

PROCUREMENT POLICY BOARD MEETING

July 5, 1995

2:00 p.m.

Comptroller's Conference Room
1151 Punchbowl Street, Room 410
Honolulu, Hawaii 96813

Members Present

Haruo Shigezawa, Chairman
Tim Johnson, Vice Chairman
Sam Callejo, Secretary
Bill Gray, Member
Robert Oyama, Member

Others

Lloyd Unebasami, Interim Administrator
Robert Governs, State Procurement Office
Justin Fo, State Procurement Office
Grant Turner, State Procurement Office
Kay Fujimoto, State Procurement Office
Pat Ohara, Deputy Attorney General
Eric Tom, DOE Procurement Office
Duff Zwald, University of Hawaii
Gwen Won, University of Hawaii
Jeffrey Agader, Judiciary
Clayton Wong, Honolulu City Council

Call to Order

The meeting was called to order at 2:00 p.m. by Chairman Haruo Shigezawa.

Minutes

Motion

A motion was made by Mr. Bob Oyama, seconded by Mr. Tim Johnson, to approve the minutes of the meeting held on June 6, 1995.

AYES: Mr. Haruo Shigezawa
 Mr. Tim Johnson
 Mr. Sam Callejo
 Mr. Bill Gray
 Mr. Robert Oyama

NAYS: None

The minutes were approved as distributed.

New Business

A. Welcome Comptroller. Chairman Shigezawa welcomed Comptroller Sam Callejo as a member and secretary of the Procurement Policy Board.

B. Review and Approval of Amendments to Interim Rules. Chairman Shigezawa announced that Chapter 3-125 will be discussed first.

1. Chapter 3-125, Modifications and Terminations of Contract. Mr. Bob Governs stated that three major revisions were made to this chapter.
 - a. Section 3-125-2 was amended to provide for change clauses in goods and services contracts.
 - b. Section 3-125-3 was amended to provide for modifications to goods and services contracts.
 - c. Section 3-125-23 was amended to include a prompt payment clause as required by subsection 103D-501(c), HRS.

Mr. Oyama expressed concerns regarding the specificity for *anticipated* change clauses in contracts for goods and services. He cautioned about being too specific regarding possible change orders as a lot of unnecessary work may be created in drafting the contract. The present language in the rules seem broad enough to address many of the unanticipated changes. Mr. Governs explained that the law specifically states that there must be a change clause in the contract. Chairman Shigezawa recommended that a standard change clause be developed for all contracts--for goods, services and construction contracts.

Chairman Shigezawa asked that the Board defer any action on this matter to allow the staff time to further review this item.

2. Chapter 3-121, Procurement Organization.
 - a. Section 3-121-1(b) was deleted as the duties of the chief procurement officers (CPO) have been expanded by the passage of Act 178 (1995). The responsibility for compliance with the code and rules will rest with the CPO's.

- b. Section 3-121-1(c), deleted "or the administrator's representative" in reference to serving as a nonvoting advisor to the Procurement Policy Board.
- c. Section 3-121-2(4), section was amended for clarity.
- d. Section 3-121-16(b)(5)(C)(i) was amended to clarify the delegation of authority for the procurement of professional services. Act 178 (1995) authorizes the heads of purchasing agencies the authority to procure professional services and does not require a delegation by the chief procurement officer. Deputy Attorney General Pat Ohara suggested that the language be amended to read:

Authority to approve, . . . rests with the head of a purchasing agency, and does not require a delegation by the chief procurement officer.
- e. Section 3-121-17 was amended to allow the CPO to delegate to a designee the authority to sign on the CPO's behalf for exemptions, purchases by sole source selection, and emergency procurements.

Motion

Mr. Bill Gray made a motion to approve the amendments to Chapter 3-121, as discussed above; the motion was seconded by Mr. Sam Callejo.

AYES: Mr. Haruo Shigezawa
Mr. Tim Johnson
Mr. Sam Callejo
Mr. Bill Gray
Mr. Robert Oyama

NAYS: None

The motion was unanimously approved.

- 3. Chapter 3-122, Source Selection and Contract Formation.
 - a. Section 3-122-43, it is recommended that this section be deleted from the rules and placed in a procedural manual as the information contained herein are of a general nature.
 - b. Section 3-122-44, the items were re-listed in the order of priority. Item (7) was deleted since changes to a contract after award should

be done by change order or contract modification as permitted by the contract. (With the deletion of section 3-122-43 above, this section will be numbered 3-122-43.)

- c. Section 3-122-46, as authorized by Act 178 (1995), this section was amended to allow the Procurement Policy Board to approve a list of goods and services or construction that may be procured by competitive sealed proposals without a determination by the head of a purchasing agency. The section further allows the head of a purchasing agency to request that the procurement of a specific type of goods, services, or construction by competitive sealed proposal be added or deleted from the list. (With the deletion of section 3-122-43 above, this section will be numbered 3-122-45.)
- d. Section 3-122-53, this section was amended to exclude cost as an evaluation factor if there is no direct expenditure. (With the deletion of section 3-122-43 above, this section will be numbered 3-122-52.)

Subsection (b): Mr. Oyama suggested that if a numerical system is used, the third sentence in (b) be replaced with the following:

The relative priority to be applied to each evaluation factor shall be set out in the request for proposals.

Subsection (c): Mr. Oyama stated that cost may be a factor whether there is a direct expenditure or not. He therefore suggested that this subsection be amended to read:

Where applicable, cost should be an evaluation factor.

- e. Section 3-122-62, the major amendment in this subchapter is that the chief procurement officer is no longer in the review and approval process for professional services. The revisions in this section include references to the statutes and the U.S. Office of Personnel Management's Qualifications Standards Handbook.
- f. Section 3-122-63, the revision amends the language to give responsibility for change orders and modifications to the head of a purchasing agency since the chief procurement officer no longer reviews the requests.

During the discussion that followed, Chairman Shigezawa stated that, based on the intent of the initial procurement law, the chief procurement officer should continue to be the individual to approve the change orders and modifications to contracts. Messrs. Oyama and Johnson expressed similar concerns.

However, Mr. Callejo expressed concerns regarding the undue delays this may cause for the project since the work must be halted in order to secure the necessary approvals from the chief procurement officer who had not been involved in the original approvals for the contract. Mr. Unebasami concurred with this concern and explained that the amendment to the procurement law specifically allows the heads of purchasing agencies the authority to procure professional services; thereby allowing them to grant such approvals for change orders and modifications to contracts. Mr. Callejo recommended that the head of the purchasing agency be given this authority and responsibility.

- g. Sections 3-122-64 to 3-122-66 are repealed as a result of Act 178 (1995).
- h. Section 3-122-67, this section sets the process for the procurement of professional services by the head of a purchasing agency. (With the deletion of sections 3-122-64 to 3-122-66 above, this section will be numbered 3-122-64.)

Mr. Bill Gray inquired about the purpose of a firm or individual informing the head of a purchasing agency of any changes in their statements of qualifications. Mr. Govers replied that this requirement is stated in the law.

- i. Section 3-122-68, this section sets the procedures for the establishment of a screening committee and the ranking process. The head of a purchasing agency is now authorized to negotiate the contract. (With the deletion of sections 3-122-64 to 3-122-66 above, this section will be numbered 3-122-65.)

Ms. Ohara asked that a correction be made to section 3-122-68(b)(1) by deleting the words "at least" in reference to the number of persons the screening committee is to submit to the head of the purchasing agency. She explained that the law states that "three names" be submitted. Mr. Unebasami stated that at an earlier Board meeting this question was raised. At that time, another deputy attorney general opined that the language, "at least

three names," was acceptable and the Board subsequently approved this language. Ms. Ohara stood on her interpretation and recommended that the language be amended to delete "at least" as stated above. The Chairman concurred.

- j. Section 3-122-69, the amendment in this section authorizes the head of a purchasing agency, instead of the procurement officer, the authority to negotiate. (With the deletion of sections 3-122-64 to 3-122-66 above, this section will be numbered 3-122-66.)
- k. Sections 3-122-71 and 3-122-72 were deleted because they are covered under other subchapters of the rules.
- l. Section 3-122-68 is a new section covering the reporting requirements of procurement actions.

In response to Mr. Gray's question, Mr. Govern explained that the chief procurement officers will submit a report to the Administrator of the State Procurement Office, who will in turn submit a consolidated report to both the legislature and the Procurement Policy Board.

Mr. Johnson asked about the details of the report. Mr. Govern replied that a format will be prescribed with the details of the types of information requested.

- m. Section 3-122-81(j), this new subsection allows the Procurement Policy Board to approve a list of sole source procurements which shall be exempt from the law.

Mr. Justin Fo, procurement specialist from the State Procurement Office, requested that the Board review Attachment 1 which lists the types of sole source procurements which the various purchasing agencies have submitted for the Board's consideration.

A lengthy discussion ensued regarding the validity of the true meaning of "sole source" for many of the items on Attachment 1. The following highlights the discussion. Regarding the request for the manufacturer to service certain equipment, during the warranty it would be understandable to have the manufacturer or the manufacturer's representative to maintain the equipment; however, outside of the warranty period there may be many authorized servicers other than the manufacturer. Regarding the purchase of

software in general, these can be purchased directly from the manufacturer or from many other vendors.

Chairman Shigezawa recommended that this item be deferred until a further review can be made.

Mr. Unebasami requested the Chairman's reconsideration and asked the Board's approval for one item on the suggested sole source list--item 1 under State Procurement--"Rental of booth space for exhibits at conventions and trade shows when organized by a single sponsor." The Chairman concurred.

Mr. Gray inquired whether the public hearing process must be complied with if this list is modified in the future. Ms. Ohara replied in the affirmative. In the interest of facilitating the purchasing agencies, Mr. Gray suggested that the list of sole source procurements be maintained by the Procurement Policy Board and not be made a part of the rules.

Mr. Gray recommended that the first sentence in subsection (j) be amended, the second sentence be left in its entirety, and the last sentence be deleted. His suggestion for the language follows:

Pursuant to section 103D-306(c), HRS, the procurement policy board shall maintain a list of procurements which constitute sole source procurements that may be procured without regard to this subchapter. However, the chief procurement officer may request reports from the heads of purchasing agencies on procurements made pursuant to this subparagraph.

- n. Section 3-122-84 is a new section which requires that the chief procurement officer maintain a record of all sole source procurement actions made under section 103D-306, HRS, for a period of five years.
- o. Section 3-122-91 is a new section which requires that the chief procurement officer maintain a record of all emergency procurement actions made under section 103D-306, HRS, for a period of five years.

Motion

As there were no further questions or discussions, Mr. Tim Johnson made a motion to approve the amendments to Chapter 3-122, Source Selection and Contract Formation, as discussed above. The motion was seconded by Mr. Sam Callejo.

AYES: Mr. Haruo Shigezawa
Mr. Tim Johnson
Mr. Sam Callejo
Mr. Bill Gray
Mr. Robert Oyama

NAYS: None

4. Chapter 3-120, General Provisions.

Mr. Unebasami presented Chapter 3-120 in final form as it was approved at the June 6, 1995 meeting. The Board was asked to review this chapter, along with the list of approved exemptions. For clarification purposes, particular attention was called to certain items on the list of exemptions. The discussion follows:

Item 14, Goods and services purchased through agreements made by regional or national educational purchasing consortia. Mr. Duff Zwald and Ms. Gwen Won, both from the University of Hawaii, defended this exemption by explaining that the prices are very favorable for educational items for the UH and that only if you are a member of the consortia would an agency would allowed to purchase from this price list. Mr. Unebasami stated that the UH may still take advantage of the favorable prices without this exemption. For example, if the purchase is under \$10,000, the prices from the schedule would be the prices quoted for a small purchase. If it is over \$10,000, the chief procurement officer may declare that it would not be practicable or more advantageous to purchase from other sources.

Item 17, Service providers as determined by State Cluster. Mr. Unebasami stated that he discussed this item with the departments concerned. Their request for the exemption is to make the process less complicated.

Item 19, Proprietary software tied to existing operating systems.

Software may be available for purchase from several sources.

Item 20, Institutional networking services and equipment.

Services and equipment may be available from several sources.

Item 21, Insurance. Mr. Unebasami explained that generally insurance can be procured through the bid process. However, there may be instances when the bid process may not be a feasible means to procure certain types of insurance and it is in these instances that the chief procurement officer may exercise his authority in granting an exemption. An exemption for all types of insurance may not be necessary.

Item 25, Goods and services purchased from Federal supply schedules, through agreement with the General Services Administration.

The discussion regarding this item centered around the same reasons as for item 14 above. The major concerns expressed were that purchasing from these lists may discourage broad based competition among local vendors.

Regarding item 9, Services of printers, rating agencies, support facilities; fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds, Chairman Shigezawa asked whether bond counsels are included. Ms. Ohara answered in the affirmative.

In light of the discussion regarding bond counsels, Mr. Unebasami stated, for the Board's information, that the bond underwriters are not presently considered "professionals" since they are not listed on the list of professionals as published by the U.S. Office of Personnel Management and made part of the procurement rules. Their services are presently procured through the request for proposal method.

(Mr. Callejo left the meeting at 4:20 p.m.)

Motion

Mr. Bill Gray motioned that Chapter 3-120 be approved with the following amendments to the list of Procurements Exempt from Chapter 103D, HRS:

Item 14 is deleted;
Item 17 is deleted;
Item 19 is deleted;
Item 20 is deleted;
Item 22 is amended to read: "Animals and plants;"
Item 23 is deleted; and
Item 25 is deleted.

The motion was seconded by Mr. Bob Oyama.

AYES: Mr. Haruo Shigezawa
Mr. Tim Johnson
Mr. Bill Gray
Mr. Robert Oyama

NAYS: None

The motion was unanimously carried.

Administrator's Report

1. Mr. Unebasami informed the Board of the changes to the public hearing schedule due to unanticipated delays in the approval process. The new schedule is as follows:

September 21-22, 1995	Big Island
September 26, 1995	Oahu
October 13, 1995	Maui
October 20, 1995	Kauai

The public hearings will be scheduled in the evenings, possibly starting at 6:00 p.m. to promote greater participation from the general public.

2. Mr. Unebasami reported that he has scheduled meetings with the mayors of the various counties to discuss the amendments to the procurement code and to receive feedback on any concerns that they may have. The Board shall be kept informed of any suggestions for amendments to the law.

Meetings with the Governor and the chief procurement officers of the various other jurisdictions will be scheduled in the near future.

Next Meeting

The Chairman announced that the next meeting will be held on Tuesday, August 1, 1995 at 2:00 p.m.

Adjournment

There being no further business, the meeting was adjourned at 4:36 p.m.

Respectfully submitted,

JUL 26 1995

Date



SAM CALLEJO, Secretary
Procurement Policy Board



PROCUREMENT POLICY BOARD MEETING - AUGUST 1, 1995

PROPOSED RULE CHANGES

Chapter 3-122

Subchapter 1

1. Pages 1 to 2. Section 3-122-9. This section is new except for (c) which was in Section 3-122-30. We recommend a general provision for facsimiles in subchapter 1.

Subchapter 5

2. Page 5. Section 3-122-21. Revised subparagraph (6) due to Act 186 (H.B. 3300), 1994 and Act 178 (H.B. 1834).
3. Page 6. Section 3-122-25. Revised (b) to remove discretionary. Bidders should normally be added or removed per (c).
4. Pages 7 to 8. Section 3-122-28. Allowed for fax notices in (B). Also, removed (C) - "telegraph company"??
5. Page 9. Section 3-122-30. Moved (b) to 3-122-9 in general provision. See 1. above.
6. Page 14. Section 3-122-31. Added paragraph (C)(3) to allow for more flexibility in correcting mistakes with higher approval levels above the procurement officer.
7. Page 16. Section 3-122-34. Gave authority to procurement officer in (b) to resolve tie bids to streamline the process.
8. Page 19. Section 3-122-35. Revised (b)(1)(A), (B), and (C) for clarity.
9. Page 21. Section 3-122-108. Revised to allow for fax of notices of intent to bid. See 1. above.

§3-122-9 Use of facsimiles. (a) Copies of documents transmitted by vendors via facsimile machine shall be limited to the notice of intention to offer; the offer; and modifications or withdrawal of offers, pursuant to subsections (b) and (c).

(b) Notices of intention to offer and modifications or withdrawal of an offer may be by facsimile machine pursuant to sections 3-122-108 and 3-122-28, respectively.

(c) An offer transmitted via facsimile machine shall be acceptable only if the offer is under \$25,000 when specifically allowed in the invitation for bids or request for proposals; provided:

(1) The facsimile offer is received in hand at the designated office by the time and date set for receipt of offers;

(2) The complete original offer with the bond, if required, is received within forty-eight hours from the time and date set for receipt of offers;

(3) The facsimile offer contains:

(A) The identification number of the invitation for bids or request for

proposals;

- (B) The item;
- (C) The quantity;
- (D) The price for the offer;
- (E) All pages of the bid or proposal requiring an original signature; and
- (F) A signed statement that the offeror agrees to all the terms, conditions, and provisions of the invitation for bids or request for proposals.

[Eff _____] (Auth: HRS

§§103D-302, 103D-303, 103D-310) (Imp:

HRS §§103D-302, 103D-303, 103D-310)

§3-122-21 Preparing a competitive sealed bid.

(a) The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:

- (1) Instructions and information to bidders concerning the bid submission requirements, including:
 - (A) The time and date set for receipt of bids;
 - (B) The address of the office to which bids are to be delivered;
 - (C) The maximum time for bid acceptance by the procurement officer issuing the bid; and
 - (D) Any other special information, such as any requirement of intention to bid.

The time, date, and location of the receipt of bids and the bid opening shall be the same.

- (2) The purchase description, specifications, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description.
- (3) The contract terms and conditions, including but not limited to the following, as applicable:

- (A) Warranty requirement;
 - (B) Bonding or other security requirements pursuant to subchapter 24;
 - (C) Contract extension provisions; and
 - (D) Statement that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids.
- (4) A bid form which shall include space for the following, but not limited to the following, and which the bidder shall sign and submit along with all other necessary submissions:
- (A) Bid price;
 - (B) Brand name and model number and packaging for goods; and
 - (C) Information on applicable preferences.
- (5) Invitation for bids for construction, shall require that the bidder include:
- (A) The name of each person or firm to be engaged by the bidder as a joint venture, partner or subcontractor in the performance of the contract; and

(B) The nature and scope of the work to be performed by each.

(6) Construction bids [which] that do not comply with the [above] requirements in paragraph (5) may be accepted if [the chief procurement officer concludes that] acceptance is in the best interest of the [public] State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount.

(7) Documents by reference may be incorporated provided that the invitation for bids specifies where such documents can be obtained.

(b) The invitation for bids may require the acknowledgment of the receipt of all amendments issued. Any amendment issued shall be in the form of an addendum. [Eff _____] (Auth: HRS §103D-302)
(Imp: HRS §103D-302)

§3-122-28 Pre-opening modification or withdrawal of offers. Offers may be modified or withdrawn prior to the deadline for submittal of offers by the following documents:

[(2)](1) Modification of offers:

(A) A written notice received in the office designated in the solicitation, stating that a modification to the offer is submitted; [and] or

(B) [The actual modifications securely sealed in a separate envelope or container, accompany the written notice.] A written notice by facsimile machine pursuant to section 3-122-9 to the office designated in the solicitation, stating that a modification to the offer is submitted; and the written notice accompanying the actual modification securely sealed in a separate envelope or container.

[(1)](2) Withdrawal of offers:

(A) A written notice received in the office designated in the solicitation; or

(B) A [written] notice by facsimile machine pursuant to section 3-122-9, to the office designated in the solicitation[;

or].

[(C) A telegraphic message received by telephone by the office designated in the solicitation from the receiving telegraph company office, provided the telegraph company confirms the telephone message by sending a written copy of the telegram showing that the message was received at such office prior to the time and date set for opening.]

(3) The documents shall be made a part of the appropriate procurement file.

[Eff] (Auth: HRS §103D-302)

(Imp: HRS §103D-302)

§3-122-30 Receipt, opening, and recording of bids. (a) Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place by the procurement officer until the time and date set for bid opening. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

[(b) Copies of bids transmitted via facsimile machine may be acceptable for bids under \$25,000, provided they are received in hand at the designated office by the time and date set for receipt of bids, and further provided that the complete original bid with the bond, if required, is received within forty-eight hours after the bid opening. Such facsimile bids shall contain specific reference to the bid number, the items, quantities, and prices for which the bid is submitted; all pages of the bid requiring an original signature; and a signed statement that the bidder agrees to all the terms, conditions, and provisions of the invitation for bids.]

[(c)](b) Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the invitation for bids.

- (1) The name of each bidder, the bid price(s), and such other information as is deemed

appropriate by the procurement officer or his designated representative, shall be read aloud or otherwise made available. If practicable, such information shall also be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made.

- (2) The name(s) and address(es) of the required witnesses shall also be recorded at the opening.

[(d)](c) The opened bids shall be available for public inspection at the time of bid opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential as set forth in subsection (d).

- (1) Material so designated as confidential shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.
- (2) Prices and makes and model or catalogue numbers of items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

[(e)](d) The procurement officer, or his designated representative, shall examine the bids to determine the validity of any requests for

nondisclosure of trade secrets and other proprietary data identified in writing.

- (1) If the parties do not agree as to the disclosure of data, the procurement officer or his designated representative shall inform the bidders present at the bid opening that the material designated for nondisclosure shall be subject to written determination by the respective attorney general or corporation counsel for confidentiality.
- (2) If the attorney general or corporation counsel determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the bid opening shall be so notified in writing and the material shall be open to public inspection unless the bidder protests under chapter 3-126.

~~[(f)]~~(e) The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

~~[(g)]~~(f) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS.

~~[(h)]~~(g) Bids shall be unconditionally accepted without alteration or correction, except as allowed in

sections 3-122-29 and 3-122-31. [Eff _____]

(Auth: HRS §§92F-42, 103D-302) (Imp: HRS §103D-302)

§3-122-31 Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

(b) A bidder may remedy a mistake in a bid discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in section 3-122-28.

(c) Corrections to bids after bid openings but prior to award may be made under the following conditions:

- (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern.
- (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive such informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of such mistakes

include:

- (A) Typographical errors;
- (B) Transposition errors;
- (C) Failure of a bidder to sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound.

(3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is not contrary to the best interest of the government agency or to the fair treatment of other bidders, and the chief procurement officer of the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

(d) Withdrawal of bids after bid opening but prior to award may be made [under the following conditions: (1) If] if the mistake is attributable to an obvious error which shall affect price, quantity, quality, delivery, or contractual conditions, provided:

(1) [the] The bidder [shall request] requests withdrawal by submitting proof of evidentiary value which demonstrates that a mistake was made[.]; and

(2) The procurement officer [shall prepare] prepares a written approval [or denial] in

response to this request.

If the response to the request is a denial, the procurement officer shall notify the bidder in writing.

(e) Correction or withdrawal of bids after award is not permissible except when the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

[Eff] (Auth: HRS §103D-302) (Imp: HRS §103D-302)

§3-122-34 Low tie bids. (a) Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

(b) [In] At the discretion of the [chief] procurement officer [or the head of a purchasing agency], award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

(1) Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State;

(2) Where identical low bids include the cost of delivery, award the contract to the tie bidder farthest from the point of delivery;
and

(3) Award the contract to the identical bidder who received the previous award and continue to award succeeding contracts to the same bidder so long as all low bids are identical.

(c) If no permissible method will be effective in resolving tie bids and a written determination is made so stating, award may be made by drawing lots.

(e) Records shall be made of all invitations for bids on which tie bids are received showing at least the following information and shall be made a part of

the procurement file:

- (1) The identification number of the invitation for bids;
- (2) The good, service, or construction item; and
- (3) A listing of all the bidders and the prices submitted. [Eff _____] (Auth: HRS §103D-302) (Imp: HRS §103D-302)

§3-122-35 Waiver to competitive sealed bid process. (a) If only one responsive bid is received in response to an invitation for bids, including multi-step bidding.

- (1) An award may be made to the single bidder:
 - (A) If the procurement officer finds that the price submitted is fair and reasonable, and that other prospective bidders had reasonable opportunity to respond; or
 - (B) There is not adequate time for resolicitation.
- (2) The bid may be rejected pursuant to subchapter 11 and new bids or offers may be solicited if the conditions in subparagraphs (A) and (B) are not met;
- (3) The proposed procurement may be canceled; or
- (4) An alternative procurement method may be conducted to include but not be limited to direct negotiations if the procurement officer determines in writing that the need for the good or service continues, but that the price of the one bid is not fair and reasonable and there is no time for resolicitation, or resolicitation would likely be futile.

(b) If for a given request no bids are received or there are no responsive bids to an invitation for bids, the procurement officer may determine that it is neither practicable, nor advantageous to the State to again solicit sealed bids.

(1) When making this determination, consideration shall be given to:

(A) [time] Time constraints[,];

(B) [the competition] Competition in the marketplace[,]; and

(C) [whether] Whether the additional potential cost of preparing, soliciting and evaluating competitive sealed bids is expected to exceed the benefits normally associated with the solicitations[; and].

(2) In the event of this determination, a more cost effective alternative procurement method may be selected to include, but not be limited to, direct negotiations[;].

(c) Documentation of the alternative procurement method selected shall:

(1) State the reasons for selection and length of contract period;

(2) State why the provisions of subchapters 8, 9, and 10 do not apply;

(3) Receive prior approval of the chief procurement officer or a designee; and

(4) Be made a part of the contract file upon
award by the procurement officer.

[Eff _____] (Auth: HRS §103D-202)

(Imp: HRS §103D-202)

§3-122-108 Qualification of bidders. (a)

Prospective bidders or offerors must be capable of performing the work for which bids are being called. Each prospective bidder or offeror must file a written or faxed notice of intention to bid pursuant to section 3-122-9, [of his intention of bid,] subject to the following:

- (1) The notice of intention to bid shall be received not less than ten days prior to the date designated for opening bids.
- (2) A [written] notice of intention to bid must be filed for the construction of any public building or public work when the bid is \$25,000 or more.
- (3) A [written] notice of intention to bid need not be filed for the procurement of goods and services, unless specified in the bid documents.
- (4) The requirement for a [written] notice of intention to bid may be waived if the procurement officer concludes that acceptance of the bid will be in the best interest of the public. For this purpose, the procurement officer shall prepare a written determination setting forth the basis for the acceptance.

PROCUREMENT POLICY BOARD MEETING - AUGUST 1, 1995

PROPOSED RULE CHANGES

Chapter 124

1. Page 124-7. Section 3-124-5. Clarified the application of the preference to the non-Hawaii product in subsection (b).
2. Page 124-8. Section 3-124-5. Clarified in subsection (d) that different preference percentages are not applied.
3. Pages 124-8 and 9. Section 3-124-6. Reduce notification from ninety to sixty days in (a).
4. Page 124-9. Section 3-124-7. Changed to allow for thirty days notification of renewal and a sixty day grace period in (a) and in (d).
5. Page 124-9. Section 3-124-8. Clarified that if terminated, a new application must be submitted.
6. Page 124-19. Section 3-124-33. Changed issue of form to administrator in (a).
7. Page 124-24. Section 3-124-45. Clarified preference application if in-state contractors preference is not selected.

- (B) A bidder or offeror need not designate that an individual product to be used or supplied is a registered Hawaii product, except in those instances where there is more than one registered Hawaii product that meet the minimum specifications and the products have been assigned different classes.
- (C) Where there is more than one registered Hawaii product that meet the minimum specifications and the products have been assigned different classes, provisions shall be made in the contract so that bidder or offeror may designate which of the different classes of registered Hawaii products are to be used or supplied; if the bidder or offeror fails to indicate which of the different classes of Hawaii products will be used, preference will be given based on the class with the lower percentage. [Eff]
(Auth: HRS §103D-1002) (Imp: HRS §103D-1002)

§3-124-5 Evaluation procedures, contract award.

(a) In any expenditure of public funds, a purchasing agency shall purchase any required product from the Hawaii products list where such registered Hawaii products are available, provided the products meet the minimum specifications and the selling price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax does not exceed the lowest delivered price in Hawaii f.o.b. jobsite, unloaded, including applicable general excise tax and use tax of a similar non-Hawaii product by more than three per cent, where class I registered Hawaii products are involved, or five per cent where class II registered Hawaii products are involved, or ten per cent where class III registered Hawaii products are involved.

(b) Where a purchase contains both registered Hawaii products and non-Hawaii products, then for the purpose of selecting the lowest offer, the bid offered for a non-Hawaii product item shall be increased by [adding] the three per cent, five per cent, or ten per cent classification preference of the lowest priced Hawaii product. The responsible bidder or offeror

submitting the lowest total bid, taking into consideration the above preferences, shall be awarded the contract, but the contract amount of any contract awarded shall be in the amount of the price offered, exclusive of such preferences.

(c) Should the bid comparison, after taking into consideration the above preferences, result in identical total prices, award shall be made to the bidder or offeror offering registered Hawaii products in preference to non-Hawaii products.

(d) For evaluation purposes, [if there are only registered Hawaii products bid or offered,] no preference shall be considered between registered Hawaii products.

(e) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (5) in this section shall be applied to the original bid prices. The sum of the products of the preferences, where applicable, shall be added to the original bid price. Preference (6) shall be applied to the evaluated bid prices.

- (1) Hawaii products list, if applicable, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for out-of-state vendors and tax exempt bidders, if applicable, pursuant to section 103-53.5, HRS;
- (3) Preferred use of Hawaii software development businesses, if applicable, pursuant to section 103D-1006, HRS;
- (4) Recycled products, if applicable, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference applied to bidders from other states which apply preferences, pursuant to section 103D-1004, HRS;
- (6) Printing, binding, and stationery work within the State, if applicable, pursuant to section 103D-1003, HRS. [Eff _____] (Auth: HRS §103D-1002) (Imp: HRS §103D-1002)

§3-124-6 Change in class status. (a) All persons whose products are on the Hawaii products list shall be responsible for informing the administrator of any change affecting the classification of their products within [ninety] sixty days of the change.

(b) If, since the original application, there has

been a change in either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of the product, which could affect the product(s) classification, a new application must be submitted within sixty days of the change.

[Eff _____] (Auth: HRS §103D-1002) (Imp: HRS §103D-1002)

§3-124-7 Biennial renewal. (a) All persons whose products are on the Hawaii products list will be notified by the State [ninety] thirty days prior to the date for biennial renewal or if a new application is required. A [ninety] sixty day grace period is allowed for both the renewal and the new application after the preference expiration date which normally will be the end of an accounting period.

(b) Provided there has been no change in either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of product, which affects the product classification since the filing of the original application, the applicant shall submit an affidavit for renewal. Provided the administrator is satisfied that the classification of a registered Hawaii product is not changed, the administrator shall renew the registration and classification of the product.

(c) Failure to complete the biennial renewal or to provide any further information requested by the administrator shall be grounds for rejecting an application or for disqualification of the product.

(d) Any person receiving a notice for renewal for Hawaii products list qualification shall advise the administrator immediately if there is any reason why the person cannot comply within the [ninety] sixty day grace period. [Eff _____] (Auth: HRS §103D-1002) (Imp: HRS §103D-1002)

§3-124-8 Termination. If change of status is not reported as required in section 3-124-6, or if the biennial renewal is not provided as required by section 3-124-7, the administrator shall terminate the registration of the product effective at the end of the [ninety] sixty day grace period allowed. Any person terminated that desires to be reinstated on the Hawaii products list shall submit a new application.

[Eff _____] (Auth: HRS §103D-1002) (Imp: _____)

§3-124-33 Qualification procedure. (a) A person desiring a preference pursuant to section 103D-1006, HRS, shall certify that they are a Hawaii software development business when submitting a bid. A Certificate of Eligibility form issued by the [policy board] administrator shall be included as part of the bid.

(b) Bidders shall indicate on the certification form, included as part of the bid, sufficient information to substantiate that eighty per cent of the employees who will be working on the proposed software development project are domiciled in Hawaii.

(c) Bidders shall submit with the certification form sufficient information to support the Hawaii software development business preference. For purposes of this section, sufficient information shall include, but not be limited to, the authorized officer's name, office or position held, name of bidder and its local address, date that the office was opened, name and local addresses of bidder's employees who will provide the labor for the services described in the bid. The procurement officer calling for bids may request additional information deemed necessary in order to qualify the bidder. The procurement officer calling for bids shall have sole discretion in determining acceptance of the bidder as a Hawaii software development business.

(d) Any bidder who is not accepted for the Hawaii software development business preference may appeal by filing a written request for re-examination of facts to the procurement officer calling for bids.

[Eff] (Auth: HRS §103D-1006) (Imp: HRS §103D-1006)

§3-124-34 Bidding procedures. (a) Bids issued by a governmental agency pursuant to section 103D-301, HRS, shall contain a notice stating that a price preference will be given to Hawaii software development businesses. This price preference will be ten per cent of the bid price, and will be used for bid evaluation.

(b) All governmental agencies issuing bids shall provide an appropriate space for bidders to indicate whether the bidder is requesting the Hawaii software development business preference.

(c) When a purchase specifies that because of federal requirements, the Hawaii software development business preference will not be considered, the price

public works projects shall provide an appropriate space for bidders to indicate whether the bidder is requesting preference as an in-state contractor. The proposal shall state that the in-state contractor preference may not be used with any other preference.

(c) Bidders requesting an in-state contractor preference shall submit a tax clearance certificate obtained in accordance with section 3-124-43, with each bid proposal. All state agencies issuing bid proposals for public works projects shall provide a caution that failure to submit the tax clearance certificate automatically voids the selection of the in-state contractor preference.

(d) All state agencies issuing bid proposals for public works projects which provide a schedule of Hawaii product preference shall provide a caution that if the bidder indicates on the proposal form that it elects the in-state contractor preference to be applied to its bid, no other preferences will be allowed and all other preference selections will be ignored by the procuring agency. [Eff _____] (Auth: HRS §103-45.5) (Imp: HRS §103-45.5)

§3-124-45 Bid evaluation procedure, contract award. (a) When the in-state contractor preference is not selected, all bids shall be evaluated by applying all preferences selected by bidders which are allowed by statute. Calculations for adjustments shall be based upon the original bid prices offered. Should more than one preference apply, the evaluated bid price shall be the sum of the original bid price plus applicable preference adjustments.

(b) Whenever any bidder selects and qualifies for an in-state contractor preference, all original bid prices from bidders who do not select or qualify for the in-state contractor preference shall be increased by five per cent for evaluation purposes.

(c) Any bid submitted by a bidder selecting the in-state contractor preference or any other preference shall be subject to the adjustments of other preferences selected by the other bidders.

(d) The responsible bidder submitting the responsive bid with the lowest evaluated bid price shall be awarded the contract.

(e) Should the bid comparison result in identical evaluated bid prices, and section 103.45.5(e), HRS, does not apply, the contracting officer shall select



PROCUREMENT POLICY BOARD MEETING - AUGUST 1, 1995

PROPOSED RULE CHANGES

Chapter 3-125

1. By definition in Section 103D-104, change orders are unilateral decisions by procurement officer; however, contract must have a "change clause".
2. Pages 1 - 2, Section 3-125-2. Section was revised for change orders to goods and services contracts.

§3-125-2 Change orders to goods and services contracts.

(a) A change order is a written order signed by the procurement officer, directing the contractor to make changes which the "change clause" of the contract authorizes the procurement officer to order without the consent of the contractor.

(b) The following clauses, or similar statements expressing the intent of the clauses, shall be included in all contracts for goods and service:

(1) "Change clause. By written order, at any time, and without notice to any surety, the procurement officer may, unilaterally, order of the contractor:

(A) Changes in the work within the scope of the contract; and

(B) Changes in the time of performance of the contract that do not alter the scope of the contract work."

(2) "Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this contract or as negotiated. Failure of the parties to agree to an adjustment shall not excuse

the contractor from proceeding with the contract as changed, provided that the procurement officer promptly and duly makes the provisional adjustments in payment or time for the direct costs of the work as the State deems reasonable. The right of the contractor to dispute the contract price or time or both shall not be waived by its performing the work, provided however, that it follows the written notice requirements for disputes and claims established by the contract or these rules."

(3) "Time period for claim. Within ten days after receipt of a written change order, unless the period is extended by the procurement officer in writing, the contractor shall respond with a claim for an adjustment. The requirement for a timely written response cannot be waived and shall be a condition precedent to the assertion of a claim."

(4) "Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if written response is not given prior to final payment under this contract."

(5) "Claims not barred. In the absence of a change order, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim under the contract or for breach of contract." [Eff _____]

(Auth: HRS §§103D-104, 103D-501) (Imp: HRS §103D-501)



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PROPOSED RULE CHANGES

Chapter 131

1. Page 2. Section 3-131-2. Changes recommended by LRB.
2. Page 3. Section 3-131-3. Reworded for clarity. LRB recommended.
3. Pages 4 & 5. Section 3-131-4. Reworded for clarity. LRB recommended.
4. Page 5. Sections 3-131-5 and 3-131-6. Reworded for clarity. LRB recommended in 3-131-5.

INTERIM DRAFT

"HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 131

PROCUREMENT VIOLATIONS

§3-131-1	Definitions
§3-131-2	Parceling
§3-131-3	Procurement violations
§3-131-4	Civil and criminal penalties
§3-131-5	Procurement training
§3-131-6	Consultations with chief procurement officer

§3-131-1 Definitions. [Definition of terms as] As used in [these rules:] this chapter:

"After-the-fact" means a request for approval to authorize a procurement that was made without following proper procedures.

"Competitive bids" means either competitive sealed bidding or competitive sealed proposals.

"Parceling" means the artificial division or fragmentation into parts as in the dividing of a purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, so as to evade the statutory competitive bidding requirements.

"Reviewing officer" means the chief procurement officer, the head of a purchasing agency, or a designee of either officer above the level of the procurement officer, delegated, in writing, the authority and responsibility to review procurement violations.

[Eff] (Auth: HRS §103D-305) (Imp: HRS §103D-305)

§3-131-2 Parceling. (a) There is no definition of artificial division or fragmentation [which] that could address every circumstance. When deciding if a division is artificial or natural, the procurement officer shall consider the following:

- (1) The higher the price of a group of procurements, the more likely they should be consolidated. When the cost of a group of procurements for a twelve-month period exceeds \$10,000, [it] the procurement should be carefully reviewed to determine if competitive bids should be issued to establish a contract.
- (2) The more similar the good, service, or construction or the more possible it is to find a group of goods, services, or construction from one type of vendor, the more likely they should be consolidated. If consolidation is appropriate and the twelve-month period expenditures on the product exceeds \$10,000 for goods and services or \$25,000 for construction, competitive bids [should] shall be issued to establish a contract.
- (3) The more predictable the procurement of similar goods, services, and construction is, the more likely they should be consolidated. If consolidation is appropriate and expenditures for the product for a twelve-month period exceed \$10,000 for goods and services or \$25,000 for construction, competitive bids [should] shall be issued to establish a contract.

(b) The dollar amount for determining whether to bid or not to bid is based on the total dollar amount of the purchase of same, like, or related goods, services, or construction during any twelve-month period. When the purchase includes two or more fiscal years, and funds have been appropriated for only one fiscal year, the contract should state that funds for the second fiscal year are subject to availability.

(c) A purchasing agency shall, where possible, consolidate requirements for competitive bidding purposes. It shall be the responsibility of the procurement officer that makes the purchasing decision for small purchases under \$10,000 to ensure that requirements are consolidated so that the goods,

services, or construction are publicly bid. Whenever a procurement officer does not consolidate requirements, the officer must be prepared to explain the reason.

(d) The chief procurement officer may provide additional guidance and procedures regarding parceling.
[Eff _____] (Auth: HRS §103D-305) (Imp: HRS §103D-305)

§3-131-3 Procurement violations. (a) Most [procurement code] chapter 103D, HRS, violations are normally inadvertent, and the result of administrative error, lack of knowledge, or simple carelessness. Corrective action is the responsibility of the head of the purchasing agency and involves the implementation of better procedures, employee training, and progressive discipline. The procurement officer may prepare a report of procurement code violations for review by the reviewing officer.

(b) The purposes of procurement code violation reports are, first [of all,] to pinpoint weaknesses in the State's procurement process, including the procurement code itself, and to find ways to improve state procurement[.], [Secondly, the purpose of the reports are] and second to determine whether or not a violation has reached the level requiring civil or criminal penalties[,], [and to take such action as may be appropriate under the circumstances.]

(c) [The purpose of] Placing the responsibility for the initial investigation [of violations] with the purchasing agency [is twofold. First, it] requires that agency management carefully examine the in place procurement procedures. If lasting improvements are needed in an agency's internal procurement procedures, they can best be achieved through the agency's own initiative. [Second, in cases involving avoidable administrative error or carelessness, employee discipline can only be effected through the management prerogatives of an individual agency.]
[Eff _____] (Auth: HRS §103D-106) (Imp: HRS §103D-106)

§3-131-4 Civil and criminal penalties. (a) Certain violations of [the code] chapter 103D, HRS, may be subject to civil and criminal penalties as described below:

- (1) Civil penalties. A person who contracts for or purchases goods, services, or construction in a manner the person knows to be contrary to the requirements of the procurement code or the rules adopted under the code is liable for all costs and damages to the State arising out of the violation.
- (2) Criminal penalties. A person who intentionally or knowingly contracts for or purchases goods, services, or construction under a scheme or artifice to avoid the requirements of the procurement code or rules adopted pursuant to the code shall be guilty of a misdemeanor, and in addition to the applicable criminal penalty, shall be subject to removal from office and shall be liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county.

(b) In order for civil penalties to apply, a person must have knowingly violated the requirements of the code or rules. In other words, the person committing the violation must be aware that he or she is acting contrary to the requirements of the code or rules at the time the violation occurs. Violations that are the result of administrative error or mistake, ignorance, [and] or carelessness are usually not subject to the civil penalties. [Violations that occur when a person is aware of the code's requirements are subject to the statute's civil penalties.] The determining factor is what the person understood the procurement requirements to be when the violation occurred, and whether or not [a] the person believed he or she was acting in compliance with those requirements.

(c) In order for criminal penalties to apply, a person must have knowingly or intentionally engaged in a scheme or artifice to avoid the requirements of the code or rules. [In this instance,] The violation must have been committed in a deliberate manner, involving some calculated means, such as parceling for a single procurement, a deliberate misstatement of fact, or an after-the-fact purchase, which is purposefully designed to avoid the requirements of the code or rules. [As a practical matter,] Legally admissible documentary evidence of [such] the wrongdoing must be available to

law enforcement authorities in order for criminal prosecution to be undertaken. Law enforcement authorities will also need to determine whether [the intended result of such a scheme involved] personal gain was intended or involved for either the person committing the violation, a friend or relative of the person, or the vendor, or whether some other vendor was significantly injured, whether intended or not. [Absent such results, criminal prosecution may not be successful, and civil penalties and administrative remedies may be more appropriate.]
 [Eff] (Auth: HRS §103D-106) (Imp: HRS §103D-106)

§3-131-5 Procurement training. [When a purchasing agency finds an apparent purchasing violation which indicates an employee(s) is procuring incorrectly, an attempt will be made to provide procurement or remedial training. If the employee(s) has already received training in the area of interest, the purchasing agency will try to determine if the training was insufficient in some way. If so, it should be adjusted. If not, the employee should be re-exposed to the training and have disciplinary action applied. Disciplinary action may include reduction of an employee's purchasing authority.] When a purchasing violation has occurred, the head of the purchasing agency shall determine the training necessary to correct the deficiency. Action may include reduction of an employee's purchasing authority.
 [Eff] (Auth: HRS §103D-106) (Imp: HRS §103D-106)

§3-131-6 Consultations with the chief procurement officer. (a) The purchasing agency shall consult with the chief procurement officer on all procurement violations and shall provide a copy of [the final] a report to the chief procurement officer. [The chief procurement officer shall review the final report and recommend to the policy board, where appropriate, amendments to chapter 103D, HRS, or rules, or both.]
 (b) [In the event of a procurement violation, wherein] If the head of the purchasing agency determines that payment to a vendor is required, the head of the purchasing agency shall include a request for after-the-fact payment approval in the [final]

report of findings and corrective actions to the chief procurement officer, who shall then determine whether such payment is appropriate. [Eff _____]
(Auth: HRS §§103D-106, 103D-202) (Imp: HRS §§103D-106, 103D-202)

2. The adoption of chapter 3-131, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the Office of the Lieutenant Governor.

Haruo Shigezawa
Chairperson
Procurement Policy Board

Sam Callejo
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General