

SB1033



**STATE OF HAWAII
OFFICE OF ELECTIONS**

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TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS
ON SENATE BILL NO. 1033
RELATING TO ELECTIONS

February 11, 2009

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, thank you for the opportunity to testify in support of Senate Bill No. 1033. The purpose of this bill is to exempt the Office of Elections from the legal and contractual remedies portions of the procurement code and to establish a process similar to the one utilized for the purchase of health and human services found in chapter 103F, HRS.

This bill, along with the related SBs 1031, 1032, 1034, 1035, and 1036, are about the procurement process for elections in two contexts.

The first context is the process for obtaining a voting system for the 2010 elections which, if not addressed here or in another constructive manner, are at significant risk because the state does not have at this time a voting system for the 2010 elections and insufficient funding to acquire one.

The second context more broadly, and perhaps more significant, is the cost or price analysis that the hearing officer in the pending protest now on appeal to circuit court determined was required to be performed for the voting equipment contract for the 2008 elections. If it becomes final, the decision raises serious policy and practical issues. The hearing officer's decision establishes that all agencies face the risk of being required to perform a similar cost or price analysis for any procurement when the State Procurement Office does not have standards, procedures, or materials for performing such a cost or price analysis that would then be required, adding complexity, significant cost, and unlimited delays to a cumbersome process. This is especially true for agencies that do not have the knowledge and expertise to perform a cost or price analysis.

This bill, along with the other election-related procurement bills on today's agenda, were proposed to address problems found in the procurement code when the Office of Elections conducted a request for proposals (RFP) for a multi-year voting system contract. Specifically, these problems consist of the unsettled understanding of what is required in terms of a cost price analysis and the indefinite amount of time it takes to resolve procurement litigation when one is dealing with deadlines such as the conducting of an election which cannot be moved.

As part of the background of this bill, I would note that the RFP in question allocated 15 points toward price and 85 points toward technical requirements, which is within the range of the allocation of points for most RFPs. The contract was awarded to the vendor Hart Intercivic (Hart) which received the highest total points awarded by the RFP evaluation panel. The RFP evaluation panel was composed of the four county clerks, the interim chief election officer, and two members of the disabled community. Hart had the highest price but its score benefited from scoring the highest on the technical requirements. Election Systems & Software (ESS), the vendor with the lowest overall score, had the lowest price but also the lowest score on the technical requirements.

The award was protested by ESS. The contention was that the Office of Elections had not conducted a cost price analysis as required by the procurement administrative rules. The OE argued, based on its discussion with the State Procurement Office, that the cost price analysis is met by the evaluation panel reviewing the proposals and assigning points as provided for in the RFP. In other words, the frame work of the cost price analysis for an RFP is laid out by the procuring agency in the distribution of points in the RFP (i.e. 15 points for price, 85 for technical requirements). The analysis occurs when the evaluation panel reviews the proposals and assigns the points pursuant to compliance with the RFP criteria.

The hearings officer disagreed with the state that this constituted a cost price analysis and set a new standard for a cost price analysis, which did not adequately take into account the qualitative differences between proposals. He then required the elections office to conduct the cost price analysis under that standard. The OE conducted the analysis, but the hearings officer found it to be inadequate and he ruled that the cost of the contract was "clearly unreasonable."

The litigation dragged on until a decision was issued on August 7, 2008. Because we were only a little more than a month away from the Primary Election, the hearings officer allowed Hart to provide services until December 31, 2008 but canceled the remaining portion of the contract. Preparations for the 2008 elections were greatly impacted by the litigation because a significant part of the necessary preparation and training of poll workers is related to knowing what voting system will actually be used as soon before an election as possible.

The hearings officer's decision has been appealed by the state, Hart, and ESS to the circuit court in Honolulu. A hearing on the matter will not be held until August 19, 2009, and a decision is not expected until possibly October 2009. In addition, there could always be an appeal to the Intermediate Court of Appeals. This means that we will not obtain closure or guidance in the near future as to what is necessary for a cost price analysis.

As the Office of Elections needs to go out with a procurement for the 2010 elections, it wishes to avoid what happened in the prior procurement in term of the long drawn out nature of the litigation, which compromised the planning for the election. Specifically, the present legislation would provide for an expedited process by which protest could be resolved, similar to the method used for procurement of health and human services.

The preparations for an election all are tied into voting system that is selected. One cannot simply make a decision regarding the voting system at the final hour without a cascade effect on all operations. Countless things ranging from obvious to the not so obvious are tied into the selection of the voting system.

In regards to ballots, time is necessary to develop the ballot design, print demonstration ballots, and to write up voting materials to explain how to mark the ballots that are specific to the machine.

In terms of the voting machines themselves, time is necessary for the conducting of acceptance testing to ensure that the voting system meets the minimum requirements to conduct elections in Hawaii. The advance lead time is required to have sufficient time to address any unforeseen and unforeseeable issues that may arise and to create solutions for any such issues in time for the elections. In addition, depending on the type of voting system obtained, there may be the need for the Office of Elections to consider and determine what changes to existing policies and procedures are needed. This is part of the installation process that occurs in all jurisdictions. Examples of impacted areas are resolving voter errors with ballots at the polling places and auditing absentee ballots. A not so obvious issue is the transmission of electronic data on telephone lines. The various telephone lines utilized at the counting centers across the state cannot be installed until the Office of Election is able to determine the vendor's unique requirements and connectively issues.

As for precinct operations, election manuals and training manuals specific to the voting system would need to be created and finalized. These materials will then be used by the various trainers who will train the approximately 3,500 precinct officials who will work at the polls on election day. These training sessions will take place across the state and will begin no later than May of an election year.

In addition, materials for use in the polling places such as signs and posters need to be created, finalized and printed. These materials include instructions that specific to the voting system selected.

Finally, an overall voter education plan needs to be created, established, and implemented. This plan cannot move forward without specifically knowing which voting system will be utilized.

The foregoing points concerning a variety of areas reveals the human, intensive, and dynamic process involved in the preparations necessary for an election. These preparations involve the coordinated work of the Office of Election, the four county clerks, contract

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personnel, and thousands of volunteers. These preparations are seriously compromised by allowing the determination of the voting system to occur at the end of the process instead of at the beginning.

If the Committee is not inclined to approve this bill, the Office of Elections would ask that you consider the other bills being offered today.

Thank you for the opportunity to testify on Senate Bill No. 1033.

Respectfully Submitted

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TESTIMONY
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TO THE
SENATE COMMITTEE
ON
JUDICIARY AND GOVERNMENT OPERATIONS

February 11, 2009

9:00 AM

SB 1033

RELATING TO ELECTIONS.

Chair Taniguchi, Vice-Chair Takamine and committee members, thank you for the opportunity to testify on SB 1033. This bill exempts the Office of Elections from the existing legal and contractual remedies of HRS Chapter 103D and provides a separate process for protesting procurement awards.

The State Procurement Office (SPO) does not support this bill that would provide a separate process only for the Office of Elections to resolve and settle protests from aggrieved Offerors. Part VII, Legal and Contractual Remedies, HRS Chapter 103D, allows for a consistent and fair process for both the agency and aggrieved Offeror. In addition, HRS §103D-701(f) already provides that the Chief Procurement Officer may make a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.

The Code should not be viewed as an obstacle to a purchasing agency's mission, but rather as the single source of public procurement policy to be applied equally and uniformly. It was the legislature's intent for the Code to be a single source of public procurement policy. If individual agencies are allowed to develop their own individual processes, it becomes problematic and confusing to vendors, contractors and service providers that must comply with a variety of different processes and standards. Fairness, open competition, a level playing field, and government disclosure and transparency in the procurement and contracting process are vital to good government. For this to be accomplished, we must participate in the process with one set of statutes and rules.

There needs to be one single source of public procurement policy. Thank you.