

LINDA LINGLE
GOVERNOR



RUSS K. SAITO
Comptroller

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Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

LATE

TESTIMONY
OF
RUSS K. SAITO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE
ON
JUDICIARY AND LABOR
ON
February 12, 2008
S.B. 1773, S.D. 1

RELATING TO PUBLIC PROCUREMENT

Chair Taniguchi and members of the Committee, thank you for the opportunity to testify on S.B. 1773, S.D. 1.

The Department of Accounting and General Services (DAGS) opposes S.B. 1773, S.D. 1, because it will hamper the effective procurement of goods, services and construction by State and County agencies. The procurement process is designed to be fair, open and transparent. All records pertinent to the process are public records subject to review by interested parties, and subject to restrictions on information that may be proprietary or privileged.

In the process of providing advice or making recommendations, advisory committees must be able to have free and candid discussions relative to specifications, bids, and offers by contractors. This may involve proprietary information, operational, performance, and financial assessments and other items that cannot be effectively carried out in public while in the deliberative stage of review. In addition, in the procurement

process, all major milestones are subject to notice. To require that discussions and advice be also subject to Chapter 92 and 93 would be disruptive as it would mean that advice cannot be timely provided, especially when deadlines are short. Also of concern is the potential that parties may try to influence the advisory committee while deliberations are still underway. The procurement code is designed to avoid this kind of unfair behavior.

As to financial disclosure, the current law is applicable to appointed officials whether they serve on an advisory committee or not. This bill would be redundant for these officials. It is good practice to ask civil servants, or anyone on an advisory committee to disclose any conflict of interest they may have with the contractors or contracts for which they are providing advice.

Finally, it should be noted that all pertinent information that is not proprietary or protected by privacy laws related to any procurement of interest will be made public after the deliberation is done, and the procurement code allows for protests of the protest at key steps in the process.

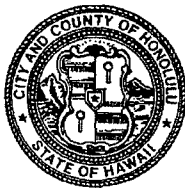
DAGS recommends that this bill be held.

Thank you for the opportunity to testify on this matter.

DEPARTMENT OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
530 SOUTH KING STREET, ROOM 208 • HONOLULU, HAWAII 96813
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LATE

MUFI HANNEMANN
MAYOR



MARY PATRICIA WATERHOUSE
DIRECTOR

MARK K. OTO
DEPUTY DIRECTOR

February 11, 2008

The Honorable Clarence K. Nishihara, Chair
and Members of the Committee on Tourism and
Government Operations
State Senate, Room 213
State Capitol
Honolulu, Hawaii 96813

Dear Chair Nishihara and Committee Members:

Subject: S.B. 1773 S.D.1 Relating to Procurement

The City and County of Honolulu opposes Senate Bill 1773 S.D.1 requiring procurement advisory committees to comply with sunshine, public records, and financial disclosure laws.

The purpose of the procurement advisory committee or group, as specified in section 103D-213 is "to assist in the development of specifications or procurement in specific areas." The advisory committee is used to provide expert recommendations; expertise not readily available to the procurement authority. The final decision for the procurement rests with the Chief Procurement Officer under the laws established in the procurement code.

Requiring advisory committee deliberations to comply with Chapter 92 and 92F would unnecessarily delay the procurement process. Committee deliberations would be subjected to delays by special interest groups and jeopardizes efficiencies of the procurement process. The advisory committee would be plagued with having to hold executive sessions to deal with proprietary information specific to specifications or technology options.

S.B. 1173 S.D.1 excludes review committees established pursuant to section 103D-304, but does not exclude committees established under section 103D-303, procurement by competitive sealed proposals. The selection process under 103D-303 is not open to the public to insure confidential discussions with offerors which oftentimes include proprietary information.

The Honorable Clarence K. Nishihara, Chair
and Members of the Committee on Tourism and
Government Operations

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February 11, 2008

Discussions held by an advisory committee are similar to discussions under competitive sealed proposals in that committee members must hold discussions with providers to understand proprietary possessing techniques or technology.

Passage of S.B. 1773 S.D.1 would result in inefficiencies to government procurement.

Your consideration of our concerns is appreciated, and we would be pleased to respond to questions you may have.

Sincerely,



MARY PATRICIA WATERSHOUSE
Department of Budget and Fiscal Services

MPW:jm

LATE

Senator Clarence K. Nishihara, Chair
Senator Donna Mercado Kim, Vice-Chair
Committee on Tourism and Government Operations
Senate of the State of Hawai'i

Lance D. Collins, Esq.
Wailuku, Maui, Hawai'i

Tuesday, February 12, 2008

Support of SB No. 1773, Relating to Procurement

I am an attorney that practices in the area of public procurement, open government records law and open government meetings law and strongly support Senate Bill No. 1773, Relating to Procurement, which would give the public more oversight of government functions related to substantial procurements.

Public procurement is used as one of the primary methods of demonstrating government operates on rational principles. In every other area where the government engages in permitting, licensing, and designation, the government entities involved in those permits, licenses and designation are required to comply with the State Ethics Code, the Sunshine Law and the Uniform Information Practices Act.

However, as it stands today, boards and commissions are by and large self-exempted from the Sunshine Law and the Uniform Information Practices Act, and advisory committees that evaluate procurements and are the penultimate step in procuring goods and services are excluded from the State Ethics Code.

Questions from the State Ethics Commission over county boards, commissions and advisory bodies requiring financial disclosure can be easily remedied with a technical amendment requiring disclosure pursuant to the several counties charters.

Any state board, commission or advisory body that has the power in the procurement process has significant discretionary or fiscal power (Article XIV, Haw. State. Con.). For this reason, either every person that materially participates in the procurement of goods and services is a state employee or state officer required to file a financial disclosure statement or the excluded person should not in any way be permitted to participate in the procurement process.

Committees formed under §§ 103D-213, 103D-303, and 103D-304, Haw. Rev. Stat. should be subject to this bill. 213 committees assist in the development of specifications or procurements in special areas. In this circumstance, it is likely that persons who are familiar with the prospective offerors and the industry can materially affect the outcome of the procurement.

While the Chief Procurement Officer may require affidavits of 303 committee members regarding their interests, it is not required by 103D-303. Additionally, the State Ethics Code was included in the constitution because like the procurement code, sometimes additional oversight is necessary.

Finally, 304 committees (similar to 213 committees) are persons who have members of the prospective offerors industry or have the proper training, background and experience in the profession. They similarly can materially affect the outcome of the procurement.

The use of signing affidavits may be helpful. However, it is limited in that it is not a substitute for the State Ethics Code, its standardized method of financial disclosure and its corpus of case law and agency opinions regarding the nuances of it.

SB1773, SD1
LATE TESTIMONY
SUBMITTED AT
HEARING

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OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: Senate Committee on Tourism and Government Operations

From: Paul T. Tsukiyama, Director

Date: February 12, 2008, 1:15 a.m.
State Capitol, Room 229

Re: Testimony on S.B. 1773 SD1
Relating to Procurement

Thank you for the opportunity to submit testimony on S.B. 1773 SD1.

The Office of Information Practices ("OIP") opposes that portion of the bill that seeks to amend the definition sections under the public records law, chapter 92, HRS, the Uniform Information Practices Act (Modified) (the "UIPA"), and the open meetings law, part I of chapter 92, HRS (the "Sunshine Law"). OIP also offers comment on the proposed language for amendment to chapter 103 and 103D, HRS.

First, OIP strongly opposes amendment of the definitions sections of the Sunshine Law and UIPA. OIP uniformly opposes amendments that seek to insert board or agency specific or record specific provisions into these statutes purposely worded in terms of broad application. Moreover, the amendment here is both confusing and **unnecessary** to effectuate the intent of the bill to subject advisory groups making recommendations or decisions regarding purchases in excess of \$100,000 to the Sunshine Law and UIPA. Thus, if the legislature desires to make these advisory groups subject to the statutes, OIP strongly recommends that this be accomplished only through amendment to chapters 103 and 103D.

With respect to the UIPA, the bill seeks, at section 5, to amend the definition of “agency” under section 92F-3 of the UIPA to include the following:

The term “agency” includes, as appropriate, an advisory committee, advisory board, advisory commission, or similar group formed or convened by a governmental body, as defined in section 103D-104, for the purpose of making recommendations for the procurement, or making the decision to procure, goods, services, public works, or construction, in an amount in excess of \$100,000; provided that review committees established pursuant to section 103D-304 shall not be subject to this definition.

This proposed language is redundant given (1) the proposed amendments to chapters 103 and 103D; and (2) the fact that section 103D-105 already expressly makes the UIPA applicable to procurement records, reading in relevant part:

“Government records relating to procurement shall be available to the public as provided in chapter 92F.”

With respect to the Sunshine law, the bill seeks, at section 4, to amend the definition of “board” under section 92-2 of the Sunshine Law to include the following:

The term “board” also includes, as appropriate, an advisory committee, advisory board, advisory commission, or similar group formed or convened by a governmental body, as defined in section 103D-104, for the purpose of making recommendations for the procurement, or making the decision to procure, goods, services, public works, or construction, in an amount in excess of \$100,000; provided that review committees established pursuant to section 103D-304 shall not be subject to this definition.

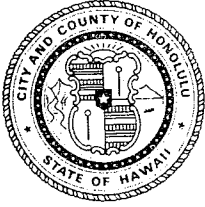
Similarly, this proposed amendment is redundant given the proposed amendments to Chapter 103 and 103D.

With respect to the proposed language to sections in chapters 103 and 103D, at sections 1 and 2 of the bill, OIP believes that the proposed amendment, as drafted, is confusing and may have an unintended consequence. First, OIP suggests

that if the intent of the initial clause is to describe Sunshine Law boards, it should simply read "A board as defined in section 92-2." The other entities named would fall within the definition of "board," but are themselves not defined in section 92-2. Second, it is unclear whether the language "formed or convened by a governmental body" is meant to expand the covered groups to include Sunshine Law boards "or an advisory committee, board, commission, or similar group" formed or convened by a governmental body. Third, the language as drafted could be read to include more informal or internal groups, such as agency staff members or interagency government employees assembled to come up with an informal recommendation.

In summary, OIP strongly objects to any amendment of the UIPA or Sunshine Law definitions sections because it is unwarranted and unnecessary to accomplish the intent of this bill. OIP also suggests that the definition of covered groups in the proposed amendment to the procurement code be more carefully worded to provide better direction as to the entities sought to be covered and to avoid any unintended consequences.

Thank you for the opportunity to testify.



LATE

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813-3065 / TELEPHONE 547-7000

February 12, 2008

Honorable Clarence K. Nishihara, Chair
and Members
Committee on Tourism and Government Operations

Honorable Brian T. Taniguchi, Chair
and Members
Committee on Judiciary and Labor
Hawaii State Capitol
415 S. Beretania Street
Honolulu, HI 96813

Dear Senators Nishihara and Taniguchi:

RE: Testimony in Support of SB 1773, SD1

Thank you for the opportunity to provide testimony in support of Senate Bill 1773, SD1.

As members of the Honolulu City Council, we support legislation that requires advisory committees that make recommendations on the expenditure of public moneys to procure goods and services or capital projects to be subject to the sunshine, public records, and financial disclosure laws.

Sunshine, public record and financial disclosure laws were enacted to provide openness and transparency in government. These laws also ensure that government is fiscally responsible in the expenditure of taxpayer dollars. We, as legislators, must do whatever we can to keep any government decision making process honest and open. We feel that this bill would provide a mechanism for greater public discussion and input.

Thank you for this opportunity to submit testimony and we strongly recommend your passage of SB 1773, SD1.

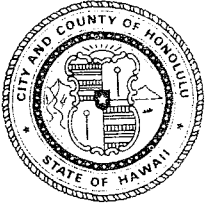
Sincerely,

A handwritten signature in black ink, appearing to read "Donovan M. Dela Cruz".

Donovan M. Dela Cruz
Councilmember
District II

A handwritten signature in black ink, appearing to read "Ann Kobayashi".

Ann Kobayashi
Councilmember
District V



LATE

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813-3065 / TELEPHONE 547-7000

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February 12, 2008

Ms. Cathy L. Takase, Esq.
Office of Information Practices
No. 1 Capitol District Building
250 South King Street, Suite 107
Honolulu, Hawaii 96813

Dear Ms. Takase:

RE: Request for Opinion (S RFO-G 8-5)

I am receipt of your February 12, 2008, letter regarding my original inquiry on whether the panel established by Resolution 07-376, CD1, FD1, to select the fixed guideway technology is subject to part I of chapter 92, Hawaii Revised Statutes (the "Sunshine Law").

I have concerns regarding Corporation Counsel's response that *only meetings* of the panel will be held pursuant to requirements of the Sunshine Law.

I request OIP to re-open the file to opine whether or not the panel will need to comply with *all* of the requirements of the Sunshine Law including:

- Posting of all meeting notices, including time and location
- Accepting of public testimony at meetings
- Availability of minutes for public review of all communications, including telephone conference calls
- Availability of all correspondence and documents relating to information reviewed and discussed by panel

I also request OIP to opine whether or not previous telephone conversations, correspondence and related documents should be made available to the public.

I look forward to your response. If you have further questions or concerns regarding this matter, please don't hesitate to contact me directly at 768-5002.

Sincerely,

A handwritten signature in black ink, appearing to read "Donovan M. Dela Cruz", written in a cursive style.

Donovan M. Dela Cruz
Councilmember
District II

DMD: kr