

SPO 110- Emergency and Sole Source Procurements

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Thank you for participating in this online training by the State Procurement Office. This training will assist purchasing staff understand the criteria and requirements for emergency and sole source procurements. The training will be in two parts. We will begin with Emergency Procurements followed by Sole Source Procurements. There is a lot of ground to cover so let us begin.

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The governing authority for Emergency Procurements can be found in the Hawaii Revised Statutes Section 103D-307 and in the Hawaii Administrative Rules, Chapter 3-122, Subchapter 10.

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Emergency is just one of six procurement methods, along with Competitive Sealed Bids (IFBs), Competitive Sealed Proposals (RFPs), Sole Source, Professional Services, and Small Purchase. Emergency procurement method is used when there is threat to life, public health, welfare, or safety. The need must be immediate and serious. While there is no dollar threshold, it does require Chief Procurement Officer (CPO) approval.

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Procurement officers and personnel assigned procurement duties are delegated procurement authority by the head of the purchasing agency (HOPA), the department head. Form SPO-036 is used to document written procurement delegation. The signature on the form indicates the staff understand and accepts responsibility for the applicable procurement. Personnel without appropriate delegation and training for HRS chapters 103D and 103F shall not participate in any procurement activity. The term 'participate' means the various procurement activities such as to oversee/supervise the procurement process; develop, draft, review, edit, conduct, manage or approve the specifications or solicitation; and administer the contract.

Failing to obtain delegation and training may result in administrative fees and/or limiting or revoking procurement activities.

For additional training information, refer to Procurement Circular 2010-05.

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An Emergency is a good, service, or construction essential to meet an emergency when ALL 3 conditions exist:

1. There must be a situation of an unusual or compelling urgency which creates a threat to life, public health, welfare, or safety by reason of major natural disaster, epidemic, riot, fire, or such other reason as may be determined by the head of the purchasing agency;

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2. The emergency condition generates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods and the government would be seriously injured if the purchasing agency is not permitted to employ the means it proposes to use to obtain the goods, services, or construction.

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3. Without the needed goods, services, or construction, the continuing functioning of government, the preservation or protection of irreplaceable property, or the health and safety of any person will be seriously threatened.

The criteria should answer three questions:

1. What happened?"
2. What were the results?
3. What are the consequences if the situation is not addressed immediately?

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Periodically an agency will use emergency procurement inappropriately. Situation that are not emergency procurements include:

1. Agency uses these goods services on a regular basis, but failed to solicit and execute a contract in a timely manner; or
2. Potential loss of funds at the end of fiscal year.

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Emergency procurements must meet additional requirements:

1. The situation must be unforeseen or unanticipated and meet the conditions in HRS 103D-307; and
2. Must obtain approval by the CPO for all dollar levels.

CPO approval of an emergency procurement may be obtained "prior to" or "after-the-fact" depending on the circumstances

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3. Emergency procurements may be utilized only to purchase the immediate needs created by emergency and not subsequent non-emergency requirements. For example, if repairs are needed for a 5-foot section of road, the procurement cannot be done for the entire road. If the entire road is to be fixed, personnel must use applicable procurement method.

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4. When using emergency method of procurement, it is not necessary to obtain quotes. If time permits, it is encouraged to obtain as many quotes as practicable.

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Some examples of Emergency procurements include the failure of runway lighting at Honolulu Airport.

Runway lighting for the Honolulu airport failed due to an electrical short . Two 5000 volt circuit breakers tripped “open” and could not be reset to the “closed” position. These circuit breakers provide primary power to the runway lighting system. An emergency generator was used to provide emergency power to keep the runway lights operational until primary power could be restored. Airport electricians were unable to determine the cause of the outage and unable to restore primary power. Is this an appropriate emergency procurement?

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Yes. The department is responsible to maintain safe runway conditions. Without runway lights, aircrafts cannot safely land or takeoff, which creates a safety hazard. The scope of work would be limited to address the immediate needs of the situation.

When SPO receives a form SPO-002, the staff responsible for reviewing will first check who conducted/participated in the procurement and are those named on the form have written delegation & training. They will also ask:

1. What was unusual or compelling urgent situation (not natural disaster)
2. Was it unanticipated or unforeseen?
3. Was there an immediate need to fix?
4. What was fixed? Or is this prior to or after-the-fact procurement
5. Why was the vendor selected?

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Another example: An agency requests after-the-fact approval to replace termite damaged civil defense siren poles to safe operations on the Leeward coast.

Is this an appropriate emergency procurement?

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This would not be an emergency procurement. The poles have been poorly maintained for years. However, SPO approved this request based on the DOD’s responsibility to provide emergency alert system. The chief procurement officer comments (CPO) state:“The deterioration of poles, due to termite damage occurs over a period of time and repair or replacement should be procured in an

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anticipated timely manner utilizing normal procurement methods. Emergency procurements are used to address unanticipated serious situations that require immediate action by a governmental agency that may affect the health & safety of the general public. However, with the passing of time, the situation has elevated to this urgent situation and any further delay could result in potential danger to the general public. Your agency should consider maintenance/prevention programs in place to alert for possible damage to avoid similar 'emergency' situations. Future requests will be considered violations due to DOD failure to take appropriate precautionary measures in a timely manner.”

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A third examples involves continued collection and disposal services for contaminated materials that would affect public health and safety if not properly disposed of. This was for an interim period pending execution of a new contract. Request received July 19, 2013 for services beginning July 1, 2013 to September 30, 2013, when a new contract could be executed. Is this an emergency procurement?

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This would not be a emergency procurement. This was previously done on a contract and would not meet the requirement of being unanticipated. Continued services should be requested as a procurement violation because the contract expired on 6/30/13. In addition the request was received 7/19/2013, after-the-fact. Violation could have been avoided if the agency requested a contract extension or procurement done on a timely basis.

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Emergency procurement has specific procedures. The head of the purchasing agency first determines in writing (using SPO-002) that the required goods, services, or construction meets the requirements in HRS 103D-307.If time permits the form is submitted prior to purchase, otherwise As soon as practicable thereafter. SPO-002 is submitted for **ALL** dollar amounts and the information shall include: 1) Nature of emergency, 2)Name of contractor, 3) Amount of expenditure, 4) Listing of the good, service or construction; and 5) Reason for contractor selection

Personnel should attach any information that would explain the need for the continuing function of the government , preservation or protection of irreplaceable property, or the health and safety of the public.

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If time permits competition shall be obtained as practicable to ensure that the good, service, or construction is procured in time to meet the emergency. As soon as practicable, a confirming purchase order/pCard must be prepared. The payment document shall include, in detail, any agreements, including price, made orally with the contractor. HCE (Hawaii Compliance Express) compliance documentation is not required at the time services are rendered. However, SPO may check when the form SPO-002 is submitted.

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The slide shows an example of a submitted SPO-002. It includes:

1. Date of emergency (or period of emergency)
2. Prior or after-the fact
3. Nature of emergency – be specific and include reference to governor’s proclamation if applicable

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Additional information shall also include:

4. Vendor/contractor name
5. Amount of request
6. Detailed description of the emergency goods, services & construction and why it is necessary
7. Why the contractor was selected. Why other vendors/contractors could not or was not invited to quote on the goods, service, or construction

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In Section 8 it is crucial to identify the personnel involved in the procurement. SPO must be able to contact the appropriate person if there are any questions. SPO will also check to ensure the the staff identified in section 8 has procurement delegation and taken the mandatory training.

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Once the request has been reviewed and all the facts revealed, a final determination will be made and signed by the CPO. It is very important to read the CPO comments as they may affect future action and procurements. In this example copies of the HCE compliance and award posting are required to be kept in the procurement file. Additionally, the HCE certificate must be attached to the invoice when processing payment.

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All emergency procurement requests , \$2,500 or greater, are posted on the SPO website after it has been signed by the CPO. The agency must also post the awards on the Awards site. The Emergency procurements are posted because the general public has a right to know how taxpayer dollars have been spent. The posting includes the award date, contract or po number, a brief description, original p.o./or pCard amount, the vendor name, and the department.

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This flow chart shows the work flow of an emergency procurement starting with the emergency situation. After the department head determines an emergency situation exists and there is an immediate need for a good or service, the agency solicits quotes, if time permits, and submits the SPO-002 to the CPO. The request will be reviewed and CPO will take action. If approved, the agency would procure from the most advantageous source and post the award on the Procurement and Awards Notices site.

If there is no time for competition, the agency procures from the best available source, then submit the SPO-002, as an after-the-fact request. In this situation, as in the first, the CPO will take action and the agency is responsible to post the award on the Procurement and Award Notices site. If an after-the-fact emergency procurement request is disapproved, the department may be required to submit the form SPO-16, Procurement Violation.

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The second half of this training will be dedicated to Sole Source procurements. Sole source procurements are governed by Hawaii Revised Statutes, Section 103D-306, and Hawaii Administrative Rules, Chapter 3-122, subchapter 9.

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Sole source procurement is used when there is only one source for the required good, service or construction, provided CPO approval is obtained. There is no dollar threshold, but will be as stated on the request.

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The criteria for sole source procurements is that it must be a good, service, or construction that has a unique feature, characteristic, or capability that is essential for an agency to accomplish its work and there is **only one** source or supplier available. Or a situation when an agency obtains CPO approval for a limited quantity of a good or service for test or evaluation purposes (cleaning solution, specialty paint, etc.).

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The Procurement Policy Board has approved 7 sole source procurements pursuant to section 3-122-81, HAR.

1. Rental of booth space for exhibits at conventions and trade shows when organized by a single sponsor. *(when rental available only through one source)*
2. For the repair, replacement, installation or relocation of public utility company equipment or facilities. *(when equipment or facility owned or controlled by utility company)*

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3. Annual license renewal and maintenance for computer software. *(when license renewal/maintenance can only be obtained from the manufacturer of the software)*
4. Procurement of computer software conversions, modifications, and maintenance for existing programs from the manufacturer of the software. *(when conversion, modification or maintenance can only be obtained from the manufacturer of the software).*
5. Transcripts of court proceedings. *(when transcripts are only available from the assigned court reporter provided by the Judiciary)*

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6. Repair and maintenance services and supplies from the original equipment manufacturer or its designated representative. *(when the services or supplies can only be obtained from the manufacturer or designee to retain the manufacturer's warranty or guarantee).*
7. Procurement of equipment upgrades from the original manufacturer to existing equipment and information technology hardware. *(when the upgrades are available only from the manufacturer).*

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If using any of the 7 items, agency cites on the payment document "Approved for Sole Source Procurement pursuant to HAR § 3-122-81, No ___." SPO 001 not required. Goods or services listed in Section 3-122-81, HAR may be procured as necessary and has no dollar limitations. HCE (Hawaii Compliance Express) compliance documents are required for purchases \$2,500 or more and are required to be posted on the Procurement Notices and Awards Reporting site.

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The requirements for a sole source procurement is that there is only one source is available for a purchase, unless expressly exempt from public bidding by law or rule (HAR 3-122-81). The justification must establish that the good, service, or construction has a unique feature, characteristic, or capability essential to the agency to accomplish its work and is available from only one supplier. Often this includes; Proprietary items, compatibility to existing software/hardware and utility repairs that can only be done by the utility company. Unacceptable justifications for sole source procurements include:

- ✓ Exact brands, (as other brands may qualify as "equal."
- ✓ Item is unique, but available from more than one supplier (may be restrictive spec).
- ✓ The previous or current person or organization/company furnishing the services does not render them the only source.

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- ✓ Potential loss of funds at the end of the fiscal year.

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Sole source procurement shall not exceed one year, unless approval is granted for a multi-term contract pursuant to section 3-122-149, HAR.

Renewal of sole source request for an additional year must be submitted as a new request, not an amendment.

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Sole Source procurements may require the procurement officer to negotiate with the sole source provider such items are cost, quality, quantity, terms and delivery. The agency must obtain a certification of funds for all dollar levels. No contract encumbrance is necessary if a request involves a situation where the compensation cannot be accurately estimated at contract award or consideration is in kind or forbearance, or will be done as a one-time payment. If an agency is requesting CPO approval, (SPO-001) and will not execute a contract, the agency must provide justification in the request to support the method of payment to be used.

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If a sole source contract is expected to exceed \$100,000 cost and/or pricing data is required. Any price adjustment to a contract involving aggregate increases or decreases in costs plus applicable profits exceed \$100,000 will also require cost or pricing data. Additionally a procurement officer may make a written determination that circumstances warrant submission of cost or pricing data.

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Cost or pricing data is actual data or other pricing documentation used by a vendor to support the pricing being offered to the agency for a contract. A vendor may be required to provide certification pursuant to HAR 3-122, Subchapter 15, using SPO-013, *Certification of Cost or Pricing Data*, which is available on SPO website, Forms for Vendors, Contractor, Service Providers.

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The cost or pricing data and/or completed form SPO-013 must be kept as part of the file contract documentation.

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Exceptions to cost or pricing data include: catalogue price, price list etc, which are regularly maintained/published by a manufacturer & available to the general public. It can also be the established market price – in the ordinary course of trade and can be substantiated by an independent source.

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In this example an agency requires certain unique features that are available on Manufacturer's A equipment. Other manufacturers can offer the unique features, but none has all the features on a single equipment. The agency would have to purchase 3 pieces of equipment in order to have all the unique features offered on Manufacturer's A equipment. Can the agency request Manufacturer's A equipment as a sole source procurement?

No. Although there are unique features involved, there are other options for the agency to get the unique features. Therefore, it does not meet HRS 103D-306 as an agency could get the same features on 3 machines(not single source) but it may not be practicable to do so based on space limitations, budget, cost, etc. It may be a reason for an exemption from HRS Chapter 103D .

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Another example of a sole source is where an agency needs to reconfigure their office space to accommodate more staffing. They initially purchased the modular furniture utilizing an RFP. They would like to purchase new cubicles, desktops, panels, overhead files etc. to accommodate the increased staffing. Cost is estimated to be \$100,000. Is this a sole source situation?

Yes, if the modular furniture manufacturer has appointed a sole Hawaii representative to sell and install their furniture. Usually, components (connecting pieces, lighting fixtures, panels, etc.) are unique to a particular furniture manufacturer and are not interchangeable with other manufacturers. Cost or Pricing Data will be required if purchase exceeds \$100K.

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A third example of a sole source is where an agency is requesting to partner with a single statewide food chain to support their Fruit & Vegetable Media campaign for a 5-month period. The food chain will share their fruits and vegetables sales data with the agency to track the effectiveness of their campaign. Information will be used to plan another program to include all interested grocery chains to promote the sale and consumption of fruit and vegetables. Could this be a sole source procurement?

Yes, on the basis that the request was for a limited period for evaluation purposes that would be used for planning a future program. No compensation was given to the food chain for working with the agency for the pilot. Compensation is not a criteria for this type of sole source.

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The final example is where an agency is requesting to purchase Polyguard burial vaults of various sizes for different casket sizes. Justification was vendor is the manufacturer of solicited polyguard burial vaults. Other vendors purchase the items from the designated manufacturer for the purposes of reselling. Purchase from any other vendor other than the manufacturer would be more costly. Is purchasing from the manufacturer a sole source procurement?

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No. The request stated that Polyguard burial vaults are also available from other vendors, therefore, it is not a sole source. This may be a situation where restrictive specifications may also be an issue.

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There are specific procedures for sole source purchases. First the head of the purchasing agency determines in writing that the required goods, services, or construction meets the criteria in HRS 103D-306 (*and not on the pre-approved list*). The SPO-001, *Notice & Request for Sole Source*, must be submitted to the CPO for **ALL** dollar amounts. Upon receipt the CPO posts the request on the designated website for 7 calendar days before taking any approval action.

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This slide represents an example of a sole source request. SPO will review the information which includes 1) detailed description of the goods, service or construction, 2) name of vendor/contractor, 3) amount of request, 4) Term of contract (cannot be retroactive) and 5) Prior sole source number (SS#) if applicable.

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In section 6 of the form agency must 6(a) describe the unique features, characteristics, or capabilities of the goods or service and 6(b) explain how these unique features, characteristics or capabilities are essential to the department to accomplish its work.

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In Section 7, the agency must indicate what the department did to determine the vendor is the sole supplier. And in section 8 the agency states what other resources were investigated.

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In section 9 the department must name the contact person who is knowledgeable about the procurement, has delegation and training. Finally the form must be signed by the department head or designee.

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Upon receipt of the form SPO-001, the request is posted on the SPO website for a minimum of 7 days, before approval action can be taken. SPO staff will review the request and make a recommendation to the CPO. The CPO will make a final determination. Sole source awards of \$2,500 or more require HCE compliance. It is important to make note and read the CPO comments as certain documentation may be required.

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The screen shot shows an example of sole source postings. The site includes, 1) sole source number, 2) date request received, 3) the status of the request, 4) brief description, 5) dollar value, and 6) vendor. A copy of the request is uploaded for public viewing.

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Sole source requests are posted because tax payer funds are being used and as government employees we have a responsibility to our shareholders (tax payers) to be open and transparent. The general public has a right to easy access and to know how the money is being spent. We are accountable for the funds and must keep an auditable trail while following all the rules and procedures, including statutes, rules, procurement circulars and departmental procedures.

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Within the 7 calendar days, objections may be submitted in writing. The CPO will consider these objections when making a determination. After the 7th calendar from the initial posting on the website the CPO may approve the request. No action or disapproval action on a request can be done anytime after posting on the website and returned to the agency.

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Amendment to a CPO approved sole source request is required when there is a change in the original scope of work, or there is a 10% or more increase to the original contract price. A form SPO-001B must be submitted prior to the expiration of the approved sole source. The request for amendment has the same posting and approval process as the initial request.

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In an effort to be transparent, the SPO-001 and SPO-001B are posted on the SPO public website prior to and after CPO action. Documents submitted supporting the sole source, objections and responses to the request, if any, shall be kept with the respective sole source file and public information after CPO action unless otherwise allowed under chapter 92F, HRS.

An agency can use the website to see if SPO received their request and are able to print a copy of the approved/disapproved request upon CPO action. This allows the agency to track a particular request.

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Sole Source Awards \$2,500 or more require HCE compliance and agencies must post the award on the Procurement and Awards Posting site.

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State agencies may use the AG's standard contract form, AG-002, *Contract for Goods and Services: Exempt; Small Purchase; Sole Source; or Emergency*. The forms can be found on the SPO website: spo.hawaii.gov > Forms > Department of the Attorney General Forms (internal) only).

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This flow chart shows the progression of a sole source procurement. First the department head determines the need for a services or good to be purchased and vendor is the ONLY source. The agency prepares the form SPO-001 which is then submitted to the CPO. Upon receipt of the SPO-001, the form will be posted for seven calendar days. The CPO will make a determination based on the information provided. If approved the agency checks HCE compliance, obtain cost price data or analysis if applicable, then issues a contract and posts on the Procurement and Awards site. If disapproved the agency is required to use another source selection method, i.e. IFB, RFP, Small Purchase, whichever is appropriate.

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Some final reminders:

Before conducting any procurement method you must have delegated procurement authority and complete the mandatory training. Training information is available on the SPO website, at Training for State & County Personnel. You can find position levels, workshop descriptions, and training requirements. Agencies must use the most current forms from the SPO website. Do not download a copy as it may be obsolete and returned for resubmission. Forms submitted with personnel listed that do have delegation or training may be returned with No Action/or Disapproved.

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Contact information is available on the SPO website at the Home page>>Contact us. Please take a moment to complete the survey which will pop up at the end of this presentation.