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**STATE PROCUREMENT OFFICE
NOTICE OF AND REQUEST FOR EXEMPTION
FROM CHAPTER 103D, HRS**

1. TO: Chief Procurement Officer
2. FROM: Department of the Attorney General

Department/Division/Agency

Pursuant to §103D-102(b)(4), HRS, and Chapter 3-120, HAR, the Department requests a procurement exemption to purchase the following:

3. Description of goods, services or construction:

Court reporting services.

4. Name of Vendor: Varies

Address:

5. Price:

\$Varies

6. Term of Contract: From: Date of Approval To: Feb 28, 2007

7. Prior Exemption Ref. No.

PE-05-66-C

8. Explanation describing how procurement by competitive means is either not practicable nor advantageous to the State:

It is impracticable for the Department of the Attorney General to go through the procurement process for court reporting services, for the following reasons:

(1) Section 606-13.6, Hawaii Revised Statutes, appears to bar "contracting" with court reporters. This statutory section reads in relevant part as follows:

(CONTINUED ON ATTACHED SHEET)

9. Details of the process or procedures to be followed in selecting the vendor to ensure maximum fair and open competition as practicable:

We can obtain price lists from court reporters and utilize the least expensive vendor when it is practicable to do so, depending upon the particular services needed and the applicable time constraints.

10. A description of the agency's internal controls and approval requirements for the exempted procurement:

The division supervisor, working with the clerical supervisors, reviews and approved invoices for payment.

NO. 8, CONTINUED

§ 606-13.6 Private court reporters; contracts. (a) Any contract for private court reporting services, not related to a particular case or reporting incident, shall be prohibited between a private court reporter or any other person with whom a private court reporter has a principal and agency relationship, and any attorney, party to an action, party having a financial interest in an action, or any entity providing the services of a certified shorthand reporter. Negotiating or bidding reasonable fees, equal to all parties, on a case-by-case basis may not be prohibited.

To the extent that the procurement requirements are derived from contracting statutes, this provision is arguably applicable. This would preclude any contract to “line up” court reporters in anticipation of litigation, and the Attorney General could not retain any court reporters on an on-call basis.

(2) In the litigation context, flexibility is required to meet the court reporting needs of each particular case. There are few certainties at the beginning of a case. The case may be dismissed quickly, it may settle, or it may launch into long, protracted litigation. In any of these scenarios, depositions may or may not be necessary. When the **are** necessary, there may be just a few depositions required, or many (in complex cases, for instance, there may be numerous parties, expert witnesses, medical witnesses, lay witnesses, etc., all of whom must be deposed).

Other typically unknown factors are how long each deposition will take, and their location. In order to effectively defend the State, we must be able to retain court reporters depending on the particular need, and the particular services the various court reporters can provide. If depositions are to take place on the outer islands, there is a certain pool of reporters who can help us. Similarly, if records are subpoenaed on the mainland, or depositions are taken on the mainland, there is a certain pool of reporters who can provide the needed service. Another important consideration is that depositions often have to be arranged very quickly, due to court/rule-imposed deadlines or due to the parties’ and or witnesses’ availability (particularly expert witnesses). Trying to coordinate such depositions when there are multiple parties and lawyers involved can be a logistical nightmare. Having to go through the procurement process in such situations may result in missed opportunities to take critical depositions.

In addition, it is very difficult if not impossible to predict ahead of time the length of a deposition, which affects our ability to obtain the price quotes required as part of the procurement process. Some depositions drag on over multiple days. Other depositions may be completed in a matter of minutes or hours. We also believe there is great benefit to our being able to consider past experience with the various reporters, in terms of their responsiveness, breadth of available services, and of course the quality of the services they provide. In the often frantic pace of litigation, the value of court reporters who have

shown themselves to be reliable and quick, without sacrificing quality, cannot be understated.

(3) We often have no control over which court reporting service we must purchase transcripts from. When a deposition is scheduled by another party to the litigation, they select the court reporter. We then have no choice but to purchase the transcript from that particular reporter, if we want a copy.

(4) We also have no ability to select the court reporter when transcripts are being obtained from the court. If we need to order transcripts from trial or a particular court hearing, we must order them from whichever court reporter was assigned to record the proceeding.

The goal of our office in terms of litigation is to defend the State to the best of our ability, always with an eye toward minimizing the amount the State may have to pay in settlements/judgments. Litigation is deadline-intensive, unpredictable, and typically fast-paced. Each case is different in terms of complexity and magnitude of risk to the State. By necessity, case strategies are often adjusted (sometimes multiple times) as the case progresses. This type of scenario, in our view, is simply not amenable to a process that requires obtaining price quotes before any type of good or service is provided. As stated earlier, the nature of what we do often requires spontaneity and flexibility. The alternative may be a decrease in the quality of representation our office is able to provide, with an accompanying increase in the financial risk to the State in potential settlements/judgments.

We believe court reporters provide a unique service. The quality of individual service, as well as the various types of services, varies from reporter to reporter, and from firm to firm. In this sense, court reporters are akin to professionals where qualitative subjectivity becomes a critical factor in selection. However, court reporters cannot be selected under the professional services method because of the statute (HRS § 606-13.6) that court reporters tell us prohibits them from entering into contracts if there is no specific case or "reporting incident" at hand. That is, as stated above, we cannot have court reporters on retention and use them as needed. There needs to be a specific case, or a specific incident (like a deposition), before they will agree to work for us. But then, as stated above, when the times comes that there is a specific case, or reporting incident, and it is necessary to obtain court reporting services (e.g., we need to take a deposition), it is often impracticable to obtain three quotes, much less go out to bid for these services, due to the lack of time.

Finally, it is because of the unpredictability of litigation that we first became concerned with requesting an exemption; what might start out as a small purchase could blossom beyond the \$25,000 limit depending on how the case proceeds. There is also the situation where there may be numerous invoices well under the \$25,000 limit, but the invoices from the firm are combined into one for all services performed within a given

period of time, exceeding \$25,000. Payment of that invoice may then raise concerns that the procurement was not bid.

For these reasons, we respectfully request at least a one-year extension of the blanket exemption from the procurement process for our department's use of court reporters. The current one-year exemption will expire on February 28, 2006.

REQUEST FOR EXEMPTION FROM CHAPTER 103D, HRS (Cont.)

12. A list of agency personnel, by position, who will be involved in the approval process and administration of the contract:		
Name	Position	Involvement in Process
		<input type="checkbox"/> Approval <input type="checkbox"/> Administration
		<input type="checkbox"/> Approval <input type="checkbox"/> Administration
		<input type="checkbox"/> Approval <input type="checkbox"/> Administration
		<input type="checkbox"/> Approval <input type="checkbox"/> Administration
		<input type="checkbox"/> Approval <input type="checkbox"/> Administration
		<input type="checkbox"/> Approval <input type="checkbox"/> Administration

13. Direct inquiries to: Department: Attorney General
 Contact Name: Cindy S. Inouye
 Phone Number: 586-1494
 Fax Number: 586-1369

Agency shall ensure adherence to applicable administrative and statutory requirements

14. *I certify that the information provided above is, to the best of my knowledge, true and correct.*

for *Levell George*
 Department Head

2/2/06
 Date

Reserved for SPO Use Only
15. Date Notice Posted <u>2/8/06</u>
The Chief Procurement Officer is in the process of reviewing this request for exemption from Chapter 103D, HRS. Submit written objections to this notice to issue an exemption from Chapter 103D, HRS, within seven calendar days or as otherwise allowed from the above posted date to: Chief Procurement Officer State Procurement Office P.O. Box 119 Honolulu, Hawaii 96810-0119
Chief Procurement Officer's comments:

16. APPROVED DISAPPROVED

Alan J. Fjiler 2/15/06
 Chief Procurement Officer Date