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February 11, 2004

MEMO TO: Ken Fukuoka, Director
Office of Council Services

FROM: Traci Fujita Villarosa 
First Deputy Corporation Counsel

SUBJECT: Professional Services Procurement (PAF 03-098)

The purpose of this memorandum is to provide you with legal advice regarding the Maui County Council's procurement of legal services pursuant to Section 103D-304, Hawaii Revised Statutes ("HRS"), as amended by Act 52 (SLH 2003) (S.B. 1262, C.D.1) ("Act 52"). It is our understanding that Council is procuring legal services to advise and represent Council on water policy matters.

This memorandum is the third in a recent series of responses to three separate requests for legal advice on procurement and contract administration.

1. May the Council Chair, who serves as the chief procurement officer, to [sic] also serve as the head of the purchasing agency? Please explain.

The term, "head of the purchasing agency", is used in a number of different contexts within section 103D-304, HRS, pertaining to procurement of professional services. In particular, the "head of the purchasing agency" is the officer charged with: publishing an annual notice inviting persons providing professional services to submit statements of qualifications and expressions of interest;¹ designating a review committee to review and evaluate all submissions;² designating a screening committee whenever, during the course of a fiscal year, the agency needs a particular professional service;³ and evaluating the summary of qualifications for each of the persons provided by the screening committee,

¹§103D-304 (b), HRS.

²§103D-304 (c), HRS.

³§103D-304 (d), HRS.

ranking the persons, and negotiating a contract with the person ranked first.⁴

Chapter 103D ("Hawaii Public Procurement Code") does not define the word "head", but does define "purchasing agency" as "any governmental body which is authorized by this chapter or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods, services, or construction."⁵

Neither the Hawaii Public Procurement Code, nor the Hawaii Administrative Rules pertaining to procurement ("Procurement Rules"), specifically address the issue of whether the chief procurement officer may also serve as the head of the purchasing agency. However, informal discussions with Mr. Aaron Fujioka, Administrator of the State Procurement Office, lead us to believe that it would not be appropriate for the Council Chair to serve as the head of the purchasing agency because the Council Chair, as chief procurement officer, is responsible for general oversight of procurement for the legislative branch.⁶ If the Council Chair also acted as the head of the purchasing agency, it would be difficult for the Chair to exercise independent and objective oversight of the procurement process inasmuch as the Chair would be personally and directly involved in that process. Accordingly, the Council Chair may want to consider delegating the duties of the head of the purchasing agency to someone else.⁷

⁴§103D-304(e), HRS.

⁵§103D-104, HRS.

⁶"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, service, and construction." §103D-205(a), HRS.

⁷In earlier informal conversations with Mr. Fujioka on issues relating to the "head of the purchasing agency", Mr. Fujioka cited, for illustrative purposes, the example of the State Senate, where the Senate President (who is the chief procurement officer for the Senate) assigns to the Senate Clerk

The foregoing advice is consistent with advice we rendered on the subject of whether it is necessary for the chief procurement officer to designate contract administrators. In particular, by memorandum addressed to you and dated January 27, 2004, we advised that the Hawaii Public Procurement Code and the Procurement Rules appear to assume that the chief procurement officer would not administer contracts directly but that he or she would assign such responsibilities to others so as to preserve the chief procurement officer's independence of judgment and objective oversight in procurement matters.⁸

2. May the authority to act as head of the purchasing agency be delegated? If so, what restrictions apply to selection of the delegee? Who within the current structure of the Council and its divisions could appropriately be designated the head of the purchasing agency?

The Council Chair, as chief procurement officer, may delegate the authority and duties of head of purchasing agency to a designee or to an official within the Council Chair's "jurisdiction" (i.e., the legislative branch of County government).⁹ Our memorandum addressed to you and dated January 27, 2004, regarding contract administration for professional services contracts, provides further information on the subject of delegation of authority and duties by the chief procurement officer. We refer you to that memorandum for further details and advice on the subject.

3. Under Subsection 3-6(6) of the Charter of the County of Maui (2003), the council shall have the power "[t]o retain or employ, by a vote of two-thirds of its entire membership, special counsel for any special matter presenting a real necessity for such employment." Should the proposed special counsel be named in the proposed resolution authorizing the employment of special counsel? Or is it sufficient for the Council to adopt a resolution that simply authorizes the employment of special counsel to be selected in accordance with the State procurement law (i.e., allowing the Council to approve only the hiring of special counsel, not the individual selection)?

the duties associated with the head of the purchasing agency.

⁸Memorandum to Ken Fukuoka, Director, from Traci Fujita Villarosa, First Deputy Corporation Counsel (Jan. 27, 2004), at 4.

⁹§103D-208, HRS.

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The interpretation of the Charter is similar to the interpretation of a statute. Maui County Council v. Thompson, 84 Hawaii 105, 929 P.2d 1355, Hawai'i (1996). The fundamental starting point for statutory interpretation is the language of the statute itself. Peterson v. Hawaii Elec. Light Co., 85 Hawaii 322, 944 P.2d 1265 (Sept. 5, 1997). Where the statutory language is plain and unambiguous, the plain and obvious meaning should be given effect. Id.

Section 3-6(6) of the Charter states that Council shall have the power to "retain or employ, by a vote of two-thirds of its entire membership, special counsel for any special matter presenting a real necessity for such employment. Any such employment shall specify the compensation, if any, to be paid for said services."¹⁰

The language of Section 3-6(6) requires that the compensation be specified in any special counsel employment, but does not require that such special counsel be named in the resolution authorizing the employment. In Maui County Council v. Thompson, the Hawaii Supreme Court, when interpreting Section 3-6(6) and Council's prerogative in the hiring of outside attorneys, emphasized Council's authority to approve the expenditure of public funds.¹¹ This emphasis suggests that a key aspect of any Council resolution approving the employment of special counsel is the amount of compensation to be paid, and not necessarily the identity or name of the special counsel being employed.¹²

Therefore, although special counsel may be named in a resolution authorizing employment of special counsel, the omission of the counsel's name would not, by itself, render the resolution defective.

4. If the name of the proposed special counsel is submitted to the Council in the proposed resolution, is it permissible for the Council to reject the selection name by the head of the purchasing agency? Would such a vote still comport with the State Procurement Code?

¹⁰Section 3-6(6), Revised Charter of the County of Maui (1983), as amended ("Charter") (emphasis added).

¹¹Maui County Council v. Thompson, 84 Haw. at 107-109.

¹²Subsections 3-6(1) and (2), Charter.

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The Hawaii Public Procurement Code and the Procurement Rules do not specifically address the procurement of professional services that are subject to legislative approvals, and we are not aware of any guidelines or opinions which address this subject.

Pursuant to its powers and duties under Section 3-6(6) of the Charter, it is clear that the Council may disapprove a proposed resolution authorizing the employment of special counsel on the grounds that there is no "real necessity for such employment", or that the compensation to be paid for such services should not in fact be paid or authorized. These grounds, based as they are on provisions in the Charter, exist independently of any considerations that may be imposed by the Hawaii Public Procurement Code, and do not appear to be in direct conflict with, or incompatible with the purposes and application of, the Hawaii Public Procurement Code.¹³

Of greater interest and concern is whether the Council may, in the course of acting upon a resolution approving the employment of special counsel, use such an occasion and process to substitute, in effect, its judgment as to the appropriate counsel to be selected in place of the evaluations and selections made by the review committee and selection committee pursuant to Section 103D-304, HRS.

We note that Act 52 amended the provisions of the Hawaii Public Procurement Code relating to the procurement of professional services.¹⁴ Act 52 states, in part:

¹³§103D-304(h), HRS, provides that, if the head of the purchasing agency is unable to negotiate a contract with the first-ranked person, the agency head must provide documentation to support selection of someone other than the first-ranked person and go to the next person on the list.

¹⁴Professional services procurement procedures may be summarized as follows:

Notice. At least once, before beginning of each fiscal year, the head of the purchasing agency publishes notice inviting persons engaged in providing professional services which the agency anticipates needing in the next fiscal year to submit current statements of qualifications and expressions of interest to the agency. §103D-304(b), HRS.

Review Committee. Head of purchasing agency designates a review committee consisting of a minimum of 3 persons with sufficient education, training, and licenses or credentials for each type of professional service which may be required. Deputy directors or equivalent positions shall not serve on committee. Non-county employees must have sufficient knowledge, serve without

The purpose of this Act is to establish procurement policies and procedures that:

- (1) Promote public confidence in the integrity of the procurement process;
- (2) Increase openness in the award of competitive sealed proposals and professional services contracts....

Standing Committee Report No. 876, relating to Senate Bill No. 1262, emphasizes those aspects of Senate Bill No. 1262 providing

compensation unless justified, and sign an affidavit attesting to no conflict, agreeing to confidentiality, and agreeing that name will become public. Head shall ensure impartiality and independence of committee members. Committee evaluates submissions and prepares list of qualified persons. §103D-304(c), HRS.

Selection Committee. When agency needs professional services, head designates a selection committee comprised of a minimum of 3 persons with sufficient education, training, and licenses or credentials in the area of the services needed. Deputy directors or equivalent positions shall not serve on committee. Non-county employees must have sufficient knowledge, serve without compensation unless justified, and sign an affidavit attesting to no conflict, agreeing to confidentiality, and agreeing that name will become public. Head of purchasing agency shall ensure impartiality and independence of committee members and names of members shall be placed in contract file. The selection criteria, in descending order of importance, are as follows:

1. Experience and professional qualifications.
2. Past performance on projects of similar scope.
3. Capacity to accomplish the work in the required time.
4. Any additional criteria determined in writing by the selection committee.

Committee ranks a minimum of 3 persons based on the selection criteria and send the ranking to the head with summary of the of qualifications. If more than one person holds the same qualifications, committee shall rank the persons in such a manner that ensures equal distribution of contracts among the persons holding the same qualifications. §§103D-304(d)-(g), HRS.

Contract Negotiation. Head of purchasing agency negotiates contract with first ranked person. If unable to agree, head of purchasing agency must provide documentation supporting selection of other than first person, and negotiate with second ranked person and so on. If head of purchasing agency cannot agree with anyone on list, selection committee may be asked to submit a minimum of 3 additional names for consideration. §103D-304(h), HRS.

for an independent selection committee and an objective ranking of professional service providers based on qualifications:

This measure also amends section 103D-304, HRS, relating to procurement of professional services. Specifically, this measure amends the composition of the review committee required under section 103D-304, HRS, and specifies that the review committee members' names shall be public information placed in the contract file.

This measure also amends section 103D-304, HRS, to require that an independent selection committee rank professional service providers according to specified criteria, and that the head of the purchasing agency negotiate with providers according to their ranking. Your Committee agrees with all of these amendments to ensure that professional contracts are awarded based on professional qualifications only.¹⁵

Under Section 103D-304, HRS, as amended, the review and evaluation of potential service providers is to be performed by individuals chosen to ensure their "impartiality and independence".¹⁶

As discussed above, our office has had informal telephone conferences with Mr. Aaron Fujioka, Administrator of the State Procurement Office. Based on such conferences, it is our understanding that Act 52 was initiated in response to a public perception that the procurement process was vulnerable to abuse by government officials who might be tempted to reward political supporters and friends. Act 52 was advanced as a measure to de-politicize the procurement process by amending the Hawaii Public Procurement Code and establishing an objective and specific process for selection of professional service providers.

Mr. Fujioka further informed us that, although not explicitly stated in Act 52, the amendments imply that elected and high-level appointed government officials should not participate in procurement selection. This interpretation is reflected in part in recently adopted interim rules for the State Procurement Office, which specifically prohibit deputy directors from serving on review or selection committees.¹⁷

¹⁵ Stand. Comm. Rep. No. 876, at 4.

¹⁶ §§103D-304(c), (d), HRS.

¹⁷"Deputy directors or equivalent positions shall not serve on review or selection committees." §3-122-69(b), HAR (interim 11/15/03).

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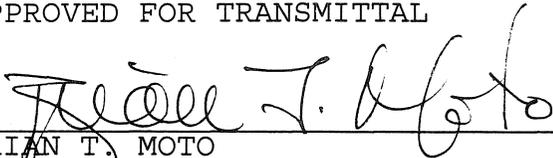
5. What are the ramifications of the Council overriding the selection by the head of the purchase [sic] agency? Would the procurement process need to start over, or can the head of the purchasing agency proceed to negotiate with the next-ranked candidate, and, if negotiations are successful, submit that name for approval to the Council?

See answer provided for question 4.

6. May the head of the purchasing agency solicit or accept input from the Council members regarding who should sit on the review and selection committees, and on the qualification and selection criteria?

Again, the Hawaii Public Procurement Code is silent on this issue. As discussed above, however, the recent amendments made to the Hawaii Public Procurement Code are intended to de-politicize the procurement of professional services and to strengthen the role played by review and selection committees consisting of individuals chosen for their "impartiality and independence". Further, Section 103D-304(e), HRS, sets forth, in descending order of importance, certain selection criteria to be employed by the selection committee in evaluating submissions.

APPROVED FOR TRANSMITTAL



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cc: Keith Regan, Director of Finance
Greg King, Purchasing Agent