



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

WRITTEN COMMENTS  
OF  
RUSS K. SAITO, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
SENATE COMMITTEE  
ON  
WAYS AND MEANS  
ON  
February 23, 2010  
S.B. 2062, S.D. 1

RELATING TO PROCUREMENT

Chair Kim and members of the Committee, thank you for the opportunity to comment on S.B. 2062, S.D. 1.

The Department of Accounting and General Services (DAGS) opposes sections 1, 2, and 35 of this bill because they are impractical and will unnecessarily increase the cost of construction projects to the State. Giving up to four, 5% preferences for companies that have no applicable non-compliances in the four categories will yield a maximum 20% advantage for a bidder with no offsetting advantage to the State.

In addition, record keeping proving no non-compliances will be like proving a negative. It will impose an unrealistic administrative burden on agencies as well as on contractors. Consider that in just one category, noncompliance must be relative to federal, state and local labor, wage, health, safety, and environmental protection laws. In addition, the sanctions on contractors who become noncompliant after commencement of

work may be disproportionate to the non-compliance, as the bill simply measures compliance, with no reference to the seriousness of the noncompliance.

DAGS also objects to section 35 of this bill because it would require the Comptroller to submit a report to the legislature of all contracts awarded under sections 1 and 2, progress reports on all of those contracts, total state revenues spent, employment and wages data, preferences awarded, challenges to bids and offers, disposition of all challenges, information on implementation, and recommendations for further legislation. There are over 200 State agencies, and the burden on DAGS will be immense.

DAGS does support sections 3-34 of this bill, which were removed from S.B. 2659, and administration bill, and inserted into this bill as sections 3-34. These sections are aimed at streamlining the procurement process.

Thank you for the opportunity to comment on this matter.

LINDA LINGLE  
GOVERNOR



PROCUREMENT POLICY BOARD  
DARRYL W. BARDUSCH  
LESLIE S. CHINEN  
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WRITTEN COMMENTS  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE  
SENATE COMMITTEE  
ON  
WAYS AND MEANS

February 23, 2010

10:00 AM

SB 2062, SD 1

RELATING TO PROCUREMENT.

Chair Kim, Vice-Chair Tsutsui, and committee members, thank you for the opportunity to provide comments on SB 2062, SD1.

The State Procurement Office (SPO) does not support SECTION 1 proposed amendments adding a new preference for public works construction. As procurement professionals, preferences are viewed as increases to cost, tend to be cumbersome, complex, and increases costs to the State, as the award may be given to the vendor with a preference at a higher dollar amount rather than to the lowest bid amount.

SECTION 2 adds a new part for responsible construction contractor law that will delay the award process. This section is imposing various requirements on the contractor and additionally the contractor's subcontractor that will delay timely award of contracts, as the procurement officer is now tasked to verify compliance prior to any award. This amendment will not simplify nor streamline the procurement processes, but rather works against awarding contracts in a timely basis. SPO does not support SECTION 2.

The SPO supports SECTIONS 3 to 34 to simplify and streamline the procurement processes of chapter 103D, the Hawaii Public Procurement Code (Code) enabling agencies to expeditiously acquire the resources or services needed to perform their missions. The Code is the single source of public procurement policy to be applied equally and uniformly, while providing fairness, open competition, a level playing field, government disclosure and transparency in the procurement and contracting process vital to good government. To provide clarity on each proposed amendment, the following details the various changes by section.

SECTION 3 amends §103D-102 on application of this chapter to remove the term "services" for applicability of "commercial resale by the State".

SECTION 4 amends §103D-103 on retention of written determinations, to clarify delegated procurement authority resides with the “procurement officer” rather than a “purchasing agency”.

SECTION 5 amends §103D-104 on definitions to add a new definition for “Subcontractor”; amends “Contractor” and “Procurement officer”; and deletes “Purchasing agency” as inconsistent due to clarification of “Procurement officer”. New definition for “executive management” is applicable to SECTIONS 1 and 2, which the SPO does not support.

The added definition for ‘subcontractor’ is to clarify the intent of §103D-302(b) which requires bidders for construction projects to list the subcontractors they intend to use. The long standing interpretation has always been to require the bidder to list only those subcontractors who have a contract with a bidder, and not any subcontractor who is in turn hired by the bidder’s subcontractors. The bidder remains responsible for the satisfactory performance of the project. Listing of subcontractors who do not have a contract with the bidder is unreasonable and only serves to jeopardize and delay the orderly review of bids and award of the contract.

SECTION 6 amends §103D-110 on education and training to clarify ‘procurement officer’ for consistency.

SECTION 7 amends §103D-207 on centralization of procurement authority to delete reference to section (-209) being repealed and section (-210) that was repealed in 1994.

SECTION 8 amends §103D-301 on methods of source selection to detail the six procurement methods that may be used to procure goods, services, and construction.

SECTION 9 amends §103D-302 on competitive sealed bidding to clarify the invitation to bid process to provide adequate notice rather than a ‘publication’; allow for electronic procurement system submittal; and clarify evaluation criteria shall be included in the invitation for bid document. Page 20, lines 14–16, 19-22, page 21, lines 1-9, 22, page 22, lines 1-2 has language applicable to SECTIONS 1 and 2, which the SPO does not support.

SECTION 10 amends §103D-303 on competitive sealed proposals to delete unnecessary language for rulemaking as §103D-211 on procurement rules already provides for this requirement; replacing the word ‘negotiation’ with ‘evaluation’; clarify procurement officer responsibility; and ‘requestor’ is replaced with ‘nonselected offeror’ for consistency. Page 24, lines 15 – 22, page 25, lines 1 – 8 and lines 10-12 has language applicable to SECTIONS 1 and 2, which the SPO does not support.

SECTION 11 amends §103D-303.5 on pre-bid conference to make this process optional, as the need for a pre-bid conference should be determined by the procurement officer. This process has been problematic and extends the procurement process. Subsection (b) is not necessary; §103D-211 on procurement rules already provides rule making requirement.

SECTION 12 amends §103D-305 on small purchases; prohibition against parceling to delete unnecessary language, as electronic procurement (eProcurement) systems and applicable training are currently in place and clarify ‘procurement officer’ for consistency.

SECTION 13 amends §103D-312 on cost or pricing data to require a less burdensome standard appropriate to the commercial goods and services that government agencies buy. The threshold for submission of such data would be provided in rules, and should be substantial. The data must also be limited to that normally kept by the contractor and not require extensive sweeps to gather data not reasonably available. This amendment is in line with the American Bar Association, Model Procurement Code recommendations.

SECTION 14 amends §103D-313 on types of contracts to delete language that requires excessive approvals; CPO approval is currently required and adequate. The SPO is not aware of the use of subsection (c).

SECTION 15 amends §103D-314 on approval of accounting system to clarify 'procurement officer' for consistency.

SECTION 16 amends §103D-316 on right to inspect plant to clarify 'procurement officer' for consistency.

SECTION 17 amends §103D-317 on right to audit records to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 18 amends §103D-320 on retention of procurement records to clarify records retention responsibility is applicable to all governmental bodies, including the counties. The Comptroller is responsible for Executive Departments, and does not have jurisdiction over county records retention policies.

SECTION 19 amends §103D-323 on bid security to clarify the estimated contract amount may be determined by other parties such as consultants, not necessarily only the procurement officer; amends the dollar limits to \$50,000; allows the procurement officer to require security for goods and services when stated in the solicitation; and the Procurement Policy Board determines the form of security.

SECTION 20 amends §103D-324 on contract performance and payment bonds on the dollar limits to \$50,000; allows the procurement officer to require security for goods and services when stated in the solicitation; delete redundant or unnecessary language for rulemaking as §103D-325 already provides for the procurement policy board to specify the bond forms and copies.

SECTION 21 amends §103D-406 on specifications prepared by architects and engineers to clarify who may prepare specifications.

SECTION 22 amends §103D-410 on energy efficiency through life-cycle costing to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 23 amends §103D-701 on authority to resolve protested solicitations and awards to make final and not appealable, the chief procurement officer's (CPO) decision to lift the automatic stay imposed by a protest. Appeal of this decision to lift the stay is contrary to the purpose of the subsection and the intent of the procurement code. The CPO should be permitted to exercise discretion when necessary to lift the stay to permit a procurement to proceed so as not to jeopardize the substantial interests of the state.

This CPO action does not impact the due process of the protestor; the protest process continues, including the administrative appeal and judicial processes of sections 103D-709 and 103D-710.

SECTION 24 amends §103D-709 to replace 'head of a purchasing agency' with 'procurement officer' for consistency.

SECTION 25 amends §103D-710 to replace 'head of a purchasing agency' with 'procurement officer' for consistency.

SECTION 26 amends §103D-1001 on definitions related to preferences deletes unnecessary definitions for "Hawaii software development business" and "Software development" due to sections proposed for repeal.

SECTION 27 amends §103D-1002 on Hawaii products to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 28 amends §103D-1005 on recycled products from 'shall' to 'may' to provide agencies the flexibility to apply preference. Application of preferences for agencies tend to be cumbersome, complex, and increases costs to the State, as the award may be given to the vendor with a preference at a higher dollar amount rather than to the lowest bid amount. Deletes unnecessary language for rulemaking as §103D-211 on procurement rules already provides for this requirement; clarify delegated procurement authority resides with the "procurement officer" rather than a "purchasing agency".

SECTION 29 amends §103D-1010 on purchases from qualified community rehabilitation programs to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 30 amend §103D-1011 on qualified community rehabilitation program; proposal to provide goods and services to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 31 deletes §103D-209 on authority to contract for certain services. Reference to §28-8.3 on employment of attorneys limits the authority to retain or contract with attorneys, and does not impact this section on the procurement of professional services. Deletes this section as procurement of professional services is one of the authorized procurement methods, and should be centralized to the CPO authority rather than any purchasing agency. This should lessen confusion as to who has authority to contract for these services; and centralized to the CPO adds accountability, who may delegate this authority to contract for professional services to an authorized procurement officer.

SECTION 32 deletes §103D-403 on exempted items as it is redundant. §103D-102(d) already provides language to meet the requirements of this section proposed to be repealed, which states in part, "...which are exempt from this chapter are nevertheless encouraged to adopt and use provisions of this chapter..."

SECTION 33 deletes §103D-1003 on printing, binding, and stationery work. This preference is not appropriate to Chapter 103D. Other business incentives may be used to support printing businesses.

SECTION 34 deletes §103D-1006 on software development businesses. This preference is not appropriate to Chapter 103D. Other business incentives may be used to support the software development businesses.

SECTION 35 is applicable to proposed amendments of SECTION 1 and 2, which the SPO does not support.

Thank you.

**BIA-HAWAII**  
BUILDING INDUSTRY ASSOCIATION

February 23, 2010

Honorable Senator Donna Merdcado Kim, Chair  
Committee on Ways and Means  
State Capitol, Room 211  
Honolulu, Hawaii 96813

RE: SB 2062, SD1 "Relating to Procurement"

Dear Senator Kim and Members of the Committee on Ways and Means:

I am Karen Nakamura, Executive Vice President and Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). BIA-Hawaii does not support SB 2062, SD1 "Relating to Procurement". Contrary to its stated purpose, the provisions in the bill will not streamline the procurement process but make it more cumbersome and time-consuming, thereby delaying the process—all in the name of providing procurement preference.

The implementation of this bill is fiscally irresponsible in the magnitude of the preference up to 20%; the costs of procurement personnel time and the delays that will be incurred for the audit requirements that are being imposed. (Please note that there is already a 5% preference provided for apprenticeship program registrations that was passed by the legislature last year.) The State's yearly construction work presently exceeds \$1 billion dollars.

The implementation of this law, if passed, will require much more work on the part of the Comptroller's office without accomplishing any cost-savings or streamlining because the process will necessitate delays to confirm the information required. It will also substantially change the procurement process that is already confusing and technical and may require retraining of the contracting personnel of the various agencies at a time when our economy can least afford delays in getting the work processed to provide jobs. .

BIA-Hawaii believes the State Procurement Office is diligently working toward fair administration of the procurement code and does not need this bill to further add to their already constrained workload.

Thank you for your consideration of our views.

*Karen Y. Nakamura*



**From:** [Roy T. Ogawa](#)  
**To:** [WAM Testimony](#)  
**Subject:** SB 2062, SD1 RELATING TO PROCUREMENT.  
**Date:** Monday, February 22, 2010 12:41:57 PM

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## COMMITTEE ON WAYS AND MEANS

Senator Donna Mercado Kim, Chair  
Senator Shan S. Tsutsui, Vice Chair

DATE: Tuesday February 23, 2010  
TIME: 10:00 am  
PLACE: Conference Room 211 State Capitol

RE: SB 2062, SD1 RELATING TO PROCUREMENT.

Dear Chair Kim; Vice Chair Tsutsui and members of the Committee:

I am taxpayer and an attorney. While I support the idea of encouraging “responsible contractors” SB 2062 SD1 is an inappropriate and fiscally irresponsible method to achieve that goal.

First of all as Mr. Russ Saito, Director of DAGS has pointed out in his testimony (a) the potential preferences of up to 20% provides no benefit to the State (and could prove potentially very costly to the State budget at a time when we can least afford it); and, (b) preferences based upon disputes with other than state agencies will impose outside influences that would impact the fairness of the procurement process (how will the procurement officer address and verify these issues at the time of procurement?; or verify the negative?)

Also, what is the cost to the State of potentially paying up to 20% more (actually 25% more since the legislature also passed an apprenticeship preference last session) when the State construction Budget stands at over \$1 billion dollars each year and the rail project will also soon be upon us? Rather than fewer workers getting paid more the legislature should be looking at ways to get more work out to more workers. i.e without these “preferences” there could be 20% more work to others.

Lastly, please look at the scope of the four items listed that supposedly indicate “responsible contractors”

There is no time period involved. e.g. A HIOSH citation from ten years ago? A labor grievance from 15 years ago? A clerical error in wage payment from 7 years ago?

Also, Judgments and liens may occur for many reasons unrelated to the responsibility of the contractor. It could be the result of a legitimate dispute or an employee theft, etc.

Also the vague preferences based on any partial foreign ownership or out of state employees may be in violation of the Privileges and Immunities clause of the Constitution. There are many instances where there is a legitimate reason and it may be the more responsible position to hire an outside consultant who may have more expertise.

What will be the ramifications on the rail project given its significant cost?

However, the main reason is still that SB 2062 SD1 is not a fiscally responsible bill from the stand point of the cost to government agencies and the “friction” that it will cause to the procurement process.

Thank you for allowing me to present my comments.

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