

2013 Procurement Training  
for State and County Purchasing Personnel

## PROCUREMENT ETHICS AND COMPLIANCE WITH HRS CHAPTER 103D (PROCUREMENT VIOLATIONS)

HRS 103D-101  
HAR Chapter 3-131-1.02  
HRS Section 103D-106  
HAR Chapter 3-131

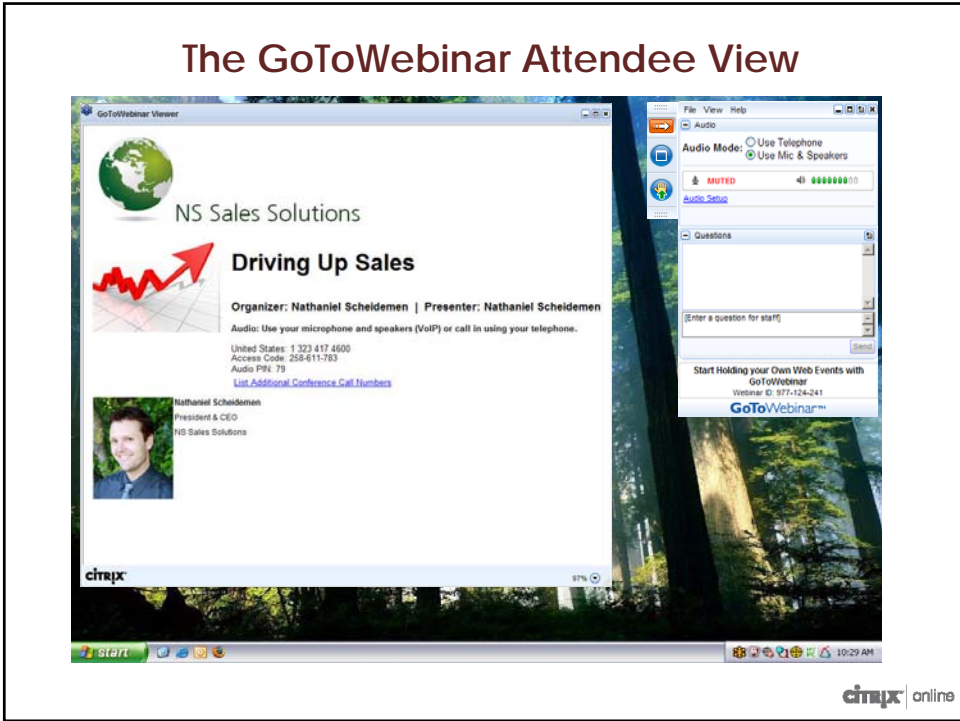
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### About SPO Webinars

- Participation encouraged.
- If we cannot get to all your questions we will provide answers at a later date (FAQ, etc.)
- If there is more than one person participating at a single computer.
  - Everyone registers for this webinar on the SPO Training website.
  - Only the person logging in should register on the Webinar site.
  - All attendees in the group (including the person registered on the webinar site) complete the SPO Webinar Group Attendance form, scan it in and send it to: [spo.training@hawaii.gov](mailto:spo.training@hawaii.gov)
  - **Send it in within 1 working day of the webinar**
- On the day of the webinar, the SPO Webinar Group Attendance form is placed on the SPO training schedule along with the handouts.  
<http://hawaii.gov/spo> click **Training and Informational Sessions;**  
click **Training/Informational Sessions for State and County**
- **DO NOT send in the signed form prior to the workshop.**

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## The GoToWebinar Attendee View

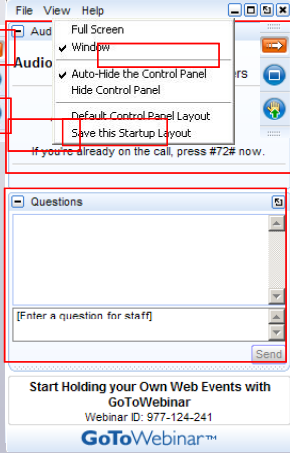


## Webinar Viewer Window

- Having trouble seeing?
  - Maximize your viewer window; and/or
  - Increase the magnification in your viewer window (in lower right corner.)
- To exit full screen - GTW (GoToWebinar) control panel menu
  - click the button with the square on the tab or
  - View > window
- Note: Attendee Quick Reference is available
  - <http://hawaii.gov/spo>
  - Click **Training for State and County Procurement Personnel**
  - Click **About SPO Webinars** or wherever 'webinar' is a link
  - Click **FAQs and Quick Reference**



## How to Participate Today



The screenshot shows the GoToWebinar control panel interface. A red box highlights the 'Audio' section, which includes options for 'Full Screen', 'Window', 'Auto-Hide the Control Panel', and 'Hide Control Panel'. Another red box highlights the 'Questions' section, which features a text input field with the placeholder '[Enter a question for staff]' and a 'Send' button. Below the interface, there is a banner for 'Start Holding your Own Web Events with GoToWebinar' and the text 'Webinar ID: 977-124-241'.

- Open and close your Panel
- View, Select, and Test your audio
- Submit text questions
- Raise your hand
- Q&A addressed at the end of today's session

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## Applicability of the Procurement Code of Ethics

- Applies to any person, including any actual or prospective bidder, offeror, contractor, or business.
- Applies to state or county governmental employee.

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*Ethics is knowing the difference  
between what you have the right to do  
and what is right to do*

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### PROCUREMENT RESPONSIBILITIES

- Ensure employees and vendors understand the Hawaii Public Procurement Code and are given opportunities to attend training workshops.
- Encourage employees to seek guidance if unsure about a situation prior to conducting the procurement.
- Upon being informed, take immediate corrective action to remedy the situation that is found to be contrary to the Hawaii Public Procurement Code to prevent it from reaching the level of a procurement violation.
- If an inappropriate action is done, not correctable and determined to be contrary to the procurement code, submit the Report of Procurement Violation to the CPO as soon as possible.

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## Important Definitions

- Business Integrity- practice of good business responsibility such as business ethics, honesty, fidelity, and trustworthiness.
- Parceling- Artificial division or intentional division of a purchase of same, like, or related items into smaller purchases of smaller quantities, in order to evade the statutory competitive requirements.
- Purchasing ethics- Principles to be respected and applied, including 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 the procurement code.

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## Requirements of Ethical Public Procurement

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All public employees shall conduct and participate in public procurement in an ethical manner. They shall:

- Act as a fiduciary and trustee of public moneys;
- Remain independent from any actual or prospective bidder, offeror, contractor or business;
- Act only in the public interest;
- Abide by the statutes and administrative rules relating to public procurement;

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- Identify and maximize efficiencies in the public procurement process;
- Encourage economic competition by ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment and researching innovative goods and services to meet the public needs;
- Avoid the intent and appearance of unethical behavior;

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- Avoid social interactions with any actual or prospective bidder, offeror, contractor business, or other interested parties during the procurement process;
- Maintain confidentiality in a manner that ensures a fair procurement process;
- Remain impartial in dealings with any actual or prospective bidder, offeror, contractor, business or other interested parties; and
- Identify and eliminate any conflicts of interest.

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Any actual or prospective bidder, offeror, contractor, or business taking part in the conduct of public procurement, shall act in good faith to practice purchasing ethics, and when applicable, display business integrity as a responsible offeror through the public procurement process, including but not limited to the following:

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- Avoiding the intent and appearance of unethical behavior or business practices;
- Refraining from any activity that would create the appearance of impropriety or conflicts of personal interest and the interests of the State or counties;
- Identifying and eliminating any conflicts of interest;

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- Ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment.

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*All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.*

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### **What is Parceling?**

- Artificial or intentional division of multiple procurements that, when combined, exceed the limits of HRS Section 103D-305, for any 12-month period.
- Considerations for a Procurement Officer (PO) to determine “artificial or intentional”:
  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.

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3. The more foreseeable the procurement of similar goods, services, and construction is, the more likely it should be consolidated.
- Whenever possible, a purchasing agency shall make appropriate consolidations to allow for a competition process.
  - The PO is responsible for decisions to proceed with small purchase procurements rather than with a competitive sealed process.

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### **Case #1 – Combined 12-month Purchases of Plumbing Repairs/Replacement Parts**

*You conduct seven to ten small purchases procurement each fiscal year for plumbing supplies and repairs services for the past two years.*

*In a 12-month period, your agency purchases plumbing supplies and repair services from various vendors*

*that total close to \$100,000.*

*(Assuming you are not using an SPO approved vendor/price list.)*

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## What You Should Do

- Review history of regular maintenance items or services to see if a formal method of procurement would need to be conducted, i.e. competitive sealed bidding, request for proposals.
- Execute “indefinite quantities” or “as needed” types of contracts in situations where exact number of supply items are unknown for 12-month period.
- Issue contracts for longer periods, i.e. initial 12-month contract, with option to extend additional 12-month periods.

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## Case #2 – Janitorial Services Contract

*What if your current janitorial services contract will expire and you have no extension periods left.*

*You issue purchase orders for the next few months that follow until you execute a new contract.*

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## What you should and should not do

- *Process a form SPO-003 Request for Extension of Time or similar form until you can execute a new contract.*
- *Using a purchase order/pCard for even a single month is a procurement violation knowing that similar purchases exceed the small purchase threshold.*

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## Procurement Violations

- The Head of the Purchasing Agency (HOPA) is responsible for agencies compliance with the law. Some violations are inadvertent, result of administrative error, lack of knowledge, or simple carelessness.
- In reviewing a procurement violation report, it is important to pinpoint any weaknesses in the procurement system and to determine if the action was civil or criminal.
- Agencies must report to and obtain the approval of the Chief Procurement Officer/Chief Financial Officer on form SPO-016.

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### **Civil Penalties**

When civil penalties may apply:

Situation where 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.

What needs to be proven:

- Person knowingly violated the requirements of the law.
- Person committing the violation was aware that he or she is acting contrary to the requirements of the law at the time the violation occurs.

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### **Civil Penalties**

Considerations:

- Violations that can be attributed to administrative error, mistake, ignorance, or carelessness are usually not subject to civil penalties.
- 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.

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### **Civil Penalties**

Penalties-

- Personally liable for all costs and damages to the State or County arising out of the violation.
- May be assessed an administrative fine.

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### **Criminal Penalties**

When criminal penalties may apply:

- Where a person's action is determined to be deliberate and intentionally or knowingly contracts for or purchases goods, services, or construction, under a scheme or trickery to avoid the requirements of the procurement law.
- Examples include but are not limited to, parceling of a large single procurement, a deliberate misstatement of fact, or an after-the-fact purchase that is contrary to the procurement code.

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### **Criminal Penalties**

What needs to be proved:

- Evidence of the wrongdoing and satisfactory to law enforcement authorities for criminal prosecution to be undertaken.
- Deliberate actions under a scheme or trickery.
- Person understood the procurement statutes and acted in a contrary manner.
- If personal gain was intended or involved for either the person committing the violation, a friend or relative of the person, or vendor, or whether some other vendor was significantly injured, whether intended or not.

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### **Criminal Penalties**

- Penalties associated with a conviction of a misdemeanor in the Hawaii Penal Code.
- Subject to removal from office.
- Liable for any sum paid by it in connection with the violation, and that sum, together with interest and costs.
- Assessment of administrative fines.

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### **CPO Penalties**

In addition to any civil or criminal penalty allowed by law, the CPO may impose any of the following when it has been determined that there has been a violation of any provision in the Hawaii Public Procurement Code by a **government employee**:

- Reimbursement for any sum paid in connection with the violation (interest included).
- Recommendation for termination of employment.
- Reduction or rescission of delegated procurement authority.
- Administrative fine.

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In addition to any civil or criminal penalty allowed by law, the CPO may impose any of the following when it has been determined that there has been a violation of any provision in the Hawaii Public Procurement Code by a **person or actual or prospective offeror**:

- Payment for any sum paid in connection with the violation (including interest).
- Suspension and debarment action.
- Administrative fine.

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### **Administrative Fines**

The 2007 Legislature passed Act 142 (SB1929 SD2 HD2 CD1) which provides for the imposition of an administrative fine by the CPO.

- Prior to the imposition, the CPO shall notify the person in writing of the intent to assess a fine.
- If the violation involved was in excess of the amount specified in HRS section 103D-305 (small purchase), the fine shall not exceed \$5,000 for each violation.

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- If the violation involved was less than the amount specified in HRS section 103D-305, the fine shall not exceed \$1,000 for each violation.
- The person may, at his/her own option, request a meeting with the CPO which shall be scheduled within 7 calendar days after receipt of the request by the CPO. After the meeting (if one is requested), the CPO may determine that the assessment of the fine is still appropriate.

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- After the meeting and the CPO determines that the fine is still appropriate, the person may request an administrative review of the CPO determination pursuant to HRS section 103D-709.
- The request for an administrative review must be made within 7 calendar days of the CPO decision with the Office of Administrative Hearings, DCCA (HAR section 3-126-42).
- If a fine is to be paid, it shall be the responsibility of the person (not state or county funds if a government employee).

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### **Determination of Corrective Action**

The 2008 Legislature passed Act 203 (SB 2825 SD1 HD2 CD1) which allows the Administrator of the State Procurement Office (SPO) to make a determination of corrective action that must be complied with and to impose an administrative fine if a procurement officer or a CPO fails to comply within 30 days.

- Applies to a procurement officer under the jurisdiction of the SPO Administrator or a CPO of any other state and county agency.

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- The assessment of an administrative fine as provided under HRS section 103D-306?106 would apply if a procurement officer or a CPO fails to comply with the determination of correction action issued by the SPO Administrator within 30 days from the date of the issuance of the corrective action.
- Upon request, the SPO Administrator may extend the 30 day requirement.

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## Report of Findings and Corrective Action

The report shall include:

- Facts and circumstances that led to the procurement and why appropriate procedures were not followed (i.e., unanticipated, unplanned, lack of planning, etc.).
- Whether there are any indications of intent to deliberately evade appropriate purchasing procedures (i.e., parceling, use of pCard/purchase orders, etc.).

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- Was there a lack of procurement information or training that contributed to the violation (i.e., person did not attend mandatory training, no written procedures, inadvertent mistake, etc.).
- Whether this is a first occurrence.
- Whether appropriate written assurances and safeguards have been established to preclude a subsequent violation (meeting, attendance at mandatory training, procurement authority rescinded, posting of written procedures, etc.).

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## **STATE PROCUREMENT OFFICE**

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