PROCUREMENT POLICY BOARD MEETING
February 21, 2008
1:00 pm
Conference Room 410
1151 Punchbowl Street
Honolulu, Hawaii 96813

Members Present

Gregory King, Chair
Russ Saito, Secretary
Darryl Bardusch, member
Keith Matsumoto, member
Daryle Ann Ho, member
Pamela Torres, member

Excused

Leslie Chinen, member

Others

Aaron Fujioka, State Procurement Office
Ruth Yamaguchi, State Procurement Office
Justin Fo, State Procurement Office
Colin Tanaka, State Procurement Office
Pat Ohara, Office of the Attorney General
Reese Nakamura, Office of the Attorney General
Terry Thomason, Alston Hunt Floyd & Ing
Kathryn Kanemori, Board of Water Supply

Agenda Item I - Call to Order

Chair Greg King called the meeting to order at 1:02 p.m.

Agenda Item II - Minutes

Mr. Keith Matsumoto made a motion, seconded by Mr. Russ Saito, to approve the minutes as amended by changing Les to Leslie for form on page 2 of the January 17, 2008 meeting.

The motion was unanimously carried.

Agenda Item III

Mr. Aaron Fujioka explained that a statewide public notice was issued on January 5, 2008 announcing the public hearing on HAR Chapter 3-122, Source Selection and Contract Formation. The public hearing was held on Wednesday, February 6, 2008 at 9:00 am via video conference on Oahu, Hilo, Maui and Kauai.

No verbal or written comments were received and the State Procurement Office (SPO) is requesting the Procurement Policy Board's (Board) approval for the adoption of HAR Chapter 3-122. Thereafter, the SPO will proceed to obtain Governor's final approval, and filing with the Lieutenant Governor's office for the effective date of this chapter.

Mr. Fujioka pointed out a couple of non-substantial edits/corrections which were noted when SPO conducted a final review. Page 65, sec. 3-122-59 to correct numbering to reflect (2) and (3) and page 76, sec. 3-122-75 (3) to correct word 'an' to reflect 'and'.

Mr. Matsumoto made a motion, seconded by Mr. Darryl Bardusch, to approve the adoption of the amendments and compilation of HAR Chapter 3-122. The motion was unanimously carried.

Agenda Item IV

Mr. Fujioka reported to the board that this is the re-draft for interim rules on administrative fines to implement Act 142/SLH 2007. The draft incorporates the board's comments made at the January 17, 2008 meeting. §3-131-1.02(c) was expanded to include examples of business integrity for non-government entities, and replaced "Payment" with "Reimbursement" in §3-131-4(d)(1)(A). Another amendment was made to §3-131-4(d)(2), amending subsections (E) and (F) to (A) and (B).

Mr. Matsumoto made a motion, seconded by Mr. Bardusch, to approve the adoption of the amendments and compilation of HAR Chapter 3-131 as interim rules, with the changes as noted. The motion was unanimously carried.

Agenda Item V

Mr. Fujioka reported that as requested by the board at its January 17, 2008 meeting, he prepared the enclosed memo requesting the Small Business Utilization Council (SBUC) to identify targeted areas of emerging industries. A response was received from the SBUC Chair which stated this issue will be placed on the SBUC agenda at its next meeting, scheduled for March 3, 2008.

Mr. Matsumoto requested that when information is received from the SBUC, that it be placed on the board's next agenda. He is interested in SBUC's justification of its proposed recommendations.

Agenda Item VI

Mr. Fujioka stated that the enclosure provided is the SPO matrix detailing 5 levels of government employee procurement responsibility. It was difficult to compress the different levels of procurement responsibility into 3 levels. In order to best match the mandatory training workshops to the appropriate level of procurement responsibility, the five levels will allow agencies to better place their personnel into the matrix. Examples of positions for each level were listed.

Mr. Bardusch had concerns that if the Procurement Officer/Department Head plans to do lower level processes, they would need to have training. He inquired how would SPO determine whether the procurement officer is doing lower level processes and has attended the required training for that particular level. Mr. Matsumoto inquired whether SPO had requested input from other jurisdictions. Ms. Pamela Torres inquired whether SPO knew how many employees have had training and how many still require training and that the matrix and course description does not address frequency of training. Mr. Terry Thomason, an observer from the Hawaii Procurement Institute (HPI), suggested that based on the concerns of the board and state law requiring agenda and materials to be provided, that the board consider asking SPO to issue agendas, including agenda materials, earlier. He felt that more people/jurisdictions will be able to provide comments before the board votes. Mr. Fujioka commented that SPO complies with all applicable laws regarding the posting of agendas and that all materials provided to the board members are posted on our website. Mr. Fujioka described the current timetable for preparing the agenda and its attachments and explained the difficulty for SPO to circulate and post the agenda and the materials sooner than the 6 days prior to the meeting. There was consensus that the current schedule was tight as is.

Mr. Bardusch wanted to know how to make training mandatory. Ms. Torres said she was not comfortable adopting any rules on training and would like to give SPO more time to develop its training program. Ms. Daryle Ann Ho suggested SPO may want to develop tapes/dvd of training courses to be readily available to agencies.

Mr. Fujioka said SPO will incorporate the frequency of training and tracking of courses in the current matrix and course descriptions.

Agenda Item VII

Mr. Fujioka explained that Act 50/SLH 2005 amended sections of Part IX, Assistance to Small Business, of the Hawai Revised Statutes (HRS), to establish a set-aside program to identify small businesses eligible to compete for contracts set-aside for only small business. Part X of the HRS is on Preferences, such as Hawaii Products, Recycled, Printing, software development, in which a percentage preference is applied in the evaluation of offers; all offerors competing, but a preference is given for specific categories.

Mr. Matsumoto felt it was more fitting for the small business rules to be in chapter 3-127. Mr. Bardusch felt it was premature and that the board should wait until after the rules are published. Ms. Patricia Ohara stated that amending the chapter reference from chapter 3-124 to chapter 3-127 would be permissible after the public hearing process, as it would be only a housekeeping item.

Mr. Matsumoto made a motion, seconded by Ms. Torres, to move the small business rules from chapter 3-124 to chapter 3-127 as part of the public comment process for the interim 3-124 rule. Mr. King, Ms. Torres, Ms. Ho and Mr. Matsumoto voted in favor of the motion. Mr. Bardusch opposed and Mr. Saito, abstained. The motion was carried.

Agenda Item VIII

Mr. Saito made a motion, seconded by Mr. Bardusch, to take out of order and address Agenda Item VIII 2. The motion was unanimously carried.

Mr. Saito explained that the Department of Accounting and General Services (DAGS) is treating change orders issued after July 1, 2007, as contracts for purposes of being subject to the prompt payment act (Act 291, SLH 2006). He requested the board to issue a procurement directive reflecting DAGS' position.

Ms. Kathryn Kanemori of the Honolulu Board of Water Supply stated they have received numerous comments from contractors regarding the memo from DAGS on this subject. She stated that for the Board of Water Supply, the application of prompt payment requirements to such change orders would create an administrative and financial burden.

Mr. Terry Thomason stated he has contractors as clients and that from a contractor's perspective, the statute says there cannot be a contract without funds available. He objected to the supplement provided to the board 3 months ago and his supplement addresses this concern. DAGS, DOE, BWS all say different things and this will not be solved by sending out a procurement directive. The problem will be solved in a clause submitted in his supplement.

Mr. Saito made a motion, seconded by Mr. Bardusch, to have the Procurement Policy Board issue a Procurement Directive that change orders issued after July 1, 2007 be subject to the prompt payment act. Mr. Saito and Mr. Bardusch voted for the motion. Mr. King and Mr. Matsumoto opposed and Ms. Torres and Ms. Ho abstained. The motion failed.

Agenda Item IX – 1. & 2.

Mr. Bardusch explained that the attachment he provided to the board shows a pattern of procurement activity by the Department of Business, Economic Development, and Tourism (DBEDT) that has him concerned as to whether DBEDT is utilizing the exemption process properly. He also feels that the Hawaii Public Library System (HPLS) is buying books improperly using the exemption for reference materials, and recommended an audit be conducted of DBEDT and HPLS. Much discussion followed on the relative merits of an audit, and whether a full audit was warranted, or a compliance review to determine whether exemptions were correctly used, and if proper documentation has been filed. The consensus of the Board was for SPO to review DBEDT and HPLS procurements for compliance with the procurement exemption requirements.

Mr. Bardusch made a motion, seconded by Mr. Matsumoto, to direct SPO to conduct a compliance review of the DBEDT and HSPLS 2006 and 2007 procurements. The motion was unanimously carried.

Mr. Bardusch made a motion, seconded by Mr. Matsumoto, to amend the previous motion to reference the materials provided to the board for the SPO compliance review. The motion was unanimously carried.

Mr. Bardusch made a motion, seconded by Ms. Torres, to withdraw Agenda Item IX-3. The motion was unanimously carried.

Agenda Item IX – 4.

Mr. Fujioka stated that as best as can be determined, the draft enclosed is the same Draft Proposal 2 submitted at the 10/18/07 PPB meeting by Jessica Horiuchi and Terry Thomason. He added that at that meeting, because of the differences between Mr. Thomason's version and the SPO version, the board approved a motion for Mr. Thomason and Ms. Ohara to work together on a consolidated draft to present to the board.

Mr. Bardusch said he had reviewed both proposals and that they are the same except for 1 item, and requested the Board consider and approve the enclosed draft.

Mr. Thomason, felt they already had provided their input to the board in their current draft, and they have not been contacted.

Ms. Ohara apologized to the Board for the misunderstanding she had that Mr. Thomason would contact her, and for not following up on this matter with Mr. Thomason. She offered to review Mr. Thomason's version against the SPO version and report back to the board at the next meeting.

There was much discussion regarding the relative merits of the HPI and SPO versions of the rules, of the timing of the approval of the interim rules, and of the need to review the drafts.

Mr. Bardusch made a motion, seconded by Mr. Saito, to adopt as interim rules the proposed HAR Chapter 3-125 presented to the board by Mr. Thomason. Mr. Bardusch and Mr. Saito voted in favor of the motion. Mr. King, Ms. Torres, Ms. Ho and Mr. Matsumoto opposed the motion. The motion failed.

Agenda Item X.

Mr. Fujioka stated that the next board meeting is tentatively scheduled for Thursday, March 20, 2008. He also handed out a listing of bills in the legislature pertaining to procurement.

Mr. Saito made a motion, seconded by Mr. Bardusch that the board go into an executive session pursuant to HRS § 92-5(a)(4) to consult with the Board's attorney on agenda item VIII-1 and issues thereto pertaining to the Board's powers, duties and liabilities. The motion was unanimously carried.

The board went into executive session pursuant to HRS § 92-5(a)(4) to consult with the Board's attorney at 3:37 pm.

Chair King called the meeting back to order at 3:44 pm and explained that the executive session was to consult with counsel on the rules and responsibility of board members. Pursuant to HRS §36-25, administrative supervision of boards, the director of the department to which the agency is attached shall communicate with the governor and legislature on behalf of the attached agency. Board members are free to testify as individuals, but need-director's authorization to speak as a board member.

Mr. Saito made a motion, seconded by Ms. Ho, to adjourn the meeting. The motion was unanimously carried. The meeting was adjourned at 3:45 p.m.

Respectfully submitted,

3/7/08
Date

RUSS K. SAITO, Secretary
Procurement Policy Board

Attachment: February 21, 2008 Agenda

PROCUREMENT POLICY BOARD
1151 Punchbowl Street
Conference Room 410
Honolulu, Hawaii 96813

Regular Meeting
February 21, 2008
1:00 pm

AGENDA

I. Call to Order.

II. Approval of Minutes – Meeting of January 17, 2008.

III. HAR Chapter 3-122, Source Selection and Contract Formation – Public Hearing update and for final approval.

IV. State Procurement Office's proposed rules on Act 142/2007 on Administrative Fines, incorporating the Board's input.

V, State Procurement Office's update on correspondence to the Small Business Utilization Council.

VI. Matrix of State Procurement Office's 5 levels of procurement training; and updated procurement training course description, which includes designated attendees.

VII. Board's motion on January 17, 2008 to place on the next meeting agenda on whether to keep the small business rules in HAR 3-124, Preferences or move to HAR 3-127, Small Business Assistance.

VIII. Request by Member Russ Saito:

1. responsibilities of the Board; and
2. proposed procurement directive conveying Department of Accounting and General Services' interpretation of Act 291/2006 (pending receipt of interpretation from Member Saito).

IX. Request by Member Darryl Bardusch:

1. request of audit of DBEDT's 2006 & 2007 procurements;
2. request for audit of State of Hawaii Public Library System's 2006 & 2007 procurements;
3. proposed mandatory training program. This proposal utilizes existing SPO training classes; and
4. prompt payment rule changes (Chapter 3-125).

X. Announcements.

XI. Adjournment.

Individuals may present testimony on matters on the Procurement Policy Board's agenda when the agenda item is being discussed by the Board. Individuals intending to testify should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting. Written testimonies will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, February 19, 2008. Testimonies received after the February 19, 2008 deadline will be forwarded to the board after the February 21, 2008 meeting. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., February 18, 2008 to discuss accommodation arrangements.