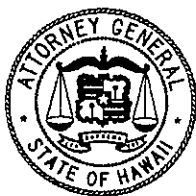


**HB1901,  
HD2**



## TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2010

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### ON THE FOLLOWING MEASURE:

H.B. NO. 1901, H.D. 2, RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT.

### BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Friday, March 12, 2010 TIME: 9:30 AM

LOCATION: State Capitol, Room 016

TESTIFIER(S): Mark J. Bennett, Attorney General, or  
Russell A. Suzuki, Deputy Attorney General

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Chair Taniguchi and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of this bill is to provide an alternative to, not an exemption from, the procurement process of chapter 103D, Hawaii Revised Statutes, for the selection of voting equipment. History has shown that the present procurement process set forth under chapter 103D is unworkable.

Chapter 103D works where there is broad-based competition in the marketplace. However, only a few companies specialize in voting systems and, in fact, the number of companies is getting even smaller. For example, Election Systems & Software, Inc. ("ES&S") has merged with Premier Election Solutions Inc., the voting machine division of one of its competitors, thus reducing the competition in this lucrative market.<sup>1</sup>

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<sup>1</sup> The merger's effect on competition in the marketplace prompted the U.S. Department of Justice to commence an anti-trust action against ES&S. According to a March 8, 2010 Department of Justice news release, a settlement, which needs court approval, will require ES&S to divest all of Premier's intellectual property - past, present and in development.

Because of the intense and limited market for this business, procurement protests and appeals have been frequently used, thereby disrupting and delaying the selection of election equipment and creating great uncertainty about the ability to put on a timely election. Under the existing procurement process, a protest can be filed for any reason and, when one is filed, the entire process is stalled until resolved by an administrative hearings officer and can be further delayed by an appeal to the courts.

This bill provides for a fair and timely procurement process that involves a selection committee composed of the county clerks or their designees, a representative of the Office of Elections, a representative of the disabled community, and representatives of the Legislature and the Governor. This selection process uses a broad-based committee that is representative of the community and the process is transparent and objective. The bill also provides a right to request reconsideration by the Chief Election Officer but no further appeal.

We note, and appreciate, that H.D. 2 includes the June 30, 2011, sunset date we recommended. This date will allow the alternate procurement process to be used for the upcoming 2010 primary and general elections as a trial to see how well the process works. If the alternate procurement process is successful, the Legislature can repeal the sunset date next year and will not have to enact a new bill.

LINDA LINGLE  
GOVERNOR



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**AII  
OFFICE**

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TESTIMONY  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE  
SENATE COMMITTEE  
ON  
JUDICIARY AND GOVERNMENT OPERATIONS

March 12, 2010

9:30 A.M.

HB 1901, HD2

RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT.

Chair Taniguchi, Vice-Chair Takamine, and committee members, thank you for the opportunity to testify on HB 1901, HD2.

The State Procurement Office (SPO) does not support the language to amend HRS Chapter 16, for an alternative procurement process allowing the chief election officer an exemption from chapter 103D, the Hawaii Public Procurement Code (Code) when procuring voting system equipment.

In prior procurements for voting system equipment, the competitive sealed proposals or request for proposals (RFP) process was utilized by the Office of Elections. That process encouraged diverse and varied proposals, which resulted in a lengthy and difficult evaluation of proposals which are more susceptible to protests and eventually resulted in the award being nullified. This bill identifies the procurement process as being ill-suited to procure voting system equipment, rather than addressing and clarifying how the solicitation was crafted. The solicitation should clearly define specifically the voting system equipment requirements necessary to be procured by utilizing the competitive sealed bidding process. The more difficult and lengthy evaluative RFP process would be eliminated because selection is based on lowest price.

For example, open competition via a competitive sealed bid or invitation for bid (IFB) process would establish the voting system equipment specifications, which may allow brand name or equivalent and set the requirements or standard of service provided by the contractor. Award would then be made to the lowest offer meeting the solicitation requirements.

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Senate Committee on Judiciary  
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The SPO does not support statutorily exempting specific agencies from the Code, as it is not in the best interest of government, the business community, and the general public. The Code establishes a time-tested, fair, and reliable set of rules and processes for award of contracts. The competitive procurement processes of the Code are to insure that all potential providers are afforded the opportunity to compete for the required services. To the extent agencies may need specific purchases to be exempted from Code requirements, the Code provides an exemption process.

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 exempted and 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.

We understand there are only a few companies that specialize in this area. This intense and competitive business results in procurement protests and appeals being frequently utilized.

If the committee plans on proceeding with this bill, then as an alternative approach to a total exemption from compliance with the Code, if the intent of the legislature is to expeditiously acquire voting machines, then we suggest temporarily exempting the acquisition of voting system equipment from only the protest process of HRS §§103D-701 and 709.

Thank you.



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SCOTT T. NAGO  
CHIEF ELECTION OFFICER

**TESTIMONY OF THE  
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS  
TO THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT  
OPERATIONS  
ON HOUSE BILL NO. 1901, HD 2  
RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT**

**March 12, 2010**

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, thank you for the opportunity to testify in support of House Bill No. 1901, HD 2. The purpose of this bill is to establish an alternative public procurement process for the procurement of voting equipment systems.

The Office of Elections agrees with the purposes of the procurement code and its administrative rules. Namely, the promotion of a fair and open process by which the "best value" can be obtained for the State. We believe that the proposed alternative procurement process will accomplish this while avoiding the delays and difficulties with previous election procurements that have threatened the conduct of our elections.

Much has been said in the media by those who claim we should simply award a contract to the lowest bidder and that they do not understand why there is so much litigation regarding election procurements. Such comments fail to recognize what constitutes "best value" and that most awards rest on a qualitative analysis, which will always be subject to attack by any disappointed vendors.

As part of the background of this bill, I would note generally that most procurements occur either through the Invitation for Bids (IFB) or Request for Proposals (RFP) processes. These two (2) processes are fundamentally different as described below:

Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. **Under competitive sealed proposals, the quality of competing products or services offered may be compared and trade-offs made between and quality of the products or services offered (all as set forth in the solicitation). Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].**

2000 Model Procurement Code for State and Local Governments at 26 (Commentary to § 3-203 Competitive Sealed Proposals) (emphasis added).

In regards to the procurement of a voting system, the request for proposals process is utilized given the qualitative nature of the voting experience and as such the need to compare and make tradeoffs between the quality of the products and services of the various proposals that are expected be made by the vendors. The criteria typically include technical requirements, an on-site demonstration, and price. The technical requirements make up the most points, then the on-site demonstration, and finally price. The on-site demonstration, which clearly involves a judgmental evaluation, is considered critical as all of the State of Hawaii's voters would be utilizing the selected voting system, and simply procuring a system without taking the opportunity to interact with the system could result in unforeseen problems.

As the judgmental evaluation component of the procurement involves the majority of points, a vendor might have a low score for price but high scores for technical requirements and on-site demonstration, which would cause the vendor to be considered the "best value" for the State, as opposed to a vendor who has the highest score for price but the lowest scores for the technical criteria and on-site demonstration.

Given the important judgmental evaluation component of the voting system in the RFP process, the Office of Elections has consistently made sure that election officials such as the Chief Election Officer and the four county clerks, or their designees, are part of the evaluation committee making the decision.

As members of the election community will attest, there is a broad spectrum of voting systems using different types of technologies, which require an evaluation of the trade-offs associated with each system. Among the issues are security, speed, and accuracy of the system. Also, as this is a system that will be used by the general public one must consider whether the system is in fact user-friendly.

As most RFPs are decided on the basis of the scores involving a judgmental evaluation, disappointed vendors frequently protest and contend that they should have received a higher score on the judgmental component. Others do not even acknowledge the judgmental evaluation component of the RFP process and instead insist that if they had the lowest price they are the "best value" for the State.

This has resulted in contentious litigation in the past. This coupled with the fact that unlike other procurements, the goods and services requested cannot be delayed, as the election dates are fixed by both federal and state law, results in our elections being held hostage by the uncertain litigation process.

The present bill avoids this uncertainty by creating a process by which election official and relevant stakeholders from the executive branch, legislature, and disability community will share in the decision making process for selecting a voting system which constitute the "best value" for the State.

We would note that given the bill provides for members to be chosen by various appointing authorities, there should be a mechanism to address by when the appointment needs to be made, and if no appointment is made how a vacancy in the selection committee will be addressed.

Thank you for the opportunity to testify on House Bill No. 1901, HD 2.