

PROCUREMENT POLICY BOARD
Meeting Minutes
Thursday, October 30, 2014, 10 a.m.
Public Works Conference Room, Room 426, 1151 Punchbowl Street
Honolulu, Hawaii 96813

Members Present

Howard S. Garval
Ronald N. Hirano
Gregory L. King, Chair
Dean H. Seki, Secretary
Kathy Suzuki-Kitagawa

Members Absent

David Langille, Vice Chair

Staff

Sarah Allen, State Procurement Office (SPO)
Ruth Baker, SPO
Stella Kam, Department of the Attorney General
Hōkūlei Lindsey, SPO
Andrew Lum, SPO
Robyn Pfahl, SPO
Mara Smith, SPO
Donna Tsuruda-Kashiwabara, SPO
Paula Youngling, SPO

Others

Shannon Alivado, General Contractors Association of Hawaii
J.R. Carino, Building Industry Association of Hawaii
Nicole Chapman, Honolulu Authority for Rapid Transportation
Daniel Chun, American Institute of Architects
Rina Chun, Hawaii State Legislature
Christine Erorita, Department of Water, County of Kauai
Mary Alice Evans
Susan Gray-Ellis, State Energy Office, Department of Business Economic Development and Tourism
Shellie Hee, Department of Budget & Finance, City & County of Honolulu
Michael Hiu, Division of Purchasing, City & County of Honolulu
Wendy Imamura, Division of Purchasing, City & County of Honolulu
Amy Kondo, Corporation Counsel, City & County of Honolulu
Melanie Martin, Department of Transportation
Jeff Masatsuga, Finishing Trades Trust Funds
Kamana'o Mills, Department of Hawaiian Home Lands
Eric Nishimoto, Public Works Division, Department of Accounting & General Services
Dan Purcel
Brooke Wilson, Pacific Resources Partnership
Sherman Wong, General Contractors Association
Jolie Yee, Public Works Division, Department of Accounting & General Services

I. Call to Order, Public Notice, Quorum

Chair Gregory King called the Procurement Policy Board (PPB) meeting to order at 10:11 a.m.

II. Approval of September 29, 2014 Meeting Minutes

Draft minutes of September 29, 2014 were discussed, including revisions that included Deputy Attorney General Ms. Stella Kam's comments for clarification. Shannon Alivado of the General Contractors Association (GCA) questioned details in an earlier draft, and was informed that the issues have been addressed in the revision draft. PPB Secretary Dean Seki clarified statements made at the previous

meeting and gave an update that SPO's HlePRO Team was named the State of Hawaii's 2014 Team of the Year.

Mr. Seki made a motion to approve the revised minutes of the September 29, 2014, meeting. Kathy Suzuki-Kitagawa seconded the motion. Motion passed unanimously.

III. PPB Procurement Policy Board Operations

A. Vacancies and Status of PPB Nominating Committee (NC)

State Procurement Office (SPO) Administrator Sarah Allen reported that PPB application information for existing board vacancies have been posted on the SPO website, and that the NC has not been able to meet because of members' pending confirmation by the Governor's Office. She added that the NC can meet as soon as Governor's confirmation is received.

B. Statutory Requirements for Board Member Qualifications

The PPB asked the SPO to look at the Board composition for considering making the position qualifications less restrictive. Written background information on the current Board composition, its creation, legislative history, and nominating and appointment process was provided. SPO Procurement Policy Specialist Robyn Pfahl reported that per Act 8 (SLH Special Session 1993), all board members are to "demonstrate[] sufficient business or professional experience to discharge the functions of the policy board," with additional qualifications specific each of the seven (7) board positions. PPB's composition was changed in 1997 to add two (2) Health and Human Services professionals per Act 190 (SLH 1997), changing the board composition from five (5) to seven (7) members.

The NC reviews the applications, establishes criteria for the qualifications of each position, and provides a list of three qualified individuals to serve on each open position for appointment consideration by the Governor. Ms. Allen stated that the NC, not the SPO, has the authority to change the criteria for evaluating the statutory qualifications of each PPB position. The SPO finds that the statutory qualifications themselves are not overly restrictive, and that there is a pool of professionals in the community who would qualify for the positions.

The challenge in receiving new appointees to the PPB has been in the process. The time delay of getting the Governor's confirmation of NC members before the NC can be activated has been most troublesome, and is where the process currently remains to be stalled. Once the Governor confirms the NC members, the NC can meet and review applicants based upon criteria for the board positions. The PPB may suggest that the NC seek guidance from the PPB on the criteria, however the criteria for evaluating statutory qualifications is under the purview of the NC. An unidentified member of the audience commented that cancelling a meeting due to a lack of quorum provides a scheduling challenge for PPB members and the public. Chair King agreed that one of the questions for candidates is his/her availability and commitment to serve on the PPB.

IV. Administrative Rule Changes Procedures – Interim Rulemaking and Rulemaking Pursuant to HRS Chapter 91

Ms. Pfahl reviewed the interim rulemaking process, which applies to a number of items on the agenda. She reported that pursuant to applicable provisions of chapter 91, Hawaii Revised Statute (HRS), the interim rules that were approved by the PPB on September 29, 2014, have been drafted in both Standard (STD) and Ramseyer (RAM) format. After review by the Department of the Attorney General, the interim rules are to be signed by the PPB Chair and Comptroller, and then the rules in Standard format will be filed at the Lieutenant Governor's Office. Ten days after filing, the SPO will issue a

procurement directive as official notification of the interim rules, which will be in effect for 18 months then will automatically sunset, unless repealed or replaced prior to sunset date.

Permanent rule-making pursuant to HRS chapter 91 is a much lengthier process, which includes public hearing, and will hopefully be completed prior to the interim rules sunset so that permanent rules will replace the interim rules. STD and RAM formatting for interim rulemaking will be presented to Chair and Comptroller for signature today. SPO will work with Department of Accounting and General Services' (DAGS) administrative rulemaking team to coordinate permanent rulemaking steps and timelines.

V. Inventory Services – amending HAR chapter 3-130

The PPB voted to promulgate changes to section 3-130, Hawaii Administrative Rules (HAR), as recommended by the SPO through interim rules pursuant to HRS §103D-202 on September 29, 2014. The change is to align the administrative rules relating to inventory management with HRS §103D-1204, and to make other clarifying amendments. The SPO requested that the PPB vote to promulgate permanent rulemaking, a process that can run simultaneously to the interim rules and provides process for public input. Deputy Attorney General Ms. Kam confirmed that the PPB's authority to issue interim rules pursuant to HRS §103D-202 makes rule changes effective immediately after promulgation.

The STD and RAM formatting to amend HAR chapter 3-130 through interim rulemaking will be presented to Chair and Comptroller for signature today.

Ronald Hirano made a motion to approve permanent changes to HAR §3-130 pursuant to HRS chapter 91. Dean Seki seconded the motion. The motion passed unanimously.

VI. Professional Services – repealing HAR §3-122-66

The PPB voted to repeal HAR §3-122-66 as recommended by the SPO through interim rules pursuant to HRS §103D-202 on September 29, 2014. This change was due to a 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 process for procurement of professional services.

Ms. Pfahl reported that the interim rules provides immediate notice that HAR §3-122-66 is no longer able to be utilized, and the SPO has posted a Procurement Circular to provide guidance on professional services. The SPO is also proposing legislation through the DAGS legislative package which would clarify the PPB's authority to promulgate administrative rules to address the situation that HAR §3-122-66 previously addressed.

The STD and RAM formatting to repeal HAR §3-122-66 through interim rulemaking will be presented to Chair and Comptroller for signature today, and there was no request for further action on HAR §3-122-66.

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

The PPB voted to promulgate changes to HAR §3-120-4 and Exhibit A as recommended by the SPO through interim rules pursuant to HRS §103D-202 on September 29, 2014. The SPO asked the PPB to make this a permanent rule change pursuant to HRS chapter 91 rulemaking process.

The purpose of this rulemaking is to avoid ambiguity from the previous inclusion of "etc." on Exhibit A's Exemption Number 6.

The STD and RAM formatting to amend HAR §3-120-4 and Exhibit A will be presented to Chair and Comptroller for signature today.

Kathy Suzuki-Kitagawa made a motion to approve permanent changes to HAR § 3-120-4 and Exhibit A pursuant to HRS chapter 91. Mr. Hirano seconded the motion. Motion passed unanimously.

VIII. Communications During Source Selection – amending HAR §§ 3-122-1 and 3-122-108; adding HAR §§ 3-122-16.10 and 3-122-52.1

The purpose of this amendment request is to provide a method for clarification communications between a purchasing agency and an offeror, and to increase effectiveness and efficiency in the state procurement process during competitive sealed proposals by increasing the potentially acceptable list of responsible offerors. Ms. Allen commented that this mirrors language in the Federal Acquisition Regulation and the Invitation for Bid process, and it reduces source selection and evaluation time. She added that clarification communications will also help address simple clerical errors in proposals.

The PPB, SPO and the Deputy Attorney General had a discussion about communication being part of responsibility and responsiveness. Comments were received from representatives from the City & County of Honolulu, the Honolulu Authority for Rapid Transportation, the Public Works Division of DAGS, and the General Contractors Association on the issue.

The PPB deferred this agenda item.

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

The SPO requested the PPB to promulgate amendments to HAR §3-120-4, Exhibit A, and 3-122-14 through interim rulemaking to clarify remaining ethical and contractual obligations of procurements exempted from HRS chapter 103D. The PPB previously heard this request at the September 29, 2014, meeting, and requested the SPO draft language that would be approved of by the Attorney General.

Ms. Pfahl offered three versions of suggested language to be inserted at the end of HAR §3-122-14:

- Version A: "However, all public employees must continue to conduct and participate in public procurement in a responsible and ethical manner with contracting integrity, guided by HRS §103D-101 and HAR 3-131-1.02."
- Version B: "“However, all public employees must continue to conduct and participate in public procurement in a responsible and ethical manner with contracting integrity, acting as a fiduciary and trustee of public funds in the public interest, avoiding unethical behavior, maintaining confidentiality, remaining impartial in dealings with any actual or prospective interested party, and identify and eliminate any conflicts of interest to conduct an alternative procurement in a responsible and ethical manner with contracting integrity.”"
- Version C: "However, all public employees must continue to conduct and participate in public procurement in a reasonable and ethical manner and contracting integrity pursuant to HRS chapters 84 and 103."

Ms. Allen stated that the impetus for the exemption language is to provide clarity in the HAR that regardless of being exempt from HRS chapter 103D, there are always ethical and contractual requirements, and that offerors still have to do their due diligence and be responsible. This clarification provides guidance on ethics throughout the acquisition life cycle (contract management, post- and pre-award, market research, and acquisition planning).

Deputy Attorney General Ms. Kam reviewed the three versions and stated her preference for Version A with revised language.

Mr. Garval made a motion to amend HAR §§3-120-4, Exhibit A, and 3-122-14, to Version A, as amended to read “notwithstanding remaining ethical considerations in public procurement, guided by relevant subsections of HRS §103D-101 and HAR §3-131-1.02” through interim and permanent rulemaking procedures. Mr. Hirano seconded the motion. Motion passed unanimously.

The STD and RAM formatting to amend HAR §§3-120-4, Exhibit A, and 3-122-14, will be presented to Chair and Comptroller for signature today.

X. Past Performance - amending HAR §§ 3-122-201 and HAR 3-122-108; Adding HAR §§ 3-122-9.03 and 3-122-52.1

Ms. Allen said that during the 2014 legislative session, she met with many State Senators, State Representatives, State department directors and members in the community who expressed their frustration with past performance not being considered when awarding State contracts. The SPO has been working through HCR 176 (SLH 2014)’s request that the SPO to conduct a study and propose legislation on past performance.

Ms. Allen emphasized that the issue of Past Performance was placed on the PPB agenda to promote a discussion, to elicit and record feedback from stakeholders in the community as part of the report in response to HCR 176 (SLH 2014), and to clarify where the PPB sees past performance as the Procurement Code is currently written in HRS chapter 103D. The SPO has been seeking input from stakeholders and holding focus groups, studying surveys, as well as researching and benchmarking federal and other states’ policies as part of its study in response to HCR 176 (SLH 2014). Ms. Allen thanked the community for showing-up to this PPB meeting and said that their input will be documented for the report.

Ms. Pfahl shared that the SPO submitted draft legislation as part of the DAGS’ legislative package for 2015 mid-October to meet internal departmental deadlines. SPO’s proposed legislation requests the legislature to make a clear determination that they intend past performance to be included in all procurement. The SPO is aware of other versions of more restrictive legislation drafted by other parties on past performance, and anticipates seeing multiple bills introduced in the 2015 legislative session.

Ms. Allen and Ms. Pfahl cited numerous issues about implementing past performance evaluations and the perception of poor past performers. SPO research has shown that past performance is complex and is interpreted differently across the State’s decentralized procurement jurisdictions. Gathering information about contractors, such as self-reporting references on a questionnaire, provides some information on past performance, but there are many questions about applicability, objectivity, and subjectivity without any guidance. There was a previous attempt to use an “objective” computer program calculation that accumulated all information, but the information generated was not relevant and the idea has not been further pursued for many years.

Ms. Allen added that state departments and agencies reported that they are being forced to hire bad contractors who consistently show that they are bad performers, are “change order” or “low-bid” artists. Ms. Allen sees a large part of the “past performance problem” as procurement officers utilizing the wrong method of procurement during the planning stages of the acquisition.

SPO’s extensive research supports past performance falling under responsibility, which is applicable to all procurements under HRS §103D-. Ms. Pfahl cited HRS §103D-310, which addresses the responsibility of offerors: “Procurement officer shall determine whether the prospective offeror has the

financial ability, resources, skills, capability, and business integrity necessary to perform the work.” Although some procurement jurisdictions interpret past performance as a matter of responsibility, already implementing their own past performance review process, other jurisdictions are not interpreting the current statutory language in the same manner. Additionally, there is no current infrastructure to support a statewide past performance review on contractors. Additional infrastructure and guidance are necessary to establish solid policy and procedures for past performance because the current infrastructure does not support information sharing between jurisdictions, which would be crucial for implementing past performance review of government contracts across the State.

Ms. Pfahl explained that the PPB’s role is to implement rules to provide guidance on procurement issues within the scope of their statutory authority, and then the SPO’s role is to implement policy guidance and training on these issues.

If the PPB currently sees past performance as part of the legislatively mandated procurement process, the SPO is requesting the PPB promulgate rules to start providing guidance on past performance, which identifies the government’s responsibility to collect and review past performance information as part of responsibility determination. The SPO acknowledged that there are more details to be addressed, such as additional language to define available information, and how to consider “recent and relevant,” and offered the following language to start the process: “The procurement officer may consider available recent and relevant past performance of the contractor as it applies to a responsibility determination for the current solicitation.”

The Building Industry Association submitted written testimony (attached) requesting that the PPB defer any decision-making on proposed amendments to the HAR on past performance. Various people representing various state and county departments, as well as trade organizations, shared their thoughts and concerns about past performance. Ms. Alivado of GCA and Daniel Chun of American Institute of Architects reported that they stand on their written testimony submitted for the PPB meeting on September 29, 2014, expressing concern about legislation and promulgating rules on past performance prior to reviewing the study.

Chair King voiced his personal opposition to past performance legislation for IFBs. He said that the problem has to be clearly identified and past performance must be defined, and proposed legislation needs clarity.

The PPB tabled this issue until after the 2015 legislative session.

XI. Update on Legislative Initiatives

Ms. Allen provided an overview on the SPO’s legislative initiatives that were submitted as part of the DAGS’ legislative package.

- Professional Services (HRS§103D-304) - brings back option of alternatives if there are less than three bidders on a request for professional services.
- Past Performance – Response to HCR 176 (HRS §§103D-104 and 103D-310)
- Source Selection - Clarification Communications (HRS §103D-104 and HRS §103D-303)

Ms. Allen continues to meet with other agencies who have indicated that they are working on legislation that will be affecting procurement. The Office of Hawaiian Affairs is working on a bill for procurement of native plants. The Department of Agriculture is working on reinstating an exemption of foods from the procurement code. Other Departments and Agencies have also come to SPO requesting initial feedback on procurement initiatives. Ms. Allen is encouraged with the open communication from other Agencies and stated she welcomes anyone proposing legislation affecting procurement to come speak with SPO as soon as possible in their process.

XII. Small Business Initiative – Act 50 SLH 2005

Ms. Allen provided the PPB with an update on the small business initiative to promulgate administrative rules pursuant to HRS §§103D-901 through -906. Although Interim Rules were adopted beginning in 2006, permanent rules were not implemented and the interim rules expired in 2011 without further action on the small business set-aside law. The SPO is revisiting the issue, conducting focus groups and developing a survey in order to gather information for a successful initiative. A small business focus group that included small business representatives, from Department of Labor and Industrial Relations; Department of Business, Economic Development and Tourism; Building Industry Association and a variety of small business stakeholders and community leaders met October 29, 2014, to identify some major issues that should be addressed in a survey of the greater small business stakeholder community, and to identify possible survey participants and associations that may be willing to distribute a small business set-aside survey to their membership

Anyone interested in offering input on this small business initiative is asked to contact Hōkūlei Lindsey, SPO Procurement Policy Specialist, at ruth.h.lindsey@hawaii.gov, or 587-3355. The SPO will be submitting a report of its findings to the PPB for consideration on next steps.

XIII. Next Meeting

The next PPB meeting will be scheduled as needed.

XIV. Announcements

There were no announcements.

XV. Adjournment

Mr. Seki made a motion to adjourn the meeting. Mr. Hirano seconded the motion. Motion passed unanimously. The meeting was adjourned at 12:22 p.m.

Respectfully submitted,



Procurement Policy Board

Renard N. Hirani

Attachments:

October 30, 2014, PPB Meeting Agenda

Testimony from Building Industry Association dated October 30, 2014

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

THE VOICE OF THE CONSTRUCTION INDUSTRY

2014 Officers

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Brian K. Adachi
BKA Builders, Inc.

President-Elect

Richard Hobson, Jr.
Gentry Homes, Ltd.

Vice President

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Gary T. Okimoto

Honolulu Wood Treating

Lili Shintani

Alan Shintani, Inc.

Mark Hertel

Inter-Island Solar Supply, Oahu-Maui-
Hawaii-Kauai

Marshall Hickox

Homeworks Construction, Inc.

Michael Watanabe

JW, Inc.

Ryan Engle

Bays Lung Rose & Holma

Stephen Hanson

simplicityHR by ALTRES

October 30, 2014

Honorable Gregory King, Chair
Policy Procurement Board
Hawaii State Procurement Office
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813

Via email: procurement.policy.board@hawaii.gov

RE: Request for Deferral in Adopting Changes to the Hawaii Administrative Rules on Past Performance (HAR Section 3-122).

Dear Chair King and Members of the Board,

My name is Gladys Marrone, CEO for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii respectfully requests this Board defer any decision-making on proposed amendments to Administrative rules on past performance by interim rulemaking. During the 2013 Legislative session, the Procurement Task Force was created and is expected to present its report, relating to bad performing contractors, to the Legislature in 2015. Furthermore, consideration of past performance is already permitted by statute under 103D-302(f), under the invitation for bid process, what is commonly known as low bid. Under this Section, an agency may set the criteria and qualifications for the bidder in its bid specifications, which could include such criteria as past performance. However, it seems that agencies choose not to utilize it.

Based on the above reason, BIA-Hawaii respectfully requests this Board defer any adoption of interim rules on past performance until the report from the Procurement Task Force is presented to the Legislature.

We appreciate the opportunity to share with you our views.