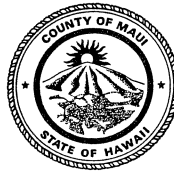


ALAN M. ARAKAWA  
Mayor




BRIAN T. MOTO  
Corporation Counsel

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

March 4, 2004

MEMO TO: Ken R. Fukuoka  
Director 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 review and selection committee member qualifications for purposes of professional services procurement. By memorandum dated February 2, 2004 you asked this department to issue a written legal opinion responding to two questions: (1) What qualifications are necessary to meet the statutory requirements for the review and selection committees; and (2) How strictly are these membership criteria to be interpreted.

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

1. What qualifications are necessary to meet the statutory requirements for the review and selection committees?

Chapter 103D, Hawaii Revised Statutes ("HRS") ("Procurement Code") states that review committee members must have sufficient education, training, and licenses or credentials for each type of professional service that may be required and that members be impartial and independent.<sup>1</sup>

The Procurement Code also states that selection committee members must have sufficient education, training, and licenses or credentials in the area of the services required and that members be impartial and independent.<sup>2</sup>

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<sup>1</sup> §103D-304 (c), HRS.

<sup>2</sup> §103D-304 (d), HRS.

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The interim administrative rules for the State Procurement Office ("Procurement Rules") state that persons who serve on review and selection committees who are not government employees must: (1) have sufficient knowledge to serve on the committee; (2) serve without compensation, unless justified and determined in writing by the purchasing agency head; and (3) sign an affidavit attesting to having no conflicts of interest, agreeing to the confidentiality of the selection process, and agreeing that their names will become public information upon award of the contract.<sup>3</sup> The Procurement Rules also prohibit deputy directors or equivalent positions from serving on review or selection committees.<sup>4</sup>

2. How strictly are these membership criteria to be interpreted?

"The fundamental starting point for statutory interpretation is the language of the statute itself." Mathewson v. Aloha Airlines, Inc., 82 Hawai'i 57, 71, 919 P.2d 969, 983 (1996) (citation and internal quotation signals omitted); State v. Kwak, 80 Hawai'i 291, 295, 909 P.2d 1106, 1110 [Kwak I] (citation and internal quotation signals omitted), *vacated in part on other grounds on reconsideration*, 80 Hawai'i 297, 909 P.2d 1112 (1995) [Kwak II]. "Where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." Kwak I, 80 Hawai'i at 295, 909 P.2d at 1110 (citation and internal quotation signals omitted).

While the Procurement Code and Procurement Rules require that members be impartial and independent and preclude deputy directors or equivalent positions from serving as members, neither the Procurement Code nor the Procurement Rules state how strictly the review and selection committee membership criteria are to be interpreted and applied.

It is unclear what the Procurement Code and Procurement rules mean by the requirement that review committee members must have "sufficient education, training, and licenses or credentials for each type of professional service that may be required"<sup>5</sup>, that selection committee members must have "sufficient education, training, and licenses or credentials in the area of the services

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<sup>3</sup> §3-122-69(a), Hawaii Administrative Rules ("HAR") (interim).

<sup>4</sup> §3-122-69(b), HAR (interim).

<sup>5</sup> §103D-304(c), HRS.

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required"<sup>6</sup>, and that persons who are not governmental employees must have "sufficient knowledge to serve on the review or selection committee."<sup>7</sup>

The determination as to whether a member's education, training, licenses or credentials are sufficient to meet the requirements of the Procurement Code and Procurement Rules is a question of fact and will depend upon the circumstances of a particular situation.

In your memorandum you indicate that the Council is in the midst of procuring, through §103D-304, HRS, the services of an attorney, auditor and an architect. You further state that if the Procurement Code was read literally, Council may need to rely on outside resources if three auditors and three architects were needed for each procurement.

First, it is important to note that the head of the purchasing agency may choose to recruit persons who are not government employees to serve on the selection and review committees.<sup>8</sup> The Procurement Rules, by implication, permit such persons to serve as members.<sup>9</sup>

Second, neither the Procurement Code nor the Procurement Rules require review and selection committee members to be licensed in the profession of the services being procured. In this case, unless the head of purchasing agency determines, due to the specific needs of the procurement, that the requirement that committee members possess sufficient education, training, and licenses or credentials means that committee members must be licensed auditors and architects, such licensed professionals would not be required as a matter of law to be on the procurement committees.

Thus, the head of the purchasing agency, must determine what qualifications are sufficient for the procurement. For example, in procuring the services of an auditor, it would be possible for the head of the purchasing agency to determine that, because the auditor services being procured are similar to auditor

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<sup>6</sup>§103D-304(d), HRS.

<sup>7</sup>§3-122-69(a), HAR (interim).

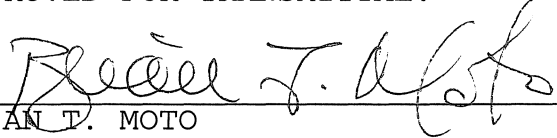
<sup>8</sup>See Memorandum to Ken Fukuoka, Director, from Traci Fujita Villarosa, First Deputy Corporation Counsel (February 11, 2004) for further discussion on head of the purchasing agency.

<sup>9</sup>§3-122-69(a), HAR (interim).

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services utilized in previous years by Council, legislative staff now has sufficient qualifications to serve as members of the review and selection committees for the procurement. On the other hand, in procuring the services of an architect, it would be possible for the head of the purchasing agency to determine that Office of Council Services staff does not have sufficient qualifications to serve as members of the review and selection committees because Council rarely procures architect services and its staff does not have the education or training necessary for the architect procurement. In such a case, the head of the purchasing agency may wish to identify other persons who are able to serve on the committees.

APPROVED FOR TRANSMITTAL:

  
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BRIAN T. MOTO  
Corporation Counsel  
S:\ALL\Advisory\TFV\review selection comm.wpd

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