



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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October 31, 2013

PROCUREMENT CIRCULAR NO. 2011-02, Amendment 1

TO: Office of the Governor, Chief of Staff
Office of the Lieutenant Governor, Chief of Staff
Executive Department Heads
Hawaii State Public Library System, State Librarian

Chief Procurement Officers (CPOs):

Department of Education, Superintendent
University of Hawaii, President
Office of Hawaiian Affairs, Chairperson of the Board
Hawaii Health Systems Corporation, President and Chief Executive Officer
Judiciary, Administrative Director of the Courts
Senate, President
House of Representatives, Speaker

Counties of Hawaii, Kauai, Maui, and City & County of Honolulu
Executive Branch, Finance Director
Legislative Branch, Chairperson of the County Council
Board/Departments of Water Supply, Manager/Chief Engineer
Honolulu Authority for Rapid Transportation, Executive Director

FROM: Aaron S. Fujioka 

SUBJECT: Guidance on HRS §103D-310(c), Verification of Compliance for Small Purchase Contract Awards

In response to the information from the Department of the Attorney General, (refer to attached 3 correspondence) regarding the powers of the Administrator, of the State Procurement Office (SPO), the requirement to utilize the Hawaii Compliance Express (HCE) to verify compliance for awards pursuant to HRS §103D-305, that are \$2,500 or more is amended.

If a vendor is participating in HCE, State and County procurement personnel are required to verify compliance via HCE. All other vendors should be encouraged to subscribe to HCE, but if paper certificates are submitted, the SPO highly recommends that, State and County personnel contact the issuing agency to verify its validity as there have been fraudulent paper certificates submitted in the past.

attachments (3)

NEIL ABERCROMBIE
GOVERNOR



DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
ADMINISTRATION DIVISION
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September 5, 2013

The Honorable Daynette "Dee" Morikawa
Representative
House of Representatives, 16th District
State Capitol, Room 310
415 S. Beretania Street
Honolulu, Hawaii 96813

Dear Representative Morikawa:

Re: Hawaii Compliance Express

Your letter dated April 16, 2013 to Deputy Attorney General Patricia Ohara expressed concerns about the Hawaii Compliance Express ("HCE"), an electronic system that allows vendors doing business with State or county agencies to furnish proof of compliance with the requirements of section 103D-310(c), Hawaii Revised Statutes ("HRS") electronically. Procurement Circular No. 2011-02 (July 8, 2011), issued by the State Procurement Office ("SPO"), requires State and county procurement personnel to use HCE to obtain proof of compliance prior to award of a contract. SPO bases this requirement on Act 190 (2011).¹

Our office has reviewed Act 190, which amends HRS § 103D-310(c) to include small purchases among the types of contracts for which State and county procuring officers must verify compliance. As amended by Act 190, HRS § 103D-301(c) states:

(c) All offerors, upon award of contract, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392 and 393. Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. Any offeror making a false affirmation or certification under this subsection shall be suspended from further offerings or awards pursuant to section 103D-702.

¹An earlier Procurement Circular had instructed agencies to encourage vendors to register on HCE, but did not require agencies to accept only proof of compliance through HCE. See SPO Procurement Circular No. 2005-04; Amendments 1-4.

The procuring officer shall verify compliance with this subsection for all contracts awarded pursuant to sections 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts and procurements of \$2,500 or more awarded pursuant to section 103D-305; provided that the attorney general may waive the requirements of this subsection for contracts for legal services if the attorney general certifies in writing that comparable legal services are not available in this State.

HRS § 103D-310(c) (Supp. 2012) (amendment emphasized).

We note that the amendment to this subsection does not mention HCE. Moreover, the second sentence of this subsection specifically states that “[o]fferors shall produce documents to the procuring officer to demonstrate compliance with this subsection” (emphasis added) which indicates that paper certificates are acceptable. Although the preamble to Act 190 discusses the benefits of using HCE, there is no indication in either the Act’s Preamble or the amendment to HRS 103D-301(c) that State and county procuring officers are required to use HCE to verify compliance and cannot accept paper certificates of compliance. Neither is there any language in the Act requiring vendors to use HCE as the sole method of establishing compliance.

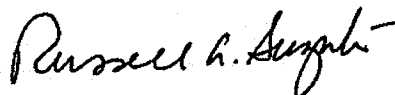
In the absence of statutory authority requiring vendors with State and county contracts to use HCE, the State Procurement Office cannot mandate such use through a Procurement Circular.² Although Procurement Circular No. 2011-02 is directed to State and county procurement personnel, and not to vendors, the effect of the Circular is to force vendors to use HCE (which requires an annual fee of \$12) to establish compliance.

² Statutory authority or a validly promulgated administrative rule pursuant to statutory authority is required in order for a State agency to implement procedures affecting the general public. The definition of “rule” in HRS § 91-1(4) includes “each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the . . . procedure, or practice requirements of any agency.” See Vega v. National Union Fire Ins. Co. of Pittsburgh, PA, Inc., 67 Haw. 148, 682 P.2d 1208 (1984) (Insurance Commissioner’s requirement that no-fault claimants submit to insurer-ordered medical exams is a “rule” that should have been promulgated through HRS chapter 91). The authority of the State Procurement Office to promulgate an administrative rule mandating the use of HCE is not addressed in this letter. See also, Haole v. State, 111 Hawaii 144, 152, 140 P.3d 377, 385 (2006) (“[A] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may exercise this power within the framework of the statute under which it is conferred. Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down.” Stop H-3 Ass’n v. State Dept. of Transportation, 68 Haw. 154 161 (1985)).

Hon. Daynette Morikawa
September 5, 2013
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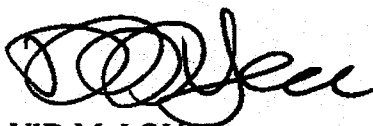
By copy of this letter, we urge the State Procurement Office to amend Procurement Circular No. 2011-02 to inform State and county procurement personnel that HCE is available for vendors awarded contracts over \$2,500 to establish proof of compliance, and that vendors are encouraged, but are not required to subscribe to HCE to establish proof of compliance.

Very truly yours,



Russell A. Suzuki
First Deputy Attorney General

APPROVED:



DAVID M. LOUIE
Attorney General

c: Rene Dela Cruz
Office of the Ombudsman

Aaron Fujioka
Administrator – State Procurement Office



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SPO 14-078

September 23, 2013

TO: Mr. Russell A. Suzuki
First Deputy Attorney General

FROM: Aaron S. Fujioka

SUBJECT: Hawaii Compliance Express (HCE)

This is in response to your letter to Representative Daynette Morikawa dated September 5, 2013, which on page 3 stated ". . . we urge the State Procurement Office to amend Procurement Circular No. 2011-02 to inform State and county procurement personnel that HCE is available for vendors awarded contracts over \$2,500 to establish proof of compliance, and that vendors are encouraged, but are not required to subscribe to HCE to establish proof of compliance."

State government as a whole through the Office of Information Management and Technology (OIMT) is rapidly moving toward modernizing government through technology. Reverting back to an obsolete and antiquated paper system is counterproductive to these efforts.

Paper compliance certificates are not real-time and may become invalid the day after issuance, similar to an automobile's paper no-fault card or financial/bank account paper balance statement. HCE is real-time; allowing state and county contract managers/administrators to easily monitor vendor/contractor compliance with ACT 211, SLH 2005 and subsequently ACT 190, SLH 2011 requirements for HRS §103-310(c). The paper tax clearance is also susceptible to the reproduction of fraudulent certificates. SPO and our deputy attorney general have seen first-hand evidence of a fraudulent tax clearance authorized signature, colored stamp, etc.

Knowing paper certificates are susceptible to fraud, a separate process would be needed to verify all paper clearance certificates submitted by the vendor/contractor is authentic, i.e. Certificate of Good Standing from DCCA, Certificate of Compliance from DLIR, and Tax Clearance Certificates from DOTAX and federal IRS. The State would have to expend resources to deliberately maintain an obsolete and antiquated paper-driven process, that is illogical, not forward thinking and susceptible to abuse.

Currently, there are over 16,500 vendors/contractors registered on the HCE system. HCE provides real-time monitoring of compliance status and automatically notifies the business entity via email of any compliance status change. This expedites the vendor's ability to furnish proof of compliance with the requirements of HRS §103D-310(c) prior to receiving a contract, for final

Mr. Russell A. Suzuki
First Deputy Attorney General
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SPO 14-078

payment, and facilitates any contract manager/administrator's ability to monitor compliance throughout the duration of the contract period. The paper process does not have these built in efficiency features. It would be irresponsible and a waste of tax payer's money to maintain an inefficient and costly paper driven process.

Since the inception of HCE in August 2005, there has been no breach/hacking of the system.

The State Procurement Office (SPO) is aware, as stated in your letter on page 2, that "*... there is no indication in either the Act's Preamble or the amendment to HRS 103D-310(c) that State and county procuring officers are required to use HCE to verify compliance and cannot accept paper certificates of compliance. Neither is there any language in the Act requiring vendors to use HCE as the sole method of establishing compliance.*"

However, clearly throughout the Act's preamble it strongly supports HCE and closes with "*... to support the findings of the small business working group and its recommendations to extend the use of Hawaii compliance express for small-business vendors, affording them the same savings of time and money in the contracting process.*"

This issue was discussed numerous times and at great lengths with our deputy attorney general about requiring State and county personnel and vendors/contractors to use HCE to meet the requirements of section 103D-310(c), HRS. SPO was advised that our deputy attorney general had concerns, but nonetheless said our actions were "defendable" the logic being that the Administrator's position has broad powers and authority to implement requirements to advance the consistent application of the Hawaii public procurement code regarding issues affecting transparency, fairness, and efficiency. I was advised that the Administrator's position is in effect a "super CPO" having broad authority and responsibilities to guide and assist all chief procurement officers (CPO), vendors and contractors. With this information, the decision was made that the Administrator's internal management of State and county procuring officers allowed for the more stringent application of law.

This is to request confirmation of the Attorney General's Office position regarding the Administrator of the State Procurement Office that the broad powers, authority and responsibilities of the Administrator allows for the internal management of State and county procuring officers by applying a more stringent application of the mandatory use of HCE versus submittal of paper certificates, as this is viewed as an allowable operational issue.

c: The Honorable David Louie, Attorney General
Ms. Patricia Ohara, Deputy Attorney General
Mr. Robin K. Matsunaga, Ombudsman
Mr. Sanjeev Bhagowalia, Chief Information Officer
The Honorable Daynette "Dee" Morikawa, Representative

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RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

October 2, 2013

Mr. Aaron S. Fujioka
Administrator
State Procurement Office
P.O. Box 119
Honolulu, Hawaii 96810-0119

Dear Mr. Fujioka:

Re: Hawaii Compliance Express

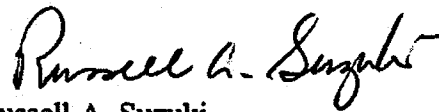
In a memorandum dated September 23, 2013, you asked that our office confirm that, as the Administrator for the State Procurement Office, you have broad powers and the authority to require State and county vendors to use the Hawaii Compliance Express ("HCE") rather than submit paper certificates of compliance. Although we do recognize your broad powers and authority over government agencies in administering chapters 103D and 103F, Hawaii Revised Statutes, we disagree that the Administrator has the power and/or the authority to mandate the use of HCE when there is no statutory authority or administrative rule to support such a requirement.

We understand that the State executive branch agencies are moving to modernize government processes through the use of technology; however, any requirement that affects individuals and entities doing business with the State by imposing a subscription fee to prove compliance must be supported by statutory authority and implemented through administrative rules. The preamble to Act 190, 2011 Session Laws, shows the Legislature's support of HCE, but such support did not result in statutory language that would require the exclusive use of HCE to demonstrate compliance with section 103D-310(c), Hawaii Revised Statutes. As we pointed out earlier in our letter dated September 5, 2013, to Representative Daynette "Dee" Morikawa, the language of subsection (c) as set forth in Act 190 ("Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection.") clearly allows vendors with State and/or county contracts to submit paper certificates of compliance.

Mr. Aaron S. Fujioka
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Although the Procurement Office Administrator has broad powers, those powers do not include imposing a requirement that goes beyond what is authorized by statute. We do not believe that the HCE requirement would withstand a challenge in the courts. Accordingly, we reiterate that Procurement Circular No 2011-02 should be amended to inform State and county procurement personnel that HCE is available to vendors awarded State or county contracts over \$2,500, and that such vendors are encouraged to subscribe to HCE, but may, if they so choose, submit paper certificates establishing proof of compliance.

Very truly yours,



Russell A. Suzuki
First Deputy Attorney General

APPROVED:



DAVID M. LOUIE
Attorney General

c: The Honorable Daynette "Dee" Morikawa, Representative
Mr. Robin K. Matsunaga, Ombudsman
Mr. Sanjeev Bhagowalia, Chief Information Officer