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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
FEBRUARY 4, 2021, 3:00 PM

SENATE BILL 1035
RELATING TO PROCUREMENT

Chair Moriwaki, Vice-Chair Dela Cruz, and members of the committee, thank you for the opportunity to submit testimony on SB 1035, Relating to Procurement. The State Procurement Office's (SPO) is in strong support of this bill.

This bill will 1) create the foundation for successful implementation and management of a fee-based procurement automation system, 2) establish a procurement automation system special fund, and 3) authorize the administrator of the SPO to establish procedures for issuing the final decision on procurement issues pursuant to section 103D-206, Hawaii Revised Statutes (HRS).

The State Procurement Office (SPO) also requests the addition of language authorizing the position of a special procurement officer in the SPO. We respectfully propose the insertion of language on pages 2 and 5 of SB 1035.

Page 2:

"(1) Authorize the position of a special procurement officer, full-time position, to assist in developing strategic planning in large multi-million dollar procurements, negotiate terms and conditions, and

assist in the development of procurement circulars, directives and opinions for the state procurement office. This function will include responsibility for the legal format and audit trail inside of the automated system, to act as a conduit to share information and develop procurement opinions, and to remove any attorney-client conflict of interest that may occur. The Special Procurement Officer will guide additional system requirements with legal issues such as past performance evaluations, small business set-asides and creation of complex, hybrid high-dollar contracts."

Page 5, under §103D- State procurement automation system special fund; administrative fee, adding language to (b):

"(b) All revenues collected by the state procurement office shall be deposited in the state procurement automation system special fund and expended by the state procurement administrator to fund the project management of the procurement automation system to achieve the state procurement mission for digital transformation and streamlining. The revenues will also fund the position of a special procurement officer in the state procurement office."

Background Information and Justification

1) Procurement Automation System

In response to the COVID-19 public health crisis, the Hawaii state government has moved to digitize its processes and conduct business online to continue its current level of customer service. In support of that move, the SPO seeks to transition its manual procurement processes to an online digital system – a procurement automation system – to increase efficiency, save personnel time, create a consistent “face” for the executive branch, ease contractor confusion, and exact better spend data to leverage economies of scale.

The SPO took into consideration the following findings:

Users: Buyers

- 912 buyers in the Executive Branch (using the Hawaii Electronic Procurement System (HlePRO))
- 2,000 buyers in other State/County jurisdictions (including the Department of Education, University of Hawaii, and counties)

Data Management

- Vendors: approximately 16,600
- Contracts: 78 statewide
- Value of Transactions: Over \$230 Million

Needs of Buyers

- Consistent templates
- Smart terms and conditions in contracts
- Concrete audit trails
- Reliable procurement tracking

The SPO also requires support and infrastructure to negotiate fair and transparent terms that protect the state government and still allow the flexibility needed to achieve success.

2) Financing the Procurement Automation System

The COVID-19 public health crisis resulted in budget cuts, and SPO is looking at ways to remain financially sustainable while providing procurement services and guidance pursuant to Chapters 103D and 103F of the HRS. Senate Bill 1035 will allow the State Procurement Office to charge an administration fee.

The SPO is proposing to collect an administrative fee that will pay for the procurement automation system, saving approximately \$1.2M of general funds each year. In addition, the fee will assist in paying for a program management team to manage and grow the automation system to ensure statewide access for the full life-cycle, and to receive monies paid to the state.

The SPO conducted extensive research on other states' systems. Other statewide purchasing offices in other states are utilizing a procurement automation system with a program management team, which is paid for by the administration fee connected to the system. Currently, 16 states have a user/administration fee, and 11 states have a vendor administration fee.

The SPO also discovered best practices for procurement information technology across the nation and at the Federal level. The acceptance of an off-the-shelf software system that is configurable rather than customizable. It is a tool for much-improved compliance and reduces the need for excessive reviews.

3) Procedures for Issue Final Decisions

It is imperative that the Administrator of the SPO have the authority, which it already does, to make final review decisions regarding procurement processes, especially now that we are looking for a robust, uniform system of record. Thus, to clarify this position, Senate Bill 1035 will give the state procurement office the clear authority to have the final review decision.

4) Special Procurement Officer

The SPO requests that language on page 2 of this testimony is added SB 1035 to authorize the position of a special procurement officer to provide legal guidance through the procurement automation system. The special procurement officer would be a dedicated position within the SPO and would ensure that the procurement automation system covers all the needs of sections 103D and 103F of the HRS, the Hawaii Administrative Rules, and procurement guidance through Procurement Circulars. The special procurement officer would ensure that terms and conditions are kept up to date and specific to the contract type, the audit trail is meticulous, and legal and interpretation decisions are established within the SPO to exact a clear and consistent process.

The special procurement officer would also navigate the considerations of spend codes, federal grant requirements, disaster and contingency needs, rule and statute changes as needed to support the procurement automation system.

The SPO requires subject-matter expertise in legal procurement and contracting in the following areas:

1. Terms and Conditions

The Department of the Attorney General's Terms and Conditions Committee will be aided by the SPO's special procurement officer in scheduling regular committee meetings, and reviewing and updating Terms and Conditions.

- a. The special procurement officer will also be responsible for developing Specific Terms set for industry and economic bases such as:

- i. Information Technology: IT proprietary data, intelligence rights, data privacy, cyber security
 - ii. Sustainability and Resiliency: Food safety, food federal regulations, green products, and energy
 - iii. Construction: Bonding, Liquidated Damages, Change Order law specific to construction
 - iv. Health and Human Services: Terms that support both the state and non-profit organizations working to support the state. The focus is to ensure these procurements make the community user the priority, including the focus on addressing homelessness by the Governor and Department of Health and Human Services. This will also focus on other agencies that work with non-profit organizations, including the Department of Public Safety/Corrections, Department of Health, the Judiciary, and the counties.
- b. The special procurement officer shall work with the Department of the Attorney General to reduce their workload, whereby the smaller group of procurements they will need to review for form will be those that veer from the originally approved terms and conditions.

2. Issues Unique to Hawaii

The special procurement officer will assist the SPO with procurement on high-visibility, multi-million-dollar projects such as:

- **Capital Improvement Projects.** (Ala Wai Flood Mitigation, Aloha Stadium, Honolulu Rail Transit System, Department of Education, and University of Hawaii). These projects involve planning, development, and construction, with construction procurement challenges, protests, unclear statute and rule guidance that affect budget and schedules.
- **Department of Transportation – Airports.** Hawaii's main gateway for our tourism industry are our airports. SPO's current memorandum of understanding with DOT-Airports is to lead the centralization of procurement across the 15-airport system. Legal aspects of alternate funding, airlines legal authority, concession laws, and an understanding of the Federal Aviation Authority regulations needs to be addressed.
- **Local Food Sustainability.** SPO has been a staunch supporter of a local food economy from the perspective of disaster management and long-term sustainability. The special procurement officer will assist in a statewide Farm-to-State initiative, research, and benchmark innovative food procurements that allow for flexible, real-time buying, leveraging waste, and partnering with state and county representatives to develop policies that support local farmers and drive demand.
- **5G Broadband Oceanic Cabling.** The Department of Business, Economic Development & Tourism's initiative in 5G cabling includes establishing public-private partnerships (P3), negotiating billions of dollars of future monies and contracting with global companies in South America and Japan. The special procurement officer shall be proficient in understanding the concept of P3 development, and assist in researching both successful and failed P3s to develop procurement rules and guidance.

3. Disaster and Emergency Preparedness

The SPO must counter two important and sometimes conflicting missions: 1) supporting the department's mission and 2) supporting the budget and finance mission. Procurement searches for best value, saves money where it is feasible, and achieves program success.

When disaster hits, the SPO must be able to act with agility as the entire rest of the State looks to this agency for guidance on purchases that must be made immediately. A special procurement officer will have direct points of contacts with counterparts in the Department of Homeland Services' Federal Emergency Management Agency. The special procurement officer will have thorough knowledge of Federal law and Federal Grants Regulations and requirements.

Other examples have demonstrated the need for a special procurement officer:

a. SPO Central Purchasing efforts for PPEs and Disinfectants during the COVID-19 Public Health Crisis

- i. The special procurement officer shall be responsible for developing favorable shipping terms, creating legally acceptable delivery and packing order terms and templates and ensure proper documentation for reimbursement from the Federal CARES Act.
- ii. COVID-19 suppliers have the advantage, and many have sold inventory to the highest bidder. Hawaii has been "outbid" by other states and even countries. The special procurement officer can negotiate terms from a global perspective with brokers, customs, and freight insurance.
- iii. The special procurement officer will act as a conduit to communicate vital legal procurement information in a timely fashion to all state and county agencies for their timely implementation. Their translation of legal federal documents (such as FEMA-reimbursable Rules and CARES Act Requirements) to:
 - respond to state and county customers urgently requiring guidance, and
 - ensure audit-ready packages are compiled and this is communicated throughout the Executive

b. Natural Disasters – Hawaii Contingency Contracting.

The special procurement officer shall develop surge legal verbiage to be considered in state contracts that could be used to aid and assist any disaster mitigation or emergency surge services pre- or during a disaster. The special procurement officer shall keep the SPO's FEMA template table current as regulations are updated. The special procurement officer shall also develop and conduct training as necessary and maintain communications between the SPO and the legal entities of each county.

4. Training

The special procurement officer will develop procurement training for state buyers covering subjects such as the foundation of a contract, liability and risk, grant management, terms and conditions. Such training will be made available to state/county personnel who handle legal issues. The officer will also provide responses to legal questions.

5. Legislation

The special procurement officer will

- assist in research and drafting of legislation to be submitted to the State Legislature via the Governor's office
- take the lead in researching and developing procurement legislation that would promote efficiency, define correct processes, work with the Department of the Attorney General to clarify opinions

- incorporate clear language in RFPs with levels of discussions to allow for correction of errors incorporate language that allows for special procurements that enhance innovation

6. Conforming Rules

The special procurement officer will take the lead to update the SPO's rules within the Hawaii Administrative Rules, will ensure that the proposed eProcurement automation system are aligned with those rules and revised statutes, and to enable best practices and more streamlined processes within the rules.

7. Hawaii Procurement Institute (HPI)

HPI was enacted pursuant to §304A-1352, HRS, and may:

- (1) Conduct and participate in procurement education and training for entry level and higher-qualified state employees and others, including persons not employed by the State;*
- (2) Conduct and promote research, conferences, and studies to improve the procurement process, laws, policies, methods, rules, procedures, and forms relating to state and local government procurement;*
- (3) Report on and make recommendations regarding goals, guidelines, innovations, and evaluation of state and local government procurement initiatives; and*
- (4) Establish and maintain a procurement library within the State. [L 2006, c 75,pt of §2]*

The special procurement officer shall be the liaison between HPI and other similar organizations who are interested in improving government procurement in Hawaii.

8. Federal Grant terms according to 2CFR200.

The special procurement officer will provide procurement guidance on federal grants, and understand the legal terms and liability issues, avoiding the risk of mismanagement of grants and possible audit failure, resulting in the requirement to pay back federal funds.

9. Procurement Considerations

For all procurement, especially visible, high-priced, and complex procurements, a special procurement officer will provide a high-level review on the following:

- Contract content from the perspective of liability, risk, warranties, and indemnification
- Contract amendments and post-award non-performance - issuing legal notices to cure, to assist in discussions with surety's, and liquidated damages.
- Contract negotiations (post-award negotiations)
- Statewide, multi-state contracts (manage risk and liability in developing robust, state-protected state-wide contracts)
- Protest and protest information (ensure transparency of protests to initiate much needed improvements in the procurement process and actively lead in the resolution of court cases.

10. Supreme court case provisions

Due to some results of protests that have reached the Hawaii State Supreme Court, such as *Asato v. Procurement Policy Board* regarding professional services, buyers are obligated to stretch the scope of work, which can affect procurement integrity. The special procurement

officer will research and make recommendations on how we can resolve the conflicts between court rulings and ethical procurement.

11. Standard templating and pre-approval to form

The special procurement officer will be responsible for developing standard procurement templates which are pre-approved to form, reducing the purchasing lag time for this review of between 2 to 4 weeks. The system will have embedded audit controls whereby a procurement will be flagged if the buyer changes the pre-approved template terms and conditions. At that point, the special procurement officer will conduct the approval as to form or facilitate discussions with the Department of Attorney General.

12. Compliance and transparency

The Special procurement officer will be responsible for managing and maintaining legal compliance throughout the entire state eProcurement automation program and extract spend data to make better strategic decisions on leveraging economies of scale. Such data can be provided to the Legislature and public.

13. Small Business Set-Aside and other preferences legal advisory

- Local versus Small Business – The special procurement officer shall ascertain how to encourage local business inclusion into government contracts.
- The Small Business Set-Aside program - The special procurement officer shall assist in facilitating outreach and developing Rules to enact this the small business set-aside statute.
- Other preferences - Some of these preferences are no longer required or are obsolete, and others need to be updated based on the change of environment. The special procurement officer shall be responsible for the outreach and the recommendations to improve, add or remove said preferences.

14. Legal Research

Conduct research on new procurement models that create efficiencies to developing IT data privacy clauses, complex licensing terms, value engineering, legal assertions and exceptions.

15. Legal Opinions.

The special procurement officer shall be responsible for facilitating and leading legal discussions when procurement issues arise, and shall be responsible for developing, in partnership with the Administrator, the final procurement opinion with clear guidance.

16. Past Performance

SPO has been working to implement a past performance policy whereby state departments can share past performance information on contractors in an effort to reduce awarding contracts non- or under-performing businesses. The special procurement officer will assist in covering legal risks and liabilities to address the issues of responsibility as well as contractor rights and develop policies in this area.

Thank you.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
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WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE ON
GOVERNMENT OPERATIONS

THURSDAY, FEBRUARY 4, 2021, 3:00 P.M.
CONFERENCE ROOM 016, STATE CAPITOL

S.B. 1035

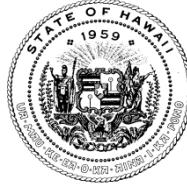
RELATING TO PROCUREMENT.

Chair Moriwaki, Vice Chair Dela Cruz, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 1035.

The Department of Accounting and General Services (DAGS) offers the following comments:

1. DAGS supports the concept of centralized e-procurement system beginning with goods and services which includes the use of service contractors and consultants.
2. Due to the complexities involved when procuring for construction, DAGS supports the incorporation of construction at a later time. Although large scale construction projects may vary, there are similarities within the process that needs further discussion with various stakeholders in State agencies. DAGS believes there is value in centralizing a database that will be referenced during the initial procurement cycle.

Thank you for the opportunity to submit testimony on this matter.



LATE

TESTIMONY BY:

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February 4, 2021
3:00 P.M.
State Capitol
Conference Room 016
VIA VIDEO CONFERENCE

S.B. 1035
RELATING TO PROCUREMENT

Senate Committee on Government Operations

The Department of Transportation (DOT) **supports** this Administration bill which authorizes the State Procurement Administrator to develop and administer a procurement automation system; authorizes the State Procurement Administrator to charge and collect an administrative fee to cover the costs of the procurement automation system; establishes a procurement automation system special fund; and supports the State Procurement Administrator's final decision on investigations of procurement policy and compliance.

The establishment of a procurement automation system across the executive branch and state agencies will increase efficiencies and responsiveness, support consistent and standardized procurement practices and processes, policies and procedures, and provide greater confidence to taxpayers by ensuring optimal compliance and transparency in following the procurement code.

Along the lines of automated procurement, DOT transitioned to electronic bidding and virtual bid openings, primarily in response to the pandemic safety requirements of social distancing and limited congregation. Both electronic bidding and virtual bid openings directly responded to accessibility issues of bidders on Oahu and the neighbor islands. In the conventional environment, neighbor island bidders submitted bids to the respective DOT Highways district offices for public reading. These district offices, for safety of staff and public, were now closed and all bids were received and publicly read on Oahu.

The electronic bidding and virtual bid openings allowed bid openings to be executed without compromise to the integrity of the process. The electronic bidding through HlePRO is confidential, secure, and available to the public. It is the electronic procurement system vetted and endorsed by the State Procurement Office with a support infrastructure in place that partners well with processes outside the system.

The electronic bidding, virtual bid openings, and related electronic services tied to the bid opening were implemented in response to the pandemic but will be sustainable moving forward.

Thank you for the opportunity to provide testimony.



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February 4, 2021

3:00 p.m.

Senate Government Operations Committee

Support for SB 1035, Relating to Procurement

Aloha Chair Moriwaki, Vice-Chair Dela Cruz, and members of the committee!

Thank you for the opportunity to submit testimony in support of SB 1035, Relating to Procurement. My name is Melissa Pavlicek and I am an attorney and small business owner who has worked in the area of procurement for more than ten years.

Through my past work and previous discussions with the State Procurement Office administrator, I believe that the provisions in this bill will create the foundation for successful implementation and management of a fee-based procurement automation system, establish a procurement automation system special fund, and authorize the administrator of the State Procurement Office to establish procedures for issuing the final decision on procurement issues pursuant to section 103D-206, Hawaii Revised Statutes (HRS). My understanding is that the State Procurement Office will also be requesting the addition of language authorizing the position of a special procurement officer in the SPO. This is an important step toward promoting sound and effective procurement. Please support this bill and the proposed amendment.

The State Procurement Office's mission is to promote efficiency, effectiveness, and impartiality in procurement for State and county governments through development, implementation and maintenance of policies and procedures that provide for broad-based competition, accessibility to government contracts, fiscal integrity and responsibility in the procurement process; and to promote efficiency, effectiveness and stewardship in inventory management and surplus property management in an open, fair and transparent process. SB 1035 will further the mission of the State Procurement Office and help to ensure the interests of the people of the state.

Thank you.