

PROCUREMENT POLICY BOARD MEETING

February 6, 1996

2:00 p.m.

Comptroller's Conference Room
1151 Punchbowl Street, Room 410
Honolulu, Hawaii 96813

Members Present

Haruo Shigezawa, Chairman
Tim Johnson, Vice Chairman
Sam Callejo, Secretary
Bill Gray, Member
Robert Oyama, Member

Others

Lloyd Unebasami, Administrator
Robert Governs, State Procurement Office
Justin Fo, State Procurement Office
Ruth Yamaguchi, State Procurement Office
Doris Lee, State Procurement Office
Taren Taguchi, State Procurement Office
Kay Fujimoto, State Procurement Office
Pat Ohara, Attorney General's Office
Duff Zwald, University of Hawaii
Craig Hopseker, State Auditor's Office

Call to Order

The meeting was called to order at 2:00 p.m. by Chairman Haruo Shigezawa.

Minutes

Motion

A motion was made by Mr. Bill Gray, seconded by Mr. Tim Johnson, to approve the minutes of the meeting held on November 7, 1995.

AYES: Mr. Haruo Shigezawa
 Mr. Tim Johnson
 Mr. Sam Callejo
 Mr. Bill Gray
 Mr. Robert Oyama

NAYS: None

The minutes were approved as distributed.

New Business

Review of Subject Areas for Proposed Rule Amendments.

A. Chapter 3-120. (Mr. Justin Fo)

1. Mr. Fo explained that section 3-120-6, Record of Procurement Action, is being reviewed for amendment. The Senate President requested that this section of the rules be reviewed for amendment or deletion as it appears to be inconsistent with the procurement law.
2. Exhibit to Chapter 3-120. Item 6, utility services; should this item be placed on the sole source list rather than on the exempt list. Also, item 9, functions related to the issuance and sale of bonds, clarification is needed for the support facilities.

B. Chapter 3-121. (Ms. Ruth Yamaguchi)

Section 3-121-2(a)(3) will be amended to delete the interim rule authority, as the procurement rules have been formally adopted.

C. Chapter 3-122. (Ms. Doris Lee)

1. Ms. Lee explained that the work group, comprised of DAGS' Public Works staff and the Attorney General's Office staff, has recommended numerous changes to this chapter.
2. Section 3-122-1, Definitions. Amend "final settlement" definition, reference to publication of notice will be moved to another section of the rules.
3. Section 3-122-9.1, Disclosure of names of potential offers, is a new section to clarify when names may be disclosed to the public.

4. Section 3-122-21, Preparing a competitive sealed bid. Section 3-122-21(b) discusses amendments; a reference should be made to §3-122-27 which details amendments to bids.
5. Section 3-122-22, Multi-step sealed bidding. A correction is necessary; change reference from (k) to (j) at end of this section.
6. Section 3-122-33, Bid evaluation and award. A typographical error needs correction. In (c), second line, the word "or" should be "of."
7. Section 3-122-45, Determinations. The Attorney General's Office has recommended that consulting services in the areas of software and telecommunications be included on the list of specific goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of a purchasing agency.
8. Section 3-122-48, Amendments to request for proposals. Correct the reference at the end of the sentence to read "section 3-122-22(f)."
9. Section 3-122-54, Best and final offers. Amendment to this section is for housekeeping purposes only (sentence formatting).
10. Section 3-122-58, Public inspection. Correct the reference in §3-122-58(b)(1) to read, "section 3-122-51."
11. Section 3-122-65, Procedures for procurement of professional services. Re-phrase section 3-122-65(b)(2) for clarity.
12. Section 3-122-67, Small purchase of professional services. In subsection (b), expand the reference to section 3-122-65(b)(5) to include, "and (6)."
13. Section 3-122-74, Conditions for use. In subsection (b), change the HRS reference to HAR 3-122-67.
14. Section 3-122-81, Conditions for use. Add sole source for utility companies to exhibit, as referenced in last paragraph of this section.

15. Section 3-122-108, Qualification of bidders and offerors. In first paragraph, change word "faxed" to "a facsimile." Also, the sample questionnaire referred to in section (b) will be revised.
16. Section 3-122-110, Determination of responsibility. Add a new section (f) to clarify the amount of time allowed to file an administrative appeal.
17. Section 3-122-211, Record of procurement actions. As a result of a letter received from the Senate President, staff is reviewing the requirements in (c).
18. Section 3-122-227, Payment claims against the bond. Amend this section to include the criteria for publication of final settlement; language in section 3-122-1 (definitions) should also be included in this section. Section 3-122-227(c) will be re-written for clarity.
19. Exhibit, Procurements Approved for Sole Source. Add a new item--number 2, utility companies.
20. Exhibit, Surety [Bid] [Proposal] Bond. Revise format of form--to double spaced lines.
21. Exhibits, Performance Bond (Surety); Labor and Material Payment Bond (Surety). Amend the forms to include lines for signatures and positions/titles.

D. Chapter 3-123 (Ms. Ruth Yamaguchi)

This chapter on Cost Principles has been reviewed by the DAGS/AG working group and changes were recommended at previous board meetings. Staff is reviewing the recommendations.

E. Chapter 3-124 (Mr. Justin Fo)

1. Section 3-124-5, Evaluation procedure and contract award.
2. Section 3-124-12, Evaluation procedure and contract award.
3. Section 3-124-18, Evaluation procedure and contract award.
4. Section 3-124-25, Evaluation procedure and contract award.
5. Section 3-124-35, Evaluation procedure and contract award.

Housekeeping amendments to above sections; language will be re-phrased for clarity.

F. Chapter 3-125 (Mr. Justin Fo)

All revisions to this chapter are for housekeeping purposes.

G. Chapter 3-126 (Ms. Ruth Yamaguchi)

Changes to this chapter were recommended by the DAGS/AG working group. Copies of the changes to this chapter will be provided to the Board members at a later date.

H. Chapter 3-127 (Mr. Robert Governs)

This chapter needs to be drafted.

I. Chapter 3-128 (Mr. Justin Fo)

Section 3-128-3, Cooperative purchasing agreements between public procurement units. Item (5) needs clarification that the cooperative purchase agreement referred to is a nonprofit private procurement entity.

J. Other HRS Sections (Mr. Robert Governs)

1. Section 103-24.6, Indigenous and Polynesian introduced plants; use in public landscaping. Section 103-24.6(c) requires that the Procurement Policy Board adopt rules to implement this section.
2. Section 103-49, Value engineering clauses; rules. Requires that the Procurement Policy Board adopt rules, as necessary, to implement this section. Staff will review.

Administrator's Report

Personnel. Mr. Lloyd Unebasami, Administrator, introduced Ms. Taren Taguchi, executive assistant, in the State Procurement Office. Ms. Taguchi will work on the procurement debarment process and will also assist in drafting of legislation and amending the administrative rules.

Legislation. Mr. Unebasami briefed the Board on the status of bills that are before the current Legislature. Many of the bills that are being introduced call for

exemptions from the procurement law. The State Procurement Office's position in this regard is against any blanket exemption, as each Chief Procurement Officer has the authority to provide certain exemptions.

Another bill before the Legislature would amend the definition of professional services to include bond underwriters and bond investment bankers.

One bill which would significantly impact the State Procurement Office is one which amends Chapter 42D, purchase of services, which is due to sunset on June 30, 1996. The Auditor's Office feels that purchase of services is another procurement process and, therefore, falls under the jurisdiction of Chapter 103D.

Mr. Oyama inquired whether Hawaii's procurement information is on the Internet. Ms. Yamaguchi explained that Invitation for Bids and Requests for Proposals are already online and may be accessed through Hawaii FYI and the Internet since January 1996. However, many state agencies do not have access to the Internet due to the costs involved--a computer and a modem are necessary.

Next Meeting

The next meeting will be scheduled at the call of the Chairman.

Adjournment

There being no further business, the meeting was adjourned at 3:10 p.m.

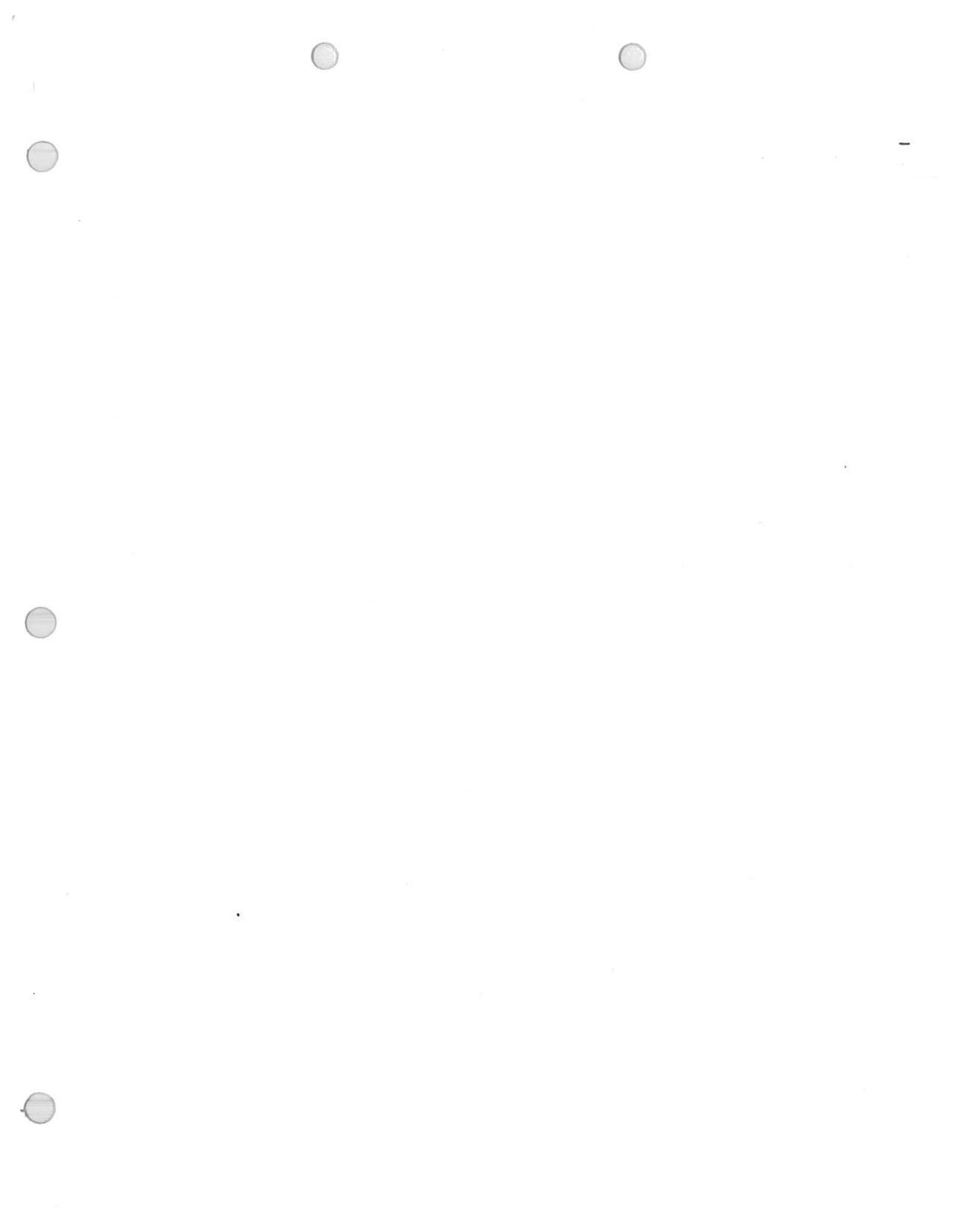
Respectfully submitted,

SEP 26 1996

Date



SAM CALLEJO Secretary
Procurement Policy Board



JUSTIFICATION SHEET

DATE: October 2, 1996

DEPARTMENT: Accounting and General Services

TITLE: A BILL FOR AN ACT RELATING TO THE HAWAII
PUBLIC PROCUREMENT CODE.

PURPOSE: To provide changes to the provisions of
chapter 103D, the Hawaii public procurement
code and to amend related chapters and
sections of the HRS to bring them into
compliance with the code.

MEANS: Adding new sections in chapters 103D and 231
and amending sections 103D-201, 103D-203,
103D-204, 103D-206, 103D-308, 103D-309, 103D-
324, 103D-325, 103D-801, 103D-802, 103D-1002,
103D-1003, 103D-1006, and various sections in
chapters 103 and 103D, the title of part VIII
of chapter 103D, and section 201-82, Hawaii
Revised Statutes. Also, by repealing
sections 103-32.1, 103-32.2, 103-45.5, 103-
53, and 237-45, Hawaii Revised Statutes.

JUSTIFICATION: Section 1 adds a new section to part III of
chapter 103D. The purpose of this new
section is to provide a reference to a new
section in 231- to comply with tax
clearance requirements for chapter 103D
contracts.

Section 2 provides for contract retainage
currently found in sections 103-32.1 and 103-
32.2, Hawaii Revised Statutes. A change to
the provision increases the amount that can
be retained from five per cent to ten per
cent. The reason for the increase is that
prime contractors are withholding ten per
cent from subcontractors. So in effect the
state and counties are retaining the
subcontractors funds, thereby providing no
incentive for the prime contractor to close

the contract, obtain tax clearances, etc. Allowing the retainage to be increased should assist in correcting this problem.

Section 3 provides for the in-state preference currently found in section 103-45.5, Hawaii Revised Statutes. Four changes are recommended. In subsection (c) the filing time of taxes is reduced from four to two years and the preference percentage is decreased from fifteen to seven per cent. In subsection (d) the filing time of taxes is reduced from eight to four years and the preference percentage is also decreased from fifteen to seven per cent. By reducing the time requirements newer companies will be afforded the preference when bidding on state contracts. The percentage preference decrease will decrease average costs to the State for public works contracts.

Section 4 establishes a new section and amends and clarifies the tax clearance provisions that are in section 103-53 (Act 314 HSL 1996). The current law (Act 314) is burdensome in that it can be interpreted to apply to purchases less than \$10,000. Subsection (e) clarifies the application of the tax clearance. The amendment also provides for chapter 91 rules.

Section 5 amends section 103D-201 to substitute the words "policy board" for "policy office". "Policy board" is more descriptive because it is a board (headed by a chairperson) of five members who meet on call of the chairperson. An office would normally be open day to day and have a permanent location. The term will be consistent with section 26-34, Hawaii Revised Statutes and will eliminate the confusion which presently exists because section 103D-204 provides for a procurement office (change to "state procurement office" is being recommended) attached to the department of accounting and general services, which shall be headed by the administrator of the state procurement office. Also, subsections (d) and (e) are amended since they no longer

apply.

Section 6 amends section 103D-203 to designate the deputy administrator of operations as the chief procurement officer for the office of Hawaiian affairs. Having the office of Hawaiian affairs board function as a chief procurement officer is not workable and places no one in charge. Having the deputy administrator function as a chief procurement officer will provide for a single authority in order to ensure compliance and efficiency with the procurement code. The chief procurement officers for the University of Hawaii and the department of education are amended to facilitate timeliness and oversight in the procurement process. The chief procurement officer for the division of community hospitals is removed since the division is exempt from chapter 103D and is now the Hawaii health systems corporation. This section also provides for placement of the Hawaii state public library system under the administrator of the state procurement office for procurement compliance. This is to clarify the relationship between the executive branch and the department of education as to the public libraries procurement actions.

Section 7 amends section 103D-204 to clarify the title of the office and that the office is administratively attached to the department of accounting and general services.

Section 8 adds the word "state" to title of section 103D-206 to make language consistent in law.

Section 9 amends section 103D-308 to change "policy council" to "policy board" for consistency in the law.

Section 10 amends section 103D-309 to delete the formal contract requirement for sole source awards that are one time payments. Many sole sources are one time payments by purchase order for such items as utility

bills and membership fees. Preparing formal contracts for these types of payments is both time consuming and unnecessary.

Section 11 clarifies section 103D-324 to allow the claimant to file its claim against a payment bond within two months from final settlement and not completion of contract. Completion of contract includes tax clearances, etc. and is a different date from the notice of final settlement.

Section 12 amends section 103D-325 to allow the policy board to issue bond forms by procurement directive rather than rules. Changes by rules are difficult and time consuming. Forms, applications, etc. should be issued by methods easily changed as required.

Section 13 amends the title of part VIII of chapter 103D to remove "intergovernmental" which would apply only to cooperative between governmental units. Act 186 amended section 103D-802 to allow for cooperatives between public and nonprofit private units. The title change from "intergovernmental" to "governmental" broadens Part VIII to reflect that change for nonprofit private procurement units so as not be restricted to only public units.

Section 14 amends section 103D-801 to revise the definitions and include nonprofit private procurement units. Act 186 allowed for cooperative purchasing between public and nonprofit private procurement units; however, the definitions were not amended at the time Act 186 was passed. The definitions are now amended to reflect that change.

Section 15 amendment to section 103D-802 has technical changes and allows for exemption from applying preferences in cooperative purchasing arrangements 103D-802. Attempting to apply preferences in a multi state bid would be futile and could result in different vendors being awarded contracts thereby negating bulk purchases. For example,

recycling percentage preferences vary from state to state and a vendor could be awarded a contract in one state and not another. Applying preferences locally e.g. state and county cooperative bids would normally be allowed since the preferences should be the same.

Section 16 amends section 103D-1002 so that bidders identify Hawaii products they are offering in their bids as well as non-Hawaii products. All other preference are applied by identifying the product or service for which the preference is earned. This change will make preference application consistent. The amendment also repeals the penalty provision since section 103D-106 now provides for penalties.

Section 17 amends section 103D-1003 to apply the printing preference as other preferences are applied. The amendment also repeals the penalty provision since section 103D-106 now provides for penalties.

Section 18 amends "developmental center" in section 103D-1006 to read "development business" to correct a wording error.

Section 19 affects numerous sections and provides for amendments to substitute the words "policy board" wherever the words "policy office" appear. Section 2 above provides the justification for the amendments.

Section 20 repeals section 103-32.1. See section 2 of this proposed bill for new section and changes.

Section 21 repeals section 103-32.2. See section 2 of this proposed bill for new section.

Section 22 repeals section 103-45.5. See section 3 of this proposed bill for new section and changes.

Section 23 repeals section 103-53. The

provisions for a tax clearance are amended into chapter 231- . See sections 1 and 4 in this proposed legislation.

Section 24 repeals section 237-45. Tax clearance provisions are moved to chapter 231. See section 4 in this proposed legislation.

GENERAL FUNDS: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: AGS-240 State Procurement

OTHER AFFECTED
AGENCIES: All chief procurement officers and all branches of government including the several counties.

A BILL FOR AN ACT

RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 103D, Hawaii Revised Statutes, is
2 amended by adding a new section to part III to be appropriately
3 designated to read as follows:

4 "§103D- Contracts with the State or counties; tax
5 clearances, assignments. All State and county procurement
6 officers and agents making contracts on behalf of the State or
7 county pursuant to this chapter shall do so in accordance with
8 section 231- ."

9 SECTION 2. Chapter 103D, Hawaii Revised Statutes, is
10 amended by adding a new section to part III to be appropriately
11 designated to read as follows:

12 "§103D- Contract retainage. (a) Any public contract
13 issued under this chapter may include a provision for the
14 retainage of a portion of the amount due under the contract to
15 the contractor to ensure the proper performance of the contract;
16 provided that the sum withheld by the procurement officer from
17 the contractor shall not exceed ten per cent of the amount due
18 the contractor and that after fifty per cent of the contract is
19 completed and progress is satisfactory, no additional sum shall
20 be withheld; provided further that if progress is not

1 satisfactory, the procurement officer may continue to withhold as
2 retainage, sums not exceeding ten per cent of the amount due the
3 contractor.

4 (b) Any other law to the contrary notwithstanding, any
5 public contract issued under this chapter may provide that the
6 procurement officer may enter into an agreement with the
7 contractor which will allow the contractor to withdraw from time
8 to time the whole or any portion of the sum retained under this
9 section upon depositing with the procurement officer any general
10 obligation bond of the State or its political subdivisions with a
11 market value not less than the sum to be withdrawn; provided that
12 the procurement officer may require that the total market value
13 of such bond be greater than the sum to be withdrawn."

14 SECTION 3. Chapter 103D, Hawaii Revised Statutes, is
15 amended by adding a new section to part X to be appropriately
16 designated to read as follows:

17 "§103D- Preference to bidders on state agency contracts.

18 (a) The requirements in this section are in addition to any
19 other applicable requirements provided in this chapter.

20 (b) The preference in this section may not be utilized in
21 combination with any other preference otherwise available to a
22 bidder under state or federal law.

23 (c) In any contract for a public works project, a state
24 agency shall award the contract to a bidder who has filed State
25 of Hawaii employment, general excise, or income tax returns and
26 has paid all amounts owing on such returns for two successive

1 years prior to submitting the bid; provided that the amount of
2 that bid is not more than seven per cent higher than the amount
3 bid by any competing contractor who has not filed nor paid State
4 of Hawaii taxes as specified, and the amount of the bid by the
5 state tax paying bidder is \$5,000,000 or less.

6 (d) In any contract for a public works project, a state
7 agency shall award the contract to a bidder who has filed State
8 of Hawaii employment, general excise, or income tax returns and
9 has paid all amounts owing on such returns for four successive
10 year prior to submitting the bid; provided that the amount of
11 that bid is not more than seven per cent higher than the amount
12 bid by any competing contractor who has not filed or paid State
13 of Hawaii taxes as specified, and the amount of the bid by the
14 state tax paying bidder is more than \$5,000,000.

15 (e) If two or more contractors who have paid state and
16 county taxes or were required to submit a filing regarding state
17 and county taxes are bidding on a public works contract, and
18 those contractors meet the criteria outlined in subsection (c) or
19 (d), the state agency shall award the contract to the contractor
20 among them who has submitted the lowest bid.

21 (f) If any federal statute or regulation precludes the
22 granting of federal assistance or reduces the amount of that
23 assistance for a particular public works project because of
24 preference awarded by this section, this section shall not apply
25 insofar as its application would preclude or reduce federal
26 assistance for that work.

1 SECTION 4. Chapter 231, Hawaii Revised Statutes, is amended
2 by adding a new section to be appropriately designated to read as
3 follows:

4 "231- Contracts with the State or counties; tax
5 clearances, assignments. (a) All procurement officers and
6 agents making contracts on behalf of the State or any county
7 shall require, as a prerequisite to entering into these
8 contracts, tax clearances from the director of taxation and the
9 Internal Revenue Service to the effect that all tax returns due
10 have been filed, and all taxes, interest, and penalties levied or
11 accrued under the provisions of title 14 that are administered by
12 the department of taxation and under the Internal Revenue Code
13 against the contractor have been paid.

14 (b) Notwithstanding the provisions under sections 40-57 and
15 40-58, if a contractor fails to timely file all tax returns and
16 pay all taxes, interest, and penalties due to the State or
17 Internal Revenue Service during the term of a contract, the state
18 or county procurement officer or agent shall immediately assign
19 any progress payment due to the contract, if any (provided such
20 payment is not subject to any restriction or encumbrance), to the
21 State payable to the department of taxation or to the Internal
22 Revenue Service to the credit of the contractor, whichever the
23 case may be; provided that the department of taxation may first
24 offset its tax debt against the sum owed to the contractor. The
25 state or county procurement officer or agent shall assign as many
26 progress payments as necessary to cover the amount of the tax

1 delinquency.

2 (c) All state and county procurement officers or agents
3 shall withhold payment in the final payment of a contract until
4 the receipt of tax clearances from the director of taxation and
5 the Internal Revenue Service. Notwithstanding sections 40-57 and
6 40-58, if a contractor fails to provide the tax clearances within
7 six months of the notice of final settlement or completion date
8 of the contract, the state or county procurement officer or agent
9 shall assign the final payment in an amount not to exceed the tax
10 liability to the department of taxation or Internal Revenue
11 Service; provided that the department of taxation may first
12 offset its tax debt against the sum owed to the contractor.

13 (d) Any assignment of a contract shall require the
14 assignee, as a condition precedent to the assignment, to first
15 obtain a bulk sales certificate if required under section 237-43,
16 and present the certificate, or tax clearance as provided under
17 subsection (a) if a bulk sales certificate is not required, to
18 the state or county procurement officer or agent.

19 (e) Subsection (a), (c), and (d) shall not apply to:

20 (1) Any procurement of less than \$10,000;

21 (2) A small purchase procurement pursuant to section 103D-
22 305; and

23 (3) Emergency purchases as set forth in section 103D-307.

24 (f) This section shall not apply to a contractor if the
25 department of taxation certifies that the contractor is in good
26 standing under a plan in which delinquent taxes are being paid to

1 the department of taxation (and the Internal Revenue Service, if
2 applicable) in installments.

3 (g) Any officer or employee of any governmental agency who
4 intentionally or knowingly violates any provision under this
5 section shall be fined not more than \$1,000 or imprisoned not
6 more than one year, or both.

7 (h) The provisions of subsections (a), (b), (c) and (d)
8 shall not apply to the extent and during the period that the
9 validity of the taxes, penalties, or interest is being contested
10 in an administrative or judicial appeal with the department of
11 taxation or Internal Revenue Service.

12 (i) The director of taxation shall adopt rules pursuant to
13 chapter 91 necessary for the purposes of this section."

14 SECTION 5. Section 103D-201, Hawaii Revised Statutes, is
15 amended to read as follows:

16 "[[§103D-201]] Creation and membership of the procurement
17 policy [office.] board. (a) There is hereby created an
18 autonomous state procurement policy [office.] board. The policy
19 [office] board shall be assigned, for administrative purposes
20 only, to the department of accounting and general services.

21 (b) The policy [office] board shall consist of [a board of]
22 five members. Notwithstanding the limitations of section 78-5,
23 the members of the board shall include:

24 (1) The comptroller;

25 (2) A county employee with significant high-level
26 procurement experience; and

1 (3) Three persons who shall not otherwise be full-time
2 employees of, or contractors with, the State or any
3 county; provided that at least one member shall be a
4 certified professional in the field of procurement and
5 at least one member shall have significant high-level,
6 federal procurement experience.

7 Each appointed member shall have demonstrated sufficient business
8 or professional experience to discharge the functions of the
9 policy [office.] board. The initial and subsequent members of
10 the policy [office,] board, other than the comptroller, shall be
11 appointed by the governor from a list of three individuals for
12 each vacant position, submitted by a nominating committee
13 composed of four individuals chosen as follows: two persons
14 appointed by the governor; one person appointed by the president
15 of the senate; and one person appointed by the speaker of the
16 house. Except as provided in this section, the selection and
17 terms of the policy [office] board members shall be subject to
18 the requirements of section 26-34. No member of the policy
19 [office] board shall act concurrently as the chief procurement
20 officer. The members of the policy [office] board shall devote
21 such time to their duties as may be necessary for the proper
22 discharge thereof.

23 (c) The policy [office] board shall be assisted by
24 employees of the department of accounting and general services,
25 which shall provide at least one full time support staff and
26 funding necessary to support the policy [office.] board.

1 (d) Members of the policy [office] board shall be
2 reimbursed for any expenses, including travel expenses,
3 reasonably incurred in the performance of their duties. [During
4 the first year of the existence of the policy office, members who
5 are not otherwise employees of the State or a county shall be
6 allowed compensation at a rate of \$100 per day for each day's
7 actual attendance at meetings.]

8 (e) The chairperson of the policy [office] board shall be
9 elected annually by a majority of its members from among all of
10 its members; provided that the state comptroller shall not be
11 eligible to serve as the chairperson. [If the chairperson is not
12 a county officer or employee, the chairperson shall be allowed an
13 additional compensation of \$50 per day for each day of actual
14 attendance at board meetings.]"

15 SECTION 6. Section 103D-203, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "[[]§103D-203[[]] Chief procurement officers. (a) The
18 chief procurement officer for each of the following state
19 entities and the several counties shall be:

- 20 (1) The judiciary - the administrative director of courts;
21 (2) The senate - the president of the senate;
22 (3) The house of representatives - the speaker of the house
23 of representatives;
24 (4) The office of Hawaiian affairs - its [board of
25 trustees] deputy administrator of operations;
26 (5) The University of Hawaii - the [president] senior vice

1 houses of the legislature, office of Hawaiian affairs, department
2 of education, division of community hospitals within the
3 department of health, University of Hawaii, remaining departments
4 of the executive branch and all governmental bodies
5 administratively attached to them and the several counties,
6 unless otherwise expressly provided. "State" shall mean
7 "judiciary," "state senate," "state house of representatives,"
8 "office of Hawaiian affairs," "department of education,"
9 "division of community hospitals within the department of
10 health," "University of Hawaii," "executive branch," and
11 "county," respectively."

12 SECTION 7. Section 103D-204, Hawaii Revised Statutes, is
13 amended to read as follows:

14 "[[§103D-204]] Administrator of the state procurement
15 office. (a) There shall be a state procurement office [within]
16 administratively attached to the department of accounting and
17 general services, which shall be headed by the administrator of
18 the state procurement office. The administrator shall be the
19 chief procurement officer for [the] those governmental bodies of
20 the executive branch [other than the University of Hawaii and the
21 department of education, and those governmental bodies
22 administratively attached thereto.] as provided in section 103D-
23 203. The administrator shall be a full-time public official.
24 The administrator shall serve a term of four years, and shall be
25 paid the salary established for deputies or assistants to
26 department heads under section 26-53 without diminution during

1 the administrator's term of office unless by general law applying
2 to all deputies or assistants to department heads.

3 (b) The administrator shall be appointed by the governor
4 from a list of no less than three and no more than five names
5 submitted by the state procurement policy [office] board. The
6 appointment of the administrator shall require the advice and
7 consent of the senate. The administrator may only be removed
8 from office by the governor, provided the governor shall give
9 prior notification of such removal to the chair of the policy
10 [office] board, the president of the senate, and the speaker of
11 the house of representatives.

12 (c) The administrator shall have:

13 (1) A minimum of five years experience in public
14 procurement within twelve years preceding the date of
15 appointment; and

16 (2) Demonstrated executive and organizational ability.

17 (d) The state procurement office shall be [assigned]
18 attached for administrative purposes to the department of
19 accounting and general services; provided that the administrator
20 shall operate independently of the comptroller. The
21 administrator may appoint and dismiss a private secretary without
22 regard to chapter 76 or 77, who shall serve at the
23 administrator's pleasure. The comptroller shall provide support
24 to permit the administrator to satisfy all of the administrator's
25 responsibilities as the chief procurement officer for those
26 governmental bodies of the executive branch of the State for

1 which a chief procurement officer is not otherwise designated."

2 SECTION 8. Section 103D-206, Hawaii Revised Statutes, is
3 amended to read as follows:

4 "[[]§103D-206[[]] Additional duties of the administrator of
5 the state procurement office. In addition to the duties referred
6 to in section 103D-205, the administrator shall:

- 7 (1) Perform periodic review of the procurement practices of
8 all governmental bodies;
- 9 (2) Assist, advise, and guide governmental bodies in
10 matters relating to procurement;
- 11 (3) Develop and administer a statewide procurement
12 orientation and training program;
- 13 (4) Develop, distribute, and maintain a procurement manual
14 for all state procurement officials; and
- 15 (5) Develop, distribute, and maintain a procurement guide
16 for vendors wishing to do business with the State and
17 its counties."

18 SECTION 9. Section 103D-308, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "[[]§103D-308[[]] Cancellation of invitation for bids or
21 requests for proposals. An invitation for bids, a request for
22 proposals, or other solicitation may be canceled, or any or all
23 bids or proposals may be rejected in whole or in part as may be
24 specified in the solicitation, when it is in the best interests
25 of the governmental body which issued the invitation, request, or
26 other solicitation, in accordance with rules adopted by the

1 policy [council.] board. The reasons therefor shall be made part
2 of the contract file."

3 SECTION 10. Section 103D-309, Hawaii Revised Statutes, is
4 amended by amending subsection (a) to read as follows:

5 "(a) [No contract] Contracts awarded pursuant to [section]
6 sections 103D-302, 103D-303, or 103D-306, except for one time
7 payments pursuant to 103D-306, shall not be binding or of any
8 force and effect unless the comptroller, the director of finance
9 of a county, or the chief financial officer of the University of
10 Hawaii or the department of education, as the case may be,
11 endorses thereon a certificate that there is an appropriation or
12 balance of an appropriation over and above all outstanding
13 contracts, sufficient to cover the amount required by the
14 contract; provided that if the contract is a multi-term contract,
15 the comptroller, director of finance, or chief financial officer
16 shall only be required to certify that there is an appropriation
17 or balance of an appropriation over and above all outstanding
18 contracts, that is sufficient to cover the amount required to be
19 paid under the contract during the fiscal year or remaining
20 portion of the fiscal year of each term of the multi-year
21 contract; provided further that this section shall not apply to
22 any contract under which the total amount to be paid to the
23 contractor cannot be accurately estimated at the time the
24 contract is to be awarded, or to any contract for which
25 consideration is in kind or forbearance."

26 SECTION 11. Section 103D-324, Hawaii Revised Statutes, is

1 amended by amending subsection (d) to read as follows:

2 " (d) Every person who has furnished labor or material to
3 the contractor for the work provided in the contract, in respect
4 of which a payment bond is furnished under this section, and who
5 has not been paid in full therefor after two months from the
6 [completion and] final settlement of any contract, may institute
7 an action against the contractor and its sureties, and have their
8 rights and claims adjudicated in the action, and judgment
9 rendered thereof; subject to the State's priority on its
10 performance bond. If the full amount of the liability of the
11 sureties on the bond is insufficient to pay the full amount of
12 the claims, then, after paying the full amount due the State, the
13 remainder shall be distributed prorata among the claimants."

14 SECTION 12. Section 103D-325, Hawaii Revised Statutes, is
15 amended by amending subsection (a) to read as follows:

16 " (a) The policy [office] board shall [adopt rules
17 specifying] by procurement directive specify the form of the
18 bonds required by this chapter."

19 SECTION 13. Chapter 103D, Hawaii Revised Statutes, is
20 amended by amending the title of part VIII to read as follows:

21 "PART VIII. [~~INTERGOVERNMENTAL~~] GOVERNMENTAL RELATIONS AND
22 COOPERATIVE PURCHASING"

23 SECTION 14. Section 103D-801, Hawaii Revised Statutes, is
24 amended to read as follows:

25 "[~~103D-801~~] Definitions. As used in this part, unless
26 the context requires otherwise:

1 "Cooperative purchasing" [means procurement conducted by, or
2 on behalf of, more than one public procurement unit, or by a
3 public procurement unit with an external procurement activity.]
4 means procurement conducted by a public or external procurement
5 unit with one or more public procurement units, external
6 procurement units, or nonprofit private procurement units,
7 pursuant to this chapter.

8 "External procurement [activity] unit" means any buying
9 organization not located in this State which, if located in this
10 State, would qualify as a public procurement unit. An agency of
11 the United States is an external procurement [activity] unit.

12 "Nonprofit private procurement unit" means a health or human
13 services organization of the State that provides services to the
14 public and receives public funds for the procurement of goods,
15 services, and construction through cooperative purchasing
16 agreements with a public procurement unit.

17 SECTION 15. Section 103D-802, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "**§103D-802 Cooperative purchasing authorized.** A public
20 procurement unit may either participate in, sponsor, conduct, or
21 administer a cooperative purchasing agreement for the procurement
22 of goods, services, or construction with one or more public
23 procurement units, external procurement [activities,] units, or
24 nonprofit private [health and human services organizations]
25 procurement units pursuant to rules adopted by the policy
26 [office] board and an agreement entered into between the

1 participants. The cooperative purchasing may include, but shall
2 not be limited to, joint or multi-party contracts between public
3 procurement units and [open-ended] state public procurement unit
4 requirements contracts which are made available to local public
5 procurement units provided that cooperative purchasing agreements
6 may be exempt from preferences pursuant to part X."

7 SECTION 16. Section 103D-1002, Hawaii Revised Statutes, is
8 amended to read as follows:

9 "§103D-1002 Hawaii products. (a) In any expenditure of
10 public funds, a purchasing agency shall review all purchase
11 specifications in a bid or proposal for purchase from the Hawaii
12 products list where these products are available; provided that
13 the products:

14 (1) Meet the minimum specifications and the selling price
15 f.o.b. jobsite;

16 (2) Unloaded including applicable general excise tax and
17 use tax does not exceed the lowest delivered price in
18 Hawaii f.o.b. jobsite; and

19 (3) Unloaded, including applicable general excise tax and
20 use tax do not exceed the lowest delivered price of a
21 similar non-Hawaii product by more than:

22 (A) Three per cent where class I Hawaii products are
23 involved;

24 (B) Five per cent where class II Hawaii products are
25 involved; or

26 (C) Ten per cent where class III Hawaii products are

1 involved.

2 (b) Where a package bid or offer contains both Hawaii and
3 non-Hawaii products, then for the purpose of selecting the lowest
4 bid or purchase price only, the price bid or offered for a non-
5 Hawaii product item shall be increased by adding thereto: three
6 per cent, five per cent, or ten per cent where similar class I,
7 class II, or class III Hawaii product items have been bid or
8 offered by another party pursuant to this section. The lowest
9 total bid or offer, taking the preference into consideration,
10 shall be awarded the contract unless the bid or offer provides^f
11 for additional award criteria. The contract amount of any
12 contract awarded, however, shall be the amount of the bid or
13 price offered, exclusive of the preferences.

14 (c) All persons submitting bids or offers based on
15 Hawaii products to any purchasing agency shall designate in their
16 bids which individual product is to be supplied either as a
17 Hawaii or a non-Hawaii product. All bidders shall list the price
18 of either the Hawaii or the non-Hawaii product in their bid.

19 (d) In all public works and any repair or maintenance
20 contracts, a purchasing agency or any person employed by a
21 purchasing agency, including architects and engineers, shall
22 describe in all specifications, products, and their established
23 classes listed in the Hawaii products list established under this
24 section which may be used, where the products are available and
25 meet the minimum specifications.

26 (e) The policy [office] board shall adopt rules in

1 accordance with chapter 91 for the establishment and
2 administration of a Hawaii products list. The administrator of
3 the state procurement office shall maintain and distribute copies
4 of the list to the purchasing agencies of the various
5 governmental agencies.

6 (f) This section shall not apply whenever its application
7 will disqualify any governmental agency from receiving federal
8 funds or aid.

9 (g) Any purchase made or any contract awarded or executed
10 in violation of this section shall be void and no payment shall
11 be made by any purchasing agency on account of the purchase or
12 contract.

13 [(h) Any person, or any officer or employee of any person,
14 who violates this section shall be fined not more than \$1,000 or
15 imprisoned not more than one year, or both. In addition, any
16 person who is awarded a contract or given an order for purchase
17 as a result of misrepresentation in the person's bid or offer or
18 makes a claim in the person's bid or offer that the person will
19 purchase Hawaii products, but fails to do so:

20 (1) Shall be fined the difference between the price the
21 person would have paid for Hawaii products and the
22 actual price; and

23 (2) Shall not be awarded any contract or be given any order
24 for purchase or be eligible for bidding until one year
25 after the date of the payment of fines.]"

26 SECTION 17. Section 103D-1003, Hawaii Revised Statutes, is

1 amended to read as follows:

2 "§103D-1003 Printing, binding, and stationery work. (a)

3 All contracts of \$10,000 or more for printing, binding, and
4 stationery work [for the State or any county shall be] performed
5 [within the state] in-state, including all preparatory work,
6 presswork, bindery work, and any other production-related work,
7 [and all requests for bids or contracts for this work shall so
8 stipulate; provided that whenever it is established that this
9 work cannot be performed within the state or that the lowest
10 price for which the work can be procured within the state exceeds
11 the bid or charge of a mainland manufacturer of the item by
12 fifteen per cent, the work or any part thereof so affected may be
13 performed outside the state.

14 (b) No payment shall be made by the State or any county for
15 printing, binding, or stationery work unless it appears that the
16 work was done within the state or was authorized to be done
17 outside the state pursuant to this section. In addition, any
18 manufacturer violating a stipulation in a bid or contract that
19 all work will be performed within the state shall be subject to a
20 civil penalty in an amount not to exceed the bid or contract
21 price to be collected by a civil action filed by the attorney
22 general on behalf of the State.] shall require the application of
23 a fifteen per cent preference. Where responses to a bid include
24 work performed in-state and out of state, then for the purpose of
25 selecting the lowest bid, the price bid or offered for work
26 performed out of state shall be increased by adding fifteen

1 percent. The lowest total bid or offer, taking the preference
2 into consideration, shall be awarded the contract unless the bid
3 provides for additional award criteria. The contract amount of
4 any contract awarded, however, shall be the amount of the bid or
5 price offered, exclusive of the preference.

6 [(c)] (b) The policy [office] board shall adopt rules to
7 implement this section."

8 SECTION 18. Section 103D-1006, Hawaii Revised Statutes, is
9 amended by amending subsection (a) to read as follows:

10 "(a) In any expenditure of public funds for software
11 development, the use of Hawaii software development businesses
12 shall be preferred. Where a package bid or response to a request
13 for proposal contains both Hawaii and non-Hawaii software
14 development businesses, then for the purpose of selecting the
15 lowest bid or purchase price only, the bid or offer by a non-
16 Hawaii software [developmental center] development business shall
17 be increased by a preference percentage pursuant to rules adopted
18 [in accordance with chapter 91.] by the policy board."

19 SECTION 19. Sections 103-24.6, 103D-102, 103D-104, 103D-
20 105, 103D-202, 103D-205, 103D-208, 103D-211, 103D-213, 103D-214,
21 103D-302, 103D-303, 103D-304, 103D-305, 103D-306, 103D-308, 103D-
22 310, 103D-311, 103D-312, 103D-313, 103D-322, 103D-323, 103D-324,
23 103D-401, 103D-501, 103D-601, 103D-701, 103D-702, 103D-703, 103D-
24 704, 103D-709, 103D-804, 103D-901, 103D-902, 103D-1002, 103D-
25 1004, 103D-1005, 103D-1103, 103D-1105, 103D-1107, 103D-1201,
26 103D-1202, 103D-1203, and 201-82 are amendedd by substituting the

1 words "policy board" wherever the words "policy office" appear,
2 as the context requires.

3 SECTION 20. Section 103-32.1, Hawaii Revised Statutes, is
4 repealed.

5 "[[]§103-32.1[[]] Contract provision for retainage. Any
6 public contract issued under this chapter may include a provision
7 for the retainage of a portion of the amount due under the
8 contract to the contractor to insure the proper performance of
9 the contract; provided that the sum withheld by the contracting
10 officer from the contractor shall not exceed five per cent of the
11 amount due the contractor and that after fifty per cent of the
12 contract is completed and progress is satisfactory, no additional
13 sum shall be withheld; provided further that if progress is not
14 satisfactory, the contracting officer may continue to withhold as
15 retainage, sums not exceeding five per cent of the amount due the
16 contractor."]

17 SECTION 21. Section 103-32.2, Hawaii Revised Statutes, is
18 repealed.

19 "[[]§103-32.2[[]] Substitutions of retainage. Any other law
20 to the contrary notwithstanding, any public contract issued under
21 this chapter may provide that the contracting officer may enter
22 into an agreement with the contractor which will allow the
23 contractor to withdraw from time to time the whole or in any
24 portion of the sum retained under section 103-32.1 upon
25 depositing with the contracting officer any general obligation
26 bond of the State or its political subdivisions with a market

1 value not less than the sum to be withdrawn; provided that the
2 contracting officer may require that the total market value of
3 such bond be greater than the sum to be withdrawn."]

4 SECTION 22. Section 103-45.5, Hawaii Revised Statutes, is
5 repealed.

6 **["§103-45.5 Preference to bidders on state agency**
7 **contracts.** (a) The requirements in this section are in addition
8 to any other applicable requirements provided in this chapter.

9 (b) The preference in this section may not be utilized in
10 combination with any other preference otherwise available to a
11 bidder under state or federal law.

12 (c) In any contract for a public works project, a state
13 agency shall award the contract to a bidder who has filed State
14 of Hawaii employment, general excise, and income tax returns and
15 has paid all amounts owing on such returns for four successive
16 years prior to submitting the bid; provided that the amount of
17 that bid is not more than fifteen per cent higher than the amount
18 bid by any competing contractor who has not file or paid State of
19 Hawaii taxes as specified, and the amount of the bid by the state
20 tax paying bidder is \$5,000,000 or less.

21 (d) In any contract for a public works project, a state
22 agency shall award the contract to a bidder who has filed State
23 of Hawaii employment, general excise, and income tax returns and
24 has paid all amounts owing on such returns for eight successive
25 years prior to submitting the bid; provided that the amount of
26 that bid is not more than fifteen per cent higher than the amount

1 bid by any competing contractor who has not filed or paid State
2 of Hawaii taxes as specified, and the amount of the bid by the
3 state tax paying bidder is more than \$5,000,000.

4 (e) If two or more contractors who have paid state and
5 county taxes or were required to submit a filing regarding state
6 and county taxes are bidding on a public works contract, and
7 those contractors meet the criteria outlined in subsection (c) or
8 (d), the state agency shall award the contract to the contractor
9 among them who has submitted the lowest bid.

10 (f) If any federal statute or regulation precludes the
11 granting of federal assistance or reduces the amount of that
12 assistance for a particular public works project because of
13 preference awarded by this section, this section shall not apply
14 insofar as its application would preclude or reduce federal
15 assistance for that work."]

16 SECTION 23. Section 103-53, Hawaii Revised Statutes, is
17 repealed.

18 ["Section 103-53 Contracts with the State or counties; tax
19 clearances, assignments. (a) All state and county officers and
20 agents making contracts on behalf of the State or any county
21 shall require, as a prerequisite to entering into these
22 contracts, tax clearances from the director of taxation and the
23 Internal Revenue Service to the effect that all tax returns due
24 have been filed, and all taxes, interest, and penalties levied or
25 accrued under the provisions of title 14 that are administered by
26 the department of taxation and under the Internal Revenue Code

1 against the contractor have been paid.

2 (b) Notwithstanding the provisions under sections 40-57 and
3 40-58, if a contractor fails to timely file all tax returns and
4 pay all taxes, interest, and penalties due to the State or
5 Internal Revenue Service during the term of a contract, the state
6 or county contracting officer or agent shall immediately assign
7 any progress payment due to the contract, if any (provided such
8 payment is not subject to any restriction or encumbrance), to the
9 State payable to the department of taxation or to the Internal
10 Revenue Service to the credit of the contractor, whichever the
11 case may be; provided that the department of taxation may first
12 offset its tax debt against the sum owed to the contractor. The
13 state or county contracting officer or agent shall assign as many
14 progress payments as necessary to cover the amount of the tax
15 delinquency.

16 (c) All state and county contracting officers or agents
17 shall withhold payment in the final settlement of a contract
18 until the receipt of tax clearances from the director of taxation
19 and the Internal Revenue Service. Notwithstanding sections 40-57
20 and 40-58, if a contractor fails to provide the tax clearances
21 within six months of the notice of final settlement or completion
22 date of the contract, the state or county contracting officer or
23 agent shall assign the final settlement payment in an amount not
24 to exceed the tax liability to the department of taxation or
25 Internal Revenue Service; provided that the department of
26 taxation may first offset its tax debt against the sum owed to

1 the contractor.

2 (d) Any assignment of a contract shall require the
3 assignee, as a condition precedent to the assignment, to first
4 obtain a bulk sales certificate if required under section 237-43,
5 and present the certificate, or tax clearance as provided under
6 subsection (a) if a bulk sales certificate is not required, to
7 the state or county contracting officer or agent.

8 (e) Subsection (a) shall not apply to:

9 (1) Any procurement of less than \$10,000 that qualifies as
10 a small purchase under section 103D-305, except that
11 any state or county department or contracting agency
12 may apply subsection (a) to contracts of less than
13 \$10,000; and

14 (2) Emergency purchases as set forth in section 103D-307.

15 (f) This section shall not apply to a contractor if the
16 department of taxation certifies that the contractor is in good
17 standing under a plan in which delinquent taxes are being paid to
18 the department of taxation (and the Internal Revenue Service, if
19 applicable) in installments.

20 (g) Any officer or employee of any governmental agency who
21 intentionally or knowingly violates any provision under this
22 section shall be fined not more than \$1,000 or imprisoned not
23 more than one year, or both.

24 (h) The provisions of subsections (a), (b), (c) and (d)
25 shall not apply to the extent and during the period that the
26 validity of the taxes, penalties, or interest is being contested

1 in an administrative or judicial appeal with the department of
2 taxation or Internal Revenue Service."]

3 SECTION 24. Section 237-45, Hawaii Revised Statutes, is
4 repealed.

5 ["§237-45 Contracts with the State or counties; tax
6 clearances, assignments. All state and county officers and
7 agents making contracts on behalf of the State or county shall do
8 so in accordance with section 103-53."]

9 SECTION 25. Statutory material to be repealed is bracketed.
10 New statutory material is underscored.

11 SECTION 26. This Act shall take effect on July 1, 1997.

INTRODUCED BY: _____



11





Amendments

Amendments to Chapters 3-120, 3-121, 3-123, 3-125, and 3-128 Hawaii Administrative Rules

1. Section 3-120-2, Hawaii Administrative Rules, is amended by adding four new definitions to read as follows:

"Contractor" means any person having a contract with a governmental body.

"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.

"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]
(Auth: HRS §103D-202) (Imp: HRS §103D-202)

JUSTIFICATION: §3-120-2. The rules lack the definitions for "contractor" and "subcontractor". Also, for the reason of clarification, the definitions for the terms "paying agent" and "support facility providers" as found within the list of procurements exempt from Chapter

103D, HRS, are added.

2. Section 3-120-2, Hawaii Administrative Rules, is amended by amending the following definitions:

"Designee" means a [person appointed by the head of a purchasing agency to act on its behalf with delegated authority to enter into and administer contracts.] duly authorized representative of a person holding a superior position. A designee [may also] shall have limited signature authority to only sign for the [head of the purchasing agency.] person.

["Offeror" means a business submitting a bid or proposal in response to an invitation for bids or a request for proposals, or an unpriced technical offer in response to an expression of interest.] "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 work contemplated. [Eff 12/15/95; am] (Auth: HRS §103D-202)
(Imp: HRS §103D-202)

JUSTIFICATION: §3-120-2. Other sections in the HAR allows for delegations to a designee by the CPO (3-121-17). This designee should be generic, not specific to the head of the purchasing agency. Also, the definition for "offeror" is revised.

3. Section 3-120-4, Hawaii Administrative Rules, is amended by amending subsection(b) to read as follows:

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

(b) An exhibit titled "Procurements Exempt from Chapter 103D, HRS" dated [11/7/95] _____ 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."

[Eff 12/15/95; am _____] (Auth: HRS §§103D-102, 103D-202) (Imp: HRS §103D-102)

JUSTIFICATION: §3-120-4. Because of revisions to the list of procurements exempt from chapter 103D, HRS, the latest list of exemptions is attached.

4. Section 3-120-6, Hawaii Administrative Rules, is amended to read as follows:

"§3-120-6 Record of procurement actions. The chief procurement officer shall maintain a record of all chapter 103D, HRS, exemptions pursuant to sections 3-120-4 and 3-120-5 for a minimum of five years. A report of the exemptions shall be submitted in accordance with section 3-122-211 to the legislature [and the procurement policy board on an annual basis]. The record shall be available for public inspection." [Eff 12/15/95; am _____] (Auth: HRS §103D-202) (Imp: HRS §§103D-102, 103D-321)

JUSTIFICATION: §3-120-6. The procurement code does not require the CPOs to report these exemptions to the procurement policy board.

5. The exhibit titled "Procurements Exempt from Chapter 103D, HRS" dated 11/7/95 and located at the end of Chapter 3-120 is amended to read as follows:

"EXHIBIT

PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS
[(11/7/95)] _____

Exemption
Number Exemption

1. Services of expert witnesses for potential and actual litigation of legal matters involving the State, its agencies, and its officers and employees, including

- administrative quasi-judicial proceedings;
2. Works of art for museum or public display;
 3. Research and reference materials including books, maps, periodicals, and pamphlets, which are published in print, video, audio, magnetic, or electronic form;
 4. Meats and foodstuffs for the Kalaupapa settlement;
 5. Opponents for athletic contests;
 - [6. Utility services whose rates or prices are fixed by regulatory processes or agencies;]
 - [7.]6. Performances, including entertainment, speeches, and cultural and artistic presentations;
 - [8.]7. Goods and services for commercial resale by the State;
 - [9.]8. Services of printers, rating agencies, support [facilities] facility provider; fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
 9. Travel arrangements purchased by the University of Hawaii for its intercollegiate athletic programs;
 10. Contracts for services of lecturers and public speakers;
 11. Subgrants and subcontracts to organizations directed by the funding agency;
 12. Materials, supplies, and foodstuffs purchased for use by students in instructional programs when the type or amount required must be determined as part of the course curriculum;
 13. Affiliation agreements with hospitals and other health care providers required for University of Hawaii clinical programs;

14. Services of legal counsel, guardian ad litem; interpreters, psychiatrists, and psychologists in criminal and civil proceedings when required by court order or by the Rules of Court;
15. Fresh meats and produce;
16. Educational material used in schools and libraries, to include textbooks, workbooks, visuals, kits, guides, and tests, in print, video, audio, and magnetic or electronic form;
17. Insurance;
18. Animals and plants; and
19. Used and surplus items which are advantageous, only available on short notice, and subject to sale, such as through an auction."

JUSTIFICATION: Exemption No. 6 removed. This exemption for utility services belongs with the list of sole source exemptions in Chapter 3-122, HAR.

Exemption No. 8 revised. Rather than "support facilities", the term "support facility providers" is the correct terminology.

Exemption No. 9 added. This exemption was added to Section 103D-102(b)(4) under SLH 1995, Act 16.



CHAPTER 3-121 AMENDMENTS

1. Section 3-121-2, Hawaii Administrative Rules, is amended by amending subsection (a) to read as follows:

"§3-121-2 Procurement directives. (a) The policy board shall issue procurement directives to:

- (1) Cover the policies and procedures for conducting its business;
- (2) Provide general procurement policy guidance;
- [(3) Implement interim rules;] and
- [(4)](3) Issue forms, lists, or other information as required."

[Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

JUSTIFICATION: §3-121-2. Interim rule authority expired 12/31/95.

2. Section 3-121-17, Hawaii Administrative Rules is amended to read as follows:

"§3-121-17 Limits to delegation of authority. The chief procurement officer may delegate to a designee who will sign for the chief procurement officer final approval for the following:

- (1) Exemptions to chapter 103D, HRS, pursuant to paragraph 103D-102 (b)(4), HRS.
- (2) Purchases by sole source selection under the provisions of section 103D-306, HRS; [and]
- (3) Emergency procurements pursuant to section 103D-307, HRS[.];
- (4) Waiver to competitive sealed bid process pursuant to section 3-122-35; and
- (5) Waiver to competitive sealed proposal process pursuant to section 3-122-59." [Eff 12/15/95; am and comp] (Auth: HRS §§103D-102, 103D-202, 103D-208) (Imp: HRS §§103D-102, 103D-208, 103D-302, 103D-303, 103D-306, 103D-307)

JUSTIFICATION: §3-121-17. Waivers to IFB's or RFP's require CPO or designee. This revision will permit the CPO to have designee sign for in the name CPO.



CHAPTER 3-123 AMENDMENTS

1. Section 3-123-1, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-1 Applicability of cost principles. (a) The cost principles and procedures contained in this chapter shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs.

(b) The cost principles and procedures set forth in this chapter may be used as guidance in:

- (1) The establishment of contract cost estimates and prices under contracts awarded where the award may not be based on adequate price competition, as in subchapters 6, 7, and 9, chapter 122;
 - (2) The establishment of price adjustments for contract changes including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;
 - (3) The pricing of termination for convenience settlements; and
 - (4) Any other situation in which cost analysis is used.
- (c) These cost principles are not applicable to:
- (1) The establishment of prices under contracts awarded on the basis of competitive sealed bidding or based on adequate price competition rather than the analysis of individual, specific cost elements, except that this chapter does apply to the establishment of adjustments of price for changes made to such contracts;
 - (2) Prices which are fixed by law or regulation; and
 - (3) Prices which are based on established catalogue prices or market prices [pursuant to] as defined in section [3-122-145] 3-120-2". [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-1. To correct a wrong reference.

2. Section 3-123-2, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-2 Allowable costs. (a) Any contract cost proposed for estimating purposes or invoiced for cost-reimbursement purposes shall be allowable to the extent provided in the contract and, if inconsistent with these cost principles, approved as a deviation under section 3-123-24. [The contract shall provide that] [t]The total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits such as discounts, rebates, and property disposal income.

(b) All costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to its other activities. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs.

(c) [The contract shall provide that] [c]Costs [shall] may be allowed only to the extent they are:

- (1) [Reasonable] Appropriate, as defined in section 3-123-3;
- (2) Allocable, as defined in section 3-123-4;
- (3) Lawful under any applicable law;
- (4) Not unallowable under sections 3-123-5 through 3-123-15 and 3-123-17 through 3-123-20; and
- (5) In the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles." [Eff 12/15/95; am and comp]
(Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-2. The procurement regulations set policy and have the force of law. Thus the working group is puzzled by the directive in subsections (a) and (c) that "the contract shall provide"

specific language as to what constitutes an allowable cost. The required provisions do not easily convert into language that fits comfortably into a set of general conditions. The Working Group believes that the policy established is clear enough and that the parties will be controlled by it without the need to convert such general principles into specific language incorporated into the contract itself.

We believe that the use of the term "reasonable" in categorizing allowable costs is a mistake. Attorneys have made very good livings devoting their careers to disputes over what is "reasonable". The use of the word is equivalent to waving a red cape in front of a bull.

In the context for which it is used, the working group believes that we can substitute the term "reasonable" with the term "appropriate" without changing the intent of the provisions.

See further discussion in the comment to section 123-3.

3. Section 3-123-3, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-3 [Reasonable] Appropriate costs. A cost is [reasonable] appropriate if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of a competitive similar business. In determining the [reasonableness] appropriateness of a given cost, consideration shall be given to:

- (1) Requirements imposed by the contract terms and conditions;
- (2) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;
- (3) The restraints inherent in, and the requirements imposed by, such factors as

- generally accepted sound business practices, arms' length bargaining, and federal and state laws and regulations;
- (4) The action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the State;
 - (5) Significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and
 - (6) The guidelines, policies and limitations the State of Hawaii establishes for travel related expenses for its employees; and
- [(6)](7) Any other relevant circumstances." [Eff 12/15/95; am and comp]
 (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-3. As discussed above, we believe that allowable costs should be categorized as "appropriate" instead of "reasonable". Other terms considered as a substitute for "reasonable" by the Working Group were "proper", "justifiable", "acceptable" and "permitted". We settled on "appropriate" and have made the changes in the language as needed.

We have also recommended an additional consideration in determining the appropriateness of costs for which a contractor seeks reimbursement. Proposed subsection (6) is intended to limit the travel related expenses for which the State will provide reimbursement, to those that would be paid to a State employee in similar circumstances. Thus, if the travel policies existing for State employees permit only economy-class airplane travel at the lowest available rate, the rental of a compact or subcompact car, and a fixed per diem of \$130 per day for hotels and meals, it would not be

appropriate for a contractor to seek reimbursement for first class or full fare plane travel, limousine or luxury car rental, and reimbursement for four star hotel rooms and restaurant meals that exceed the fixed government employee per diem rate.

4. Section 3-123-7, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-7 Specific costs--contingencies. (a) Contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in subsection (b).
(b) For the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonably anticipated range of costs may be required and is not prohibited by this subsection. However, where contract clauses are present which serve to remove risks from the contractor, there shall not be included in the contract price a contingency factor for such risks. Further, contributions to a reserve for self-insurance in lieu of, and not in excess of, commercially available liability insurance premiums are allowable as an indirect charge. Such contributions are not allowable, however, for contributions to a reserve account maintained to cover the anticipated costs of a self-insured retention plan or allowable deductible in connection with general commercial liability, automobile liability, builder's risk or other property damage insurance if, at the time of the submission of its proposal, the insurance coverage contemplated by the contractor for the project included such a self-insured retention or deductible." [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-7. The recommended additional language is somewhat technical in nature but necessary to maintain the "level playing field" among bidder/contractors.

The Working Group, together with a committee of the General Contractors

Association dealing with Department of Transportation matters, have been working on a revision of the insurance requirements for State construction contracts. Some well capitalized contractors have been able to negotiate an arrangement with their insurers allowing them to be self-insured in the areas of commercial and automobile liability for up to the first million dollars of coverage, while the insurer provides coverage for the excess of the self-insured retention amount. The State has a direct interest in the liability coverage due to the contractual requirement that it be added as an "additional insured" for such coverage.

The debate within State circles was whether or not to abolish such self-insured retentions (thus requiring first dollar liability insurance coverage) or to take advantage of the anticipated lower bids that would result from the insurance cost savings when self-insured retentions are allowed. The decision was made that the interests of the taxpayers of the State would best be served by permitting self-insured retentions in order to save money.

The new insurance general conditions for D.A.G.S. and D.O.T. will allow for self-insured retentions that will give contractors who qualify for such arrangements a competitive bidding advantage. The language recommended to be added to this section (3-123-7) is intended to prevent a contractor who may have taken advantage of a self-insured retention in preparing its bid from having it both ways by recovering needed insurance reserves from the State through the costing of post-bid changes.

5. Section 3-123-8, Hawaii Administrative Rules,

is amended by amending subsection (d) and adding a new subsection (e) to read as follows:

"3-123-8 Specific costs--depreciation and use allowances. ***

(d) In order to compensate the contractor for use of depreciated, contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of the contract, use allowances may be allowed as a cost of that contract. Use allowances are allowable, provided that they are computed in accordance with an established industry or government schedule or other method mutually agreed upon by the parties. If a schedule is not used, factors to consider in establishing the allowance are the original cost, remaining estimated useful life, the reasonable fair market value, and the effect of any increased maintenance or decreased efficiency. Under no circumstances, however, shall the cumulative use allowance for any item of property over the course of the project exceed the actual market value of that item.

(e) No depreciation or use allowance will be permitted for equipment, tools or other items having a purchase price for any such new item or equivalent of less than one thousand dollars (\$1,000)." [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-8. The recommended changes address some of the worst abuses occurring in the accounting for change work done under force account (i.e. cost reimbursement) provisions to fixed price contracts. We expect that with proper training State contract managers will be authorizing fewer force account changes. Nevertheless, there inevitably will be situations where the State will be required to pay for work on a cost reimbursement basis.

The custom in construction is that the use of equipment, vehicles and tools is reimbursed on a fair rental value basis. Some publishers specialize in publishing

"fair rental value" schedules to be applied in determining allowable contractor costs for an amazingly wide variety of items. The use of such schedules is acknowledged herein in subsection (d) where there is reference to the use of "established industry or government schedule" in fixing the cost allowance for fully depreciated items.

The problem with this is that no upper pay limit is established for the use of such items. As a consequence, by using older, depreciated or fully expensed items for change work, a contractor can submit a claim for costs far in excess of the cost of buying the item new.

In a litigated case we had a situation where a change required an additional thirty days during which a 25 foot ladder was continuously needed. The contractor had such a ladder that probably cost not more than \$200 when purchased new five years before. It had either been written off the year of purchase as a non-depreciable expense item, or had been fully depreciated before the project in question began.

The published schedules indicated a fair rental value of \$20 per day. When multiplied by the number of days used, the State was being asked to pay three times the new purchase cost of a used ladder. We could have saved money by buying a new ladder of our own, giving it to the contractor for its use on the job and then taking it back at the conclusion of the project. The potential for abuse increases considerably when, instead of dealing with a low cost item such as a ladder, the bill submitted is for the extended use of a high cost item like a crane, a grader or a dump truck.

The Working Committee recommends two

urgently needed restrictions on this practice. The first amendment to subsection (d) limits the total amount of use allowances. The amount we will pay for a fully depreciated item over the term of the project is limited to its actual value.

The second reform is set forth in subsection (e) in which depreciation or use allowances will no longer be paid for items that can be purchased new for \$1,000 or less. This reform avoids haggling over the daily value of and the overpayment for smaller tools and equipment such as the ladder discussed above. The use of such tools and equipment is more properly a cost of doing business that the contractor should include in its fee for overhead and profit.

6. Section 3-123-9, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-9 Specific costs--entertainment. (a) Entertainment costs are unallowable and include costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodging, transportation, and gratuities. [Entertainment costs are unallowable.]

(b) Nothing herein shall make unallowable a legitimate expense for job related employee [morale,] health, welfare, food service, or lodging costs; except that, where a net profit is generated by such services, it shall be treated as a credit as provided in section 3- 123-21. [This section shall not make unallowable c]Costs incurred for meetings or conferences, including, but not limited to, costs of food, rental facilities, and transportation are not allowable except where the primary purpose of incurring such cost is the dissemination of technical information [or the stimulation of production] or the establishment of specific project policies, such as a partnering conference." [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-9. The Working Group recommends that a change in form should be made in subsection (a) as well as with similar provisions in 3-123-11, 3-123-13 and 3-123-14. In its current form, these subsections first define a type of cost and then declare whether or not such cost is allowable. We believe the first sentence should be the declaration regarding allowability, and then needed definitions and explanations may appear. In this section, the policy that entertainment costs will not be allowed to the contractor is the principle being established and should be highlighted in the first sentence, not buried later after explanations as to what are included in the term "entertainment costs".

We also recommend that an exception the current rule makes for "employee morale" costs be deleted. Just about any cost can be justified in the interest of "morale," such as a golf weekend at a Maui hotel for the contractor's executives and key personnel. We do not doubt that such an all-expenses paid weekend won't improve the morale of the employees, but clearly such expenditures should not be reimbursed, in whole or part, by the taxpayers.

The same holds true for the second sentence of subsection (b) in its current form that in very convoluted language approves of cost reimbursement for transportation, lodging and food costs for meetings and conferences where the primary purpose is "the stimulation of production". Since this can justify just about any expense and is clearly subject to abuse, we believe the better rule is disallow all meeting and conference costs except where the principal purpose is a "partnering" meeting or for the dissemination of job

related technical information.

7. Section 3-123-11, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-11 Specific costs--gifts, contributions, and donations. Gifts, contributions, and donations are unallowable. A gift is property transferred to another person without the person providing return consideration of equivalent value. [Reasonable costs for employee morale, health, welfare, food services, or lodging are not gifts and are allowable.] Contributions and donations are property transferred to a nonprofit institution which are not transferred in exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. [Gifts, contributions, and donations are unallowable.]"
[Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-11. The Working Group recommends that the prohibition on cost reimbursement for gifts should be moved to the start of the provision. See Comments to 3-123-9.

We believe that it is inappropriate to ask the taxpayers to pick up the costs expended by an employer for employee "morale" and therefore recommend that this exception be deleted. Expenditures for employee "health, welfare, food services, or lodging" are covered in 3-123-9.

Repetition here we believe can only result in an ambiguity suggesting that reimbursement for such expenses is an entitlement, not a matter that may or may not be allowed at the discretion of the Engineer/Procurement Officer.

8. Section 3-123-12, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-12 Specific costs--interest expense.

[(a)]Interest, [is generally an unallowable cost for purposes of determining the original contract price. Compensation for any interest expense incurred in connection with work originally contemplated under the contract will be deemed to be included in the fee or profit negotiated on the contract.] whether actual or imputed, is an unallowable cost.

[(b) Imputed interest on a contractor's expenditures made to pay allowable costs which are allocable to the performance of work required by change orders, suspension of work, or other acts of the State requiring additional work over and above that required by the original contract, hereinafter called "additional work," shall be an allowable cost. Imputed interest is an allowable cost in relation to such additional work in a negotiated settlement, if one can be agreed upon, or to the extent that it is determined administratively or judicially that the State is liable for such additional work. Such imputed interest shall be computed on expenditures from the date or dates on which the contractor made expenditures for the performance of such additional work until the date of payment therefor by the State. The rate of interest shall be the prevailing prime rate charged by banks in this State as determined by the procurement officer, at the time or times the contractor made such expenditures for additional work. Imputed interest on the costs of additional work shall not be allowable to the extent that it is otherwise recovered as profit or fee.]"

[Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-12. This section, as written, attempts to establish a policy for the reimbursement of interest expenses incurred by a Contractor in order to finance its work on a cost reimbursement contract or change. Not all contractors are equal with respect to capitalization and cash flow. Some contractors will not need to borrow to carry out a cost reimbursable contract. Some may be able to borrow at terms much more favorable than others.

The provision as written provides that

interest costs incurred in borrowing money to finance operations is an allowable cost. Section (b) establishes a completely unwieldy policy that says that even if a contractor does not borrow money to finance the work, the State will pay "imputed interest" as if the contractor did indeed borrow money with attendant interest expenses.

The Working Group believes that the policy defies logic and engages the State in a no win negotiation over how much of a contractor's expended funds should be deemed to be "borrowed" even though no loan transaction was ever actually contemplated, and how much interest ("prevailing prime rate charged by banks in this State") should be allowed on the imaginary borrowed funds. In 1994 the Federal Reserve official lending rate was changed six or seven times resulting in like adjustments to the banks' prime rates. The near impossibility in making the imputed interest calculations for money never borrowed in the first place under these circumstances proves the problems this provision would create for the State.

The Working Group proposes that interest expenses, actual and imputed, real and imagined, not be allowed as a reimbursable cost. The Contractor should incorporate such expenses as part of its overhead and profit calculation.

9. Section 3-123-13, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-13 Specific costs--losses incurred under other contracts. A loss incurred under one contract may not be charged to any other contract. A loss is the excess of costs over income earned under a particular contract. Losses may include both direct and indirect costs. [A loss incurred under one contract may not be charged to any other contract.]"

[Eff 12/15/95; am and comp
§103D-601) (Imp: HRS §103D-601)

] (Auth: HRS

JUSTIFICATION: §3-123-13. The Working Group recommends that the order of the sentences be reversed. See Comment to 3-123-9.

10. Section 3-123-14, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-14 Specific costs--material costs. (a) Material costs are allowable, subject to subsections (b) and (c). Material costs are the costs of all supplies, including raw materials, parts, and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary, or affiliate under the common control of the contractor), which are acquired in order to perform the contract. [Material costs are allowable, subject to subsections (b) and (c).] In determining material costs, consideration shall be given to [reasonable] appropriate spoilage, [reasonable] appropriate inventory losses, and [reasonable] appropriate overages.

(b) Material costs shall include adjustments for all available discounts, refunds, rebates, and allowances which the contractor [reasonably should take] may take under the circumstances, and for credits for proceeds the contractor received or [reasonably should] may receive from salvage and material returned to suppliers.

(c) Allowance for all materials transferred from any division including the division performing the contract, subsidiary, or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor, except the transfer may be made at the established price provided that the price of materials is not determined to be unreasonable by the procurement officer, the price is not higher than the transferor's current sales price to its most favored customer for a like quantity under similar payment and delivery conditions, and the price is established either:

- (1) By the established catalogue price; or
- (2) By the lowest price obtained as a result of competitive procurements conducted with other

businesses that normally produce the item in similar quantities." [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-14. The Working Group recommends that the order of the sentences be reversed. See Comment to 3-123-9. For consistency, we also recommend that "reasonable" be substituted with "appropriate".

11. Section 3-123-16, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-16 Costs requiring prior approval to be allowable as direct costs. The costs described in sections 3-12[2]3-17 through 3-12[2]3-20 are allowable as direct costs [to cost-reimbursement type contracts] to the extent that they have been approved in advance in writing by the procurement officer. [In other situations the allowability of these costs shall be determined in accordance with general standards set out in these cost principles.]" [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-16. There is a typographical error in the cross-references that must be corrected to refer to 3-123 of the regulations.

The Working Group believes that the policies established should apply to all contracts and therefore recommends that the difficult to understand distinction made in the interim rule as written be eliminated.

12. Section 3-123-17, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-17 Pre-contract costs. Pre-contract costs are those incurred after the contract award in

anticipation of, and prior to, [the effective date of the contract] notice to proceed. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the [contract] notice to proceed; provided that, in the case of a cost-reimbursement type contract, a special provision must be inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs." [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-17. The Working Group believes that the term "effective date of the contract" is ambiguous for enforcement purposes. There should be no entitlement for costs before the notice of an award is sent to the contractor. Our new general conditions will provide that a Contractor is not authorized to make contract related expenditures before the notice to proceed is issued, unless given written authority to proceed with a certain category of work. Often a contractor is told that it may proceed with the preparation of submittals such as material samples and shop drawings before the notice to proceed is issued. The proposed revisions will clarify the Contractor's entitlement for reimbursement under such circumstances.

13. Section 3-123-18, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-18 Bid and proposal costs. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Otherwise, such costs are not allowable as either direct or indirect costs. Bid and proposal costs are the costs incurred in preparing, submitting, and supporting bids and proposals including proposals for the charges for change work within the scope of the contract. [Reasonable ordinary bid and proposal costs

are allowable as indirect costs in accordance with these cost principles. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Where bid and proposal costs are allowable as direct costs, to avoid double accounting, the same bid and proposal costs shall not be charged as indirect costs.]" [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-18. The arrangement of the sentences has been changed to provide emphasis and clarity. The Working Group is of the firm opinion that in the absence of a specific written advance authority for reimbursement of such costs, they should not be allowed. We have had experience with contractors who look upon change work as a major profit center and have submitted grossly inflated charges for the expense of estimating the cost of proposed change work whether or not changes have been actually authorized. Such costs should be absorbed in the contractor's markup for overhead.

14. Section 3-123-19, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-19 Insurance. (a) Ordinary and necessary insurance costs are normally allowable as [in direct] indirect costs. Direct insurance costs are the costs of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purchase of self-insurance. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.

(b) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.

(c) Actual losses which should [reasonably] have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the

parties expressly agree otherwise in the terms of the contract." [Eff 12/15/95; am and comp]
(Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-19. There is a typographical error in the second line that needs to be corrected. The inclusion of the word "reasonably" in subsection (c) adds nothing and should be deleted.

15. Section 3-123-20, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-20 Litigation costs. Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles except that costs incurred in litigation by or against the State are unallowable. Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims before an administrative board or in court. [Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles except that costs incurred in litigation by or against the State are unallowable.]" [Eff 12/15/95; am and comp] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

JUSTIFICATION. §3-123-20. The sentences are inverted for emphasis and clarity.

16. Section 3-123-21, Hawaii Administrative Rules, is amended by amending subsection (a) to read as follows:

"§3-123-21 Applicable credits. (a) Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts [ad] as direct or indirect costs. Examples include purchase discounts, rebates, allowances, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and foods sales."

[Eff 12/15/95; am and comp] (Auth: HRS
§103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-21. Typographical error corrected changing the word in the third line as apparently intended, to "as".

17. Section 3-123-22, Hawaii Administrative Rules, is repealed:

["§3-123-22 Advance agreements. (a) Both the State and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the solicitation and the contract the treatment to be accorded special or unusual costs which are expected to be incurred.

(b) Advance agreements may be negotiated either before or after contract award, depending upon when the parties realize the cost may be incurred, but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties, and incorporated in the contract.

(c) An advance agreement shall not provide for any treatment of costs inconsistent with these cost principles unless a determination has been made pursuant to section 3-123-24."] [Eff 12/15/95;

R] (Auth: HRS §103D-601) (Imp: HRS §103D-601)]

JUSTIFICATION: §3-123-22. This section does not establish any enforceable policy and adds nothing to the way the State does business. The Working Group recommends its repeal.

18. Section 3-123-24, Hawaii Administrative Rules, is amended to read as follows:

"§3-123-24 Authority to deviate from cost principles. When the best interest of the State would be served by a deviation, the procurement officer may deviate from the cost principles set forth in these

regulations; provided that a written determination shall be made by [such] the procurement officer specifying the reasons for the deviation. A copy of the determination shall be filed promptly with the [chief procurement officer] head of a purchasing agency and the determination shall be effective only upon approval by the [chief procurement officer] head of a purchasing agency and upon incorporation into the contract. However, all costs must be reasonable, lawful, allocable, and accounted for in accordance with generally accepted accounting principles to be reimbursed, and a deviation shall not contravene this principle." [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-601) (Imp: HRS §103D-601)

JUSTIFICATION: §3-123-24. This section allows the PO to deviate from cost principles. Amending the section to give this responsibility to the head of a purchasing agency (HOPA). The HOPA has final responsibility for management of their funds, and may choose to follow recommendations provided by the PO. Each PO should not have the authority to determine deviations from the cost principles.



CHAPTER 3-125 AMENDMENTS

1. Section 3-125-6, Hawaii Administrative Rules, is amended by amending subparagraph (2)(B) to read as follows:

"§3-125-6 Stop work orders for goods and services contracts. ***

(B) The contractor asserts a claim for an adjustment within thirty days after the end of the period of work stoppage; provided that, if the procurement officer decides that the facts justify [such] the action, any claim asserted may be received and acted upon at any time prior to final payment under this contract."

[Eff 12/15/95; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

JUSTIFICATION: §3-125-6. Word change in (2) (B) required.

2. Section 3-125-14, Hawaii Administrative Rules, is amended by repealing paragraphs (4) and (5).

"§3-125-14 Novation or change of name. ***

[(4) Reports. All change of name or novation agreements effected hereunder other than by the chief procurement officer shall be reported to the chief procurement officer within thirty days of the date that the agreement becomes effective.

(5) Actions affecting more than one purchasing agency. Notwithstanding the provisions of paragraphs (1)(C) through (1)(C), when a contractor holds contracts with more than one purchasing agency of the State, the novation or change of name agreements herein authorized shall be processed only through the office of the chief procurement officer.]" [Eff 12/15/95; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

JUSTIFICATION: §3-125-14. Because it is not necessary to process or report all change of name or novation agreements through the chief procurement officer, paragraphs (4) and (5) should be repealed.

3. Section 3-125-15, Hawaii Administrative Rules, is amended by amending paragraph (1) to read as follows:

"3-125-15 Claims based on a procurement officer's actions or omissions for goods and services contracts.

- (1) "Claims based on a procurement officer's actions or omissions. If any action or omission on the part of a procurement officer or designee of [such] the officer, requiring performance changes within the scope of the contract constitutes the basis for a claim by the contractor for additional compensation, damages, or an extension of time for completion, the contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:"

[Eff 12/15/95; am] (Auth: HRS §§103D-202, 103D- 501) (Imp: HRS §103D-501)

JUSTIFICATION: §3-125-15. Word change in (1) is required.

4. Section 3-125-19, Hawaii Administrative Rules, is amended to read as follows:

"§3-125-19 Liquidated damages for goods and services contracts. The following statement captioned "Liquidated damages" may be used in goods or services contracts when it is difficult to determine with reasonable accuracy the amount of damage to the State due to delays caused by late contractor performance or

nonperformance and the contract contains the termination for default clause set forth in section 3-125-17:

"Liquidated damages. When the contractor is given notice of delay or nonperformance as specified in [[]section 3-125-17(1)[]] of the termination for default clause of this contract and fails to cure in the time [it is agreed] specified, the contractor shall pay to the State the amount of [[]\$_____ []] per calendar day from date set for cure until either the State reasonably obtains similar goods or services if the contractor is terminated for default, or until the contractor provides the goods or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under [[]section 3-125-17(4)[]], excuse for nonperformance or delayed performance of the termination for default clause of this contract, liquidated damages shall not be due the State. The contractor remains liable for damages caused other than by delay." [Eff 12/15/95; am] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

JUSTIFICATION: §3-125-19. Unnecessary brackets found in this section should be repealed.

The words "it is agreed" is inappropriate and should be removed.

5. Section 3-125-21, Hawaii Administrative Rules; is amended by amending paragraph (3) and (4) to read as follows:

"§3-125-21 Termination for convenience of goods and services contracts. ***

- (3) Right to goods. The procurement officer may require the contractor to transfer title and deliver to the State in the manner and to the extent directed by the procurement officer:
- (A) Any completed goods; and
 - (B) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights, hereinafter called

"manufacturing material," as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.["]

The contractor shall, upon direction of the procurement officer, protect and preserve property in the possession of the contractor in which the State has an interest. If the procurement officer does not exercise this right, the contractor shall use the contractor's best efforts to sell [such] the goods and manufacturing materials. Use of this section in no way implies that the State has breached the contract by exercise of the termination for convenience clause.

(4) Compensation:

- (A) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by subchapter 15, chapter 3-122, bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with subparagraph (C).
- (B) The procurement officer and the contractor may agree to settlement provided the contractor has filed a termination claim supported by cost or pricing data to the extent required by subchapter 15, chapter 3-122, and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the State, the proceeds of any sales of goods and manufacturing materials under subparagraph [(C)] (3) of this clause, and the contract price of the work not terminated.
- (C) Absent complete agreement under subparagraph (B), the procurement officer shall pay the contractor the

following amounts, provided payments agreed to under [paragraph (2)] subparagraph (B) shall not duplicate payments under this subparagraph for the following:

- (i) Contract prices for goods or services accepted under the contract;
- (ii) Costs incurred in preparing to perform and performing the terminated portion of the work plus a five percent markup on actual direct costs on [such] the portion of the work, the markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided that if it appears that the contractor would have sustained a loss if the entire contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
- (iii) Subject to the prior approval of the procurement office the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to paragraph (2). Subcontractors shall be entitled to a markup of no more than ten percent on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with clause (ii) of subparagraph (C).
- (iv) The total sum to be paid the contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph (B), and the contract price of work not terminated."

[Eff 12/15/95; am] (Auth: HRS §§103D-
202, 103D-501 (Imp: HRS §§103D-312, 103D-501, 103D-
601)

JUSTIFICATION: §3-125-21. In (3) (B) the quotation
mark needs to be removed and a word
change is required. In (4) (B) the
reference should be to subparagraph (3).
In (4) (C) the reference should be to
subparagraph (B). A word change is
required in (4) (C) (ii).



CHAPTER 3-128 AMENDMENTS

1. Section 3-128-1, Hawaii Administrative Rules, is amended by amending the definitions of "cooperative purchasing", "nonprofit private procurement unit" and "State public procurement unit" to read:

"Cooperative purchasing" [means procurement conducted by, or on behalf of more than one public or nonprofit private procurement unit, or by a public procurement unit with an external procurement activity.] means procurement conducted by a public or external procurement unit with one or more public procurement units, external procurement units, or nonprofit private procurement units, pursuant to this chapter.

"External procurement [activity] unit" means any buying organization not located in this State which, if located in this State, would qualify as a public procurement unit. An agency of the United States is an external procurement [activity] unit.

"Nonprofit private procurement unit" means a health or human services organization of the State that provides services to the public and [expends private] receives public funds for the procurement of goods, services, and construction through cooperative purchasing agreements with [the State.] a public procurement unit.

"State public procurement unit" means the office of [the] a chief procurement officer [and any other] or a head of a purchasing agency of this State. [Eff 12/15/95; am] (Auth: HRS §103D-202)
(Imp: HRS §103D-801)

JUSTIFICATION: §3-128-1. To clarify the definitions and the source of the funds received. Also, as these cooperative purchasing agreements may be with State or local procurement units, the term public procurement unit should be used.

2. Section 3-128-2, Hawaii Administrative Rules, is amended to read as follows:

"§3-128-2 Cooperative purchasing subject to chapter 103D, HRS. Procurement by cooperative purchasing agreements between public procurement units shall be done in compliance with the requirements of chapter 103D, HRS, and title 3, subtitle 11, HAR[.] except when the cooperative agreement is initiated by an external procurement activity." [Eff 12/15/95; am] (Auth: HRS §103D-202) (Imp: HRS §103D-802)

JUSTIFICATION: §3-128-2. There is a need to clarify that these cooperative purchasing agreements are between public procurement units. An exception is also needed when an external procurement activity is not in compliance with all the requirements of chapter 103D, HRS.

3. Section 3-128-3, Hawaii Administrative Rules, is amended to read as follows:

"§3-128-3 Cooperative purchasing agreements between public procurement units. Any cooperative purchasing agreement between [a State public procurement unit and a local] public, external and nonprofit private procurement units for requirements or open-ended purposes, where the exact amount of goods or services to be obtained cannot be determined with certainty at the outset, shall provide that:

- (1) A public procurement unit shall be designated as lead agency for the procurement.
- [(1)] (2) The requirements for any good or service shall be obtained by the participating public procurement units through the placement of purchase orders in accordance with the terms and conditions of the agreement;
- [(2)] (3) Payment for any goods or services obtained through purchase order shall be the exclusive responsibility of the public procurement unit which placed the order;
- [(3)] (4) Inspection and acceptance of any goods or services obtained through purchase order shall be the exclusive obligation of the public procurement unit which placed the order;
- (5) The lead agency for the procurement may

terminate the cooperative agreement with a public procurement unit for failure of that unit to comply with the terms of the contract.

- [(4)] (6) The exercise of any warranty rights attached to any good or service obtained through a purchase order shall be the exclusive right of the public procurement unit which placed the order; and
- [(5) Failure of a public procurement unit to comply with the terms and conditions of a cooperative purchasing agreement shall not result in a breach or termination of that agreement, nor shall it preclude the remaining public procurement units from obtaining goods and services under that agreement.]
- (7) Failure of a public, external, or nonprofit private procurement unit which is procuring goods and services from a cooperative agreement contract to secure performance from the contractor pursuant to its terms and conditions, may not necessarily preclude the remaining procurement units from obtaining goods and services from the cooperative agreement contract." [Eff 12/15/95; am] (Auth: HRS §103D-202) (Imp: HRS §§103D-802, 103D-803)

JUSTIFICATION: §3-128-3. The reference to State and local public procurement units in the first sentence is removed. The term public procurement units in the same sentence, by definition, means State or local public procurement units. The remaining amendments clarify responsibilities under cooperative purchasing agreements.