SPO hasn’t directly addressed this complex past performance issue yet because it is still conducting research, and waiting for Legislative and PPB guidance to move forward with initiatives.

Mr. Garval commented that one of the issues is that the state agency doing the procurement doesn't evaluate contractors in terms of performance, they don't have information. He said that HRS §103F has almost nothing about past performance in scoring criteria, but experience can be counted in health and human services procurement.

Ms. Allen stated that some problems in past performance can be a combination of government delays and contractor problems. Without proper documentation, communication and a good process, procurement can unintentionally disqualify good contractors.

Shannon Alivado of General Contractors Association (GCA) submitted testimony on past performance. GCA cited that the report is yet to be released to the Legislature, and GCA doesn't know that the report includes. She voiced concern on the implementation, objectivity, funding and fairness in past performance. They have proposed revisions to 103D to the Legislature in past sessions, and have had discussions about past performance with county and state agencies. She said that GCA would like to see what happens to SPO's proposed bill during the next Legislative Session. GCA asked that the PPB defer its decision on past performance until after the SPO's report is released.

Ms. Pfahl responded that the study requested by HCR 176 (SLH 2014), which will be finalized and delivered to the State Legislature and shared with as many people as possible, will make numerous recommendations. The report is comprehensive to serve as a resource, including benchmarking, feasibility study, , will contain comments from key stakeholders, procurement community survey results, legislative history, as well as address the logistics on the implementation of an information system that can be easily accessed by CPOs. The implementation will require resources. Also, an interim process will be in place to allow contractors to review their evaluation after contract close-out.

Mr. Seki recommended that the PPB to consider holding off on making a decision on past performance until after the feasibility report is released and hold discussion at a future meeting.

Ms. Pfahl said that the PPB has the authority make rules to clarify and implement the statute as written.

Chair King supports past performance as long as it is implementable, and noted that its implementation will require tremendous resources. Ms. Allen said that it is difficult to implement objective past performance. She recalled that the state previously tried to include a comprehensive past performance calculation, but failed because it combined all relevant or non-relevant experience, and it became subjective.

Mr. Garval points are well-taken, and asked if there is an alternative that will allow the SPO to spend more time and energy on review of offerors. Ms. Allen said that

other states are clearly implementing past performance, and supports finding a way that implementation can work in Hawaii.

Ms. Allen welcomes any input from the PPB.

This HAR revision issue to address Past Performance was being presented to the PPB for the first time. The PPB took no action on Past Performance.

**D. Communication During Source Selection – amending HAR §3-122**

The PPB was provided background information on the proposed rule changes to HAR §3-122. Ms. Allen explained that the impetus is that otherwise responsible offerors are omitted from the “priority list” pool of potential awardees because procurement officers are currently barred from any form of communications, even to resolve apparent mistakes or clarify information applicability for initial responsible and responsive determinations made during the Competitive Sealed Proposal procurement process.

The purpose of this rule change is to authorize creation of a limited form of communication during the competitive sealed proposal process and responsibility determination process through “clarification communication.” Steps in this change will:

- 1) Amend HAR §3-122-1 - establishes a definition for "clarification communication";
- 2) Adding HAR §3-122-16.10 - establishes a clarification communication process;
- 3) Add HAR §3-122-52.1 - Establishes a process for clarification communications during Competitive Sealed Proposal process;
- 4) Amend §3-122-108 - creates opportunity for clarification communication during determination of responsibility of offerors; through interim rulemaking and rulemaking pursuant to HRS Chapter 91.

Note: Legislative initiative has been started, to also clarify legislative intent that limited clarification communication may be utilized to increase effective and efficient procurement, amending HRS §§103-104 and -303.

Per Ms. Allen this creates an opportunity for communication if there are any questions or need for clarification. Ms. Kam noted that the draft HAR also says “bids,” and should be revised to be limited to “proposals” only. Ms. Allen agreed and said it should be corrected to say proposals.

Ms. Kam questioned why this communication is necessary, because HAR §3-122-53 allows for communications during discussions. Ms. Pfahl said that those discussions and determination of responsiveness are not even allowable for anyone who makes mistakes in their proposal because “discussions” are only available to the “priority listed” proposals, and mistakes in proposals sometimes prevents offerors

from getting to the priority list where communications are authorized. Ms. Kam suggested that the language be revised to follow language as in 302.

Chair King wanted to check on the responsiveness issue, and said that PPB doesn't have to vote on this during this meeting now. Mr. Garval commented that it will be important that communication boundaries are narrow because we don't want to open up discussions to all offerors.

This HAR revision issue to address communication during source selection of Competitive Sealed Proposals was being presented to the PPB for the first time. The PPB took no action on communication during source selection.

**E. "Etc." - amending HAR §3-120-4 and Exhibit A**

The PPB was provided background information about the proposal to amend HAR §3-120-4 and Exhibit A, which provides an exemption for "New or used items which are advantageous and available on short notice through an auction, bankruptcy, foreclosure, etc." Ms. Allen said that the impetus is that there is an unclear application of "Etc." in Exhibit A. This use of "etc." may be interpreted a number of ways, and has opened the door for expanding the scope of this exemption, creating confusion and uncertainty for procurement officers. The proposal is to delete the "etc." from Exhibit A's Exemption Number 6 description to avoid ambiguity and limit the exception to situations that "are advantageous and available on short notice through an auction, bankruptcy, or foreclosure."

The proposal is to amend HAR §3-120-4 and Exhibit A to delete "Etc.", through interim rulemaking and rulemaking pursuant to HRS Chapter 91.

Mr. Garval made a motion to authorize interim rules to remove of the word "Etc." in HAR §3-120-4 and Exhibit A. Mr. Langille seconded the motion. Motion passed unanimously.

**F. Exemption Language - amending HAR §§ 3-120-4, Exhibit A, and HAR §3-122-14**

Ms. Allen explained that there is a lack of accountability and transparency when items are "exempt" from the procurement code pursuant to either board determinations (Exhibit A), or CPO determinations (through SPO form 007). She noted that when departments know that they have an exempt contract, they often think that contract law and due diligence does not apply to them. The purpose of this rule change request is to clarify that, although a specific item may be "exempt" from the procurement code process, the procuring public employees are still responsible for procuring all items in a responsible and ethical manner pursuant to HRS §103D-101.

The means would be to amend HAR §§ 3-120-4, Exhibit A, and 3-122-14 with clarification language requiring responsible and ethical procurement for exemptions, through interim rulemaking and rulemaking pursuant to HRS Chapter 91.

The SPO wants to remind all public employees that they are still bound by ethical and contractual responsibilities, regardless if the procurement method is in 103D or exempted from the specific 103D processes.

Ms. Kam advised that referencing HRS §103D-101 is not possible because it is “exempt from the chapter.” Ms. Pfahl read the ethical requirements of ethical public procurement language in HRS §103D-101, which includes 11 items: act as a fiduciary and trustee of public moneys; remain independent; act only in the public interest; abide by laws; identify and maximize efficiencies; encourage economic competition; avoid unethical behavior; avoid social interactions with any actual or prospective interested parties during the procurement process; maintain confidentiality; remain impartial; and identify and eliminate any conflict of interests.

Mr. Seki said that the intent is there, and the HRS §103D-101 language is clean, asked if they can approve a change in language that Ms. Kam approves, and the PPB vote on this today. Chair King agreed that it would be good to make a stronger point. Mr. Garval asked if the HAR can repeat the language without referring to the statute.

Ms. Pfahl said that the PPB can put specifications on the PPB’s exemptions as the PPB wants. She explained that there are three methods of authorizing procurement exemptions: approval through the Legislature, PPB, or individually through CPOs. ACPO authorizes exemptions through SPO Form 007. Exhibit A is the PPB’s list of exemptions. Ms. Allen says that other states call exemptions “special procurement,” which helps with the cultural understanding that there are still clear ethical and contractual guidelines to abide by

Mr. Seki repeated Mr. Garval’s suggestion, that the rule change use verbiage from HRS §103D-101. Ms. Kam said that the PPB can do that. Ms. Pfahl said that the SPO will redraft the proposed rule change to reflect language options that convey the same idea.

This HAR revision issue to address ethical and contractual obligations of procurement exemptions was being presented to the PPB for the first time. The PPB took no action on exemption language.

## **VI. Legislative Initiatives**

The SPO has submitted first drafts of proposed statutory changes to be considered as part of the 2015 legislative administrative package. Because the SPO is administratively attached to DAGS, the first draft of any possible legislative initiative was due on September 16, 2014. Final drafts with revisions are due November 4, 2014. The PPB was provided proposed legislation language and justification explanations that will be attached to DAGS legislative package for consideration in the Governor’s legislative package.

**A. Professional Services (HRS §103D-304)**

- Title: A BILL FOR AN ACT RELATING TO PROCUREMENT OF PROFESSIONAL SERVICES
- Purpose: To specifically authorize the Procurement Policy Board to promulgate administrative rules to provide an effective procurement process for situations where a review committee receives less than three qualified persons' submittals to provide professional services under specific selection criteria.
- Means: Amend HRS §103D-304
- A procurement circular on the procurement of Professional Services has been posted. The final drafts after the AG comments will be circulated to the PPB for review.
- The PPB did not take a vote, but was fine with the legislation.

**B. Past Performance – Response to HCR 176 (HRS §103D-104 and 103D-310)**

- Title: A BILL FOR AN ACT RELATING TO RESPONSIBILITY UNDER THE STATE PROCUREMENT CODE
- Purpose: To increase accountability and transparency in state procurement by clarifying the due diligence requirement for contractor responsibility determination to be made prior to awarding any government contract under Chapter 103D, Hawaii Revised Statutes. Establishes a past performance definition. Requires recent and relevant past performance to be considered in all contractor responsibility determinations of capability, integrity, and reliability to perform contract requirements in good faith.
- Means: Amend HRS §§ 103D-104 and 103D-310
- The PPB did not take a vote, but was fine with the legislation.

**C. Source Selection (HRS § 103D-104 and HRS §103D-313)**

- Title: A BILL FOR AN ACT RELATING TO COMMUNICATIONS DURING PROCUREMENT
- Purpose: To provide a method for clarification communications between a purchasing agency and an offeror, to increase effectiveness and efficiency in the state procurement process during competitive sealed proposals by increasing the potentially acceptable list of responsible offers.

- Means: Amend HRS §§ 103D-104 and 103D-313
- Recommended Changes: Ms. Kam expressed similar concern with the need for clarification communication as previously discussed in SPO's recommended changes to HAR §3-122. Ms. Pfahl welcomed comments and explained that the SPO is still awaiting revision recommendations from the attorney general through the legislative coordinator process, and will work with Ms. Kam to make any changes
- The PPB did not take a vote, but was fine with the intent of the legislation.

#### **VIII. Health and Human Services Report**

Corinne Higa of the SPO reported that the SPO has held three meetings with representatives from various state departments and one meeting with providers. The initial meeting with both groups was to familiarize them with the Action Team's purpose and goals, and to develop and implement best procurement practices. The SPO asked both government and provider groups to talk about their challenges, which were compiled in a chart that was distributed to the PPB. The issues pertained to both 103F and crossed over to 103D.

Additional meetings with governmental officials were scheduled to provide time for addressing governmental challenges. The group also looked at acquisition life cycles and how payment processes differed between departments. A Health and Human Services meeting with providers has been scheduled for October 14, 2014. The SPO will continue its focus group meetings and will open up communication.

Mr. Garval asked for clarification on the meeting schedule, because the initial schedule included more provider meetings than a joint meeting. Ms. Allen explained that representatives from the state and representatives from health and human services engage very differently, and the initial meeting schedule had to be modified for the SPO to accurately address the issues being raised. The SPO does not believe that a joint meeting with the two groups would be the best use of resources at this time, as there is more individual group work to be done before bringing both groups together. Mr. Garval said that while he is not surprised, he voiced his concern of the providers' perception that this is setting up a barrier to collaboration between government and providers. He suggested that the SPO communicate with HANO and PHOCUS, which represent many of the non-profits in health and human services. Ms. Allen assured Mr. Garval that revising the SPO meeting schedule will be discussed in more detail during the upcoming provider meeting.

Mr. Garval then asked about the Community Council, which has been inactive. Ms. Allen said that the SPO has to determine how to dissolve the Council.

#### **IX. New Business**

Mr. Seki requested the SPO to make recommendations to the PPB that will loosen the current constraints on qualifications of board positions because it can be difficult to fill PPB positions. Ms. Allen asked the PPB members if there are any specific areas that may be too

constraining to inform the SPO, and the SPO will present recommendations at the next PPB meeting. Chair King said he was fine with an investigation into this matter..

Mr. Seki asked Ms. Pfahl to check with Mr. Kerry Yoneshige, DAGS Administrative Officer, since he coordinates such issues for DAGS.

**X. Next Meeting**

The next PPB meeting will be scheduled for sometime in October. SPO staff will poll the members.

**XI. Announcements**

**Small Business Initiative – Act 50 (SLH 2005)**

At the request of community members, the SPO has begun looking into the small business set-aside mandated by Act 50 (Session Laws 2005), which charges the PPB with implementing administrative rules. The SPO is learning who the small business advocates are and is researching the past rules in the effort of making them fundamentally sound in the future. There are no current administrative rules to give effect to the law. There were previous interim rules promulgated by the PPB, which were reportedly difficult to implement and costly. They are researching small business set-aside and preference programs across the nation, have started speaking to stakeholders in Hawaii and are preparing to engage in a comprehensive process to make formal recommendations for new administrative rules for PPB consideration.

Chair King commented that his procurement office in Maui did not have a good experience in working with the small business rules previously adopted by the PPB, and it cost Maui County a lot of money without having the desired effect on local small business. Ms. Lindsey is researching what works across the country and what didn't work last time, investigating how the PPB can develop rules that get small business in a competitive pool for state procurement.

Ms. Pfahl added that the SPO is working on assembling a small business procurement advisory group pursuant to HRS §103D-213 and welcomes the PPB to refer people to Ms. Lindsey to participate in the advisory group.

**XII. Announcements**

Mr. Seki announced that the Department of Accounting and General Services selected staff from the State Procurement Office as awardees for the Team and Employee of the Year. The HIePRO Team, led by Mara Smith, Bonnie Kahakui and Stacey Kauleinamoku, was named Team of the Year, and Ronnie Correa was named Employee of the Year. The awards were presented by Comptroller Dean Seki, and Governor's Chief of Staff Bruce Coppa, during a ceremony on Wednesday, September 10, 2014, in the State Capitol Auditorium.

Mr. Seki also presented the Comptroller's Perpetual Trophy for the Team of the Year and the Comptroller's Perpetual Trophy for the Employee of the Year to Sarah Allen,

Administrator of the SPO. These employees will be at the Governor's Awards Ceremony on October 3, 2014, to compete for the state awards.

**XIII. Adjournment**

The meeting was adjourned at 3:36 pm.

Respectfully submitted,

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Dean Seki, Secretary  
Procurement Policy Board

Attachment: September 29, 2014, PPB Agenda

DRAFT

# PROCUREMENT POLICY BOARD

Regular Meeting

Monday, September 29, 2014, 1:30 p.m.

Locations:

Kalanimoku Building ♦ 1151 Punchbowl Street, Conference Room 410 ♦ Honolulu, Hawaii 96813  
County of Maui Building ♦ 200 South High Street, Room 616 ♦ Wailuku, Hawaii 96793

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## A G E N D A

<b>I.</b>	<b>Call to Order</b> , Public Notice, Quorum
<b>II.</b>	<b>Approval of <a href="#">Minutes</a></b> – Meeting of August 4, 2014
<b>III.</b>	<b>Procurement Policy Board Operations</b> A. Vacancies and Status of PPB Nominating Committee B. Election of Officers Pursuant to HRS §103D-201E C. Procurement Policy Board Resources and Support
<b>IV.</b>	<b>Administrative Rules Overview</b> A. Overview of interim and permanent rulemaking procedures B. Electronic HAR upgrade initiative
<b>V.</b>	<b>SPO Recommending HAR changes:</b> A. <b>Inventory Services</b> – <a href="#">amending HAR §3-130</a> B. <b>Professional Services</b> – <a href="#">repealing HAR §3-122-66</a> C. <b>Past Performance</b> - <a href="#">amending HAR §3-122</a> D. <b>Communication During Source Selection</b> – <a href="#">amending HAR §3-122</a> E. “Etc.” - amending HAR §3-120-4 and <a href="#">Exhibit A</a> F. <b>Exemption Language</b> - amending HAR <a href="#">§§ 3-120-4, Exhibit A, and HAR §3-122-14</a>
<b>VI.</b>	<b>HAR Decision-Making</b>
<b>VII.</b>	<b>Legislative Initiatives</b> A. <b>Professional Services</b> ( <a href="#">HRS §103D-304</a> ) B. <b>Past Performance</b> – Response to HCR 176 ( <a href="#">HRS §103D-104 and 103D-310</a> ) C. <b>Source Selection</b> ( <a href="#">HRS § 103D-104 and HRS §103D-313</a> )
<b>VIII.</b>	<b>Health and Human Services Report</b>
<b>IX.</b>	<b>New Business</b>
<b>X.</b>	<b>Next Meeting</b>
<b>XI.</b>	<b>Announcements</b> A. Small Business Initiative – Act 50 (SLH 2005)
<b>XII.</b>	<b>Adjournment</b>

Please allow 2.5 hours for the meeting, which will include a 5-minute break.

Agenda and available agenda items may be viewed at [www//spo.hawaii.gov/procurement-policy-board/](http://www//spo.hawaii.gov/procurement-policy-board/) (click on *Meeting Agenda and Minutes*).

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., Friday, September 26, 2014, to discuss accommodations.

**PROCUREMENT POLICY BOARD  
Meeting Minutes**

**Monday, August 4, 2014, 10:30 p.m.**

**Kalanimoku Building  
1151 Punchbowl Street, Conference Room 410, Honolulu, Hawaii 96813**

*web-video conference connection with:*  
**County of Maui Building  
South High Street, Room 616, Wailuku, Hawaii 96793**

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Members Present

Ronald Hirano  
Greg King, Chair (via Adobe Connect)  
Dean Seki, Secretary  
Kathy Suzuki-Kitagawa (via Adobe Connect)

Staff

Sarah Allen, State Procurement Office (SPO)  
Stella Kam, Department of the Attorney General  
Hōukūlei Lindsey, SPO  
Dianne Matsuura, Department of Accounting and General Services  
Michael Ong, SPO  
Robyn Pfahl, SPO  
Mara Smith, SPO  
Donna Tsuruda-Kashiwabara, SPO

Others

David Ching, Hawaii Procurement Institute  
Lance Inouye, General Contractors Association of Hawaii (GCA)  
Melanie Martin, Department of Transportation  
Ken Kakenaka, GCA

**I. Call to Order**

Chair Greg King called the meeting to order at 10:34 a.m.

**II. Approval of Minutes of Meeting on April 17, 2014.**

- PPB approved the minutes of its April 17, 2014, meeting (Attachment 1).
  - Ronald Hirano motioned to approve minutes. Dean Seki seconded the motion. Motion passed unanimously.

### **III. Executive Session Pursuant to HRS §92-5(a)(2)**

PPB met privately in an executive session pursuant to HRS §92-5(a)(2). After returning to regular session, Chair Greg King reported that the PPB discussed personnel compensation issues.

- PPB approved a motion to submit a letter to the Governor recommending an increase in the State Procurement Office Administrator's salary pursuant to the 2013 Salary Commission Memo.
  - Motion was made by Chair. Motion was seconded by Mr. Seki. Motion passed unanimously.

### **IV. Professional Services**

The posted agenda for PPB's August 4, 2014, meeting included a typo in "Professional Services – Interim Rule Repealing Hawaii Administrative Rules § 3-122-~~69~~". The Professional Services subsection was intended to be § 3-122-~~66~~. The unintended consequences of the "-~~69~~" typo does not provide adequate public notice pursuant to Hawaii sunshine laws (HRS §92-1), which requires a six (6) day posting.

- PPB decision making will be postponed to the next PPB meeting to provide adequate notice.
- Discussion on Professional Services will be held under new business today.

### **V. Past Performance – HCR 176 (SLH 2014) Legislative Resolution Update**

House Concurrent Resolution 176 (S.L.H. 2014) requested that the State Procurement Office ("SPO") conduct a study on the feasibility of requiring **past performance** as a factor in awarding *any* public contract, including low-bid invitation for bid ("IFB") contracts.

SPO Procurement Policy Specialist Robyn Pfahl has been researching past performance and implementation strategies for obtaining metrics and formulating recommendations as a response to House Concurrent Resolution 176 (S.L.H. 2014). Ms. Pfahl has also been working with government officials, contractors, and other procurement policy stakeholders to gather and share experiences, perceptions, opinions, and ideas on past performance accountability for the report. SPO's actions to respond to HCR 176 thus far have included:

- 1) Research on procurement statutes and rules applications and compliance;
- 2) Research on Federal and state past performance initiatives and implementation tools;
- 3) Stakeholder Focus Groups to identify specific concerns and brainstorm ideas;
  - a) Contractor and Government Focus Group held July 11, 2014
  - b) Attorney Focus Group Scheduled August 5, 2014 with the Hawaii Procurement Institute
  - c) Ongoing Discussions with Stakeholders and Lobbyists
- 4) Past Performance perception and experience survey SPO IFB Past Performance Survey LINK was developed and distributed through posting on SPO website as well as email announcements to:

- a) All CPOs
  - b) Legislators
  - c) Offices of the Governor & Lieutenant Governor
  - d) SPO Staff
  - e) Educators
  - f) Unions & Trade Organizations
  - g) Vendors & Buyers Registered with Hawaii Compliance Express (8,878 individual emails)
- 5) Drafting a white paper to include research outcomes, gathered stakeholder input, and recommendations on past performance accountability and implementation feasibility.

SPO is continuing to formulate the HCR report and record stakeholder meetings and survey responses, which totaled 807 as of August 4, 2014. SPO plans to have another update with recommendations to be considered by the next PPB meeting.

## **VII. New Business**

### **A. Professional Services**

**HAR §3-122-66** has been **invalidated** by the Hawaii Supreme Court in Asato v. Procurement Policy Board, Hawaii, 2014 (pending publication). 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 the HRS §103D-304 process. The Court held that HAR § 3-122-66, Waiver to Requirement for Procurement of Professional Services is **invalid** because it is in direct conflict with the clear mandate of HRS 103D-304(g) which required that “[t]he selection committee shall rank a **minimum of three persons...**”, and therefore the Procurement Policy Board “exceed[ed] the scope of authority give by the legislature to [the Board].”

SPO issued **Procurement Circular No.2014-09** on July 17, 2014, explaining that the HAR §122-66 is no longer available to be utilized by procurement officers and providing guidance to conducting professional services method of procurement. SPO Purchasing Supervisor Donn Tsuruda-Kashiwabara, SPO Procurement Policy Specialist Robyn Pfahl, and SPO Administrator Sarah Allen provided background information.

- 1) SPO is recommending that the PPB **issue interim rules**, pursuant to HRS §103D-202, by a **Procurement Directive**, pursuant to HAR § 3-122-2, to **repeal HAR §122-66**.
- 2) Because of the clerical error on the August 4, 2014, agenda, PPB is deferring decision making until the next PPB meeting.
- 3) SPO also plans to submit a legislation request in 2015 that will allow HAR § 3-122-66 to be reinstated after legislative approval.

### **B. Inventory**

SPO Inventory Specialist Michael Ong reported that the statute and rules are inconsistent, making inventory management very difficult. SPO is requesting PPB engage in rulemaking changes to align HAR §3-130 with the law stated in HRS §103D -1204 so that SPO can improve inventory management practices.

- HRS §103D-1204 places inventory responsibility with “**The head of the department, or the head of any board, commission, agency, bureau, or office of the State**” as responsible for the “accountability, protection, maintenance, and proper use of all state property pertaining to their office or department”
- HAR §3-130-3 places inventory responsibility with “**The chief procurement officer**, or the head of any state governmental unit that is not by law under the control of a chief procurement officer” for “all state property in the possession, custody, control, or use of the unit or jurisdiction, including the several counties, which the officer or head presides.”
- SPO is recommending that the PPB **issue interim rules**, pursuant to HRS §103D-202, by a **Procurement Directive**, pursuant to HAR § 3-122-2, to **amend HAR §130** to place inventory responsibility with the same language as the HAR “**The head of the department, or the head of any board, commission, agency, bureau, or office of the State.**”

Ms. Allen explained that, as a chief procurement officer (CPO), she and other CPOs have to sign-off on all of their jurisdiction’s approval of disposal applications. CPOs therefore must sign-off on disposals of inventory items that they do not touch or see because it is outside their logistical purview. This is a direct conflict of statute and administrative rules, creates confusion on duties and responsibilities, as well as creates excessive paperwork.

### **C. Source Selection**

Ms. Allen discussed the difficult application of the current law and administrative rules in the source selection process of the request for proposal (RFP) process. Pursuant to HAR Subchapter 6, Complete Sealed Proposals, and specifically HAR §3-122-52, there may be no direct communications between procurement officers and offerors during the RFP process until after the creation of a “priority list.” Then, “discussions [are] limited to only “priority-listed offerors,” whom are “those responsible offerors who are selected for the priority list.” Because any type of direct communication is barred before creating the priority list, procurement officers don’t have any opportunity to clarify apparent mistakes in offers that prevent an offeror to become a “priority-listed offeror.”

SPO is creating language for administrative rule changes, which would allow for some type of clarifying communication before “discussions,” to make logical determinations of responsible offerors, to get the right offerors into the pool of potentially acceptable proposals, and follow into full “discussions” as needed.

### **D. Procurement Policy Board General Information**

- 1) PPB MEMBERSHIP VACANCIES: Currently, there are three (3) vacancies on PPB.
  - a. Waiting on Governor to appoint two (2) individuals to the nominating committee.

- b. The Governor's Office of Boards and Commissions has authorized two current board members to remain on board as "holdovers" if those members agree.
- 2) PPB MEMBERSHIP QUALIFICATIONS: Mr. Seki expressed concern that the current specific membership qualifications are very restrictive, making finding new members very difficult. Chair King agreed and suggested that the PPB look at creating a new legislative initiative to expand the leadership and background qualifications of PPB members.
- 3) PPB OFFICE ELECTIONS: PPB is due for elections of officers, and will plan on holding office elections at the next PPB meeting.
- 4) PPB INTERNAL DOCUMENTS: SPO does not have any official bylaws. All government board are bound by statutes and administrative rules for operational procedures. SPO will pull together a PPB guide to statutory and administrative rule provisions governing the SPO, to create an internal reference working document for institutional memory.

**XI. Meeting Schedule**

The next PPB meeting will be scheduled as needed.

**XII. Announcements**

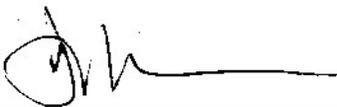
**New SPO Assistant Administrator**

Paula Youngling is the new Assistant Administrator and was introduced to the PPB. Ms. Youngling was previously the head of procurement of the Honolulu Authority for Rapid Transportation (HART). Paula's experience includes federal and state government procurement through the U.S. Air Force and various Department of Defense contractors.

**XIII. Adjournment**

The meeting was adjourned at 11:23am.

Respectfully submitted,



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Dean Seki, Secretary  
Procurement Policy Board

Attachment: August 4, 2014, PPB Agenda

# PROCUREMENT POLICY BOARD

Kalanimoku Building  
1151 Punchbowl Street, Conference Room 410 ♦ Honolulu, Hawaii 96813

County of Maui Building  
200 South High Street, Room 616 ♦ Wailuku, Hawaii 96793

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Regular Meeting  
Monday, August 4, 2014, 10:30 a.m.

## A G E N D A

	Agenda Item
I.	Call to Order, Public Notice, Quorum
II.	Approval of Minutes – Meeting of April 17, 2014
III.	Executive Session pursuant to HRS §92-5(a)(2) to discuss personnel matters
IV.	Professional Services – Interim Rule Repealing Hawaii Administrative Rules §3-122-69
X.	Past Performance – HCR 176 (SLH 2014) Legislative Resolution Update
XI.	New Business
XII.	Next Meeting
XIII.	Announcements
XIV.	Adjournment

Please allow 1 hour for the meeting.

Agenda and available agenda items may be viewed at [www//spo.hawaii.gov/procurement-policy-board/](http://www//spo.hawaii.gov/procurement-policy-board/) (click on *Meeting Agenda and Minutes*).

Individuals requiring special assistance or services may call (808) 587-4700 by 10:30 a.m., Friday, August 1, 2014, to discuss accommodations.