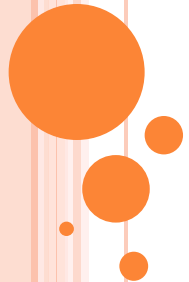


**PROCUREMENT TRAINING
FOR STATE AND COUNTY PURCHASING PERSONNEL**


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

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



**APPLICABILITY OF THE PROCUREMENT
CODE OF ETHICS**

- Applies to any person, including any actual or prospective bidder, offeror, contractor, or business
- Applies to state or county government employees



ETHICS DEFINITIONS

Ethics - rules of behavior based on ideas about what is morally good and bad.

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

Purchasing Ethics - -Principles to be respected and applied, including prohibition of any breach of the public trust by realizing or attempting to realize improper gain for oneself or another, through conduct inconsistent with the requirements of the procurement code.



PROCUREMENT RESPONSIBILITIES

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



ALL PUBLIC EMPLOYEES SHALL CONDUCT AND PARTICIPATE IN PUBLIC PROCUREMENT IN AN ETHICAL MANNER.

Pursuant to HRS 103D-101(a) employees shall:

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

ALL PUBLIC EMPLOYEES SHALL CONDUCT AND PARTICIPATE IN PUBLIC PROCUREMENT IN AN ETHICAL MANNER. EMPLOYEES SHALL:

- Identify and maximize efficiencies in the public procurement process;
- Encourage economic competition by ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment and researching innovative goods and services to meet the public needs;
- Avoid the intent and appearance of unethical behavior;
- Avoid social interactions with any actual or prospective bidder, offeror, contractor business, or other interested parties during the procurement process;

ALL PUBLIC EMPLOYEES SHALL CONDUCT AND PARTICIPATE IN PUBLIC PROCUREMENT IN AN ETHICAL MANNER. EMPLOYEES SHALL:

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

**PROCUREMENT CODE OF ETHICS
(HAR 3-131-1.02)**

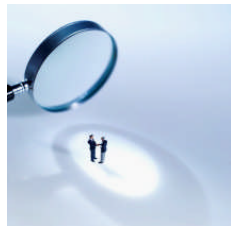
- Diligently follow the procurement laws, rules and procedures;
- Avoid soliciting or accepting money, loans, credits, discounts, favors, or services from present or potential suppliers which may influence or appear to influence purchasing decisions.

REQUIREMENTS OF ETHICAL PUBLIC PROCUREMENT ALSO STATES: (HRS 103D-101(B))

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

- Avoiding the intent and appearance of unethical behavior or business practices;
- Refraining from any activity that would create the appearance of impropriety or conflicts of personal interest and the interests of the State or counties;
- Identifying and eliminating any conflicts of interest;
- Ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment.

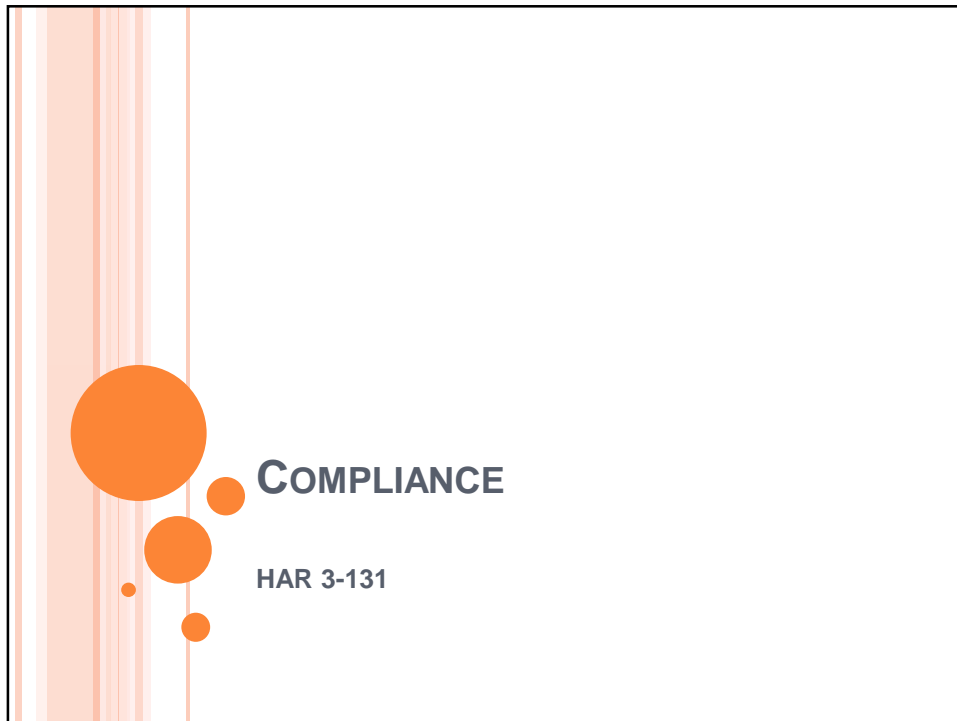
All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.



ETHICAL MISCONCEPTIONS

- "I can't make a difference."
- "No one is watching."
- "If I didn't know it was wrong, it must be OK."
- "I can be objective!"
- "As long as I am not receiving personal gain, it must be OK."
- "It will only be this one time."
- "If it happens outside of work, what I do doesn't matter."
- "The end justified the means (or if it saves the agency money, it must be OK)."
- "Everyone else does it."





WHAT IS PARCELING?

- Artificial or intentional division of multiple procurements that, when combined, exceed the limits of HRS Section 103D-305 (Small Purchase), for any 12-month period.
- Considerations for a Procurement Officer (PO) to determine “artificial or intentional”:
 1. The higher the price of a group of procurements, the more likely they should be consolidated.
 2. The more similar the good, service, or construction, or the more likely it is to purchase a group of goods, services, or construction from one type of vendor, the more likely it should be consolidated.

3. The more foreseeable the procurement of similar goods, services, and construction is, the more likely it should be consolidated.

- Whenever possible, a purchasing agency shall make appropriate consolidations to allow for a competition process.
- The PO is responsible for decisions to proceed with small purchase procurements rather than with a competitive sealed process.

CASE #1 –PURCHASES OF PLUMBING REPAIRS/REPLACEMENT PARTS

An employee conducts seven to ten small purchases procurement each fiscal year for plumbing supplies and repairs services for the past two years. In a 12-month period, the agency purchases plumbing supplies and repair services from various vendors totally \$110,000. (Assuming you are not using an SPO approved vendor/price list.)

WHAT YOU SHOULD DO

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

CASE #2 – JANITORIAL SERVICES CONTRACT

The current janitorial services contract will expire in three weeks and there are no options to extend. You plan to issue purchase orders for the next few months until a new contract can be executed.

What should you do?

WHAT YOU SHOULD DO?

- *Process a form SPO-003 Request for Extension of Time or similar form until you can execute a new contract.*
 - *Cease all purchasing activity for the goods or services in question.*
- ❖ *Using a purchase order/pCard for even a single transaction after the contract has expired is procurement violation.*

COMPLIANCE & PROCUREMENT VIOLATIONS

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

CIVIL PENALTIES

When civil penalties may apply:

Situation where a person who contracts for or purchases, goods, services, or construction, in a manner the person knows to be contrary to the requirements of the procurement law.

What needs to be proven:

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

CIVIL PENALTIES

Considerations:

- Violations that can be attributed to administrative error, mistake, ignorance, or carelessness are usually not subject to civil penalties.
- What the person understood the procurement requirements to be when the violation occurred, and whether or not the person believed he or she was acting in compliance with those requirements.

CIVIL PENALTIES

Penalties-

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

CRIMINAL PENALTIES

Criminal penalties may apply:

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

CRIMINAL PENALTIES

What needs to be proved:

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

CRIMINAL PENALTIES

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

CPO PENALTIES FOR EMPLOYEES

In addition to any civil or criminal penalties allowed by law, the CPO may take action against any a **government employee** found to be in violation of any provision of the Hawaii Public Procurement Code, HRS 103D. Action may include:

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

CPO PENALTIES FOR OFFERORS/BIDDERS

The CPO may impose any of the following sanctions when it has been determined that there has been a violation of any provision in the Hawaii Public Procurement Code by a **person or actual or prospective offeror**:

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

ADMINISTRATIVE FINES

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

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

ADMINISTRATIVE FINES

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

ADMINISTRATIVE FINES

- After the meeting and the CPO determines that the fine is still appropriate, the person may request an administrative review of the CPO determination pursuant to HRS section 103D-709.
- The request for an administrative review must be made within 7 calendar days of the CPO decision with the Office of Administrative Hearings, DCCA (HAR section 3-126-42).
- If a fine is to be paid, it shall be the responsibility of the person.

CORRECTIVE ACTION & ADMIN FEES

- The 2008 Legislature passed Act 203 (HRS 103D-206), which allows the Administrator of the State Procurement Office (SPO) to make a determination of corrective action that must be complied with and to impose an administrative fine if a procurement officer or a CPO fails to comply with corrective action.
- Applies to a procurement officer under the jurisdiction of the SPO Administrator or a CPO of any other state and county agency.

CORRECTIVE ACTION & ADMIN FEES

- Under HRS Section 103D-206 administrative fines would apply if the procurement officer or CPO fails to take correction within 30 days from the date of the issuance of the corrective action for each day of noncompliance.
- Upon request, the SPO Administrator may extend the 30 day requirement.

REPORT OF FINDINGS AND CORRECTIVE ACTION FORM SPO-016

The report shall include:

1. Description of the goods, services, or construction procured.
2. The applicable method of procurement used (i.e. RFP, IFB, Small Purchase, Sole Source, Emergency, Exemption, Professional Services, SPO Price/Vendor List or other)

**REPORT OF FINDINGS AND CORRECTIVE ACTION
FORM SPO-016 (CONTINUED)**

3. Facts and circumstances that led to the procurement and why appropriate procedures were not followed (i.e., unanticipated, unplanned, lack of planning, etc.).

- ✓ Where there any indications of intent to deliberately evade appropriate purchasing procedures (i.e., parceling, use of pCard/purchase orders, etc)?
- ✓ Was there a lack of procurement information or training that contributed to the violation (i.e., person did not attend mandatory training, no written procedures, inadvertent mistake, etc.)?
- ✓ Is this a first occurrence?

**REPORT OF FINDINGS AND CORRECTIVE ACTION
FORM SPO-016 (CONTINUED)**

4. The corrective action that has or will be taken to prevent recurrence.

- ✓ What appropriate written assurances and safeguards have been established to preclude a subsequent violation (meeting, attendance at mandatory training, procurement authority rescinded, posting of written procedures, etc.).

