DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-131
Hawaii Administrative Rules

February 21, 2008

SUMMARY

1. Title amended.

2. §3-131-1 is amended.

3. §§3-131-1.01 and 3-131-1.02 are added.

4. §§3-131-4 to 3-131-6 are amended.

5. §3-131-7 is repealed.

6. New §3-131-8 is added.

7. Chapter 3-131 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 131

COMPLIANCE (INTERIM)

§3-131-1	Definitions
§3-131-1.01	Applicability
§3-131-1.02	Procurement code of ethics
§3-131-2	Parceling
§3-131-3	Procurement violations
§3-131-4	Civil and criminal penalties
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§3-131-8	Administrative fine

Historical Note. This chapter 131, subtitle 11 of title 3, Hawaii Administrative Rules:

1. Replaces interim rules dated on 2/16/02 (file no. 2449) that amended sections 3-131-1, 3-131-2, 3-131-3, and 3-131-6.

§3-131-1 Definitions. Definitions are in section 103D-104, HRS. The following definitions are also applicable to terms used in this chapter:

"After-the-fact" means a request for approval, unless the context requires otherwise, for a procurement made in violation of proper procedures.

"Business integrity" means the practice of good business responsibility such as business ethics, honesty, fidelity, and trustworthiness.

"Parceling" means the artificial division or intentional division of a purchase of same, like, or related items of goods, services, or construction into

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several purchases of smaller quantities, in order to evade the statutory competitive requirements.

"Purchasing ethics" means the principles to be respected and applied, including the prohibition of any breach of the public trust by realizing or attempting to realize improper gain for oneself or another through conduct inconsistent with the requirements of this chapter.

"Reviewing officer" means the chief procurement officer, the head of a purchasing agency, or a designee above the level of a procurement officer, who has been delegated in writing by the chief procurement officer or head of a purchasing agency, the authority and responsibility to review procurement violations; provided the authority and responsibility to review procurement violations of a chief procurement officer or designee shall be that of the administrator and the authority and responsibility to review procurement violations of the administrator shall be with the Department of Commerce and Consumer Affairs, pursuant to section 103D-709, HRS. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp DEC 14 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-104, 103D-305, 103D-709)

§3-131-1.01 Applicability. This chapter shall apply to any person, including any actual or prospective bidder, offeror, contractor or business. [Eff APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-1.02 Procurement code of ethics. (a) Public employees shall act in good faith to discharge their duties to ensure the fair and equitable treatment of all persons who deal with government procurement; to foster public confidence in the integrity of the procurement process; and to ensure the appropriate application of purchasing ethics. Any person employed by a governmental body who, when engaging in procurement, shall be bound by this code, including but not limited to the following:

(1) Avoid the intent and appearance of unethical behavior or practices;
(2) Diligently follow the procurement laws, rules, and procedures;

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(3) Refrain from any activity that would create a conflict between personal interests and the interests of the State;
(4) Identify and eliminate any conflicts of interest;
(5) Avoid soliciting or accepting money, loans, credits, discounts, favors, or services from present or potential suppliers which may influence or appear to influence purchasing decisions; and
(6) Ensure that all persons are afforded equal opportunity to compete in a fair and open environment.

(b) Governmental bodies shall conduct procurement in accordance with all applicable statutes and rules, including chapter 84, HRS, standards of conduct.

(c) Any person, including any actual or prospective bidder, offeror, contractor or business shall act in good faith to practice purchasing ethics, and when applicable, display business integrity as a responsible offeror, including but not limited to the following:
(1) Avoid the intent and appearance of unethical behavior or business practices;
(2) Refrain from any activity that would create a conflict between personal interests and the interests of the State;
(3) Identify and eliminate any conflicts of interest; and
(4) Ensure that all persons are afforded equal opportunity to compete in a fair and open environment. [Eff APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-101, 103D-106, 103D-310, 84-15, 84-16)

§3-131-2 Parceling. (a) Procurements should be done through a competitive process whenever possible. Since there is no definition of artificial division or intentional division that could address every circumstance, the procurement officer in deciding if a division is artificial or intentional, shall consider the following:
(1) The higher the price of a group of procurements, the more likely they should be consolidated.
(2) The more similar the good, service, or construction, or the more likely it is to

purchase a group of goods, services, or construction from one type of vendor, the more likely it should be consolidated.

(3) The more foreseeable the procurement of similar goods, services, and construction is, the more likely it should be consolidated.

(b) In determining whether a competitive sealed process is required and if consolidation is appropriate, the estimated expenditures for any twelve-month period exceeding the dollar limits as stated in section 103D-305, HRS, the competitive sealed process pursuant to subchapter 5 or 6 shall be used to establish a contract.

(c) A purchasing agency shall, where possible, make appropriate consolidations to obtain competition. The procurement officer shall be responsible for decisions to proceed with small purchase procurements rather than with a competitive sealed process. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp APR 14 2008] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-131-3 Procurement violations. (a) The head of the purchasing agency is responsible for the agency's compliance with the law. Violations of chapter 103D, HRS, which are normally inadvertent, and the result of administrative error, lack of knowledge, or simple carelessness, may be avoided through the implementation of better procedures, employee training, and progressive discipline.

(b) The procurement officer may prepare a report of procurement violations for review by the reviewing officer. It may be helpful to prepare and maintain procurement violation reports, first, to pinpoint weaknesses in the State's procurement process, including the procurement code itself, and to find ways to improve State procurement, and second, to determine whether or not a violation has reached the level requiring civil or criminal penalties.

(c) Being responsible for the initial investigation of violations requires the head of the purchasing agency to carefully examine the in-place procurement procedures. Any improvements can best be achieved through the agency's own initiative. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; comp APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-4 Civil and criminal penalties. (a) Certain violations of chapter 103D, HRS, may be subject to civil and criminal penalties as described below:

(1) Civil penalties. A person who contracts for, or purchases goods, services, or construction, in a manner the person knows to be contrary to the requirements of the procurement law is liable for all costs and damages to the State arising out of the violation.

(2) Criminal penalties. A person who intentionally or knowingly contracts for or purchases goods, services, or construction, under a scheme or artifice to avoid the requirements of the procurement law shall be guilty of a misdemeanor, and in addition to any applicable criminal penalties, shall be subject to removal from office and shall be liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county.

(b) In order for civil penalties to apply, a person must have knowingly violated the requirements of the law. In other words, the person committing the violation must be aware that he or she is acting contrary to the requirements of the law at the time the violation occurs. Violations that are the result of administrative error or mistake, ignorance, or carelessness are usually not subject to the civil penalties. The determining factor is what the person understood the procurement requirements to be when the violation occurred, and whether or not the person believed he or she was acting in compliance with those requirements.

(c) In order for criminal penalties to apply, a person must have knowingly or intentionally engaged in a scheme or artifice to avoid the requirements of the law. The violation must have been committed in a deliberate manner, involving some calculated means, such as parceling for a single procurement, a deliberate misstatement of fact, or an after-the-fact purchase, which is purposefully designed to avoid the requirements of the law. Legally admissible documentary evidence of the wrongdoing must be

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available to law enforcement authorities in order for criminal prosecution to be undertaken. Law enforcement authorities will also need to determine whether personal gain was intended or involved for either the person committing the violation, a friend or relative of the person, or the vendor, or whether some other vendor was significantly injured, whether intended or not.

(d) In addition to any other civil and criminal penalty allowed by law, a chief procurement officer may render a written decision on any person found in violation of any provision of this chapter, and impose any of the following:

(1) If an employee of a governmental agency:
- (A) Reimbursement for any sum paid in connection with the violation, including interest and costs;
- (B) A recommendation for termination of employment;
- (C) Reduction or rescission of delegated procurement authority; and
- (D) Administrative fine as provided below.

(2) If a person or actual or prospective offeror:
- (A) Payment for any sum paid in connection with the violation, including interest and costs;
- (B) Suspension and debarment action pursuant to section 103D-702, HRS; and
- (C) Administrative fine as provided below.

[Eff 12/15/95; comp 11/17/97; comp 11/25/02; am and comp APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §§103D-106, 103D-702)

§3-131-5 Corrective action. When a procurement violation has occurred, the head of the purchasing agency shall determine whether any corrective action is necessary to remedy the situation, or prevent its reoccurrence. Action may include training, or a reduction of an employee's purchasing authority. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; am and comp APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-6 Report of findings and corrective actions. (a) The purchasing agency shall consult with

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the chief procurement officer on all procurement violations and provide that shall include, at a minimum:

(1) The facts and circumstances leading to the need for the good or service, including the explanation as to why established procedures were not followed;

(2) Whether there are any indications of intent to deliberately evade established purchasing procedures;

(3) Any lack of procurement information or training;

(4) Whether this is the first occurrence; and

(5) Whether appropriate written assurance and safeguards have been established to preclude a subsequent unauthorized procurement.

(b) If the head of the purchasing agency determines that payment to a vendor is also required, the head of the purchasing agency shall include a request for after-the-fact payment approval in the report of findings and corrective actions to the chief financial officer.

(c) If the chief procurement officer disapproves the purchasing agency's report of findings and corrective actions, then provisions of section 3-131-4(d) shall apply. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

§3-131-7 REPEALED. [R APR 14 2008]

§3-131-8 Administrative fine. (a) A chief procurement officer may assess an administrative fine in the amounts as follows:

(1) In an amount not to exceed $5,000.00 for each violation involving a procurement which amount is in excess of the dollar levels specified by section 103D-305, HRS.

(2) In an amount not to exceed $1,000.00 for each violation involving a procurement which amount is less than the dollar levels specified by section 103D-305, HRS.

(b) Prior to the imposition of an administrative fine, the chief procurement officer shall notify the person in writing that the chief procurement officer intends to assess an administrative fine. The person

then shall be given an opportunity to be heard by the chief procurement officer. A request for a meeting shall be made within seven calendar days after the receipt of the chief procurement officer's letter. After the meeting, if any, should the chief procurement officer determine the imposition of an administrative fine is appropriate, the person may request the review of such assessment through an administrative review of the chief procurement officer's decision pursuant to section 103D-709, HRS. Such request shall be made within seven calendar days pursuant to section 3-125-42, HAR, after the receipt of the chief procurement officer's decision.

(c) The payment of administrative fine shall be the responsibility of the person, and if the person is a government employee, shall not be paid with government funds.

(d) The chief procurement officer shall report annually to the state procurement office any administrative fines assessed. The report shall include but not be limited to the following information, the name of person, amount of fine, reason for the fine. [Eff APR 14 2008] (Auth: HRS §103D-202) (Imp: HRS §103D-106)

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to and compilation of chapter 131, Hawaii Administrative Rules, on the Summary Page dated February 21, 2008 were adopted as interim rules at the Procurement Policy Board meeting on February 21, 2008. Pursuant to section 103D-202, HRS, these rules shall be issued by Procurement Directive and be effective for not more than eighteen months.

These interim rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

GREGORY L. KING
Chairperson
Procurement Policy Board

RUSS SAITO
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General