

PROCUREMENT POLICY BOARD MEETING

April 22, 2004

2:00 p.m.

Conference Room 410  
1151 Punchbowl Street  
Honolulu, Hawaii 96813

Members Present

Gregory King, Vice-Chair  
Russ Saito, Secretary  
Gordon Ing, member  
Claire Motoda, member  
Winifred Odo, member  
Myron Tong, member

Members Excused

Phyllis Koike, Chair

Others

Aaron Fujioka, State Procurement Office  
Ruth Yamaguchi, State Procurement Office  
Justin Fo, State Procurement Office  
Mara Smith, State Procurement Office  
Sharon Koga, State Procurement Office  
Corinne Higa, State Procurement Office  
Cheryl Oho, State Procurement Office  
Chris Butt, Department of Education  
Eric Tsugawa, Safety Systems  
Al Kanno, Safety Systems  
Clifford Higa, Safety Systems

Call to Order

Vice-Chair Greg King called the meeting to order at 2:00 p.m.

**Minutes**

Motion

Mr. Gordon Ing made a motion; seconded by Ms. Winifred Odo to approve the minutes of the meeting held on October 28, 2003.

The minutes were approved as distributed.

## **New Business**

### For Action

Mr. Aaron Fujioka reported to the Board that on April 8, 2004 the State Procurement Office conducted statewide public hearings via videoconference on Hawaii Administrative Rules for chapters 3-124 and 3-126.

Chapter 3-124 – Mr. Fo explained that the rules submitted to the public hearing were the same as what the Board had approved at an earlier meeting. A few non-substantive changes were brought up at the hearing. The main change was for the preference on recycled products. Previously, the preference was added to the non-recycled product's price for evaluation purposes. However, because recycled products are only a small part of a construction bid, DAGS, Public Works Division was encountering problems when vendors not asking for the recycled preference were not showing the cost of their non-recycled product. Without the non-recycled product's price, the preference could not be applied. Therefore, the change to the rule is to make the application of the preference similar to the Hawaii Products preference, where the preference is subtracted from the recycled product's price.

After a discussion on various parts of the chapter, Vice-Chair King called for a motion for final approval. Mr. Gordon Ing moved for final approval of Chapter 3-124. Ms. Claire Motoda seconded. The motion was unanimously approved.

Chapter 3-126 – Mr. Fujioka stated that copies of the testimonies are included in the folders and will be covered by Ms. Ruth Yamaguchi.

Ms. Yamaguchi presented section 3-126-49 for the board's attention. The proposed rules distributed for the public hearing did not reflect the proposed changes as noted in the public hearing notice and at the public hearing. The copy for adoption by the board today includes the corrections, as detailed in the public notice and at the public hearing. Ms. Yamaguchi explained the recommendation in the testimony from the Hawaii County Office of Corporation Counsel has been added on page 126-10, section 126-11.01, Other causes for debarment or suspension. The recommendation was to clarify who would initiate the debarment. Subsection (a) now reads "Debarment procedures shall be initiated by the administrator of the State Procurement Office . . ." The other sections presented at the public hearing were as approved by the Board at a previous meeting.

Ms. Motoda requested that the next time the rules are amended a definition be added for "sua sponte". Mr. Fujioka said it will be noted for a future consideration.

Mr. Russ Saito suggested SPO consider amending section 126-12 regarding suspension to further explain under what conditions a person would be suspended prior to debarment.

After further discussion, Vice-Chair King requested a motion to approve for final adoption. Mr. Saito made a motion for final approval of Chapter 3-126. Mr. Myron Tong seconded. The motion was unanimously approved.

Other Business – Mr. Fujioka referenced the letter from Mr. Albert Kanno of Safety Systems Hawaii, Inc. regarding Chapter 3-122-112 requesting the amendment and/or repeal of the interim rule. On this same subject, Mr. Fujioka pointed out section 4, page 10, starting with line 10 in H.B. 2136, SD1 that refers to the small purchase provision. If this provision becomes law, then SPO will be returning to the Board to repeal portions of section 3-122-112.

Vice-Chair King requested discussion on this subject and to also defer to Deputy Attorney General Pat Ohara before a decision is made. Mr. Saito reiterated what was presented by Mr. Fujioka, in that if this bill passes, the letter from Mr. Kanno is moot.

During the discussion the main concern for state and county agencies is the cost factor and the burden it will create to comply. The Board and SPO would like to confer with the Deputy Attorney General before any decision is made. Mr. Saito made a motion to defer and also seek the Deputy Attorney General's written opinion for consideration, at the next meeting. Mr. Gordon Ing seconded. The motion was unanimously approved.

Vice-Chair King asked if Mr. Kanno would like to make any comment. Mr. Kanno said "I understand it will take more people to do what you say, but I don't think it will take that much more. Even if it does take 40 people, we're trying to make it easier for the local people to stay in business. So although you might add 40 people in your government, I think it will save a lot of jobs because we do have this problem of people from the internet, from all over the world going to be bidding. How do we compete with that? It is very difficult, so we can lose a lot of our business. . . . and that's the reason why we are very adamant about this, we're very strong about this. I've talked to the people we represent, all the companies that came in during the past legislature for the Grainger thing and they all agree. And it's helped them because that has prevented companies from the mainland from bidding. I shouldn't say prevented but at least they have to set up shop here if anything so we compete on an equal playing field and that's the only thing."

Mr. Fujioka stated that if Grainger Industrial Supply is being used as the example, he did not think that was appropriate because Grainger would certainly meet all the requirements of 103D-310, the provisions that were being discussed, and because they meet the requirements, would actually be a model company in compliance with the law.

Mr. Kanno stated "I'm not using Grainger as an example, but talking about the last legislature during the Grainger thing, not that Grainger doesn't comply. We have no problem competing with Grainger. That has always been our position because they have an office here. I'm not using them as an example to stop them, no. I'm sorry if I said it wrong."

Mr. Eric Tsugawa, attorney for Safety Systems Hawaii, Inc. added that “maybe you guys need to confirm this, but the letter that was submitted by Safety Systems is pursuant to HRS section 91-6 and I believe the response has to be submitted back within 30 days. I don’t know how that affects your timing of responding to it, but I believe chapter 91 requires a response.” “The other point, is a minor point, but Aaron mentioned about requiring the repeal of subsection (b) of 3-122-112, in addition to that it would actually require the inclusion of 103D-305 to subsection (a). Because right now 103D-305 is not included in subsection (a) which requires the -----.” Mr. Russ Saito asked Mr. Tsugawa what is 91-6 specifically. Mr. Tsugawa replied “it allows for the petition to amend or repeal the administrative rules and the letter submitted by Safety Systems to amend or repeal the interim rule 3-122-112 was submitted pursuant to that chapter and that chapter sets forth the procedural requirements and I believe and you can confirm it that the response is required to be made within 30 days.” Mr. Saito asked if the repeal or just the response. Mr. Tsugawa said “the response.” Mr. Saito said the response is that we are deferring until we can have an opinion from the Attorney General. Mr. Tsugawa said “Well, you may take a look at chapter 91, I don’t know if that is going to satisfy the chapter.” Mr. Saito said he would like to comment that “We have had a lot of comments since the rule and the problem is that you guys have been saying that it’s hurting the small businesses or they’re the ones that are concerned. They are the ones that are telling us they want it repealed because they’re saying that if they got to go through that rigamarole everytime to do a purchase, it’s not worth it for them to do business with the state. That’s what most of them are saying, so again the notion, I understand where you’re coming from but the feedback I’m receiving from the small businesses is that if that’s what they have to go through to do business to sell you \$1,000 widget and got to go through all those 4-5 steps, it’s not worth it.” Mr. Kanno said “I’m not going to dispute that the people you talked to but the people we talked to say the opposite. They say that the bill has really helped them and we have talked to people that have gotten contracts because the people from the mainland were through. We have that, we have that also. I mean I don’t know what to tell you, I guess you’ll have both sides.”

Vice-Chair King said most people are in agreement that there should be some kind of protection for local businesses that provide added value. The problem affects efficiency in government. They have programs utilizing the procurement card, allowing employees to repair or fix a problem on a timely basis. An employee may go to a pump site somewhere and he wants to go to an electrical shop because something’s broken down to get a brake or something to fix that afternoon. The employee is not going to check if the electrical shop is in compliance.

Mr. Gordon Ing felt that the Board needs to get the attorney general involved and obviously based upon what Mr. Tsugawa said if there is a 30 day requirement, then we need to respond to them within that time. Mr. Fujioka said SPO will contact Deputy Attorney General Pat Ohara and if necessary, will call a Board meeting.

Mr. Tsugawa found the section and said it says “upon submission of the petition the agency shall within 30 days either deny the petition in writing stating its reasons for the denial or initiate proceedings in accordance with section 91-3. That’s the end of that section. 91-3 is procedures for adoption, amendment or repeal of the rules. So my interpretation is either you have to deny it or take action to amend or repeal it.” Upon further discussion it was agreed that the attorney general’s office would be consulted on what would constitute a response.

Vice-Chair King asked if we needed a motion to defer this to the next meeting. Mr. Russ Saito made a motion to defer until an opinion is received. Mr. Gordon Ing seconded. The motion was unanimously passed.

Mr. Fujioka thanked Mr. Ing, Vice-Chair King and Chair Phyllis Koike for attending the video conference for the public hearing. Their support was appreciated.

#### For Information

Mr. Fujioka explained the current process utilized by state agencies to procure health and human services pursuant to Chapter 103F and its administrative rules that the Board adopted is entering its 6<sup>th</sup> year. The SPO has taken the liberty of revisiting some of the rules, taking into consideration the experience and findings during the past 3 bienniums. The proposed changes to the rules do not require statutory amendments to make these changes. It is already in the scope of the statute. Chapter 103F has emphasis on planning and community input, a collaborative process involving the community, the recipients and state agencies.

SPO has completed 7 statewide public informational meetings and thanked Mr. Ing for his attendance at the meetings. During the statewide meetings the proposed administrative rules were presented, feedback was received and SPO is analyzing the feedback and will report back to the Board at a later date. The SPO wanted to brief the Board on what the first draft contained. Depending on the Board's comments, SPO will present a second draft incorporating the concerns received from the public hearings and the Board. These public meetings are community input processes that SPO is adding prior to the public hearings process. Ms. Mara Smith presented the proposed changes by chapters.

Ms. Smith explained there are 10 chapters of administrative rules for health and human services. Five chapters, each address a method of procurement and the other 5 chapters are more general in nature. SPO is recommending changes to 5 chapters at this time.

Chapter 3-141, General Provisions – The first change is to eliminate the 1 day newspaper notice to posting the procurement notice on the internet for the duration of the solicitation. Second would be consolidating the requirements for posting the public notice in this chapter. The SPO proposed the addition of a procurement violation process. Ms. Motoda asked about the posting changes. Ms. Smith replied it has to do with request for exemptions from procurement, when the request is given to the chief procurement officer (CPO). What is being recommended is that the request for exemption be posted on the internet in a central location prior to any action by the CPO.

Chapter 3-142 – SPO is proposing to require the request for information (RFI) mandatory, that it is in writing, that the state agencies conduct analyses on input received and that both the RFI and the analyses are posted on the internet. This will ensure the public has an opportunity to give input about service specifications. Planning prior to procurement would also be mandatory. Mr. Saito asked if the minimum period between the RFI and the RFP is 7 days.

Ms. Smith replied that the minimum period an RFI must be advertised is 7 days and that RFIs are most often conducted several months before an RFP. Mr. Saito asked if there could be a rule-based interval where people can get a sense of what is the minimum period. Mr. Fujioka said that will be addressed in the rules.

Chapter 3-143 – Most of the changes are technical and for clarification purposes. The public notice section is reiterated here because the date the public notice is first published has increased from 21 to 28 days before the submittal deadline. Another recommended change is having RFPs posted on the web.

Chapter 3-144 – The recommendation is to place all requests for restrictive purchases on the internet for seven days prior to any action by the CPO. Ms. Smith stated SPO is currently doing this and would like to make it consistent in rules. Mr. Saito said it seems almost a contradiction in terms to be talking to something similar to a sole source and posting it on the internet. If it's a sole source there is only one provider. Mr. Fujioka explained the current process under 103F doesn't require posting prior to approval, but SPO has taken the liberty as part of the public notification process to disclose the request prior to any CPO action. This allows the public to view and verify that it is a sole source. On the website there is a listing of all sole source requests and their disposition. Ms. Motoda stated this might also give a vendor the option to get an idea of what the state is requesting in terms of services that have few vendors. Mr. Fujioka said this is one of the reasons why the list has been posted. Vendors sometimes ask where is there limited competition and they are referred to the website.

Chapter 3-145 – Awards will be posted in a fashion similar to professional services to facilitate public disclosure.

Mr. Fujioka stated that health and human services contracts is an industry in itself. The database for the past fiscal year shows \$690 million worth of contracts. These rules and statutes have consolidated the effort to create a process that is consistent and fair. When the proposed rules were presented to the private sector, the majority embraced the idea because it gave them opportunity to gain information in a more timely manner and to participate and represent the community interest. Commodities are a little different. When the state needs something, it's purchased. Services to communities are much more sensitive, more unique from one geographic area or target group to another. The states geographical distribution is one among a number of other things that must be considered. Therefore, many of the changes are for disclosure and to allow more community involvement. The focus is to have community participation during the front end and avoid protests or complaints about how the RFP should have been written. SPO wants to formalize or structure the exchange of information.

Ms. Winifred Odo inquired about the response from DOH and DHS. Mr. Fujioka responded that many state agencies are already doing much of what is being proposed. However, the RFI is not being conducted universally. Mr. Fujioka stated that SPO would like the agencies to start the community planning process a little sooner allowing them to be more thoughtful about what is being procured. There are a number of state agencies who have infused the community planning process into their own planning while others have been more reluctant.

SPO feels with technology, now is the time to be more deliberate with regard to planning activities and would like to ensure all state agencies conduct a community planning process.

Mr. Saito commented on H.B. 2136 as being a really important bill. The genesis of the bill was to address some of the concerns by the Board's decision on debarment for campaign spending violations. The initial thrust of the bill was to create a set of conditions that would be considered before debarment is initiated. The bill kind of snowballed and eventually ended up trying to take away all of the exemptions to the procurement code that are there for no good reason. The SPO did a good job of documenting all of the exemptions that didn't make sense. In addition because there were still some concerns about procurement of certain services that were just not available in Hawaii or at least the best that was not available in Hawaii that was also put in as part of the bill and that's the opening that was created to put the requirement to verify all compliance. You might view this as almost an omnibus bill for this year.

Mr. Ing returned to the Chapter 103F rules, inquiring whether any action needed to be taken by the Board. Mr. Fujioka replied that if the Board did not have any concerns the SPO would return with a second draft at a future meeting, incorporating the findings from the public informational meetings.

### **Administrator's Report**

Mr. Fujioka added comments on H.B. 2136, CD1 stating the diversity of the bill. It addresses the 103D-310 provision that was earlier discussed, debarment and suspension and also the elimination of statutory exemptions from chapter 103D. As a matter of policy the administration has supported a fair and equitable process. SPO appreciates the administration's support, in particular Mr. Saito.

Mr. Fujioka updated the Board on the purchasing card, stating that the implementation phase has been completed. At this time over 500 pCards have been issued, which affect state and county agencies. Nine executive branch agencies have implemented and have started using the pCard and another 8 agencies have signed up and are in the training process. DAGS for the month of April had about \$32,000 worth of pCard transactions which covered 155 purchases, compared to a year ago this month when DAGS used the card for 4 transactions covering \$250.00. There's clearly a movement which the SPO is happy about, and would like it to go faster and encompass more. It is a big change from the current practice of only using purchase orders, and now this opportunity will enable government to do some streamlining, expediting payment and collecting data in a better fashion.

Vice-Chair King said the County of Maui's pCard is utilized only for travel now and approaching \$100,000 a month. Mr. Fujioka added that the SPO is appreciative of the efforts that everyone has provided.

With regards to the Hawaii electronic procurement system, a number of months ago an award was made and was protested. The SPO did not believe the protest had merit and denied the protest. The protestor proceeded to file a request for administrative hearing with the Department of Commerce and Consumer Affairs. The SPO believes the filing was late and the Attorney General's Office on behalf of the SPO has filed a motion for dismissal. That is scheduled for June 3, 2004.

The SPO is planning to put a Procurement Policy Board item on the website. As part of this will include a short bio of each board member. A draft was presented to the Board members for editing before being placed on the website.

**Next Meeting**

The next meeting will be at the call of the chair.

**Adjournment**

There being no further business, the meeting was adjourned at 3:25 p.m.

Respectfully submitted,

May 19, 2004  
Date

Russ K. Saito  
RUSS K. SAITO, Secretary  
Procurement Policy Board