

**SB2659**

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TESTIMONY  
OF  
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TO THE  
SENATE COMMITTEES  
ON  
JUDICIARY AND GOVERNMENT OPERATIONS  
AND  
ENERGY AND ENVIRONMENT

February 9, 2010

9:30 AM

SB 2659

RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.

Chair Taniguchi, Chair Gabbard, Vice-Chair Takamine, Vice-Chair English, and committee members, thank you for the opportunity to testify on SB 2659.

The State Procurement Office (SPO) supports this bill 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 1 amends the current statute for preference for recycled oil products by moving this from part XIII to the appropriate part X for preferences; see SECTION 31 to repeal same section and move this to PART X, Preference. Additionally, it amends to make this an option for chief procurement officers to implement. 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 amends §103D-102 on application of this chapter to remove the term "services" for applicability of "commercial resale by the State". To correct this change, recommend page 5, line 20 to read as "(H) Goods [~~and services~~] for commercial resale by the State;" Commercial resale should be limited to goods.

SECTION 3 amends §103D-103 on retention of written determinations, to clarify delegated procurement authority resides with the "procurement officer" rather than a "purchasing agency".

SECTION 4 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".

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 5 amends §103D-110 on education and training to clarify 'procurement officer' for consistency.

SECTION 6 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 7 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 8 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.

SECTION 9 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.

SECTION 10 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 11 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.

SECTION 12 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 13 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 14 amends §103D-316 on right to inspect plant to clarify 'procurement officer' for consistency.

SECTION 15 amends §103D-317 on right to audit records to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 16 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 17 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 18 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 19 amends §103D-406 on specifications prepared by architects and engineers to clarify who may prepare specifications.

SECTION 20 amends §103D-410 on energy efficiency through life-cycle costing to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 21 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 22 amends §103D-1001 on definitions related to preferences. Pulls the definitions from various areas of Part X on preferences and places in this section; and deletes unnecessary definitions for "Hawaii software development business", "Printed material", and "Software development" due to sections proposed for repeal.

SECTION 23 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 24 amends §103D-1010 on purchases from qualified community rehabilitation programs to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 25 amend §103D-1011 on qualified community rehabilitation program; proposal to provide goods and services to replace 'purchasing agency' with 'procurement officer' for consistency.

SECTION 26 amends §103D-1012 on biofuel preference 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. The definitions for "biodiesel" and "biofuel" are proposed to be moved to §103D-1001 on definitions.

SECTION 27 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 28 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 29 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 30 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.

Thank you.