

Senate Special Committee on Accountability Informational Briefing

August 12, 2021, 1:00 p.m.
Hawaii State Capitol, Conference Room 211

Keith T. Hayashi
Interim Superintendent

Brian Hallett
Assistant Superintendent and Chief Financial Officer

Randall Tanaka
Assistant Superintendent





Department Procurement Units that Conduct Formal Procurement Projects

Office of Facilities and Operations, Auxiliary Services Branch, Project Control Section

- Delegated Procurement Authority to the Assistant Superintendent of the Office of Facilities and Operations
- Construction and Architecture & Engineering Projects

Office of Fiscal Services, Procurement and Contracts Branch

- Delegated Procurement Authority to the Assistant Superintendent of the Office of Fiscal Services
- Other Goods and Services Projects
- Health and Human Services Projects



Procurement Support Services to Program/Project Managers (Contract Managers and Contract Administrators)

The Hawaii State Department of Education's (Department) Procurement Units (Project Control Section and Procurement and Contracts Branch) provide procurement and contracting support services to the Department's Program/Project Managers for the formal procurement projects to obtain goods, services, and construction, and health and human services.



1. Procurement Training Procedures

Office of Facilities and Operations, Auxiliary Services Branch, Project Control Section staff and Procurement and Distribution Specialist (Construction and A&E Services)

- Completed State Procurement Office (SPO) training workshops for HRS Chapter 103D and applicable General Workshops; and
- New employees take the SPO training workshops before being independently assigned to work on a formal solicitation/formal procurement project.

Office of Fiscal Services, Procurement and Contracts Branch (PCB), Procurement and Contracts Support Specialists levels II through VI, and Director (Goods, Services, and Health and Human Services)

- In 2018, PCB Team members retook SPO training workshops for HRS Chapter 103D, HRS Chapter 103F, and applicable General Workshops;
 - PCB Team members would have taken these courses prior to independently working on a formal solicitation/formal procurement project and taking this in 2018 was to renew and refresh their knowledge base; and
- New employees take the SPO training workshops before being independently assigned to work on a formal solicitation/formal procurement project.



2. Procurement Procedures and Timelines

The Department complies with what is required by the HRS Chapter 103D and HRS Chapter 103F and the Administrative Rules (together the Procurement Code) for the procurement method/project.

Procurement Administrative/Acquisition Lead Time (PALT):

The amount of time from the receipt of a request for procurement to the date the goods/services are needed may vary depending upon the size of the project; the dollar value of the project; the method of procurement; and the resultant contract type.

The desirable PALT would be minimally three months for an Invitation for Bid (IFB); minimally six months for a Request for Proposals (RFP) for goods and services and construction; minimally nine months to one year for a RFP for health and human services; and minimally three months for a professional services project.



2. Procurement Procedures and Timelines

Factors that may affect the solicitation timeline, including but not limited to the following activities:

- Request For Information - as required or determined advantageous;
- Pre-bid / Pre-Proposal Conference / Orientation - as required or determined advantageous and suggested for new or complex projects;
- Protest of content of solicitation; and
- Lead time required/desired for the specific good to be produced or service to be ready for delivery to the Department.
- Specific to construction-related projects:
 - Development of specifications are variable due to design, permitting, funding and other factors;
 - IFB timelines vary due to the number and complexity of inquiries from prospective bidders, and external variables such as school schedules or other factors; and
 - IFB evaluation varies due to elements such as subcontractor listings, preferences, if there are additive alternates, and factoring variables for contractor's means and methods.



2. Procurement Procedures and Timelines

(continued)

Activities that may affect the timeline after award:

- Protest(s)/litigation;
- Awarded Vendor HCE compliance; and
- Obtaining a compliant Certificate of Liability Insurance that reflects compliance with the contract's insurance provisions.
- Specific to construction-related projects:
 - Contracts may be delayed as specified in the specification to align with school schedules, issues with permitting and/or coordination with other agencies over shared infrastructure.



3. Protest Procedures

(continued)

- HRS Chapter 103D
- Procedures followed in accordance with the Procurement Code.
- Additionally, construction contracts awarded pursuant to HRS section 103D-302 or 103D-303 would need to have a written decision issued within seventy-five calendar days of receipt of the protest, provided that an extension not exceeding forty-five days may be granted by the chief procurement officer or a designee based on written justification of extenuating circumstance.
- Facts specific to the protest are addressed with input from the Program/Project Manager.
- A ruling may be required from the Contractor License Board.
- Attorney General review of procurement protest determinations.

HRS Chapter 103F

Procedures followed in accordance with the Procurement Code. (reference SPO resource) □

https://spo.hawaii.gov/wp-content/uploads/2013/12/protestrfr_procedures_InstrVendor.pdf



4. Problems or Challenges

5. Suggested Recommendations

Problem or Challenge #1

Subcontract listings are open to interpretation. This ambiguity is often the basis of a protest. Unless the procuring agency prescribes means and method for the deployment of the work, different work methodologies require different licenses. (Ex: Metal railings require a C-44 sheet metal license, but if the railing is fabricated off site and installed it does not require a C-44 and can be performed by a C-5 carpenter license.) Prescribing the means and method shifts the assumption of risk to the State for the professional judgement of the Contractor and does not outweigh the respective clarity of specifying the subcontractor listing.

This ambiguity is also subject to interpretation from the Contractor License Board as to what work is covered by a particular license or trade. This is exacerbated by the fact that the Board decisions are expressly applicable only to that case, and so interpretation requires a hearing.

Suggested Recommendation #1

The Department suggests making subcontractor listing a matter of responsibility rather than responsiveness as established under HRS §103D-310. This would make subcontractor listings due after bid opening as opposed to upon opening.



4. Problems or Challenges

5. Suggested Recommendations *(continued)*

Problem or Challenge #2

Some recent construction-related protests are over areas in the Procurement Code that have changed due to new legislation or Court decisions that have not been accompanied with updated guidance in published Administrative Rules. These ambiguities have been left to the Office of Administrative Hearing (OAH) to determine through its procurement hearings decisions. Lack of clear guidance has opened areas for administrative challenge and potential litigation. Protest received by the Department are increasingly complex, raising issues of law beyond general agency rules. A few recent protests have focused on issues of constitutional law as opposed to applicability of the Procurement Code. The Department believes the increasing number of disputes of this nature are caused by reliance on ambiguous OAH decisions and lack of clear direction from statute and administrative rule.

Suggested Recommendation #2

Assist the Procurement and Policy Board to fill vacancies and maintain a quorum either through reducing the number required for quorum, or some interim measures to allow vacancies to be filled on a temporary basis.



4. Problems or Challenges

5. Suggested Recommendations *(continued)*

Problem or Challenge #3

The State Procurement Office provided guidance that HRS § 103D-102(b)4(L) does not extend the ability for the Chief Procurement Officer to exempt construction from the procurement code. The Department feels this places a limitation on experimental innovation in trying new procurement processes not expressly prescribed in the Procurement Code. An example would be to exempt a procurement for construction to examine the feasibility of accepting the 2nd lowest bid as opposed to the lowest bid. This may alleviate the phenomenon of contractors low bidding a job in hopes of making up the difference through change orders.

Suggested Recommendation #3

The Department would appreciate revising HRS §103D-102(b)4(L) to specifically include construction. This would return symmetry to this aspect of the Procurement Code and allow for innovation or a legitimate means to address unforeseen issues or changes in the law that the Procurement Code did not contemplate.



4. Problems or Challenges

5. Suggested Recommendations *(continued)*

Problem or Challenge #4

The apprenticeship preference causes significant delay in evaluating and awarding the contract. As means and method are determined by the contractor, and not all contractors will apply the same means and method to a job, there are interpretive differences with bids. This is further extended to the inclusion of trades, which may differ based on the contractor's approach and licenses held and requires a further analysis of whether the trade is covered by an apprenticeship program.

Suggested Recommendation #4

Eliminate the apprenticeship preference requirement from HRS § 103-55.6



4. Problems or Challenges

5. Suggested Recommendations *(continued)*

Problem or Challenge #5

The Department has experienced an increasing number of what appear to be frivolous construction-related protests. As there is no cost or disincentive to filing an initial protest with the procuring agency, there is no disincentive to test the appeals process without a true expectation of the protest being upheld. Many protests appear to have the appearance of an effort to obtain the project through a technicality, rather than a true belief that the award was unjust.

Suggested Recommendation #5

Look at requiring a bond to be submitted with the initial protest similar to what is required in filing an appeal with the OAH. The bond should be at a lower amount required for administrative hearings. The bond should be returned if the protestor prevails in the initial protest or the administrative hearing (if applicable).



New Construction-Related Initiatives

- CIP Project Tracking (CPT)

Link to school facilities projects ⇒ <https://www.hidoefacilities.org/>

- Job Order Contracts (JOC Indefinite Quantity Contracts)
- Other Indefinite Quantity Contract Procurements are under development
 - Incorporating contractor past performance



Thank you.