

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-149  
Hawaii Administrative Rules

2017

1. Chapter 3-149, Hawaii Administrative Rules, entitled "Contracting" 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 149

CONTRACTING

Subchapter 1 Purpose and Scope

§3-149-101 Scope  
§3-149-102 Purpose

Subchapter 2 Contract Forms and Conditions

§3-149-201 Contracts subject to appropriation of  
state funds  
§3-149-202 Contracts subject to the availability  
of federal funds  
§3-149-203 Contract requirement  
§3-149-204 Termination of contracts  
§3-149-205 Selection of substitute provider after  
early termination of contract

§3-149-101

Subchapter 3 Miscellaneous Contracting  
Procedures

- §3-149-301 Extension of existing contract during  
procurement process
- §3-149-302 Multi-term contract use, requirements  
and procedures
- §3-149-303 Amendment of contracts
- §3-149-304 Parceling forbidden

Subchapter 4 Monitoring of Contracts

- §3-149-401 Contract monitoring

Subchapter 5 Evaluation of Contracts

- §3-149-501 Contract evaluation

SUBCHAPTER 1

PURPOSE AND SCOPE

§3-149-101 Scope. The provisions of this chapter shall apply to all contracts awarded under chapter 103F, HRS, and these rules. [Eff 6/19/99; comp 1/23/06; comp ] (Auth: HRS §103F-106) (Imp: HRS §§103F-408 to 103F-414)

§3-149-102 Purpose. The purpose of this chapter is to provide for uniform practices and procedures for drafting, monitoring, and evaluating contracts awarded under chapter 103F, HRS. [Eff 6/19/99; comp 1/23/06; comp ] (Auth: HRS §103F-106) (Imp: HRS §§103F-408 to 103F-414)

## SUBCHAPTER 2

## CONTRACT FORMS AND CONDITIONS

§3-149-201 Contracts subject to appropriation of state funds. (a) Every contract awarded pursuant to chapter 103F, HRS, shall, at all times, be subject to the appropriation of state funds, and may be terminated without liability to either the purchasing agency or the provider in the event that funds are not appropriated or available.

(b) Clarification for multi-term contracts. A multi-term contract shall be subject to the availability and appropriation of funds for each and every fiscal year that it is in effect, and may be terminated without liability to either the purchasing agency or the provider in the event that funds are not appropriated or available for any fiscal year. [Eff 6/19/99; comp 1/23/06; comp ] (Auth: HRS §103F-106) (Imp: HRS §103F-414)

§3-149-202 Contracts subject to the availability of federal funds. (a) Every contract awarded pursuant to Chapter 103F, HRS, that is partially or wholly funded from federal funds shall be subject to the availability of federal funds as provided herein.

(b) Federally funded portion of contract severable. The portion of any contract awarded pursuant to chapter 103F, HRS, that is funded federally shall be severable from the contract as a whole, and such portion may be severed and terminated without liability to either the purchasing agency or the provider, in the event of the unavailability of federal funds.

(c) No obligation to expend state funds. No contract awarded pursuant to chapter 103F, HRS, that is partially or wholly funded from federal funds shall be construed to obligate a purchasing agency to expend state funds to cover any shortfall created by the unavailability of the anticipated federal funds.

(d) Clarification for contracts wholly funded from federal funds. Any contract awarded pursuant to chapter 103F, HRS, that is wholly funded from federal funds shall, at all times, be subject to the availability of the federal funds, and may be terminated without liability to either the purchasing agency or the provider in the event that the federal funds do not become available. Such a contract shall not be construed as an obligation to expend state funds to replace unavailable federal funds.

(e) Construction of section. This section shall be liberally construed so as not to hinder or impede the state in contracting for any service involving financial aid from the federal government, nor shall it be construed in a way that hinders or impedes a purchasing agency's application for or receipt of federal funds. [Eff 6/19/99; comp 1/23/06; comp ] (Auth: HRS §103F-106) (Imp: HRS §§103F-105, 103F-414)

§3-149-203 Contract requirement. (a) Every contract awarded under chapter 103F, HRS, shall be made in writing as provided herein before any funds are disbursed by a purchasing agency, or any services are provided by a provider.

(b) Selection of contract form. A purchasing agency may use any of the following methods for preparing a written contract as required in subsection (a):

- (1) Standard forms. A purchasing agency may always use the standard form contracts prepared by the attorney general pursuant to subsection (c).
- (2) Purchase order. A purchasing agency may use a purchase order for procurements less than \$25,000 made under the treatment and small purchase of service methods if the purchasing agency determines, in its discretion, that the state's legal interests are adequately protected without the use of a formal written contract.

- (3) Form generated by the purchasing agency. A purchasing agency may generate its own forms of contract by following the procedures in subsection (e).

(c) Standard contract forms from attorney general. The attorney general shall provide standard forms of contract for each purchase of service method established under chapter 103F, HRS. Purchasing agencies may use the standard forms without seeking approval as to form from the attorney general, except where there has been a substantial change to the forms.

(d) Additional contractual conditions. In addition to the contractual conditions in the standard form contracts provided by the attorney general, the head of a purchasing agency may impose other such requirements on a provider as may be necessary to ensure compliance with statutes, these rules, and other such requirements for the receipt of state or federal funds.

(e) Procedure for submission of contract form to attorney general. Every form of contract generated by a purchasing agency other than provided for in subsections (b)(1) and (b)(2), shall be submitted to the attorney general along with a memorandum that explains how the purchasing agency's proposed form of contract addresses the following issues:

- (1) The uncertainties which may be involved in contract performance and how the purchasing agency's form of contract addresses these uncertainties;
- (2) The factors which made the standard forms provided by the attorney general inappropriate;
- (3) A summary of how the proposed form of contract addresses the following issues:
  - (A) Subcontracting;
  - (B) Termination;
  - (C) Defaults;
  - (D) Compliance with laws governing anti-discrimination, access and accommodations for persons with

- disabilities, and other highly-regulated areas;
- (E) Indemnification; and
- (F) Liability insurance; and
- (4) The urgency of the requirement. [Eff 6/19/99; am and comp 1/23/06; comp ] (Auth: HRS §103F-106) (Imp: HRS §103F-409)

§3-149-204 Termination of contracts. (a) Every contract awarded under chapter 103F, HRS, and these rules shall contain a clause providing for termination of the contract, either in whole or in part, for non-performance, reduction in funds available to pay the provider, or a change in the conditions upon which the need for the service was based. Such clause shall also require that the purchasing agency give advanced notice of ten working days to the provider, that includes a brief statement of the reason for the termination.

(b) Additional termination clauses authorized. In addition to the termination clause required under subsection (a), a contract awarded under chapter 103F, HRS, may include any additional termination clauses deemed necessary or advisable in order to protect the interests of the state.

(c) Election of termination clause. When a contract awarded under chapter 103F, HRS, contains more than one termination clause, a purchasing agency may, in its sole discretion, elect which termination clause to invoke in order to terminate the contract. [Eff 6/19/99; am and comp 1/23/06; comp ] (Auth: §§103F-106, 103F-408) (Imp: HRS §103F-408)

§3-149-205 Selection of substitute provider after early termination of contract. (a) In the event that a contract for health and human services awarded under this chapter is terminated before the contract expiration date, the purchasing agency shall

follow the procedures in this section to select a substitute provider.

(b) Initiation of new competitive purchase of service. To select a substitute provider, a purchasing agency may initiate a new competitive purchase of service procurement by issuing a new request for proposals.

(c) Expedited procedure for selection of substitute provider. If the selection of a substitute provider through the initiation of a new competitive purchase of service procurement is not practicable, then the purchasing agency may, if applicable, negotiate a contract with the next highest evaluated ranked applicant. If the purchasing agency and applicant are unable to negotiate a contract, the purchasing agency may negotiate with the next highest ranking applicant, and so on. In the event that there are no other proposals, or none of the proposals and applicants are sufficiently advantageous, the purchasing agency may select any provider that will be an advantageous substitute. Any contract awarded to a substitute provider selected under this subsection shall terminate either at the same time that the original contract would have, or at the close of the following fiscal year, whichever occurs sooner. [Eff ] (Auth: HRS §103F-106) (Imp: HRS §103F-402)

Historical note: §3-149-205 is based substantially upon §3-143-505. [Eff 6/19/99; am and comp 1/23/06; R ]

### SUBCHAPTER 3

#### MISCELLANEOUS CONTRACTING PROCEDURES

§3-149-301 Extension of existing contract during procurement process. (a) In order to provide continuity of services during the procurement process, the term of a contract may be extended in accordance with this section until a new contract has been

awarded and executed under the procurement procedures established by chapter 103F, HRS, and these rules.

(b) Conditions for extension. A contract may be extended if all of the following conditions are met:

- (1) The extension will be made for the purpose of providing continuity of services during the period between:
  - (A) The termination of the contract to be extended; and
  - (B) The effective date of a contract to be awarded and executed through a pending procurement procedure;
- (2) The period of the extension will be for six months or less;
- (3) Funds to pay for the services during the extended term of the contract have been appropriated and are available; and
- (4) The terms and conditions of the contract to be extended:
  - (A) Will remain substantially the same as the original contract, or the original contract as amended; or
  - (B) Will be fair and reasonable.

(c) Form and content of extension. Any extension made under this section shall be in writing, and by a supplemental agreement that:

- (1) States that an extension is being allowed pursuant to this section;
- (2) States that the extension will terminate in [~~one hundred and eighty days~~] six months, or when a replacement contract has been executed, whichever occurs first;
- (3) States that the terms and conditions for the extension will be the same as for the contract before the extension; and
- (4) Is signed by the provider and the purchasing agency.

(d) Extension of contract available if not expired. An extension is available under this section provided the contract to be extended has not expired.

[Eff 6/19/99; am and comp 1/23/06; am and comp  
] (Auth: HRS §103F-106) (Imp:



HRS §103F-413

§3-149-302 Multi-term contract use, requirements and procedures. (a) Multi-term contracts may be awarded in accordance with the terms of this section in order to advance the interests of the state through greater economy or efficiency in the provision of health and human services.

(b) Multi-term contract defined. A multi-term contract is any contract that covers [a] an initial term of [more than] two or more years, or that provide] and which may provide for [extension] extensions beyond [a two-year] the initial term[-] in accordance with (f).

(c) Required determination for the use of multi-term contracts. In order to use a multi-term contract, a purchasing agency must make a determination that funds are available for the first fiscal period of the contract, and that a multi-term contract is in the best interest of the purchasing agency such as the following:

- (1) Provision of the required services involves high start-up costs that only have to be paid once over the life of the contract;
- (2) Where a changeover of providers would involve both high phase-in and high phase-out costs during the transition period;
- (3) When stabilization of the provider's workforce over a longer period of time would promote economy and consistent quality;
- (4) Where there is a compelling clinical reason for continuity in services from a provider, as applicable; or
- (5) Where the benefit to be gained from normal competitive practices is substantially outweighed by the costs associated with repeated competitive purchases of services.

(d) Additional contract content requirements. Every multi-term contract awarded under chapter 103F, HRS, shall contain an express provision that the multi-term contract is subject to the appropriation

and availability of funds for each and every fiscal year, and may be terminated without liability to either the purchasing agency or the provider in the event that funds are not appropriated or available, as provided in sections 3-149-201 and 3-149-202.

(e) Construction of section. Nothing in this section shall be construed to limit the rights of the state or the provider under any termination clause of any contract awarded under chapter 103F, HRS.

(f) A multi-term contract may [~~extend~~] be extended for [~~any~~] the period of time [~~to which the provider and purchasing agency agree~~] specified in the contract, provided that for any proposed period of more than six years, the head of the purchasing agency [~~submits~~] shall submit a written request to and [~~receives~~] receive approval from the chief procurement officer. The written request shall include the following:

- (1) A determination that a period of more than six years is necessary in order to secure a substantial economic benefit for the state, or a substantial clinical benefit to a service recipient;
- (2) A brief factual description of the circumstances that justify a period of more than six years, including reference to economic or clinical studies that support the determination in paragraph (1);
- (3) A determination that there is no motive of frustrating the purposes of chapter 103F, HRS, underlying the proposed award of a contract for a period of more than six years; and
- (4) A statement that all the information and determinations in the request are true and correct to the best of the requestor's knowledge. [Eff 6/19/99; am and comp 1/23/06; am and comp ]  
(Auth: HRS §103F-106) (Imp: HRS §103F-410)

§3-149-303 Amendment of contracts. (a) Every amendment to a contract awarded under chapter 103F, HRS, shall be made in accordance with this section. Form of amendment. Every amendment shall be made in writing, and signed by both parties.

(b) Procedures for amendment. The head of a purchasing agency may negotiate to amend an existing contract at any time provided that the amendment does not constitute a fundamental change.

(c) Fundamental change. A fundamental change to a contract is one which is so great that a reasonable purchasing agency would in light of all the circumstances, re-procure the required services instead of amending an existing contract in order to assure that the state is receiving the most advantageous bargain. In the case of a contract awarded under chapter 3-144, 3-145, 3-146 or 3-147, a fundamental change is also any change that would result in an amendment that would exceed the scope of the chapter of these rules under which the contract was originally awarded. [Eff 6/19/99; am and comp 1/23/06; comp ] (Auth: HRS §§103F-106, 103F-408) (Imp: HRS §103F-408)

§3-149-304 Parceling forbidden. (a) The practice of parceling a large single purchase of health and human services into multiple smaller purchases in order to avoid conducting a competitive purchase of services, or to otherwise frustrate the purposes of chapter 103F, HRS, and these rules is forbidden.

(b) Suspension of power to procure. In the event that it is determined that a purchasing agency is guilty of parceling, the administrator may, in his or her discretion, take any action permitted by law he or she deems appropriate in order to address the situation, including order that all or a part of the purchasing agency's procurement activities shall be conducted under the direct supervision of its chief procurement officer, or the administrator. [Eff 6/19/99; comp 1/23/06; comp ]

(c) (Auth: HRS §103F-106) (Imp: HRS §103F-408)

#### SUBCHAPTER 4

#### MONITORING OF CONTRACTS

§3-149-401 Contract monitoring. (a) Each purchasing agency shall formulate and implement a monitoring plan consisting of the following components:

- (1) A manual or other set of guidelines that includes the objectives, procedures, and requirements of the monitoring process;
- (2) Procedures for documentation of reporting problems or recommendations between the provider and the purchasing agency; and
- (3) A clear procedure for follow-up on recommendations, problems, and items requiring corrective action including deadlines for both reporting and responding to such items.

(b) Coordination among agencies. Purchasing agencies shall coordinate monitoring activities to eliminate duplication of monitoring of a provider who has more than one contract with a purchasing agency. The administrator may assist the purchasing agencies in this coordination as practicable. Such activities may include monitoring of administrative and fiscal requirements. Each departmental coordinator shall coordinate with other purchasing agencies in reducing duplication of monitoring activities among purchasing agencies, where feasible. [Eff 6/19/99; am and comp 1/23/06; comp ] (Auth: §103F-408)

#### SUBCHAPTER 5

#### EVALUATION OF CONTRACTS

§3-149-501 Contract evaluation. (a) Each purchasing agency shall establish contract evaluation criteria and procedures. The administrator may coordinate with purchasing agencies to develop uniform criteria and procedures.

(b) Minimum requirements for evaluation process. Each contract awarded under the competitive or restrictive purchase of service method shall be evaluated. A final written evaluation shall be completed within 120 days after the expiration or termination of the contract and shall include an analysis of the extent to which defined performance outcomes were met. As applicable, a discussion of any problems with or adjustments to, the performance outcomes shall also be addressed.

1. Provider response to report. The provider shall be given an opportunity to respond in writing to all evaluation reports. The evaluation report and provider response shall be included in the contract file." [Eff 6/19/99; am and comp 1/23/06; comp ] (Auth: HRS §103F-106) (Imp:

HRS

2. Material, except source notes, to be repealed is bracketed. New material is underscored.

3. Additions to update source notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 3-149, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which are adopted on \_\_\_\_\_ and filed with the Office of the Lieutenant Governor.

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Chairperson  
Procurement Policy Board

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Roderick Becker  
State Comptroller

APPROVED AS TO FORM

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Deputy Attorney General