DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-141
Hawaii Administrative Rules

December 29, 2005

SUMMARY

1. §§3-141-406 and 3-141-407 are added.

2. Subchapter 5 title is amended.

3. §3-141-502 is repealed.

4. §3-141-503 is amended.

5. Subchapter 6 is added.

6. Chapter 3-141 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 141

GENERAL PROVISIONS

Subchapter 1 Purpose and Scope

§3-141-101 Purpose
§3-141-102 Scope
§3-141-103 Construction

Subchapter 2 General Grounds for Rejection

§3-141-201 Rejection for failure to cooperate or deal in good faith
§3-141-202 Rejection for inadequate accounting system

Subchapter 3 Record-Keeping

§3-141-301 Retention of procurement records
§3-141-302 Retention of books and records
§3-141-303 Confidentiality

Subchapter 4 General Operating Procedures

§3-141-401 Lists of providers
§3-141-402 Cost principles

2688

§3-141-403 No exemption from laws governing the treatment of persons with disabilities
§3-141-404 No exemption from anti-competitive practices
§3-141-405 Selection of procurement method
§3-141-406 Availability of forms
§3-141-407 Public notice

Subchapter 5 Waivers and Exemptions

§3-141-501 Waiver of compliance with administrative rules
§3-141-502 Repealed
§3-141-503 Exemptions from procurement procedures

Subchapter 6 Procurement Violations

§3-141-601 Purpose of procurement violations procedures
§3-141-602 Core Procedures
§3-141-603 Content of report of findings and corrective action
§3-141-604 Types of corrective action
§3-141-605 Penalties

SUBCHAPTER 1

PURPOSE AND SCOPE

§3-141-101 Purpose. The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of health and human services for the state, by:

(1) Simplifying, clarifying, and modernizing the law governing procurement;
(2) Encouraging the continued development of procurement policies and practices to

2688

accommodate changing needs and circumstances;

(3) Making the procurement laws and practices as consistent as practicable;

(4) Ensuring the fair and equitable treatment of all providers who deal with the procurement system of the state;

(5) Providing increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds;

(6) Fostering effective, broad-based competition within the free enterprise system;

(7) Providing safeguards for the maintenance of a procurement system that has quality and integrity; and

(8) Increasing public confidence in the procedures followed in public procurement. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-101 to 103F-504)

§3-141-102 Scope. The provisions of this chapter are of a general character, and shall apply to all procedures, matters, and issues arising in connection with chapter 103F, HRS, or these rules. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-101 to 103F-504)

§3-141-103 Construction. These rules shall be liberally interpreted to accomplish the purposes stated in section 3-141-101. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §103F-106)

SUBCHAPTER 2

GENERAL GROUNDS FOR REJECTION

§3-141-201 Rejection for failure to cooperate or deal in good faith. (a) A purchasing agency may reject any proposal, statement of qualifications, or quotation submitted to it if, in light of all the circumstances, the purchasing agency deems that the applicant has failed to cooperate with the purchasing agency, or to deal with the purchasing agency in good faith.

(b) Actions constituting a failure to cooperate or deal in good faith. Actions constituting a failure to cooperate or deal in good faith include but are not limited to:

(1) The knowing withholding, omission, or misrepresentation of information that is material to an applicant's proposal; or

(2) The refusal to provide any information reasonably requested or required by the purchasing agency.

(c) Procedure for rejection. Any rejection made under this section shall be made in writing, and shall include a concise statement of the actions justifying the rejection. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §§103F-106, 103F-407) (Imp: HRS §103F-407)

§3-141-202 Rejection for inadequate accounting system. (a) A purchasing agency may reject any proposal or quotation submitted to it if, in light of all the circumstances, the purchasing agency deems that the applicant's accounting system is inadequate for keeping the procurement and financial records required by the purchasing agency or the state procurement office.

(b) Requirements for accounting systems. The requirements for an adequate accounting system may include, but are not limited to:

(1) The ability to keep accurately all the procurement and financial records required by law, the purchasing agency, or the state procurement office;

(2) The ability to permit timely development of

2688

all necessary cost data in the form required by the specific contract type contemplated; or

(3) Compliance with generally accepted accounting principles.

(c) Procedure for rejection. Any rejection made under this section shall be made in writing, and shall include a concise statement of the reasons justifying the rejection. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §§103F-106, 103F-407) (Imp: HRS §103F-407)

SUBCHAPTER 3

RECORD-KEEPING

§3-141-301 Retention of procurement records. All procurement records shall be retained and disposed of in accordance with chapter 94, HRS, and retention guidelines and schedules for records approved by the comptroller. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §103F-301)

§3-141-302 Retention of books and records. Any provider or sub-provider who receives a contract or contract amendment or modification for which programmatic, fiscal or expenditure data are required shall maintain appropriate programmatic and financial records for three years from the date of final payment under contract. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §103F-301)

§3-141-303 Confidentiality. Except as provided in chapter 3-143, procurement documents shall be available for public review in accordance with existing law governing information practices. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-504)

SUBCHAPTER 4

GENERAL OPERATING PROCEDURES

§3-141-401 Lists of providers. (a) In order to facilitate the efficiency of the health and human services procurement system, purchasing agencies may compile lists of providers that may be interested in competing for various types of contracts.

(b) No right to notice given. Inclusion on any list compiled under this section does not give a provider any right to notice of requests for proposals or other solicitations by a purchasing agency. Lists of providers are compiled solely for the convenience of purchasing agencies, and shall not be construed to confer any right or privilege on any provider included on such a list.

(c) Procedure for compilation. Lists of providers may be compiled based on any procedure reasonably calculated to include as many potential providers as practicable. Such procedures may include but are not limited to listing the providers that currently hold contracts with the purchasing agency, listing providers who have responded to the purchasing agency's recent requests for proposals, or other solicitation made by the purchasing agency.

(d) Updating lists. Purchasing agencies may update lists of providers compiled under this section as frequently as they deem necessary or advisable.

(e) Public inspection of lists. Any list of providers compiled under this section shall be available for public inspection at the purchasing agency or office of the procurement officer.
[Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §103F-301)

§3-141-402 Cost principles. (a) In order to promote uniform purchasing practices among purchasing agencies that require health and human services, the administrator may, in conjunction with the purchasing

2688

agencies, establish cost principles for use in contracts for health and human services.

(b) Coordination with federal law. Nothing in this section shall be construed to create an exemption from any cost principle or pricing requirements arising under federal law. Purchasing agencies receiving federal funding shall comply with applicable federal cost principle and pricing requirements, unless the state cost principles are more restrictive, in which case the purchasing agency shall comply with the state cost principles.

(c) Waiver for good cause. The head of a purchasing agency may, for good cause, waive compliance with any cost principles established under this section. Such waiver shall be made in writing by the head of the purchasing agency, and shall include an explanation of the circumstances that justify the waiver. The written waiver shall be placed in the contract file, and appropriate notice of the waiver shall be included in the request for proposals, statements of qualifications, or any other solicitation, as applicable. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-105, 103F-301)

§3-141-403 No exemption from laws governing the treatment of persons with disabilities. Nothing in these rules or in chapter 103F, HRS, shall be construed as an exemption from the Americans with Disabilities Act (42 U.S.C. 12101, et seq.), the Rehabilitation Act (29 U.S.C. 701, et seq.), the Individuals with Disabilities Education Act (20 U.S.C. 1401, et seq.), or any other federal, state, or county law governing the treatment of persons with disabilities. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-105, 103F-301)

§3-141-404 No exemption from anti-competitive practices. Nothing in these rules, or in chapter 103F,

HRS, shall be construed as an exemption from federal, state, or county laws forbidding anti-competitive practices. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-203, 103F-301, 103F-401 to 103F-406)

§3-141-405 Selection of procurement method. A particular planned purchase of health and human services may fall within the scope of multiple methods of procurement established by chapter 103F, HRS. Whenever multiple methods of procurement apply to a single planned purchase, the head of the purchasing agency shall select the applicable method of procurement that is in the best interests of the state. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

§3-141-406 Availability of forms. Forms and instructions for submittal of proposals, statements of qualifications, or other requests for funding may be prescribed by the administrator. Purchasing agencies shall make available to applicants all necessary forms for each respective procurement method. [Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

§3-141-407 Public Notice. (a) Public notice shall be made to encourage competition and obtain information for planning or other collaborative purposes. Public notice shall be given in accordance with this section.

(b) Required contents of public notice. Public notices shall include the following information:

(1) A brief description of the service;

(2) When and where additional information will be available, such as a request for proposals or the details of a request for information;

2688

(3) The submittal deadline for any responses to the notice;

(4) The date, time and place of any orientation or meeting to be held;

(5) The name, phone number, address and e-mail address of the purchasing agency contact person to whom inquiries may be addressed; and

(6) Any other information a purchasing agency deems appropriate.

(c) Required internet publication. All public notices shall be posted on the internet website in a location or locations designated by the administrator. Notices shall remain posted until the submittal deadline for responses, if any.

(1) Public notices for requests for proposals shall be posted until the proposal submittal deadline, but not less than twenty-eight days.

(2) All other public notices shall be posted for a minimum of seven days unless specified elsewhere in these administrative rules.

(d) Additional media for publication authorized. In addition to the required internet publication, other means of public notice may be utilized to promote competition among providers, including but not limited to:

(1) Publication in newspapers of general or local circulation;

(2) Telephone calls, United States mail, telefacsimile transmission, or electronic mail to potential applicants on a provider list compiled in accordance with section 3-141-401;

(3) Publication in trade or community publications related to the service; or

(4) Publication by any public or private telecommunications information network.

[Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

26 88

SUBCHAPTER 5

WAIVERS AND EXEMPTIONS

§3-141-501 Waiver of compliance with administrative rules. The administrator may, for good cause, upon his or her own initiative or upon application by the head of a purchasing agency, waive a purchasing agency's compliance with these rules. [Eff 6/19/99; comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-101, 103F-106)

§3-141-502 Repealed. [R JAN 23 2006]

§3-141-503 Exemptions from procurement procedures. (a) In addition to the exemptions specifically enumerated in section 103F-101, HRS, the following are also exempted from chapter 103F, HRS:

(1) Subawards and subgrants to organizations directed by the funding source;
(2) Grants and subsidies as those terms are defined in chapter 42F, HRS;
(3) Affiliation agreements with hospitals and other health care providers required for University of Hawaii clinical programs; and
(4) Services of psychiatrists and psychologists in criminal and civil proceedings when required by court order or by the rules of court.

(b) Certain federally funded contracts. Contracts for health and human services that are wholly or partly funded from federal sources shall be exempt from chapter 103F, HRS, when:

(1) The source of the federal funds imposes conditions on the receipt of the federal funds that conflict with the procedures and requirements established by chapter 103F, HRS, and its implementing rules; or

2688

(2) The contract is to provide health and human services to implement a federal program that
  (A) Identifies a target class of beneficiaries;
  (B) Defines the requirements for a provider to be qualified to participate in the federal program; and
  (C) Has the price of the provided health and human services dictated by federal law.

(c) Further exemptions by the chief procurement officers. Chief procurement officers may for good cause, upon their own initiative, or upon application by the head of a purchasing agency, exempt additional transactions. The head of the purchasing agency shall submit a request for exemption and a notice of exemption from chapter 103F, HRS, to the chief procurement officer. The following procedures shall be followed when requesting an exemption from procurement:

(1) The request shall contain:
  (A) The services to be purchased;
  (B) The name of the provider;
  (C) The total contract funds;
  (D) The term of the contract;
  (E) An explanation describing how procurement by competitive means is not practicable or not advantageous to the State;
  (F) A description of procedures followed to ensure maximum fair and open competition in selecting the provider; and
  (G) A list of state agency personnel who will be involved in the approval process and administration of the contract.

(2) The notice shall contain:
  (A) A statement that the state intends to exempt a purchase from procurement for good cause;
  (B) A brief description of the services;

(C) The name of the provider;
(D) The term of the contract;
(E) The funding amount of the contract;
(F) A statement that any inquiries shall be directed to the designated contact person of the purchasing agency;
(G) The name, phone number and e-mail address of the designated contact person;
(H) A statement that any concerns to the exemption must be in writing and received by the chief procurement officer within seven days of the date the notice was first posted; and
(I) The name and address of the chief procurement officer.

(3) The administrator may prescribe the format of the request and notice.

(4) The chief procurement officer shall post the request and notice on a internet website widely accessible to the public for seven days prior to any approval action.

(5) Before granting an exemption under this subsection, the chief procurement officer shall consult with the administrator.

(6) The chief procurement officer shall forward a copy of the request for exemption from chapter 103F, HRS, to the administrator upon approval or disapproval. [Eff 6/19/99; am and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §103F-101)

SUBCHAPTER 6

PROCUREMENT VIOLATIONS

§3-141-601 Purpose of procurement violation procedures. The procurement violation procedures shall implement:

2688

(1) A reporting and corrective action procedure for failures to follow procurement procedures for health and human services pursuant to chapter 103F, HRS, and chapters 3-140 to 3-149 of the administrative rules; and

(2) A procedure for requesting after-the-fact payment to a provider. [Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

§3-141-602 Core Procedures. For each occurrence of a procurement violation, the procedure shall be as follows:

(1) The procurement officer shall prepare and submit a report of the procurement violation to the head of the purchasing agency;

(2) The head of the purchasing agency or a designated reviewing officer shall review the report to determine whether corrective action is necessary to remedy the situation or prevent any reoccurrence, and shall submit the report of findings and corrective action to the chief procurement officer, in accordance with sections 3-141-603 and 3-141-604;

(3) If payment to a provider is also required, the head of the purchasing agency shall include in the report of findings and corrective action, a request for approval from the chief financial officer for after-the-fact payment;

(4) The chief procurement officer shall determine whether appropriate corrective action has been taken; and

(5) Forward the request to the chief financial officer for after-the-fact payment approval, if one has been requested. [Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

§3-141-603 Content of report of findings and corrective action. (a) The report of findings and corrective action shall include at a minimum:

(1) The circumstances leading up to the unauthorized procurement and an explanation why the established procedures were not followed;

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

(3) Any lack of procurement information and training;

(4) Whether this is a first occurrence; and

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

(b) The administrator may prescribe the report format to be used by purchasing agencies. [Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

§3-141-604 Types of corrective action. Corrective actions may include, but are not limited to:

(1) Training;

(2) Changes in planning and procedures;

(3) Modifying internal purchasing timetables; and

(4) A reduction of an employee's purchasing authority. [Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

§3-141-605 Penalties. (a) A person who contracts for services in a manner the person knows to be contrary to the requirements of chapter 103F, HRS, and its administrative rules shall be liable for all costs and damages to the State arising out of the violation.

2688

(b) A person who knowingly or intentionally contracts for or purchases health and human services under a scheme or artifice to avoid the requirements of chapter 103F, HRS, shall be referred to the attorney general for possible criminal prosecution. The person shall be subject to removal from office and shall be liable for any sum paid by the State in connection with the violation, and that sum, together with interests and costs, shall be recoverable by the State. [Eff and comp JAN 23 2006] (Auth: HRS §103F-106) (Imp: HRS §§103F-401 to 103F-406)

26 86

Amendments to and compilation of chapter 3-141, title 11, Hawaii Administrative Rules, on the Summary Page dated December 29, 2005 were adopted on December 29, 2005 following a public hearing held on November 30, 2005 in Honolulu, Hawaii; and via video conference from Honolulu, Hawaii on November 30,2005 to Hilo, Hawaii; Wailuku, Maui; and Lihue, Kauai; after public notice was given in the Honolulu Star-Bulletin, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island on October 28, 2005.

They shall take effect ten days after filing with the Office of the Lieutenant Governor.

GREGORY L. KING
Chairperson
Procurement Policy Board

RUSS K. SAITO
State Comptroller

LINDA LINGLE
Governor
State of Hawaii

Dated: JAN 11 2006

Filed

APPROVED AS TO FORM:

Deputy Attorney General