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March 9, 2016

The Honorable David Y. Ige
Governor of Hawai'i
State Capitol, Fifth Floor
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Governor Ige:

Re: Applicability of the Hawaii Public
Procurement Code to Gifts Accepted by the State

In the process of reviewing the draft of your policy regarding the conditions under which the State may accept and manage gifts from non-governmental parties, a question arose as to whether the provisions of the Hawaii Public Procurement Code, chapter 103D of the Hawaii Revised Statutes (HRS), apply to the State's acceptance of gifts from private donors.¹ In order to continue the policy review, we address this issue.

QUESTION PRESENTED

Does the Hawaii Public Procurement Code apply to the State's acceptance of gifts from private donors?

¹ We previously opined in a formal Attorney General opinion that a state agency has "inherent authority to accept such gifts to assist in carrying out its duties and is also authorized to use those gifts in accordance with their terms." Haw. Att'y Gen. Op. No. 92-04 (June 26, 1992).

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SHORT ANSWER

The Hawaii Public Procurement Code does not apply to the acceptance of gifts by the State. The Code expressly states that it applies to procurement contracts for goods, services, or construction.

DISCUSSION

At issue is the interpretation of the "Application" provision of the Hawaii Public Procurement Code, section 103D-102(a), HRS, which reads as follows (emphases added):

This chapter shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement.

Section 103D-104, HRS, defines "procurement" as follows (emphasis added):

"Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

"Procurement" is defined to mean "buying, purchasing, renting, leasing, or otherwise acquiring." The words "otherwise acquiring" could have been intended to include acquiring by gift. Furthermore, although section 103D-102(a) provides that the chapter applies to "all procurement

contracts," the section goes on to set forth a proviso for compliance with terms and conditions of "any other grant, gift, bequest, or cooperative agreement," possibly meaning that these types of agreements were included within the reference to "all procurement contracts." On the other hand, the reference to "any other grant, gift, bequest, or cooperative agreement" may have been intended to distinguish these types of agreements from the "procurement contracts" that the Hawaii Public Procurement Code applied to.

The Legislature enacted the Hawaii Public Procurement Code by Act 8, Special Session Laws of Hawaii 1993, to create, as stated in section 1 of Act 8, "a single source of public procurement policy" that included the policy to "ensure fiscal integrity, responsibility, and efficiency" in expenditure of public funds in the acquisition of goods, services, or construction for the State. Section -102 of the new chapter added to the Hawaii Revised Statutes, by section 2 of Act 8, originally provided in subsection (b) that the new Hawaii Public Procurement Code "shall apply to every expenditure of public funds irrespective of their source by a governmental body . . . under any contract."

Section -301 of the new chapter originally provided for the methods of source selection as follows:

- § -301 **Methods of source selection.** Unless otherwise authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to section -302, except as provided in:
- (1) Section -303 (Competitive sealed proposals);
 - (2) Section -304 (Professional services procurement);
 - (3) Section -305 (Small purchases);
 - (4) Section -306 (Sole source procurement); and
 - (5) Section -307 (Emergency procurements)

Section -302(b) of the new chapter provided, "An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions

applicable to the procurement." Section -104 of the new chapter defined "purchase description" to mean "the words used in a solicitation to describe the goods, services, or construction purchased, and includes specifications attached to, or made a part of, the solicitation." These provisions remain unchanged in the current sections 103D-102 and 103D-302(b).

Section -309 of the new chapter in Act 8 provided, and the current section 103D-309 continues to provide, with revisions to the list of chief financial officers, that a procurement contract is not binding unless funds are available: "Contracts awarded pursuant to section 103D-302, 103D-303, or 103D-306, shall neither be binding nor have any force and effect of law unless the comptroller, the director of finance of a county, or the respective chief financial officers of the department of education, the judiciary, or the legislative branches of the State or county, as the case may be, endorses thereon a certificate that there is an appropriation or balance of an appropriation over and above all outstanding contracts, sufficient to cover the amount required by the contract."

The Hawaii Public Procurement Code's provisions requiring competitive sealed bidding and other methods of the selection of the source of goods, services, or construction to be purchased and the provisions requiring the certification of the availability of funds to pay for the purchased goods, services, or construction literally apply to the expenditure of public funds under procurement contracts, not to the acceptance of gifts by the State.

The Supreme Court of Hawai'i has repeatedly recognized that "[w]hen construing a statute, our foremost obligation 'is to ascertain and give effect to the intention of the legislature' which 'is to be obtained primarily from the language contained in the statute itself.'" In re Hawaiian Telephone Co., 61 Haw. 572, 577, 608 P.2d 383, 387 (1980); accord Gorospe v. Matsui, 72 Haw. 377, 379, 819 P.2d 80, 81 (1991); Franks v. City & Cty. of Honolulu, 74 Haw. 328, 334-35, 843 P.2d 668, 671 (1993).

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The legislative history of chapter 103D, HRS, supports the conclusion that gifts are not subject to the Hawaii Public Procurement Code. See State v. Entrekin, 98 Haw. 221, 227, 47 P.3d 336, 342 (2002) ("Legislative history may be consulted to confirm an interpretation of a statute."). The Legislature intended that the Hawaii Public Procurement Code "lay the foundation and set the standards for the way the government purchases will be made, but allows for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of this State." Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39 (emphasis added). The Legislature also emphasized the government purchasing role of the State Procurement Office and its officials. "[T]he new procurement code proposed in the bill provides the legal foundation for a sound purchasing program We have also created an administrator of the Procurement Office who will be responsible for central purchasing for most of the Executive Branch agencies, as well as educating and overseeing all other purchasing officials." Stand. Comm. Rep. No. S3-93, in 1993, House Journal, at 42 (emphases added). The Code is meant to ensure the proper expenditure of public funds. See Carl Corp v. State, Dep't of Educ., 93 Haw. 155, 172, 997 P.2d 567, 584 (2000) (purpose of the Code is to "ensur[e] accountability, fiscal responsibility, and efficiency in the procurement process[.]"). Gifts, however, are not purchased and do not require the expenditure of public funds. Thus, the acceptance of gifts by the State does not run counter to the Legislature's purpose of ensuring fiscal responsibility and accountability in the expenditure of public funds.

CONCLUSION

For the reasons stated above, we believe the Hawaii Public Procurement Code applies to only contracts for the purchase of goods, services, or construction. Thus, the State's acceptance of gifts is not subject to chapter 103D, HRS. This opinion is not intended to address any other legal requirements for the receipt of gifts.

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Should you have any questions regarding our conclusion,
please do not hesitate to contact us.

Very truly yours,



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Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General