



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

STATE PROCUREMENT OFFICE  
STATE OF HAWAII  
09 JUN -4 P 1:01

1. TO: Chief Procurement Officer  
2. FROM: 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:  
Legal services to the Employees' Retirement System (ERS) to insure compliance with the Internal Revenue Code

|  |                           |
|--|---------------------------|
| 4. Name of Vendor: J. Thomas Maloney, Esq.<br>Address: 1680 Pioneer Plaza, 900 Fort Street<br>Honolulu, HI 96813 | 5. Price:<br>\$200,000.00 |
|--|---------------------------|

|   |                             |
|---|-----------------------------|
| 6. Term of Contract: From: July 1, 2009 To: June 30, 2012 | 7. Prior Exemption Ref. No. |
|---|-----------------------------|

8. Explanation describing how procurement by competitive means is either not practicable or not advantageous to the State:  
Mr. Maloney has been providing legal services to the ERS relating to federal pension tax matters affecting the ERS for over five years. He was primary legal counsel in the preparation of the determination letter application that was filed with the Internal Revenue Service (IRS) at the end of January. The purpose of the determination letter application is to obtain the IRS's acknowledgement that the ERS's pension plan is in compliance with all relevant provisions of federal tax law. Mr. Maloney has also advised the ERS in addressing the federal tax issues relating to the design and implementation of the new "Hybrid" pension plan. (Continued on Attachment.)

9. Details of the process or procedures to be followed in selecting the vendor to ensure maximum fair and open competition as practicable:  
Mr. Maloney has agreed to an hourly rate of \$250. This is \$100 below Mr. Maloney's normal hourly rate and is the same hourly rate under the contract with Mr. Maloney's previous law firm. The previous contract was entered into in 2006 in accordance with the procedures for procurement of professional services under HRS § 103D-304.

10. A description of the agency's internal controls and approval requirements for the exempted procurement:  
Retention of Mr. Maloney, the term of the contract, and the hourly rate were approved by the Board of Trustees of the ERS, the funding agency. The contract will be subject to the Attorney General's final approval.

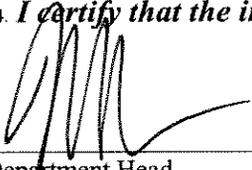
**REQUEST FOR EXEMPTION FROM CHAPTER 103D, HRS (Cont.)**

| 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                       |  |
| Mark J. Bennett   | Attorney General        | <input checked="" type="checkbox"/> Approval | <input type="checkbox"/> Administration            |
| Diane S. Kishimoto  | Deputy Attorney General | <input type="checkbox"/> Approval            | <input checked="" type="checkbox"/> Administration |
| David Shimabukuro   | Administrator, ERS      | <input type="checkbox"/> Approval            | <input checked="" 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<br>Contact Name: Diane S. Kishimoto<br>Phone Number: (808) 586- <del>0618</del> 2707 <i>AK</i><br>Fax Number: (808) 586-1372 |
|--------------------------|---|

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.*



Department Head

JUN - 3 2009

Date

**Reserved for SPO Use Only**

15. Date Notice Posted 6-4-09

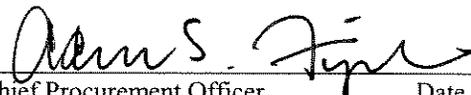
The Chief Procurement Officer is in the process of reviewing this request for exemption from Chapter 103D, HRS. Submit written objections to this notice to issue an exemption from Chapter 103D, HRS, within seven calendar days or as otherwise allowed from the above posted date to:

Chief Procurement Officer  
 State Procurement Office  
 P.O. Box 119  
 Honolulu, Hawaii 96810-0119

Chief Procurement Officer's comments:

This approval is for the solicitation process only, HRS section 103D-310(c) and HAR section 3-122-112, shall apply.

16.  APPROVED     DISAPPROVED     NO ACTION REQUIRED

  
 Chief Procurement Officer      Date 6/26/09

**ATTACHMENT TO REQUEST FOR EXEMPTION FROM CHAPTER 103D, HRS**

From: Attorney General  
Vendor: J. Thomas Maloney, Esq.  
Date: \_\_\_\_\_

**8. Explanation describing how procurement by competitive means is either not practical or not advantageous to the State: (Continuation)**

Neither the determination letter nor the Hybrid plan projects are complete:

The IRS has not responded to the determination letter application. It is difficult to predict when the IRS will respond because the vast majority of public pension plans filed determination letter applications at around the same time that the ERS did. When the IRS responds to ERS's determination letter application, the ERS anticipates that the IRS will require amendments to the statute governing the ERS and to the ERS's administrative rules.

The first phase of the Hybrid plan project, during which most existing members of the ERS were allowed to switch from the Contributory or Noncontributory retirement plans to the Hybrid plan, was completed in 2006. However, the second phase, during which members who switched to the Hybrid plan will be allowed to upgrade their Noncontributory plan to Hybrid plan service, is expected to commence in October and will run for one year. Planning for the upgrade is now underway. The service upgrade is affected by a myriad of tax issues: the final determination to proceed with the upgrade is subject to the determination by the ERS Board of Trustees that the upgrade can be achieved without affecting the eligibility of the ERS as a "qualified plan" under federal tax law.

Mr. Maloney's assistance in completing the determination letter project and the Hybrid plan project is of critical importance to the ERS. Tax law relating to public pension plans is a highly specialized field. The consequences of non-compliance with the applicable tax law are severe: loss of the plan's tax exempt status or large monetary penalties. Pension tax counsel must not only have a thorough knowledge and understanding of applicable federal tax law, but must also be very familiar with the operations of the ERS and the provisions of State law governing the ERS. During the time that he has advised the ERS on pension tax matters, Mr. Maloney has demonstrated that he has the requisite knowledge and understanding of applicable federal tax law and familiarity with the ERS. There are only one or two other attorneys in the State with the requisite knowledge of public pension tax law. In addition, there is no other tax attorney in the State with the level of familiarity with the ERS's determination letter application and the Hybrid plan project as Mr. Maloney. It would be impractical and costly to change pension tax counsel at this stage of these two very important projects.