

PROCUREMENT POLICY BOARD

1151 Punchbowl Street
Conference Room 410
Honolulu, Hawaii 96813

Regular Meeting
July 17, 2008
1:00 pm

AGENDA

- I. Call to Order.
- II. Approval of Minutes – Meeting of June 19, 2008.
- III. Election of Officers.
- IV. Proposed rules to HAR chapter 3-125, Modifications and Terminations of Contracts.
- V. HAR Chapter 3-120, General Provisions:
 - a. Annual Review of Exhibit A, Procurements Exempt from HRS Chapter 103D; and
 - b. Proposed amendments to sections of HAR Chapter 3-120, General Provisions.
- VI. Announcements.
- VII. Adjournment.

Available agenda items may be viewed at www.spo.hawaii.gov/procurement-policy-board-minutes-of-meeting. Individuals may present testimony on matters on the Procurement Policy Board's agenda when the agenda item is being discussed by the Board. Individuals intending to testify should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting. Written testimonies will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, July 15, 2008. Testimonies received after the July 15, 2008 deadline will be forwarded to the board after the July 17, 2008 meeting. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., July 14, 2008 to discuss accommodation arrangements.

Note: Current rule is in black. The SPO and Bardusch agreed upon deletions are stricken and in black, and the SPO and Bardusch agreed upon additions are underscored and in blue. Differences between the SPO and Bardusch versions are highlighted. BIA suggested changes are in green.

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to Chapter 3-125 (Interim)
Hawaii Administrative Rules

July 17, 2008

1. Section 3-125-2, Hawaii Administrative Rules (Interim), is amended to read as follows:

"§3-125-2 Change orders to in goods and services contracts. (a) A change order is a written order signed by the procurement officer, directing the contractor to make changes which the "changess clause" of the contract authorizes the procurement officer to order without the consent of the contractor.

(b) The following ~~paragraphs~~ paragraph, or similar statements statement expressing the intent of the this ~~paragraphs~~ paragraph, shall be included in all contracts for goods and services:

"Changes Clause

- (1) ~~"Change clause.~~ Generally. By written order, at any time, and without notice to any surety, the procurement officer may, unilaterally, order of the contractor:
 - (A) Changes in the work within the scope of the contract; and
 - (B) Changes in the time of performance of the contract that do not alter the scope of the contract work."
- (2) "Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause [~~of this contract or as negotiated.~~] included pursuant to §3-125-12(a).

Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause included pursuant to §3-125-12(a)(1)(E).
BIA seeks deletion of bracketed portion [] and addition of underlined portion.

Failure of the parties to agree to an adjustment in time shall not excuse the contractor from proceeding with the contract as changed, provided that the procurement officer promptly (normally within 10 days after the changed work commences) and duly makes the provisional adjustments in [~~payment or~~] time [~~for the direct costs of the work as changed~~] as the State procurement officer deems reasonable. The right of the contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work, provided however, that it follows the written notice requirements for disputes and claims established by the contract ~~or these rules.~~"

SPO recommends highlighted portion be deleted. BIA wants to add what's in () and underlined and delete what's bracketed [] and stricken.

- (3) "Time period for claim. Except as may be provided otherwise by HRS § 103D-501(b), the contractor must file a written claim disputing the contract price or time provided in a change order within ten days after receipt of a written change order, unless the such period for filing is extended by the procurement officer in writing, ~~the contractor shall respond with a claim for an adjustment.~~ The requirement for filing a timely written ~~response~~ claim cannot be waived and shall be a condition precedent to the assertion of a claim."
- (4) "Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if ~~written response~~ the claim is not ~~given~~ received by the procurement officer prior to final payment under this contract."
- (5) "Claims Other claims not barred. In the absence of such a change order, nothing in this clause shall be deemed to restrict the contractor's

right to pursue a claim under the contract or for breach of contract." [Eff 12/15/95; am and comp NOV 17 1997; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended HRS § 103D-501 by adding new requirements affecting the change order process. Minor changes made for clarification.

2. Section 3-125-3, Hawaii Administrative Rules (Interim), is amended to read as follows:

§3-125-3 Modifications to goods and services contracts. (a) A contract modification is a written alteration within the scope of the contract to specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

(b) The following ~~clauses~~ paragraph, or similar ~~statements~~ statement expressing the intent of the ~~clauses~~ this paragraph, shall be included in all contracts for goods and services:

“Modifications Clause

- (1) “Contract modification. By a written order, at any time, and without notice to any surety, the procurement officer, subject to mutual agreement of the parties to the contract and all appropriate adjustments, may make modifications within the general scope of this contract to include any one or more of the following:
 - (A) Drawings, designs, or specifications, for the goods to be furnished;
 - (B) Method of shipment or packing;
 - (C) Place of delivery;
 - (D) Description of services to be performed;
 - (E) Time of performance (i.e., hours of the day, days of the week, etc.);
 - (F) Place of performance of the services; or
 - (G) Other provisions of the contract accomplished by mutual action of the parties to the contract.”
- (2) “Adjustments of price or time for performance. If any modification increases or decreases the contractor’s cost of, or the time

required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this contract or as negotiated."

- (3) "Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if ~~written agreement of modification~~ the claim is not ~~made~~ received by the procurement officer prior to final payment under this contract."
- (4) "Claims Other claims not barred. In the absence of such a contract modification, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim under the contract or for a breach of contract." " [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

Justification: Minor changes made for clarification.

3. Section 3-125-4, Hawaii Administrative Rules (Interim), is amended to read as follows:

"§3-125-4 ~~Changes~~ Change orders for in construction contracts. The following ~~paragraphs~~ paragraph, or similar ~~statements~~ statement expressing the intent of ~~these paragraphs~~ this paragraph, shall be included in all construction contracts:

"Changes Clause

- (1) "Change order. The procurement officer, at any time, and without notice to any surety, in a signed writing designated or indicated to be a change order, may make changes in the work within the scope of the contract as ~~maybe~~ may be found to be necessary or desirable. Such changes shall not invalidate the contract or release the sureties, and the contractor will perform the work as changed, as though it had been part of the original contract. Minor changes in the work may be directed by the procurement officer with no change in contract price or time of performance."

- (2) "Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment may be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause [~~of this contract.~~] included pursuant to §3-125-13(a). Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause included pursuant to §3-125-13(a)(1)(E). Failure of the parties to agree to an adjustment in time shall not excuse a contractor from proceeding with the contract as changed, provided that the procurement officer promptly (normally within 10 days after the changed work commences) and duly makes such provisional adjustments in [~~payment or~~] time [~~for the direct costs of the work as changed~~] as the State procurement officer deems reasonable. The right of the contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work, provided however, that it follows the written notice requirements for disputes and claims established by the contract ~~or these rules.~~
- SPO recommends highlighted portion be deleted. BIA seeks to add what's () and underlined and delete what's bracketed [] and stricken.***
- (3) "Time period for claim. Within thirty days after receipt of a written change order under paragraph (1) of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file a notice of intent to assert a claim for an adjustment. The requirement for filing a timely written notice cannot be waived and shall be a condition precedent to the assertion of a claim."
- (4) "Claim barred after final payment. No claim by the contractor for an adjustment ~~here~~ hereunder shall be allowed if written notice is not given

- prior to final payment under this contract.""
- (5) "Claims-Other claims not barred. In the absence of such a change order, nothing in this clause shall restrict the contractor's right to pursue a claim arising under the contract or for breach of contract."" [Eff 12/15/95; am and comp NOV 17 1997; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended HRS § 103D-501 by adding new requirements affecting the change order process. Minor changes made for clarification.

4. Section 3-125-12, Hawaii Administrative Rules (Interim), is amended to read as follows:

"§3-125-12 Price adjustment for in goods and services contracts. (a) The following paragraph or similar statement expressing the intent of the this paragraph, shall be included in all applicable contracts for goods and services ~~contracts~~ for which price adjustments will be allowed:

"Price Adjustment Clause

- (1) "Price adjustment methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
- (A) By agreement on a fixed price adjustment before commencement of the pertinent performance ~~or as soon thereafter as practicable;~~
 - (B) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (C) By the costs attributable to the events s or situations under such clauses with adjustment of [~~covered by the clause, plus appropriate~~] profit or fee, all as specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (D) In ~~such~~ any other manner as the contracting parties may mutually agree ~~or~~ upon before commencement of the pertinent performance;
or
 - (E) In the absence of agreement between the

~~parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126."~~ :

- (i) For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A Price Adjustment change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or
- (ii) For change orders with value exceeding \$50,000 by a unilateral determination by the governmental body of the costs attributable to the events or situations under clauses with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the rules adopted under HRS section 103D-601 and subject to the provisions of part VII. When a unilateral determination has been made, a unilateral Price Adjustment change order shall be issued within ten days. Costs included in the unilateral Price Adjustment change order shall allow for

twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral Price Adjustment change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral Price Adjustment change order. Failure to file a claim [under the Disputes clause of the contract] within the time specified shall constitute agreement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral Price Adjustment change order.

BIA seeks deletion of stricken portion

- (b) (2) Submission of cost or pricing data. The contractor shall ~~provide~~ be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of **HRS** section 103D-312. The submission of any cost or pricing data shall be made for any price adjustment subject to the provisions of subchapter 15, chapter 3-122. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraphs **(1)**(A) through **(1)** ~~[(E)]~~ **(D)** shall be issued within ten days after agreement on the method of adjustment." " [Eff 12/15/95;comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-501)(Imp: HRS §§103D-312, 103D-501, 103D-601, 103D-703)

Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended HRS § 103D-501 by adding new requirements regarding price adjustments. Minor

changes made for clarification.

5. Section 3-125-13, Hawaii Administrative Rules (Interim), is amended to read as follows:

"§3-125-13 Price adjustment for in construction contracts. (a) ~~The paragraphs in this subsection, paragraph or similar statements~~ statement expressing the intent of ~~these paragraphs, this paragraph,~~ shall be included in all applicable construction contracts for which price adjustments will be allowed:

"Price Adjustment Clause

- (1) "Price adjustment methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
- (A) By agreement on a fixed price adjustment before commencement of the pertinent performance ~~or as soon thereafter as practicable;~~
 - (B) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (C) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - ~~(D) [Whenever there is a variation in quantity for any work covered by any line item in breakdown costs provided by the contractor pursuant to contractual pre work submittal requirements, by the procurement officer, at the procurement officer's discretion, adjusting the lump sum price proportionately;~~
 - ~~(D) In such other manner as the parties may mutually agree;~~
 - (E) ~~At the sole option of the procurement officer, by the costs attributable to the event or situation covered by the change, plus appropriate profit or fee;]~~

SPO and Bardusch agree to delete (D). BIA seeks to delete what's bracketed [] and stricken.

or

(F) In [such] (any) other manner as the parties may mutually agree upon before commencement of the pertinent performance; or

~~(F)~~(G) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126.":

(i) For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A Price Adjustment change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or

(ii) For change orders with value exceeding \$50,000 by a unilateral determination by the governmental body of the costs attributable to the events or situations under clauses with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the rules adopted under HRS section 103D-601 and subject to the provisions of part VII. When a unilateral

determination has been made, a unilateral Price Adjustment change order shall be issued within ten days. Costs included in the unilateral Price Adjustment change order shall allow for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral Price Adjustment change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral Price Adjustment change order. Failure to file a claim [under the Disputes clause of the contract] within the time specified shall constitute agreement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral Price Adjustment change order.

BIA seeks deletion of stricken portion.

- (2) ~~"[Determining the cost or credit. In determining the cost or credit to the State government resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office and field overhead) and profit combined, shall not exceed the percentages set forth below:~~
- ~~(A) For the contractor, for any work performed by its own labor forces, fifteen twenty per cent of the cost;~~
 - ~~(B) For each subcontractor involved, for any work performed by its own forces, fifteen twenty per cent of the cost;~~
 - ~~(C) For the contractor or any subcontractor, for~~

~~work performed by their subcontractors, seven ten per cent of the amount due the performing subcontractor."~~

- ~~(3) "Percentages for fee and overhead. Not more than three line item percentages for fee and overhead, not to exceed the maximum percentages shown above, will be allowed regardless of the number of tier subcontractors."]~~

BIA and BWS seek deletion of stricken portion.

- (4) Submission of cost or pricing data. The contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section **HRS section 103D-312**. The submission of any cost or pricing data shall be made subject to the provisions of subchapter 15, chapter 3-122. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraphs **(1)(A)** through **(1)(D)** shall be issued within ten days after agreement on the method of adjustment."

[Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-501, 103D-601, 103D-703)

Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended HRS § 103D-501 by adding new requirements regarding price adjustments. Minor changes made for clarification.

6. Section 3-125-23, Hawaii Administrative Rules (Interim), is amended to read as follows:

"§3-125-23 Prompt payment by contractors to subcontractors. The following statements, **paragraph**, or similar ~~statements~~ **statement** expressing the same intent, shall be included in all contracts:

"Prompt payment Clause

- (1) ~~"Prompt payment clause. **Generally**.~~ Any money, other than retainage, paid to a contractor shall be ~~dispersed~~ **disbursed** to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no

bona fide disputes on which the procurement agency has withheld payment. ~~; and, upon~~

(2) Final payment. Upon final payment to the contractor, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.^u

(3) Penalty. The procurement officer or the contractor, as applicable, will be subject to a penalty of one and one-half (1½) percent per month upon outstanding amounts due that were not timely paid by the responsible party under the following. Where a subcontractor has provided evidence to the contractor of satisfactorily completing all work under their subcontract and has provided a properly documented final payment request as described in subsection (4), and:

(A) Has provided to the contractor an acceptable performance and payment bond for the project executed by a surety company authorized to do business in the State, as provided in section HRS section 103-32.1; or

(B) The following has occurred:

(i) A period of ninety days after the day on which the last of the labor was done or performed and the last of the material was furnished or supplied has elapsed without written notice of a claim given to contractor and the surety, as provided for in HRS section 103D-324; and

(ii) The subcontractor has provided to the contractor:

- An acceptable release of retainage bond, executed by a surety company authorized to do business in the State, in an amount of not more than two times the amount being retained or withheld by the contractor;
- Any other bond acceptable to the contractor; or
- Any other form of mutually acceptable collateral,

then, all sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by the procurement officer to the contractor and subsequently, upon receipt from the procurement officer, by the contractor to the subcontractor within the applicable time periods specified in subsection (2) and HRS section 103-10. The penalty may be withheld from future payment due to the contractor, if the contractor was the responsible party. If a contractor has violated subsection (2) three or more times within two years of the first violation, the contractor shall be referred by the procurement officer to the contractor license board for action under HRS section 444-17(14).

- (4) A properly documented final payment request from a subcontractor, as required by subsection (3), shall include:
- (A) Substantiation of the amounts requested;
 - (B) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief, that:
 - (i) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the subcontract;
 - (ii) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
 - (iii) The payment request does not include any amounts that the subcontractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract; and
 - (C) The submission of documentation

confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied.

The procurement officer shall return any final payment request that is defective to the contractor within seven days after receipt, with a statement identifying the defect.

- (5) In the case of a construction contract, a payment request made by a contractor to the procurement officer that includes a request for sums that were withheld or retained from a subcontractor and are due to a subcontractor may not be approved under subsection (3) unless the payment request includes:
- (A) Substantiation of the amounts requested; and
 - (B) A certification by the contractor, to the best of the contractor's knowledge and belief, that:
 - (i) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
 - (ii) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the contract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
 - (iii) The payment request does not include any amounts that the contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

The procurement officer shall return any final payment request that is defective to the contractor within seven days after receipt, with a statement identifying the defect.

- (6) This section shall not be construed to impair the right of a contractor or a subcontractor at any tier to negotiate and to include in their respective subcontracts provisions that provide for additional terms and conditions that are requested to be met before the subcontractor

shall be entitled to receive final payment under subsection (3) of this section; provided that any such payments withheld shall be withheld by the procurement officer."" [Eff 12/15/95; am and comp NOV 17 1997; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

Justification: Changes made in response to Act 291, 2006 Session Laws of Hawaii, which amended law regarding prompt payments by adding new procedures. Minor changes made for clarification.

SUMMARY
PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS
HAR §3-120-4

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
1	<p>Research, reference, and “educational materials” including books, maps, periodicals, and pamphlets, which are published “or available” in print, video, audio, magnetic, or electronic form, “including web-based databases”.</p>	<p>Requested by the Dept. of Education, Hawaii State Public Libraries Systems, University of Hawaii, and Dept. of Public Safety</p> <p>Flexibility is essential to facilitate innovativeness or matching of teaching material to the environment and people involved; to get the latest books and related materials to the public in the best possible manner. Publishing companies as an industry norm do not sell to jobbers for resale.</p> <p>A similar exemption in HRS §103D-102(b) (4)(C) lacks sufficient coverage; this HAR exemption is more inclusive (added “educational materials” and “web-based databases”).</p>	<p>This exemption is supported by law, and provides clarity with the added language.</p> <p>Recommend the continuation of this exemption.</p>	<p>AG – supports SPO recommendation.</p> <p>B&F, EUTF – supports SPO recommendation. Educational materials must be obtained on an ongoing basis for the education of its board members and staff.</p> <p>C&C of Honolulu –retain the exemption. Materials are selected based on specific information necessary for the agency to accomplish their mission.</p> <p>DCCA – supports SPO recommendation. The DCCA depends on the most current, thorough, and most accurate resources and reference materials. Procuring those resources through competitive means would be impractical and seriously curtail the DCCA’s efforts and abilities to protect the public.</p> <p>DOE–supports SPO recommendation. Schools need to select and obtain educational materials that best fit within their established curriculum and programs. Obtaining educational materials through competitive means may result in materials not best suited for educators and students.</p> <p>DOH, HHSC – supports SPO recommendation.</p> <p>DLNR – retain the exemption. The Commission on Water Resource Management must have the highest quality of water resource materials, research, educational materials, and database standards to provide the best available information to the public and to make informed critical decisions. It is vital the Commission retains the option of choosing the materials that best fit its needs, regardless of vendor.</p> <p>DOT – supports SPO recommendation. This exemption is necessary for the purchase of various trade publications, and training and testing materials for the various functions within the department.</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
2	Services of printers, rating agencies, support “facility providers”, fiscal and paying agents, and registrars for the issuance and sale of the State’s or counties’ bonds.	<p>Requested by the Dept. of Budget and Finance.</p> <p>The nature of the types of procurements and time constraints involved, prevent agencies from using the competitive process. When the approval to issue a bond is received, the services of agents, rating agencies, printers, etc. need to be expedited to get the bond out on the market.</p> <p>A similar exemption in HRS §103D-102(b)(4)(I), refers to “support facilities”. The definition of a “support facility” is an irrevocable letter of credit, surety bond or agreement issued by one or more support facility providers. The definition of “support facility provider” is a bank, trust company, banking association, etc. The exemption in HAR has the correct language.</p>	<p>This exemption is supported by law, and provides clarity with the added language.</p> <p>Recommend the continuation of this exemption.</p>	
3	Services of lecturers, speakers, trainers, <u>facilitators</u> and script writers; <u>when the individual possess specialized training methods, techniques or expertise in the subject matter.</u>	<p>Requested by the University of Hawaii, Dept of Human Services, and Dept of Human Resources and Development.</p> <p>Competition is not feasible due to the numerous unique methods of training, speaking, and writing styles of individuals and the skills and intangibles of individuals that cannot be quantified.</p> <p>The amended wording is necessary because some types of training services are competitive. As an example, the State Procurement Office competitively solicits computer training services.</p>	<p>Recommend the continuation of this exemption, with the added language to restrict training services that are competitive.</p>	<p>AG – supports SPO recommendation.</p> <p>C&C of Honolulu, Purchasing – retain the exemption. The selection of vendors is based not only on their qualifications but also their effectiveness to the intended audience.</p> <p>C&C of Honolulu, Human Resources – supports continuation of the exemption. The quality of training services cannot be competitively measured and procured. Boring lecturers, speakers, and trainers who do not engage the attendees ultimately waste their time as well as taxpayers dollars.</p> <p>DOD –supports SPO recommendation. The DOD has various unique training situations that make it essential to have this exemption.</p> <p>DOH, HHSC – supports SPO recommendation.</p> <p>G. Riki Hokama – retain the exemption without the amendment. The proposed amended language requires a subjective determination as to whether an individual possesses specialized training methods, thus creating the opportunity for conflict.</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
				<p>DHRD – supports SPO recommendation but with alternate wording. Competition for these services are not feasible due to the numerous unique methods of training, speaking, and writing styles of individuals and the skills of individuals that cannot be quantified. However, while some services such as computer training services can be competitively procured, the proposed wording will be problematic. Therefore the following is recommended as an alternative: “Services of lecturers, speakers, trainers, and script writers; <u>except for technical training for hard skills, such as computer-related training services.</u>”</p> <p>DHS – opposes any elimination of the exemption. Although the textual content can be identical, the training method and style of the trainer is always unique. The skills, styles, and motivational qualities of a trainer ultimately determine the success of the training and are not easily quantifiable. In many instances, the training material used by a trainer is copyrighted.</p> <p>DLNR – supports SPO recommendation. The Commission on Resource Management has specialized needs that sometimes can only be met by a single individual. It is essential for the Commission to have the ability to select lecturers, speakers, trainers, and scriptwriters who have the required knowledge and expertise. The Division of Aquatic Resources recommends including the term “facilitators” with the exemption.</p> <p>PSD – supports SPO recommendation but recommends the following amendment- “ <u>when the individuals possess specialized training methods and expertise in the subject matter, that although are not a sole . . .</u> “</p> <p>DOT – supports SPO recommendation. The selection of speakers, trainers, and lecturers is based on the subject matter and experience of the speaker.</p>
4	Services of legal counsel, guardian ad litem, psychiatrists,	Requested by the Judiciary and Dept. of Commerce and Consumer Affairs (DCCA). The DCCA requested the addition of receivers	Recommend the continuation of this exemption	G. Riki Hokama – supports the exemption but takes no position on the amendment

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
	<p>[and] psychologists, receivers and masters when required by court order[-or by the Rules of Court in the case of interpreters, in criminal and civil proceedings].</p>	<p>and masters when appointed by the court. Receivers and masters generally are required to conduct reviews, operate businesses, etc. and report directly to the court. The DCCA also recommended the deletion of “interpreters” since they are already covered by exemption item no. 13.</p> <p>The computation rates for these services are fixed by law, judicial rule, or operational policy, which render the requirement for price comparisons moot. The circumstances regarding such proceedings also make it impracticable and unreasonable to comply with HRS chapter 103D.</p>	<p>with the proposed amendments.</p>	
5	<p>Fresh meats and produce.</p>	<p>Requested by the Dept. of Education and University of Hawaii.</p> <p>The highly perishable nature of fresh meat and produce, and unstable and frequent fluctuations in their pricing necessitate this exemption. The volatile nature of the industry, unexpected requirements, and frequent fluctuations in pricing for fresh meats and produce is not practicable or not advantageous to compete these requirements.</p> <p>The school food service programs often times must determine what to purchase or select menus based on what’s available, the quality, unexpected requirements and best pricing at the markets or food distributors. To require firm pricing for fresh meats and produce for any extended period presents an unfair situation for the agencies and vendors.</p>	<p>Recommend the continuation of this exemption.</p>	<p>DOA – recommends retaining the exemption to support local ranchers and farmers, provides quality fresh meats and produce for school culinary programs and encourages purchasing of Hawaii fresh commodities for commercial use.</p> <p>C&C of Honolulu –retain exemption. Items are perishable. Not feasible to store in large quantities. Timely delivery and availability is critical.</p> <p>DOE–supports SPO recommendation. Due to unstable and frequent fluctuation in price, vendors of fresh meat and produce are unwilling to hold firm prices for the length of time required to procure these items competitively. Unexpected requirements also make it impractical to procure these items through competitive means.</p> <p>DOH, HHSC – supports SPO recommendation.</p> <p>Hawaii Beef Producers – supports the exemption. The exemption supports local ranchers and farmers, provides quality meats and produce for the schools and food service systems. It encourages ranchers and farmers to continue to produce local products.</p> <p>Hawaii Cattle Producers Cooperative Assoc. – strongly supports retaining the exemption. The association</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
				<p>represents 46 ranchers statewide. The exemption supports these ranchers who provide meat to the DOE, culinary schools and state institutions. The exemption needs to be retained to allow the industry to achieve its full potential and goal in being a major meat provider for the state's economy.</p> <p>Maui Cattle Company – retain the exemption. The exemption supports local ranchers and producers. It is important that our state institutions support our local agricultural industry as it allows Hawaii to continue to provide some of its essential food supply.</p> <p>Kukaiiau Ranch, LLC – retain the exemption. The exemption supports local ranchers an farmers, it provides quality meats and produce for our school systems and state run food service programs. We need to market our products where possible and be self sustainable and need your assistance by supporting this exemption.</p> <p>Hawaii Farm Bureau Federation – supports continuing the exemption. The organization represents farmers and ranchers across the state and believes the agriculture is the cornerstone to Hawaii's sustainability and is a critical part of self sufficiency. Providing locally grown fruits, vegetables and meats to students fosters a strong local agricultural industry. The existing exemption is critical to supporting local ranchers and farmers.</p>
6	Insurance to include insurance broker services.	<p>Originally requested by DAGS Risk Management.</p> <p>Low price alone cannot be used for the selection of an insurance provider and many preferred providers or insurance companies will not respond to competitive solicitations.</p> <p>Because the SPO and DAGS awarded an RFP for insurance broker services that was determined to be successful, the SPO recommended the deletion of insurance broker services.</p>	<p>The SPO initially recommended amending the exemption with the deletion of insurance broker services.</p> <p>However given new information, the SPO recommends</p>	<p>B&F, EUTF – The placement of insurance, is best done by the broker through standard industry practice.</p> <p>C&C of Honolulu, Budget and Fiscal Services- opposed to any changes. It is impractical to separate the services from the product; especially since broker services are paid by the insurance company in the form of commissions. Each agency has their own unique insurance and broker services requirements and need the flexibility to employ a competitive structure best suited to their requirements.</p> <p>C&C of Honolulu, Risk Management – opposed to any</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
			retaining this exemption without amendments.	<p>change. Provided a copy of a lawsuit filed against the State that supports not making any changes to this exemption.</p> <p>Hawaii County - retain the exemption without the amendment. Brokers compete against each other as they all have access to different carriers. The elimination of broker services from the exemption will create the need for an RFP for each type of policy; an unwieldy proposition that will only add unnecessary time and effort to the process. The current process has worked well for the County of Hawaii.</p> <p>DOH, HHSC – retain the exemption as previously written without the amendment.</p> <p>UH – retain the exemption without any amendment. The exemption as presently written provides flexibility to meet the needs of the UH, other agencies and their clients in a timely manner.</p>
7	Animals and plants.	<p>Requested by the City & County of Honolulu and University of Hawaii.</p> <p>Competition is not feasible due to the unique nature, quality, visual appearance, or health of one animal or plant from another. As an example, specifications and pricing cannot determine the selection of all animals and plants. Many times, as in the case of zoo animals or rare plants, the availability may be in short supply or with short notice.</p> <p>The SPO recommended amending the exemption to read “Rare or exotic animals and plants, and animals and plants for research purposes” because it was felt that unless the animals and plants are rare or exotic such as zoo animals or needed for research purposes, most other animals and plants may be subject to competition.</p>	<p>The SPO initially recommended amending the exemption to restrict the exemption to only certain animals and plants.</p> <p>However given new information, the SPO recommends retaining this exemption without amendments.</p> <p>When animals or plants can be procured through a competitive process, solicitations may</p>	<p>C&C of Honolulu – retain exemption but without amendments. These items require careful screening to prevent the spread of disease to other animals and plants. There is also an issue of compatibility with other animals that vary with each individual animal.</p> <p>County of Hawaii – retain the exemption but without amendments. Who is to determine what animal or plant species are rare or exotic? Not all zoo animals are considered rare and exotic. There is no consistent formula to weight the value of animals or plants that vary in color, markings, size, vigor or age. While live stock may be purchased based on weight and age, the zoo may also need to purchase live stock for the petting zoo. In this case, color, markings, size, pedigree for breeding, and temperament are factors that need to be considered. As with animals, the agency also provided detailed justification for not exempting only rare or exotic plants. Short supply and short notice also affect animals and plants that are rare and exotic or required for research purposes.</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
			be issued on a case by case basis. An example is live stock not for zoo purposes.	
8	New or used items which are advantageous and available on short notice through an auction, bankruptcy, foreclosure, etc.	The exemption is essential for commodities available on short notice or subject to quick sale or acquisition, therefore making the competitive process not feasible.	Recommend the continuation of this exemption.	
9	Food and fodder for animals.	<p>Requested by the City & County of Honolulu, the University of Hawaii, and Department of Agriculture.</p> <p>The initial language of this exemption was limited to “Food and fodder for animals in a zoo”, and subsequently amended to “Food and fodder for animals” to be more generic.</p> <p>As per the C&C of due to the perishable nature of the foods, quality, availability and specialized types of foods that zoo animals require, it is not feasible to bid their food.</p> <p>The UH maintains various types of laboratory and farm animals that require a wide variety of special food that have a limited shelf, and ordered in small quantities. Changes in the feed are also necessary for testing and research purposes.</p> <p>The DOA Animal Quarantine Station must have foods that are accepted by the numerous animals that are quarantined for up to four months. Digestibility by the animals is something that cannot be determined ahead of time or without actual feeding trials.</p> <p>The SPO recommended deleting the exemption</p>	<p>The SPO initially recommended deleting the exemption.</p> <p>However given new information, the SPO recommends the continuation of this exemption.</p>	<p>DOA – Reiterated their justification for the exemption.</p> <p>C&C of Honolulu – It is not feasible to order large quantities due to the perishable nature of some foods and the changing dietary needs of animals. It is necessary to protect the well being of animals.</p> <p>County of Hawaii- retain the exemption. Quality in manufacturing and ingredients are critical to the health and welfare of animals. An example is the many recent recalls of dog and cat foods. All animal feeds are not created equally. If this exemption is deleted and animal food and fodder must be purchased competitively, the health and well being of valuable zoo animals will be at risk. At a minimum, amend the language back to “Food and fodder for animals in a zoo.”</p> <p>UH – retain the exemption. The UH reiterated their original justification for the exemption and provided additional information in support of the exemption.</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
		because it was felt that food and fodder was competitive; purchasing agencies could seek a CPO exemption if warranted on a case-by-case basis.		
10	Facility costs for conferences, meetings, and training sessions.	Agencies have specific requirements such as large meeting and break out rooms for their conferences or meetings. The desired types of facilities and hotels frequently are not available on the required dates for the conferences and meetings, necessitating agencies to negotiate dates, times and costs with any available or potential location.	Recommend the continuation of this exemption.	<p>AG – supports SPO recommendation.</p> <p>B&F, EUTF – supports SPO recommendation. It would not be practical or feasible for the EUTF to use a competitive process to obtain these facilities.</p> <p>C&C of Honolulu –retain the exemption. The location of the facility is important to achieve maximum attendance.</p> <p>DOD – supports SPO recommendation. DOD’s international involvement requires certain security measures to be met which make it difficult to select low bidders.</p> <p>DOH, HHSC – supports SPO recommendation.</p> <p>G. Riki Hokama – retain the exemption. It can be difficult to find acceptable facilities that are available on the dates needed and fit the conference’s specifications. The Council must negotiate dates, times, and costs with any available or potential location.</p> <p>DLNR – retain the exemption. The Division of Aquatic Resources has encountered problems paying for break-out rooms in the past; recommend to add “including break-out rooms”.</p> <p>DOT – supports SPO recommendation. Needed for securing conference rooms for various DOT conferences.</p>
11	Advertisements in specialized publications, such as in ethnic or foreign language publications, trade publications, <u>or</u> professional	<p>Requested by the City & County of Honolulu, the University of Hawaii, and various other State departments.</p> <p>It is not feasible to competitively solicit certain types of advertisements when agencies are required to address or reach a specific audience through a limited source of specialized publications.</p>	Recommend the continuation of this exemption, with the typo clarification.	<p>AG – supports SPO recommendation.</p> <p>G. Riki Hokama – supports SPO recommendation. It is not feasible to competitively solicit certain types of advertisements when agencies are required to address or reach a specific audience through a limited source of specialized publications.</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
	publications.			
12	<p>[Professional consultant services as required under Chapter 658, HRS] <u>Arbitrator and mediator services.</u></p>	<p>Requested by the Dept. of Agriculture, Dept. of Land and Natural Resources, Dept of Labor and Industrial Relations, and various other State departments.</p> <p>Arbitrators or mediators are periodically required to settle controversies between agencies and the public. HRS Chapter 658 (Arbitration and Awards) provides for a neutral third party to settle differences between parties. Selection of a neutral third party arbitrator or mediator makes the competitive procurement process impractical.</p> <p>HRS Chapter 658 was repealed and replaced with HRS Chapter 658A (Uniform Arbitration Act) which is basically the same. Rather than changing the reference from Chapter 658 to Chapter 658A, the SPO recommends the exemption be amended to simply refer to arbitrator and mediator services.</p>	<p>Recommend the continuation of the exemption with the proposed amendment.</p>	<p>AG – supports SPO recommendation.</p>
13	<p>Interpreter services.</p>	<p>Requested by the University of Hawaii and Dept. of Human Services.</p> <p>When purchasing sign language and oral interpreter services, the UH must abide by the Hawaii State Coordinating Council of Deafness Administrative Rules, Chapter 11-218, which requires the UH to hire a hearing impaired person’s preferred interpreter when possible or use the interpreter determined by the Hawaii Services on Deafness- the only interpreter referral agency in the State.</p> <p>The Dept. of Human Services requires this exemption for hiring a vision impaired, hearing impaired, or non-English speaking person’s preferred interpreter.</p>	<p>Recommend the continuation of this exemption.</p>	<p>AG – supports SPO recommendation.</p> <p>DOH, HHSC – supports SPO recommendation. Services are needed for the health care industry and reiterates the justification provided by the Dept. of Human Services.</p>
14	<p>Procurement of</p>	<p>Requested by the City & County of Honolulu,</p>	<p>Recommend the</p>	<p>C&C of Honolulu –retain the exemption. Without</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
	repair services when dismantling is required to assess the extent of repairs.	<p>Dept. of Transportation, Dept. of Public Safety, and various other State departments.</p> <p>Competitive procurement of repair services is impractical when the item is required to be disassembled to determine the extent of the work required. An example is the repair of vehicles where the problem or extent of the repairs is not known until the vehicle has been disassembled. It is not practical or reasonable to require agencies to ask repair shops to disassemble and reassemble vehicles to obtain repair pricing.</p>	continuation of this exemption.	<p>dismantling, it would be impossible to determine the scope of some repairs. Once dismantled, it may not be practical to utilize the services of another vendor.</p> <p>DOH, HHSC – supports SPO recommendation.</p> <p>DOT – supports SPO recommendation. This exemption is used quite frequently for the dismantling and repair of the department’s heavy and specialized equipment.</p>
15	Burial services consisting of mortuary, crematory, cemetery, and other essential services for deceased indigent persons or unclaimed corpses.	<p>Requested by Dept. of Human Services.</p> <p>Pursuant to HRS Section 346-15, the Department of Human Services may pay for the burial costs of deceased medical or financial assistance recipients or unclaimed corpses to any licensed provider of mortuary and crematory services, with a maximum limit of \$400. The law further specifies that when the decedent is survived by relatives, the relatives shall also be permitted to make their own arrangements for the burial or cremation of their deceased relative.</p>	Recommend the continuation of this exemption.	<p>C&C of Honolulu –retain the exemption. HRS Section 841-19 requires indigent persons to be decently buried or cremated. The timely disposition of a body is critical to the operation of the medical examiner or corner and to provide a dignified and decent disposition.</p> <p>DOH, HHSC – support SPO recommendation.</p> <p>DHS – supports SPO recommendation. The burial costs of deceased medical or financial assistance recipients or unclaimed corpses to any licensed provider of mortuary and crematory services is limited to a maximum \$400. Given that the average cost for mortuary services is over \$3500 and cemetery services are over \$1000, it is improbable that many mortuaries will be willing to compete for these services.</p>
16	Radio and television airtime when selection of station is [to be made] by <u>[current] the targeted</u> audience [demographics] <u>(i.e. ethnic or age group, gender, etc.</u>	<p>Requested by the Dept. of Transportation, Dept. of Health, and City & County of Honolulu.</p> <p>Factors such as type, size of listening audience, or programming time to reach a targeted audience may make competitive procurement impractical.</p> <p>The meaning of audience demographics is not clear; the SPO proposes the amendment to provide examples of a targeted audience (i.e. ethnic or age group, gender, etc.).</p>	Recommend the continuation of the exemption with the proposed amendment.	<p>UH – supports SPO recommendation.</p> <p>Recommends amending the exemption to read: Radio and television airtime <u>and advertising space in print and other media</u> when selection [of station] is [to be made] by <u>[current] the targeted</u> audience <u>[demographics]</u> (i.e. ethnic or age group, gender, etc. .</p>

No.	EXEMPTION	JUSTIFICATION	SPO RECOMMENDATION	COMMENTS RECEIVED 7/17/08 PPB Meeting
17	<u>Subscription costs and registration or workshop fees for conferences or training.</u>	Particular subscriptions, conferences or training workshops are very limited, specialized, and selection is generally determined by the agency's work requirements. For that reason, it is not practical to competitively procure these expenditures.	Recommend the approval of this exemption.	<p>AG – supports SPO recommendation.</p> <p>B&F, EUTF – supports SPO recommendation. It would not be practical or feasible to ask national organizations to bid on their subscriptions or workshop offerings.</p> <p>DOD – supports SPO recommendation. The costs for these items does not lend to competitive bidding.</p> <p>HHSC – supports SPO recommendation to approve and include this exemption.</p> <p>G. Riki Hokama – supports SPO recommendation. The selection of educational and professional subscriptions, workshops, and conferences is appropriately made on the basis of an agency's work requirements.</p>
18	<u>Court reporter services.</u>	<p>Requested by the Attorney General's Office, Dept. of Budget and Finance, and the Public Utilities Commission.</p> <p>HRS Section 606.13.6 prohibits the contracting for private court reporter services unless for a particular case or reporting incident. Court reporters violating this section shall be subject to discipline, censure, suspension or revocation of their license.</p> <p>In any litigation, flexibility is needed to meet the court reporting needs of each particular case. When court reporting services are identified for a 'particular case or reporting incident', unknown factors such as how long each deposition will take, location, number of parties involved make it not practicable to define the requirements. The unpredictability of litigation that requires the services of a court reporter may initiate as a small purchase, but escalate to amounts of \$50,000 or more.</p> <p>Court reporters provide a unique service. The quality of individual services, as well as the</p>	Recommend the approval of this exemption.	<p>AG – supports SPO recommendation when the services are for a particular case or reporting incident.</p> <p>B&F, EUTF – supports SPO recommendation. This is a specialized service with fairly standardized fees and limited availability.</p> <p>G. Riki Hokama – supports SPO recommendation. In legal and other time-sensitive matters, flexibility is needed to meet the court reporting needs of each particular situation.</p>

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		<p>various types of services, varies from reporter to reporter, and from firm to firm. HRS 606-13.6 prohibits entering into contracts if there is no specific case or 'reporting incident', therefore an establish list of court reporter services is not allowable. When a 'particular case or reporting incident' comes up it is impracticable to competitive solicit for services due to lack of time to meet the immediate needs of the agency.</p>		

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-120
Hawaii Administrative Rules

July 17, 2008

1. Chapter 120 of Title 3, Hawaii Administrative Rules, entitled "General Provisions (Interim)" is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 120

GENERAL PROVISIONS

§3-120-1	Purpose
§3-120-2	Definitions
§3-120-3	Applicability
§3-120-4	Procurements exempt from chapter 103D, HRS
§3-120-5	Procedures for requesting exemption and amendment
§3-120-6	Repealed

§3-120-1 Purpose. (a) The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods, services, and construction for the State and counties, by:

- (1) Simplifying, clarifying, and modernizing the law governing procurement;
- (2) Requiring the continued development of procurement policies and practices;
- (3) Making the procurement laws of the State and counties as consistent as possible;
- (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;
- (5) Providing increased economy in procurement activities and maximizing best value to the fullest extent practicable;
- (6) Fostering effective broad-based competition within the free enterprise system;
- (7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and
- (8) Increasing public confidence in the procedures followed

in public procurement.

(b) This chapter 120, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules previously adopted on 6/9/01 (file no. 2360) and 11/15/01 (file no. 2397). [Eff 12/15/95; comp 11/17/97; comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; [comp](#)] (Auth: HRS §103D-202) (Imp: SSLH 1993, Act 008, §1)

Justification: No proposed amendments; compile Chapter 3-120.

§3-120-2 Definitions. Definitions are in section 103D-104, HRS. The following definitions are also applicable to terms used in subtitle 11:

"Administrator of the state procurement office", hereinafter referred to as "the administrator", means the administrator as provided in section 103D-204, HRS, or the administrator's designee.

"Bid" means the executed document submitted by a bidder in response to an invitation for bids, or a multi-step bidding procedure.

"Bidder" means any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated.

"Chief procurement officer" means the chief procurement officer for state entities and the several counties as provided in section 103D-203, HRS, or the officer's designee.

"Contractor" means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the contract with the State, and acting directly or through its agents or employees.

"Cost analysis" means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

"Cost data" means information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

"Days" means calendar days unless otherwise specified.

"Designee" means a person appointed by the head of a purchasing agency to act on its behalf with delegated authority.

"Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and which may be an indication of the reasonableness of price.

"Head of the purchasing agency" means the head of any agency with delegated procurement authority.

"Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids under the competitive sealed bidding source selection method.

"Offer" means bid, proposal, or quotation.

"Offeror" means any individual, partnership, firm, corporation, joint venture, or other legal entity submitting, directly or through a duly authorized representative or agent, an

offer for the good, service, or construction contemplated.

"Paying agent" means, as to bonds of any particular series, the director of finance or the bank or trust company designated for the payment of the principal and redemption price (if any) of, and interest on, the bonds or such series in the series resolution authorizing the issuance of such series or the series certificate relating to such series.

"Person" means individuals, partnerships, corporations, associations, or public or private organizations or any character other than a governmental body.

"Price analysis" means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

"Price data" means factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both the general contractor and subcontract prices.

"Procurement officer" means any person with delegated authority to enter into and administer contracts and make written determination with respect thereto. The term includes an authorized representative acting within the limits of authority. The delegated authority is received from the chief procurement officer directly or through the head of a purchasing agency or designee to the procurement officer.

"Proposal" means the executed document submitted by an offeror in response to a request for proposals.

"Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals under the competitive sealed proposal source selection method.

"Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals.

"Solicitation" means an invitation for bids, a request for proposals, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a state contract.

"State" means the judiciary, the legislature, office of Hawaiian affairs, department of education, University of Hawaii, Hawaii Health Systems Corporation, remaining departments of the executive branch and all governmental bodies administratively attached to them, and the counties.

"Subcontractor" means any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.

"Support facility provider" means a bank, a national banking association, an organization subject to registration with the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 or any successor provisions of law, a federal branch pursuant to the International Banking Act of 1978 or any successor provisions of law, a savings bank, a saving and loan association, an insurance company or association chartered or organized under the laws of any state of the United States of

America, the Government National Mortgage Association or any successor thereto, the Federal National Mortgage Association or any successor thereto, or any other federal agency. [Eff 12/15/95; am and comp 11/17/97; comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; [am and comp](#)] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

Justification:

- *Add the definition for 'Person' which is currently defined in chapter 3-126, but the term is used throughout the procurement rules; and*
- *Amend the definition for 'State' to include the CPO jurisdictions that were statutorily added to the Code.*

§3-120-3 Applicability. These rules shall apply to:

- (1) The procurement practices of all entities created by the State's and counties' constitutions, charters, statutes, ordinances, administrative rules, or executive orders, including the office of Hawaiian affairs, and the departments, commissions, councils, boards, bureaus, committees, institutions, authorities, legislative bodies, agencies, government corporations, or other establishment or office of the executive, legislative, or judicial branches of the State or its several counties; and
- (2) All procurement contracts made by governmental bodies, whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement. [Eff 12/15/95; am and comp 11/17/97; am and comp 6/19/99; comp 6/9/01; comp 11/15/01; comp 11/8/02; [comp](#)]
Auth: HRS §103D-202) (Imp: SSLH 1993, Act 008, §1; HRS §§103D-102, 103D-111)

Justification: No proposed amendments; compile Chapter 3-120.

§3-120-4 Procurements exempt from chapter 103D, HRS.

(a) Notwithstanding the intent of chapter 103D, HRS, to require governmental bodies to procure their goods and services through competitive bidding, it is acknowledged that there may be situations where procurement by competitive means is either not practicable or not advantageous to the State.

(b) Exhibit A titled "Procurements Exempt From Chapter 103D, HRS" [~~dated 05/09/01~~] [07/17/08](#) is located at the end of this chapter. This exhibit provides a list of goods and services which the procurement policy board has determined to be exempt from chapter 103D, HRS, because although such goods and services may be available from multiple sources, their procurement by competitive means would be either not practicable or not

advantageous to the State.

(c) Chief procurement officers may request periodic reports from the heads of purchasing agencies of procurements made pursuant to subsection (b). The heads of purchasing agencies may be required to include in their reports, descriptions of the process or procedures the agency used to select the vendor ensuring maximum fair and open competition whenever practicable.

(d) Chief procurement officers may ~~[on an annual basis]~~ request that additional exemptions be added to Exhibit A.

(e) The procurement policy board shall review Exhibit A ~~[annually]~~ as needed for amendments.

(f) Purchasing agencies making procurements which are exempt from chapter 103D, HRS, are nevertheless encouraged to adopt and use provisions of the chapter and its implementing rules as appropriate; provided that the use of one or more provisions shall not terminate the exemption and subject the procurement of the purchasing agency to any other provision of the chapter.

(g) Purchasing agencies shall cite on the purchase order or on the contract, the authority waiver as "Exempt From Chapter 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number from exhibit), Hawaii Administrative Rules". [Eff 12/15/95; am and comp 11/17/97; am and comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; am and comp] (Auth: HRS §§103D-102, 103D-202) (Imp: HRS §103D-102)

Justification:

- *Changes the effective date of Exhibit A; and*
- *Changes the PPB's review of Exhibit A from annually to as needed, to allow reviews as often as required.*

§3-120-5 Procedures for requesting exemption and amendment. (a) When the head of a purchasing agency determines that a situation exists wherein procurement by competitive means would be either not practicable or not advantageous to the State, a request ~~[to procure the good or service by]~~ for an exemption may be made to the appropriate chief procurement officer as follows.

Prior to procurement:

(1) ~~[Complete and submit a "Request for Exemption from Chapter 103D, HRS", to the chief procurement officer.]~~ Heads of purchasing agencies shall submit a written request to the chief procurement officer and certify to the best of their knowledge that the information provided is true and correct~~[+]~~.

(2) ~~[If a rush review of a request is needed, complete and submit a separate memorandum explaining and justifying the reason for the rush review; and]~~ The request shall be made on a form provided by the chief procurement officer.

~~[(3) Complete and submit a "Notice of Exemption from Chapter 103D, HRS", which shall serve as a written determination to approve an exempted procurement.]~~

(b) The chief procurement officer shall post a copy of the ~~[Notice of Exemption from Chapter 103D, HRS", in a designated~~

~~area~~ request on an Internet site accessible to the public for seven days.

(1) Any inquiries shall be directed to the designated contact person of the purchasing agency stated on the notice.

(2) Any objections to the request for the exempted procurement shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted.

(c) In determining whether to approve the ~~["Request for Exemption From Chapter 103D, HRS"]~~ request, the chief procurement officer shall consider the circumstances of each individual case and may approve the exemption for the term of the contract.

(d) Amendments to contracts exempted from chapter 103D, HRS, under this section, that would change the original scope of the contract, may only be made with the prior approval of the chief procurement officer. To amend a contract exempted from chapter 103D, HRS, the purchasing agency shall complete and submit a ~~["Notice of Amendment to Exemption from Chapter 103D, HRS, Contract"]~~ request for an amendment to the chief procurement officer. The certification requirement as provided in subsection (a)(1) and the posting and approval procedures as provided in subsections (b) and (c) shall be followed.

(e) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

(f) The chief procurement officer shall forward a copy of each ~~[approved and disapproved "Request for Exemption From Chapter 103D, HRS" and "Notice of Amendment to Exemption from Chapter 103D, HRS, Contract"]~~ request and amendment, if any, to the administrator. [Eff 12/15/95; comp 11/17/97; am and comp 6/19/99; am and comp 6/9/01; am and comp 11/15/01; am and comp 11/8/02; am and comp] (Auth: HRS §103D-202)
(Imp: HRS §103D-102)

Justification:

- *Removes specific names for the exemption forms to make them generic for all jurisdictions;*
- *Rather than having two separate forms, the notice and request forms are combined into one form; and*
- *Amends posting exemption request forms to an Internet site accessible to the public, rather than a physical location.*