

SB1035



**STATE OF HAWAII
OFFICE OF ELECTIONS**

802 LEHUA AVENUE
PEARL CITY, HAWAII 96782
www.hawaii.gov/elections

KEVIN B. CRONIN
CHIEF ELECTION OFFICER

AARON H. SCHULANER
GENERAL COUNSEL

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS
ON SENATE BILL NO. 1035
RELATING TO ELECTIONS

February 11, 2009

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, thank you for the opportunity to testify in support of Senate Bill No. 1035. The purpose of this bill is to exempt the Office of Elections from the requirements of a cost price analysis found in the procurement code and its associated administrative rules.

This bill, along with the related SBs 1031, 1032, 1033, 1034, and 1036, are about the procurement process for elections in two contexts.

The first context is the process for obtaining a voting system for the 2010 elections which, if not addressed here or in another constructive manner, are at significant risk because the state does not have at this time a voting system for the 2010 elections and insufficient funding to acquire one.

The second context more broadly, and perhaps more significant, is the cost or price analysis that the hearing officer in the pending protest now on appeal to circuit court determined was required to be performed for the voting equipment contract for the 2008 elections. If it becomes final, the decision raises serious policy and practical issues. The hearing officer's decision establishes that all agencies face the risk of being required to perform a similar cost or price analysis for any procurement when the State Procurement Office does not have standards, procedures, or materials for performing such a cost or price analysis that would then be required, adding complexity, significant cost, and unlimited delays to a cumbersome process. This is especially true for agencies that do not have the knowledge and expertise to perform a cost or price analysis.

This bill, along with the other election-related procurement bills on today's agenda, were proposed to address problems found in the procurement code, when the Office of Elections conducted a request for proposals (RFP) for a multi-year voting system contract. Specifically, these problems consist of the unsettled understanding of what is required in terms of a cost price analysis and the indefinite amount of time it takes to resolve procurement litigation when one is dealing with deadlines such as the conducting of an election which cannot be moved.

As part of the background of this bill, I would note that the RFP in question allocated 15 points toward price and 85 points toward technical requirements, which is within the range of the allocation of points for most RFPs. The contract was awarded to the vendor Hart Intercivic (Hart) which received the highest total points awarded by the RFP evaluation panel. The RFP evaluation panel was composed of the four county clerks, the interim chief election officer, and two members of the disabled community. Hart had the highest price but its score benefited from scoring the highest on the technical requirements. Election Systems & Software (ESS), the vendor with the lowest overall score, had the lowest price but also the lowest score on the technical requirements.

The award was protested by ESS. The contention was that the Office of Elections had not conducted a cost price analysis as required by the procurement administrative rules. The OE argued, based on its discussion with the State Procurement Office, that the cost price analysis is met by the evaluation panel reviewing the proposals and assigning points as provided for in the RFP. In other words, the frame work of the cost price analysis for an RFP is laid out by the procuring agency in the distribution of points in the RFP (i.e. 15 points for price, 85 for technical requirements). The analysis occurs when the evaluation panel reviews the proposals and assigns the points pursuant to compliance with the RFP criteria.

The hearings officer disagreed with the state that this constituted a cost price analysis and set a new standard for a cost price analysis, which did not adequately take into account the qualitative differences between proposals. He then required the elections office to conduct the cost price analysis under that standard. The OE conducted the analysis, but the hearings officer found it to be inadequate and he ruled that the cost of the contract was "clearly unreasonable."

The litigation dragged on until a decision was issued on August 7, 2008. Because we were only a little more than a month away from the Primary Election, the hearings officer allowed Hart to provide services until December 31, 2008 but canceled the remaining portion of the contract. Preparations for the 2008 elections were greatly impacted by the litigation because a significant part of the necessary preparation and training of poll workers is related to knowing what voting system will actually be used as soon before an election as possible.

The hearings officer's decision has been appealed by the state, Hart, and ESS to the circuit court in Honolulu. A hearing on the matter will not be held until August 19, 2009, and a decision is not expected until possibly October 2009. In addition, there could always be an appeal to the Intermediate Court of Appeals. This means that we will not obtain closure or guidance in the near future as to what is necessary for a cost price analysis.

Because the OE needs to go out for with a procurement for the 2010 elections, it wishes to avoid what happened in the prior procurement. Specifically, the present proposed legislation would exempt the Office of Elections from the procurement code. As the bill shows, the OE would procure a system in a manner that is consistent with the goals of the public accountability and the public procurement practices, but not subject to chapter 103D. In accomplishing this goal, the elections office would attempt to obtain advice and guidance from the State Procurement Office as it did with the last procurement.

The Office of Elections realizes that exempting a government agency from the procurement code is a matter not to be taken lightly. The procurement code is generally considered to be a fair and efficient manner for procuring goods and services for the state of Hawaii. There have been times, however, when the legislature has reviewed certain types of procurements and found them to not fit within the procurement code. For example, the legislature created the procurement code for Health and Human Services procurements found in chapter 103F. Given the time sensitive nature of such procurements, chapter 103F departs from chapter 103D by providing an expedited protest process by which the protest is resolved by the head of the purchasing agency and an appeal of that decision can be made to the chief procurement officer whose decision is final. In regards to elections, we cannot move the general or primary election as a result of a protest and drawn out litigation, as such a similar process would be appropriate.

As the Office of Elections needs to go out with a procurement for the 2010 elections, it wishes to avoid what happened in the prior procurement. Specifically, the present legislation would exempt the Office of Elections from the requirements of a cost price analysis, due to the current legal uncertainty as to what is required in a cost price analysis.

If the Committee is not inclined to exempt the Office of Elections from the requirement of a cost price analysis, it would ask that you consider the other bills being offered today. In addition, the Office of Elections would request that any cost price analysis of any future election procurement not be allowed to be delegated from the Chief Procurement Officer to the Comptroller and subsequently delegated to the Chief Election Officer. Specifically, HRS § 103D-208 would need to be amended to disallow the Chief Procurement Officer from delegating the responsibility for conducting a cost price analysis in regards to a procurement for a voting system.

We make this final suggestion, in recognition of the fact that what is required in a cost price analysis has still not been determined. Specifically, until this protest litigation, it is our understanding that the requirements of a cost price analysis were considered by the State Procurement Office to have been satisfied by the point allocation process of the RFP. While it is our understanding that the State Procurement Office disagrees with the hearings officer's decision, the reality is that procurements will still need to go forward while this matter is being resolved by the legal system, and the requirement of a cost price analysis will continue.

As such, until it is firmly established as to what is required in a cost price analysis and how a cost price analysis should be done in this state, the implementation and preparation of such analysis should be left with the chief procurement officer. In other words, the delegation of the requirement of a cost price analysis should not be delegated by the chief procurement officer to the comptroller to be subsequently delegated to the chief election officer whose job is to organize and conduct elections.

I would encourage the State Procurement Office to develop extensive training and materials on this topic which could be provided to the Office of Elections, and arguably other agencies and departments. As it stands there appears to be very little training and materials on this topic, which is clearly understandable given that the hearing officer's interpretation is markedly different from the previous understanding of what was required in a cost price analysis in the state of Hawaii.

I believe my position regarding delegation is further supported by the chief procurement officer's own memo regarding the general delegation of procurement authority to department heads and their authority to further delegate the authority to appropriate individuals, which states the following:

Delegation of procurement authority to a procurement officer is based on their expertise, knowledge and proficiency to carry out procurement duties, while seeking economy and efficiency to achieve program operations. Careful consideration shall be taken when granting procurement authority, as you (department head) remain ultimately responsible to the CPO for this procurement delegation to authorized procurement officers.

See "Procurement Delegation No. 2008-01," (October 23, 2008).

Thank you for the opportunity to testify on Senate Bill No. 1035.

Respectfully Submitted

Kevin B. Cronin