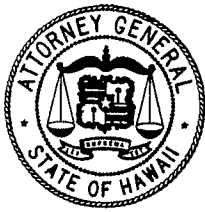


**HB 1901,  
HD2, SD1  
Testimony**



## **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, S.D. 1, RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT.

**BEFORE THE:**

SENATE COMMITTEE ON WAYS AND MEANS

**DATE:** Wednesday, March 31, 2010 **TIME:** 9:30 AM

**LOCATION:** State Capitol, Room 211

**TESTIFIER(S):** WRITTEN COMMENTS ONLY. For more information, call Robyn Chun, Deputy Attorney General, at 586-0618.

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Chair Kim and Members of the Committee:

The Department of the Attorney General continues to strongly support this bill as it has been amended in S.D. 1.

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.

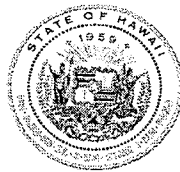
Because of the intense and limited market for this business, procurement protests and appeals have been frequently used, thereby disrupting and delaying the selection of election equipment and creating great uncertainty about the ability to put on a timely election. Under the existing procurement process, 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.

In S.D. 1, the bill has been amended to clarify the ranking process if fewer than three offers are received. We have no objection to this amendment.

We note, and appreciate, that S.D. 1 continues to include 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



PROCUREMENT POLICY BOARD  
DARRYL W. BARDUSCH  
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**COMMENTS  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE**

**TO THE  
SENATE COMMITTEE  
ON  
WAYS AND MEANS**

March 31, 2010

9:30 A.M.

HB 1901, HD2, SD1

**RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT.**

Chair Kim, Vice-Chair Tsutsui, and committee members, thank you for the opportunity to comment on HB 1901, HD2, SD1.

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.

HB 1901, HD2, SD1  
Senate Committee on Ways and Means  
March 31, 2010  
9:30 AM  
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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.

## kim2 - Jo Ann

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**From:** Bart Dame [dameb001@hawaii.rr.com]  
**Sent:** Tuesday, March 30, 2010 10:59 AM  
**To:** WAM Testimony  
**Subject:** Comments on HB1901, WAM Hearing 3-31-10

Bart Dame  
710 West Hind Drive  
Honolulu, HI 96821

Ways and Means Committee  
Senator Donna Mercado Kim, Chair  
Senator Shan Tsutsui, Vice Chair

Wednesday March 31, 2010  
9:30 am  
Conference Room 211

Comments in OPPOSITION to HB 1901, RELATING TO PROCUREMENT OF VOTING SYSTEM EQUIPMENT

Aloha Chair Kim, Vice-Chair Tsutsui and members of the committee:

My name is Bart Dame and I am commenting today as an individual in opposition to this bill.

I appreciate the desire of members of the Legislature to facilitate the operations of the Office of Elections. There is a new Acting Chief Elections Officer and I join others in wanting to come together and create optimal conditions for his success and for the common goal of well-run, accurate and secure elections in 2010, a year where voters will be deciding some very important races.

But I think this bill is a mistake. It would exempt procurement of voting systems from laws which govern procurement by government agencies for other goods and services. It claims the regular procurement code is "is ill-suited to the State's procurement of voting equipment systems," but does not explain how election systems are so unique that carefully developed procurement safeguards should be discarded in favor of this alternative system which is sketched out here in brief detail.

What is the problem this legislation seeks to resolve? The bill correctly notes that "protests and appeals" have been "routinely filed by the unsuccessful vendor," but what conclusion should we draw from that? Should we assume the vendor is simply "litigious by nature" and prone to filing frivolous lawsuits? Or perhaps the Office of Elections has made serious errors in how they handled the procurement process?

Fortunately, our busy Legislature is not forced to judge such disputes based upon second hand accounts. There is a formal appeal's process under Hawaii's existing Procurement Code, where challenges of this sort can be thoroughly adjudicated. Why the Legislature should seek to shortcut this process and remove the ability of a vendor to appeal a wrongful procurement decision is not understandable to me.

We are told such challenges lead to delays and higher costs.

Let's look at the specific examples. In September 2007, the Office of Elections issued an RFP seeking to procure voting services, including the lease of voting machines, for a ten year, five election cycle, covering elections from 2008, 10,12,14 and 2016.

They awarded the contract to Hart InterCivic for \$52 million. Another vendor, ES&S, had offered to do the job for \$18 million. (The HART price was later revised down to \$43 million after an "error" was detected.). ES&S challenged the award, claiming the OE had failed to do a final Cost or Price Analysis (COPA) to determine if the price was justified. An administrative hearings officer agreed with ES&S, but recognizing the State's need to proceed with the elections, reduced the contract from ten years to a contract that only covered the 2008 election.

Had the "fair alternative procurement process" in this legislation been in effect, the State would be locked into a grossly over-priced multi-year contract with Hart. The right of the unsuccessful vendor, ES&S, to challenge the award, protected their interests, but it also protected the interests in Hawaii taxpayers in protecting us from such an extravagant award for a grossly overpriced system.

The Office of Elections was behind schedule in acquiring the voting system for this year's elections. But let's examine the actual reason and see if this legislation would have helped. In July 2008, a lawsuit was filed against the Office of Elections, claiming the Office had failed to promulgate administrative rules for the use of "direct record electronic voting machines." In September 2009, the judge agreed, forcing the State to interrupt its procurement process until they promulgated the Administrative Rules. Once the Rules were properly adopted, the Office restarted the procurement process.

So the State was late in acquiring a voting system, but the delay was NOT caused by the ongoing litigation over the voting system award.

I have reviewed the testimony from the AG's office in support of this bill. Frankly, I do not think it provides a convincing argument for its passage. We are told the new evaluation committee will somehow do a better job in choosing a voting system than the old committee. Why? On what is such an optimistic claim based? For those who do not know, the NEW, IMPROVED evaluation committee will be almost identical to the current team, except the Governor, the Speaker and the Senate President will also appoint members. With all due respect to these political leaders, I do not see how their appointees will bring more expertise to the choice than the current committee.

We are told the new process will be more transparent. This is asserted, but not spelled out. I would certainly welcome more transparency. As someone who has been monitoring the operations of the Office of Elections and the procurement of voting systems, I have often run into a brick wall as I have sought information, so I welcome this newfound enthusiasm for transparency. If they are sincere, I can recommend some easy, concrete to make the process more transparent. First, a draft RFP for voting systems should be posted online for public review before being issued. This is already done in SOME locales. As a practical matter, this would have saved the OoE a significant delay a couple of years ago, when their RFP was ruled too narrowly written and they were forced to stop the procurement process and re-issue the RFP.

Second, the OoE could allow interested members of the public to attend demonstrations of the voting systems prior to awarding the contract. Some election boards hold a "fair" and allow members of the public to try out the competing models of voting systems. That could be done here. At present, the names of vendors and the hardware and software they are offering is treated as a tightly held state secret, forcing those of us interested in following the process to engage in what sometimes feels like industrial espionage. There is a great pretense that it is being kept "secret" from rival bidders, but this is a complete fiction. Only the public is being kept in the dark. Because there are so few vendors, and they compete against each other for voting system contracts hundreds of times each procurement cycle, each company knows its rival's software and hardware quite well, and their pricing structure. Nonetheless, the OoE, along with SPO and the AG's office, has worked to prevent interested members of the public from finding out simple details about proposed voting systems.

I have heard Attorney General Bennett disparage the right of a vendor to challenge the award of a contract to a competitor when they feel the process followed was unfair. I reject his argument that these challenges are simply frivolous or an attempt to coerce the State into buying them off. I believe the challenges do not only serve the interests of the rejected vendor. I believe the challenges help ensure the procurement process itself is equitable and the public interest is served by a careful review in those cases when a credible challenge is brought. Which challenges are "credible"? That is a decision to be made by a hearing officer, not by AG Bennett nor to be pre-judged by the Legislature.

In conclusion, I do not believe it serves the public interest to exempt the Office of Elections from our normal Procurement Code. The problems plaguing the OE do not arise from problems with the procurement code but from the inability of the OE to follow the same restrictions which safeguard the procurement for other agencies. A case has not been made why the needs of the OE are unique.

Finally, this bill has been amended to make it more palatable to those with concerns about it. A sunset clause has been added. But what is the real world effect of a one-year sunset clause when the contracts being sought are for a six year, three election cycle? They should not be allowed to follow more casual, less stringent rules in awarding that multi-year, multi-million dollar contract. They should, instead, learn to follow the existing law.

**Please DO NOT pass this bill.**

Thank you for this opportunity to comment.