

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

January 27, 2004

MEMO TO: Ken Fukuoka, Director
Council Services

FROM: Traci Fujita Villarosa ^{TFV}
First Deputy Corporation Counsel

SUBJECT: Contract Administration for Professional Services
Contracts (PAF 03-098)

The purpose of this memorandum is to respond to your request to provide you with legal advice regarding professional services contract administration.

1. Among the positions identified, who may serve as the contract administrator for the Council?

"[Contract administration] begins with the signing or execution of a contract or purchase order. Its purpose is to assure that the contractor's total performance is in accordance with the terms and conditions of the contractual agreement. The integrity of the public purchasing system demands that goods, services or construction be furnished as specified in the contract. Contract administration includes all actions taken by the purchasing agency, relative to a specified contract after the award is made. The contract administration responsibility should be assigned in writing to specific individuals or positions." State Procurement Office, State of Hawaii, Public Procurement Manual, *No Ke Ku'ai ana...* to purchase (1998).

In your memorandum, you identified the following as possible contract administrators for Council: the Council, the Council's committees, the Council Chair, the Council members, the Director of Council Services, employees of the Office of Council Services who have served on review or selection committees for procurement, and employees of the Office of Council Services who have not served on review or selection committees for procurement.

The chief procurement officer is responsible for the oversight of county contract administration.¹ The chief procurement officer for the legislative branch is the Chair of the Council.² As chief procurement officer, the Chair of the Council may delegate the duties of contract administration to a designee or to any department, agency or official within the chair's jurisdiction.³

The State procurement policy board administrative rules ("Procurement Rules") provide guidance on the delegation of authority by the chief procurement officer.⁴ The Procurement Rules set forth, among other things, the factors to be considered by the chief procurement officer when making the decision to delegate⁵,

¹ "Authority and duties of the chief procurement officer. (a) For their respective jurisdictions and unless otherwise specifically provided in this chapter, each chief procurement officer shall serve as the central procurement officer and:

(1) Procure or supervise the procurement of all goods, services, and construction;

(2) Exercise general supervision and control over all inventories of goods;

(3) Sell, trade, or otherwise dispose of surplus goods; and

(4) Establish and maintain programs for the inspection, testing, and acceptance of goods, services, and construction.

(b) Consistent with the provisions of this chapter and rules adopted by the policy board to implement its provisions, the chief procurement officers may adopt operational procedures to assist in the performance of these duties and responsibilities." §103D-205, HRS.

² § 103D-203 (b) (2), HRS.

³ "Delegation of authority by the chief procurement officer. Subject to the rules of the policy board, each chief procurement officer may delegate any authority or duty conferred upon the chief procurement officer by this chapter to designees or to any department, agency or official within their respective jurisdictions." §103D-208, HRS.

⁴ §3-121-16, Hawaii Administrative Rules ("HAR").

⁵ "Factors to consider in making the decision to delegate include:

(1) The expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;

(2) The past experience of the potential delegate in exercising similar authority;

the information the delegation must be based upon⁶, the limitations

(3) The degree of economy and efficiency to be achieved in meeting the State's requirements if authority is delegated;

(4) The available resources of the office of the chief procurement officer to exercise the authority if it is not delegated; and

(5) The consistency of delegation under similar circumstances." §3-121-16(a).

⁶ "The delegation shall be made based on information provided by the head of a purchasing agency, which shall include, but not be limited to:

(1) The title of the head of the purchasing agency or a designee who will have overall authority for procurement within the agency;

(2) The categories of procurement, i.e., goods, services, or construction;

(3) The dollar level of goods, services and construction procurement;

(4) The methods of source selection:

(A) Competitive sealed bidding: Authority to award or enter into contracts pursuant to section 103D-302, HRS;

(B) Competitive sealed proposals: Authority to approve, award, or enter into contracts pursuant to section 103D-303, HRS;

(C) Professional services procurement: Except that as otherwise provided, the authority to negotiate, award, or enter into contracts pursuant to section 103D-304, HRS, rests with the head of a purchasing agency, and does not require a delegation by the chief procurement officer;

(D) Small purchases: Authority to award purchase orders pursuant to section 103D-305, HRS;

(E) Sole source procurement: Authority to negotiate, award, or enter into contracts pursuant to section 103D-306, HRS. Approvals pursuant to section 103D-306, HRS, shall remain with the chief procurement officer;

(F) Emergency procurements: Authority to negotiate, award, or enter into contracts pursuant to section 103D-307, HRS. Approvals pursuant to section 103D-307, HRS, shall remain with the chief procurement officer; and

(5) Position titles of those individuals who will be designated procurement officers by the head of the purchasing agency or designee.

Information required by paragraphs (2), (3), and (4) shall also be required for each procurement officer delegated such authority. A sample delegation format shall be provided by the chief procurement officer." §3-121-16(b), HAR.

of such delegation⁷, and the proper form of such delegation⁸.

Each of the possible contract administrators you have identified are arguably within the jurisdiction of the Chair in the sense that all are officers or entities within the legislative branch. Therefore, the Chair may, subject to the procedures and requirements of the Procurement Rules referenced above, delegate the duties of contract administration to any of the possible administrators you have identified.⁹

We note, however, that the exact manner and extent to which such delegation of contract administration duties occurs is a procedural and policy matter for the Chair and Council to determine. The Rules of the Council currently authorize the Chair "[t]o assign duties, not otherwise assigned by law or in these rules, to the County Clerk and the Director of Council Services."¹⁰ The Rules of the Council do not specifically address the role of the Chair as chief procurement officer nor the assignment of contract administration duties. Therefore, the procedural and policy aspects of such delegation (in particular as it may pertain to delegation of duties to the Council or to a Council committee)

⁷ "Delegation of authority by the head of a purchasing agency to a procurement officer is limited by and subject to chapter 103D, HRS, and its implementing rules. Heads of purchasing agencies should familiarize themselves with those limitations." §3-121-16(c), HAR. See also §3-121-17, HAR (Limits to delegation of authority).

⁸ "(d) The delegation from the chief procurement officer shall be in writing and shall specify:

- (1) The activity or function authorized;
- (2) Any limits or restrictions on the exercise of the delegated authority;
- (3) Whether the authority may be further delegated; and
- (4) The duration of the delegation.

(e) The chief procurement officer shall retain in its files each delegation determination." §3-121-16(d), (e), HAR.

⁹ The provisions of Chapter 103D, HRS, on delegation of authority by the chief procurement officer, do not differentiate between those who have participated in review or selection committees and those who have not. See also §3-5(1), Revised Charter of the County of Maui (1983), as amended (designating chair as presiding officer of the Council).

¹⁰ §4, Rules of the Council (pertaining to "Officers and Their Duties").

are somewhat unclear. The Chair and Council may wish to consider the procedural and policy issues related to contract administration to clarify these matters.

2. Is it necessary to designate the contract administrator and, if so, who is authorized to make this designation?

Although we could find no explicit requirement that the chief procurement officer delegate contract administration duties, the Hawaii Public Procurement Code and Procurement Rules appear to assume that such duties will be delegated. The Procurement Rules define the term "contract administrator" as "the person **designated** to manage the various facets of contracts to ensure the contractor's total performance is in accordance with the contractual commitments and obligations to the purchasing agency are fulfilled."¹¹ Moreover, the State Procurement Office Public Procurement Manual states: "The contract administration responsibility should be **assigned** in writing to specific individuals or positions."¹²

This presumption of delegation may be based on the chief procurement officer's duty to oversee the procurement process. To ensure independence of judgment and objective oversight, and to avoid situations in which the chief procurement officer oversees his or her own contract administration decisions, it would be prudent for the chief procurement officer to delegate contract administration duties rather than be involved in the day-to-day activities of contract administration.

As previously stated, only the Chair as chief procurement officer is authorized to delegate contract administration duties to a designee, subject to the requirements of the Procurement Rules.

3. May the contract administrator delegate the contract administration authority?

The contract administrator may delegate (or, more precisely sub-delegate) contract administration duties to another only if the Chair as chief procurement officer has, in writing, delegated contract administration so as to permit such further

¹¹ §3-122-1, HAR.

¹² State Procurement Office, State of Hawaii, Public Procurement Manual, No Ke Ku 'Ai Ana... to purchase (1998), at 25.

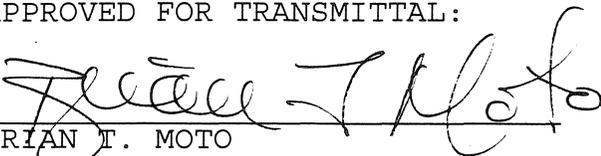
Mr. Ken Fukuoka
January 27, 2004
Page 6

delegation.¹³ For example, if the Chair specified that the delegation of duties is to an officer or the officer's authorized representative, then the officer is authorized to delegate contract administration to an authorized representative. If the Chair delegated contract administration duties solely to an officer, the officer would not have the authority to delegate the contract administration to someone else.

4. Among the positions identified, who may receive and exercise delegated authority to serve as contract administrator on behalf of Council?

Please see response to question number 1.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

TFV:tll

S:\ALL\BTM\contract amd.wpd

xc: Council Chair Dain Kane
Keith Regan, Director of Finance
Greg King, Purchasing Agent

¹³§3-121-16(d), HAR. See n. 8, above.