

PROCUREMENT POLICY BOARD MEETING

December 5, 1996

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, Administrator  
Robert Governs, State Procurement Office  
Justin Fo, State Procurement Office  
Ruth Yamaguchi, State Procurement Office  
Doris Lee, State Procurement Office  
Taren Taguchi, State Procurement Office  
Kay Fujimoto, State Procurement Office  
Steve Miwa, DAGS Public Works  
Pat Ohara, Attorney General's Office  
Duff Zwald, University of Hawaii  
Craig Hopseker, State Auditor's Office  
Clayton Wong, City Council  
Connie Chun, Department of Education

**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. Tim Johnson, seconded by Mr. Robert Oyama, to approve the minutes of the meeting held on November 6, 1996.

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. For Action

1. Election of Officers. Chairman Shigezawa opened the nominations for officers.

Chairman - Mr. Tim Johnson. Mr. Robert Oyama nominated Mr. Johnson to serve as the Chairman of the Procurement Policy Board; the motion was seconded by Mr. Sam Callejo.

Vice Chairman - Mr. Robert Oyama. Mr. Shigezawa nominated Mr. Robert Oyama, the motion was seconded by Mr. Bill Gray.

Secretary - Mr. Sam Callejo. Chairman Shigezawa requested that Mr. Sam Callejo continue to serve as the Board's secretary to facilitate the signing of documents and the minutes of Board meetings.

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

NAYS: None

The new officers were elected by unanimous decision.

2. AGS-1(97), A Bill For An Act Relating to Procurement.

Mr. Bob Govers explained that this version of the proposed legislative bill incorporates the changes which were approved by the Board at previous meetings and other changes which were necessary after staff's review and editing.

Page 3, line 21, subsection (f) is added which states that the in-state contractor preference may not be used in combination with any other preference.

Page 14, section 11(a) is amended to clarify the record keeping requirements. The amendment specifies that records shall be maintained for procurements of goods and services of \$10,000 or more and for construction of \$25,000 or more.

Page 15, line 20, the term “of the state” has been deleted from the definition of “nonprofit private procurement unit.”

Page 18, a new subsection (b) is included which requires, for all public works and any repair and maintenance contracts, a listing of the Hawaii products which offerors will be including in their bids.

Page 21, Printing, binding, and stationery work. This section was rewritten to address the Board’s comments and concerns.

Mr. Gray asked that a clarification be made because it is his understanding that the bid level of \$10,000 would be maintained in this section to be consistent with the other preferences. Mr. Governs responded that the previous version of the bill was written in that light but was revised as a result of the discussion at the last Board meeting. He apologized if he misunderstood the Board’s intent. Mr. Governs explained that another section of the law excludes preferences for small purchases and the sections on preferences in the Hawaii Administrative Rules also exclude small purchases. Mr. Unebasami confirmed the exclusion of preferences for small purchases but agreed to the Chairman’s request that another review be made of the law to ensure that preferences do not apply to small purchases. A consideration will also be made to adding a general statement in the preference area of the rules to address this concern.

Page 28, section 27, is amended to allow any revisions in this section of the proposed bill to remain in effect.

3. Chapter 120, Hawaii Administrative Rules, General Provisions
4. Chapter 121, Hawaii Administrative Rules, Procurement Organization
5. Chapter 123, Hawaii Administrative Rules, Cost Principles
6. Chapter 125, Hawaii Administrative Rules, Modifications and Terminations of Contracts
7. Chapter 128, Hawaii Administrative Rules, Governmental Relations and Cooperative Purchasing

Mr. Unebasami explained that items A-3 through A-7 of the agenda are revisions of sections of the administrative rules on procurement which were presented to the Board at previous meetings. The Board's approval is now necessary for the public hearing process; however, the public hearing process will be delayed until the results of the proposed bill is known.

Mr. Oyama stated that in the proposed bill the words "of the State" were deleted in the definition for "nonprofit private procurement unit." However, he noted that the definition which appears in the rules has not been changed to conform with the proposed bill. Mr. Govern acknowledged the oversight in §3-128-1 of the rules and assured the Board that the correction will be made.

#### Motion

Mr. Sam Callejo moved that the Board approve the amendments to the administrative rules on procurement, as discussed. The motion was seconded by Mr. Oyama.

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

NAYS:           None

The motion was carried.

#### B. For Information

Preliminary Review of Chapter 122, Hawaii Administrative Rules, Source Selection and Contract Formation.

Mr. Unebasami introduced Mrs. Doris Lee who will explain the numerous changes in Chapter 122.

Mrs. Lee explained that some of the changes she will highlight are results of discussions held at earlier Board meetings and that the DAGS/Attorney General's Office working group (hereinafter referred to as the "DAGS working group") has recommended other changes.

1. Section 3-122-1. Three new definitions have been added.

Mr. Oyama asked why the “request for information” definition is used only for the multi-step sealed proposals selection method and not for other types of procurement actions. A suggestion was made to amend the sentence to delete the reference to multi-step sealed proposals method. Mr. Unebasami then stated that certain sections of the rules allow for requests for information and that this amendment defines the term and does not make its use mandatory.

Ms. Pat Ohara stated that since this requires a legal notice, casual inquiries could not be made to vendors to gain their input on a particular situation or to obtain general information. Mr. Oyama suggested that a reference be added that this only pertains to contracts or potential contracts amounting to a certain dollar value. Mr. Johnson suggested that the reference to the legal notice be deleted to give broader approval authority to the chief procurement officers to solicit information. Mr. Unebasami stated that he understood the concerns expressed and offered to review this section again.

2. Section 3-122-1 is amended by adding to the definitions of “Final settlement” and “Professional services.” The requirement to publish the notice is included in Section 3-122-227.
3. Section 3-122-9 is amended by adding a new section entitled, Use of facsimiles. The DAGS working group recommended this change to prevent the facsimile low bidder from having the option to not submit the required bonds if it decides it does not want the contract award.
4. Section 3-122-9.1, Disclosure of names of potential offerors. This item was discussed at the February Board meeting.

Chairman Shigezawa asked for the reasons why names of potential offerors for construction contract packages could not be released. He explained that usually the prime contractors would want the subcontractors to have this information and vice versa. It was suggested that a subsection be added to include language similar to, “except the names may be released in the case of construction bids for the purpose of informing subcontractors.”

Mr. Gray inquired why the names of attendees at a pre-bid conference are not made public. Mr. Steve Miwa, who is a part of the DAGS working group, responded that this is similar to giving notice of intent to bid. Chairman Shigezawa said that a pre-bid conference is sometimes an informational meeting prior to receiving any bids; i.e., before the “solicitation clock ticks.” Mr. Governors informed the Board that upon inquiring with the Office of Information Practices (OIP) regarding this amendment, an opinion was issued that the names should be

withheld. Mr. Governs will check further if the opinion says “may” or “shall” be withheld.

5. Section 3-122-20, Conditions for use. Subsection (b) is amended to clarify that discussions are allowed in multi-step bidding.
6. Section 3-122-21, Preparing a competitive sealed bid. This section is amended to add a tax clearance provision; no substantive changes are made.

In reference to subsection (8) on page 122-6, Mr. Oyama asked how is it determined that all of the required information have been submitted by the bidder. Mr. Miwa acknowledged that this is a difficult requirement to enforce. He explained that usually the lowest bid is accepted and posted. Many times, another contractor may recognize the name of a deficient contractor or subcontractor and will immediately file a protest. At this point, an investigation is initiated. Mr. Oyama said that his main concern is the enforcement of the requirement that the value of the work to be performed by the joint contractor or subcontractor be equal to or less than one percent of the total bid amount. Mr. Miwa explained that this particular 1% requirement is a statutory requirement. He further explained that the last paragraph of subsection (8) states that construction bids that do not comply with this requirement may still be accepted if the bid is in the best interest of the State.

7. Section 3-122-22, subsection (e) is added to provide for an evaluation committee. Also, as recommended by the DAGS working group, confidentiality of discussions regarding trade secrets and other aspects of a proposal is reaffirmed.
8. Section 3-122-24 is amended, as recommended by the DAGS working group, to clarify the placement of legal advertisements and allows proposal solicitation notices to be sent to entities on a pre-existing mailing list via facsimile transmissions.
9. Section 3-122-26 is amended, as recommended by the DAGS working group, to permit the procuring agency, on special or unusual projects, to make attendance at a prebid meeting a condition for submitting a bid.
10. Section 3-122-27. The DAGS working group recommended the establishment of a category of pre-bid communications called a Bid Clarification Notice that provides useful information but does not change the terms of the bid invitation or specifications. The title of this section is changed to reflect the amendment.
11. Section 3-122-29 is amended to allow for late withdrawals due to permissible mistakes.

12. Section 3-122-30 is amended to clarify the sections which are public information.
13. Section 3-122-31 is amended to clarify errors in signatures and adds a final determination provision from subchapter 20.
14. Section 3-122-33. As discussed at the February 1996 meeting, this amendment changes the word "or" to "of."
15. Section 3-122-35. The language is changed for clarity; no substantive changes.
16. Section 3-122-43 is amended by adding parts of section 3-122-44 into this section without changing substantive meaning; adds a final determination provision from subchapter 20.
17. Section 3-122-44 is repealed; this section was added to §3-122-43.

*(The items in the document presented at the Board meeting are not numbered in sequential order. For the purpose of these minutes, the items will be correctly numbered from item 18.)*

18. Section 3-122-45 is amended by adding an exhibit which lists competitive sealed proposals that do not require a determination, as well as the determination provision from subchapter 20.
19. Section 3-122-46. Amendment provides for tax clearances, evaluation factors, confidentiality, and an evaluation committee for RFP's.
20. Section 3-122-47 is amended to provide for a process to follow when requesting information to develop an RFP.
21. Section 3-122-48 is amended to clarify text.
22. Section 3-122-49. The reference to a section is corrected.
23. Section 3-122-50 is amended by correcting an incomplete reference and adds a subsection on disposal of late bids and late modifications.
24. Section 3-122-51. This section is amended by deleting a provision which was moved to §3-122-46.
25. Section 3-122-52 is amended by adding an evaluation committee process and clarifying the ranking determinations.

Mr. Gray questioned the purpose of filing a copy of the correspondence selecting the committee members in the contract file. Mrs. Lee responded that this is part of the documentation in the award process and is public information.

Chairman Shigezawa asked for an explanation of the requirement of determining each member's role on the evaluation committee. Mr. Goveas explained that committee members are usually selected on the basis of their professional and technical expertise in reference to the proposal being evaluated.

Mr. Johnson added that there should be a threshold for this requirement--some level of complexity and/or an estimate of the total budget of a project.

Mr. Unebasami agreed that this is a good suggestion and perhaps a valuation could be placed on this requirement. Another concern brought up was that a committee member may drop out; does this mean that the evaluation done thus far would be invalid. A suggestion was made to identify the committee's role rather than the member's role.

Mr. Unebasami responded that he and staff will review these concerns and determine the evaluation criteria and the significance of identifying the members' roles.

26. Section 3-122-54 is amended by minor technical format changes.
27. Section 3-122-55. Amendments in this section are minor and makes no substantive language changes--corrects a section reference and clarifies language.
28. Section 3-122-57. This section is amended by adding the finality of determination provision from subchapter 20.
29. Section 3-122-58 is amended by clarifying the release of confidential information and correcting an HRS reference.
30. Section 3-122-59. The amendment modifies language without substantive changes to the meaning; clarifies that negotiations may include other vendors.
31. Section 3-122-62 is amended by deleting the definition for professional services which has been added to subchapter 1.
32. Section 3-122-65 is amended by clarifying the number of screening committee members required when the purchasing agency and the using agency are not the same; also corrects a reference.
33. Section 3-122-66. This section is amended, as recommended by the DAGS working group, by clarifying that direct negotiations may be undertaken with

anyone the procuring authority believes can provide the needed product or service, not just the offerors.

34. Section 3-122-67 is amended by the addition of a subparagraph, as discussed at the February 1996 meeting.
35. Section 3-122-74. A statutory reference was changed to an administrative rules reference for conformity.
36. Section 3-122-81 is amended by adding a subsection to require multi-term justification for sole source contracts.
37. Section 3-122-81 is amended by adding the finality of determination provisions from subchapter 20.
38. Section 3-122-90 is amended by adding the finality of determination provisions from subchapter 20.
39. Section 3-122-96 is amended by adding a new subsection which provides that a chief procurement officer may determine that the cancellation of the solicitation is in the best interest of the public.
40. Section 3-122-102. The DAGS working group recommended that a new subsection (d) be added which is essential for construction projects. Due to unanticipated and unavoidable delays, the amount certified for a project may be expended before the project is complete. This amendment provides that the work may proceed under these circumstances rather than being suspended at potentially great additional costs to the State.
41. Section 3-122-103. Rules are amended to require certification of funds for contracts partially and 100% funded by the federal government. Subsection (c) is added from §3-122-104.
42. Section 3-122-104 is deleted and made a part of §3-122-103.
43. Section 3-122-108 is amended as recommended by the DAGS working group. A terminology is corrected and a clarification is made that the need to file a notice of intention to bid is controlled by a specific contractor's actual bid.
44. Section 3-122-110. The amendment clarifies the time allowed for offeror to notify if an appeal will be filed; adds finality of determination provision from subchapter 20.

Mr. Oyama asked for the reason why “working days” is referred to in the first part of the sentence and then “calendar days” is referred to at the end of the sentence. Mrs. Lee responded that it is in the law.

45. Section 3-122-124 is amended by adding the finality of determination provision from subchapter 20.
46. Section 3-122-133 is amended by adding the finality of determination provision from subchapter 20.
47. Section 3-122-145 is amended by correcting a typographical error, “the bids” should be “tie bids.”
48. Section 3-122-149. The entire section was re-written for clarity and certain sections of the statutes were added. Clarifies partial funds certification for multi-term contracts.
49. Section 3-122-155 is amended by adding the finality of determination provision from subchapter 20.
50. Section 3-122-167 is amended, as recommended by the DAGS working group, to expand inspection rights to include vendors, material suppliers and professional service providers to a contractor or subcontractor.
51. Section 3-122-168 is amended, as recommended by the DAGS working group, to expand inspection rights to include vendors, material suppliers and professional service providers to a contractor or subcontractor.
52. Section 3-122-169 is amended, as recommended by the DAGS working group, to expand inspection rights to include vendors, material suppliers and professional service providers to a contractor or subcontractor.
53. Section 3-122-175. The DAGS working group recommended that the rights to audit records beyond the contractor and subcontractors to include vendors, material suppliers and professional service providers. This amendment is consistent with the expanded inspection rights in previous sections.
54. Section 3-122-176 is amended, as recommended by the DAGS working group, to allow the Attorney General or the county corporation counsel to conduct a procurement audit when the legitimacy of the contractor’s costs or quality of work is or may be the subject of litigation or other legal proceedings.

55. Section 3-122-177. The DAGS working group recommended this amendment to expand the audit authority to include the Attorney General and the county corporation counsel.
56. Section 3-122-178. The DAGS working group recommended this amendment to expand the audit authority to include the Attorney General and the county corporation counsel.
57. Section 3-122-179. The DAGS working group recommended this amendment to expand the audit authority to include the Attorney General and the county corporation counsel.
58. Subchapter 19, Chapter 3-122, Hawaii Administrative Rules, is amended by adding a new section 3-122-182. The DAGS working group recommended that sanctions be established for the parties who are subject to an audit for their refusal or failure to cooperate with the auditors.
59. Section 3-122-186 is amended to include the applicable determination required by statute. Determinations are placed in the sections of the rules to which they pertain.
60. Section 3-122-196. The DAGS working group recommended that the word “shall” in this section be replaced by “may” so that an investigation into anti-competitive practices will not be stymied by the failure to have reporting procedures in place.
61. Section 3-122-211 is amended by deleting the requirement that a copy of the record of procurement actions be forwarded to the Procurement Policy Board. This is not a statutory requirement.
62. Section 3-122-221. The DAGS working group recommended this amendment to correct the purpose of bid security.
63. Section 3-122-222. This section is amended, as recommended by the DAGS working group, to clarify that the “share certificate” referred to is a credit union certificate (equivalent to a certificate of deposit) and not to be confused with a common stock share certificate that may vary in value from day to day. Original signatures are also required.
64. Section 3-122-223. The DAGS working group recommended that the term “price offered” be clarified to mean the base bid including additive alternatives.
65. Section 3-122-224. The DAGS working group recommended that subsection (c) be amended to correctly define the State’s remedies.

66. Section 3-122-226. This amendment was recommended by the DAGS working group to make it clear that the decision to reduce the penal sum of the bond is discretionary but must be justified in writing.
67. Section 3-122-227 is amended, as recommended by the DAGS working group, by clarifying that payment bonds traditionally provide three tiers of protection. The existing language refers to only two tiers of protection. The amendment also provides for notice of final settlement.
68. Section 3-122-228 is amended to clarify who may obtain copies of bond forms.
69. Chapter 3-122, Hawaii Administrative Rules, is amended by adding a new exhibit entitled, "Procurements Approved for Competitive Sealed Proposals" at the end of Chapter 3-122.
70. Chapter 3-122, Hawaii Administrative Rules. The exhibit at the end of Chapter 3-122 entitled, "Procurements Approved for Sole Source" is amended by the addition of three items to the list.
71. Chapter 3-122, Hawaii Administrative Rules. The exhibit at the end of Chapter 3-122 entitled, "Surety [Bid] [Proposal] Bond" is revised.

## **ADMINISTRATOR'S REPORT**

1. Mr. Unebasami informed the Board that at the next meeting, the sole source and exemption listings will be reviewed. Notices were sent to all chief procurement officers for input regarding each item on the lists. The Board may want to reconsider some of the items on the exemption list as they may be more appropriately listed as sole source procurements.
2. The staff of the State Procurement Office is progressing on the report and a legislative proposal on purchase of services for health and human service type contracts. The report is due to the Legislature on December 31, 1996.

Mr. Oyama inquired about the organizational structure within the State Procurement Office with the new purchase of service responsibilities. Mr. Unebasami explained that ideally the purchase of service responsibilities will be handled by a new section within the State Procurement Office and will, therefore, fall within the purview of the Procurement Policy Board. The staff in this new section will assist the various State departments and the vendor community in the effective use of the law. In the statutes, it may be difficult and confusing if the purchase of service program is included as part of Chapter 103D;

a recommendation will be made for a new chapter--Chapter 103H or something similar.

Chairman Shigezawa inquired about the appropriation procedures. Mr. Unebasami explained that the Legislature may be making appropriations for health and human service type contracts directly to the various departments who will then disburse the funds. Policies and rules will have to be developed to ensure that proper procurement procedures are followed by the departments in the disbursement of these funds.

3. Mr. Unebasami reported that he will be attending the Hawaii State Association of Counties Conference on Kauai on December 11-13, 1996. He will give a presentation on how the procurement law is affecting the vendors.

### Next Meeting

The next meeting is tentatively scheduled on Tuesday, January 14, 1997, at 2:00 p.m.

### Adjournment

There being no further business, the meeting was adjourned at 3:39 p.m.

Respectfully submitted,

JAN 8 1997

\_\_\_\_\_  
Date

  
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SAM CALLEJO, Secretary  
Procurement Policy Board