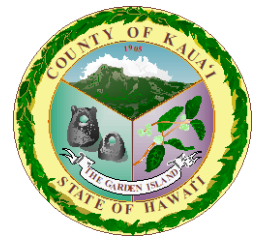


Audit of the County of Kaua‘i Disaster-Related Procurement



Submitted by

Spire Hawai‘i LLP for the
Kaua‘i County Council
County of Kaua‘i
State of Hawai‘i

Report No. 24-01

PREFACE

This performance audit of the County of Kaua‘i’s (“County”) Disaster-Related Procurement was designed to examine whether the County is following proper policies, processes, rules, and laws (County, State, and federal) as it relates to the procurement of services for construction contracts involving disaster response or recovery cleanup work.

We would like to thank all who contributed data to this report, especially Ernest Barreira, Assistant Chief Procurement Officer, Division of Purchasing (“Purchasing”); Jason Coloma, Procurement & Specifications Specialist VI, Purchasing; Reiko Matsuyama, Managing Director, former Director of Finance; Ken Shimonishi, Budget Administrator; Chelsie Sakai, Deputy Director of Finance; and former Managing Director Michael Dahilig.

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Appendix 1 – Auditee Response

EXECUTIVE SUMMARY

The Kaua‘i County Council issued a Memorandum of Concurrence, dated April 25, 2019, which called for a performance audit to be conducted to determine whether the County is following the proper policies, processes, rules and laws (County, State, and federal) as it relates to the procurement of services for construction contracts involving disaster response or recovery cleanup work.

This performance audit examines disaster-related procurement and awards in response to the flooding on Kaua‘i in April 2018 (“RAIN 18”) and March 2020 (“RAIN 20”).¹ The audit examined whether the County is following proper policies, processes, rules, and laws (County, State, and federal) as they relate to the procurement of services for construction contracts involving disaster response or recovery cleanup work.

The audit was designed to evaluate:

- The processes followed for soliciting bids, awarding contracts, and issuing contract amendments and change orders to identify whether the awards comply with all legal (County, State, and federal) requirements.
- Whether the Governor’s Emergency Proclamations and the Mayor’s Emergency Proclamation have been utilized properly.

The audit findings and recommendations are summarized as follows:

Finding 1. Of the nine projects seeking FEMA reimbursement related to RAIN 18, project files for five included all federally required documents, and four did not include all federally required documents.

Nine projects totaling \$10,263,523 sought Federal Emergency Management Agency (“FEMA”) reimbursement. In order to seek FEMA reimbursement, procurements must comply with federal standards in Title 2 of the Code of Federal Regulations (“CFR”), Chapter 2 (“Uniform Administrative Requirements” or “2 CFR 200”), §§ 218 through 326. If the entity meets local or state procurement standards, but fails to meet federal procurement standards, reimbursement of all otherwise eligible funds is jeopardized.²

¹ Selected projects related to RAIN 2020 were added to the audit scope by contract amendment dated April 10, 2023.

² Procurement Under FEMA Awards presentation.

Of the nine projects, one lacked required State compliance documentation.³

A FEMA Procurement Checklist (“FEMA Checklist”), created by FEMA and adopted and amended by the County, was used to assist agencies seeking FEMA reimbursement for procurements associated with the April 2018 flooding.

All nine project files seeking FEMA reimbursement related to RAIN 18 included FEMA Checklists. However, no FEMA Checklists were completed properly or fully.

Although the County intended to implement the FEMA Checklist as an internal control to meet the federal requirements, there were several incomplete or improperly completed sections, and, more importantly, no assurance that the minimum federal procurement standards for FEMA reimbursement were met.

In general, projects seeking FEMA reimbursement could be subject to an Office of the Inspector General’s (“OIG”) audit. The OIG Department of Homeland Security (“DHS”) periodically performs audits of FEMA grant awards. Funding de-obligations (returns) may occur when there is ineligible spending or non-compliance with federal procurement or documentation requirements.

The County has implemented changes to its procurement process and guidance and has tried to educate departments on federal requirements when seeking FEMA reimbursement. In March 2020, the Department of Finance (“DOF”) issued Procurement Instructions for COVID-19 Emergency Response to all County departments, divisions, and agencies. The instructions stated that the Procurement Law had been suspended as to COVID-19 procurements. However, for those COVID-19 procurements that the County intended to seek reimbursement from FEMA, the County had to follow federal procurement laws.⁴ The County needed to follow the same federal procurement laws for the RAIN 18 procurements.

³ One project file with all FEMA required documents did not contain a Certificate of Vendor Compliance, a State procurement-required document under HRS § 103D-328, HRS § 103D-310, and HAR § 3-122-112.

⁴ Purchasing Memo 2020-2 Re Emergency Procurement re COVID 19 dated March 18, 2020.

Recommendations:

1. In order to minimize the risk of funding de-obligations, the Division of Purchasing (“Division of Purchasing” or “Purchasing”) should develop policies and procedures related to procurements seeking FEMA reimbursements. The policies and procedures should include federal procurement requirements and be accompanied by examples of a complete contract file.
2. Purchasing should conduct regular training on procurement during disasters, which can include explanations on when to seek FEMA reimbursement and lessons learned from RAIN 18.
3. Departments should utilize the FEMA Checklists consistently, and Purchasing should monitor the departments to ensure compliance with federal procurement requirements prior to contract awards and to mitigate the risk of funding de-obligations.

Finding 2. The County’s position that all procurement laws are suspended under a Governor’s Emergency Proclamation allows for non-competitive procurements to occur. However, the County does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

Of the 34 contracts and purchase orders (“POs”) we reviewed related to RAIN 18 projects, 21 were procured non-competitively on the basis of the Governor’s Emergency Proclamation, which the County maintains suspends the typical competitive procurement process required by Hawai‘i Revised Statutes (“HRS”) chapter 103D (“Procurement Law”).

For these 21 contracts and POs, we asked Purchasing for:

1. Any documentation on how the awardee was selected;
2. Reasons the contract was not competitively bid; and
3. Any documentation of such decisions.

Purchasing did not answer any of these questions, and only stated, “[t]he Governor’s proclamation suspends the requirements under HRS 103D and allows for expediting contracts for goods, services, and construction in order to quickly respond to the disaster. Please note that the Governor’s proclamation is still in effect.”

HRS § 127A-11 does grant the Governor and Mayor flexibility to proclaim a state of emergency, extend the state of an emergency, or terminate the state of emergency. However, the Governor's powers are not limitless.

In a challenge to the Governor's extended emergency proclamations related to the COVID pandemic, the Third Circuit Court of Hawai'i dismissed a lawsuit that argued that supplementary or additional emergency procurements were invalid since the Governor's powers lapsed after the initial 60-day period following the declared state of emergency. However, although the court reaffirmed the validity of successive emergency proclamations, it stated that each supplementary or additional emergency proclamation must be based on the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency. When the facts on the ground no longer justify such a determination, the Governor's emergency powers will cease.⁵

Despite the broad powers associated with emergency proclamations and the suspension of procurement requirements of HRS chapter 103D, the County's Code of Ethics and the State Ethics law, HRS chapter 84, are not suspended during emergencies.

Further, the intent of waiving the Procurement Law during emergency situations is to expedite the procurement of goods and services. However, the waiving of the Procurement Law during emergencies does not mean the abandonment of principles such as protecting, and being fiduciaries of, public funds.

The contract and PO documentation provided to us for the 21 Emergency Proclamation procurements show that all contracts and POs reference the "RAIN 18" procurement related to the "Governor's emergency proclamation." However, only one project file contained documentation that attempted to justify how the vendor was chosen.

The Governor's ongoing Emergency Proclamations allowed the County to continue to procure goods and services noncompetitively as long as the Emergency Proclamations were in effect. Email correspondence related to another contract, shows that in January 2020, over 19 months after the RAIN 18 flooding, the user department emailed Purchasing, "[p]er your instruction, there is greater flexibility for procurement of this Act 12 funded project versus FEMA funded projects and **therefore the contracting agency can hand pick the Contractor to perform the desired scope of work as allowed by provisions under the Governor's Emergency Proclamation of April 15, 2018.**" (Emphasis added.)

⁵ The National Law Review, "When Governors Bite Back: Circuit Court Upholds Hawai'i Governor's Emergency Powers," October 23, 2020.

In comparison, federal regulations limit noncompetitive procurements to certain circumstances, including when a “non-state applicant determines that immediate actions required to **address the public exigency or emergency cannot be delayed by a competitive solicitation.**” (Emphasis added.).⁶

Further, the “use of the public exigency or emergency exception **is only permissible during the actual exigent or emergency circumstances. ... Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, applicants should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.**” (Emphasis added.)⁷

Purchasing does not have any policies or procedures for the solicitation of bids or the issuance of awards, contracts, and contract amendments relating specifically to emergency procurement. We are also not aware of any policies and procedures that Purchasing or DOF follow in the event of emergencies. According to the National Association of State Procurements Officials’ (“NASPO”) Emergency Preparedness Guide, “[g]ood planning and preparation minimize risk to life and property. Inadequate planning can turn disaster into tragedy or scandalous headlines. Preparation and planning efforts should be focused on the lowest level of government first before interacting with the Federal government.”⁸

Purchasing should also consider developing policies and procedures relating to the use of POs, small purchase awards, and Invitations for Bid (“IFB”) during emergency situations. POs and small purchases are riskier for the County because unlike IFBs, which require contracts, they do not identify responsibilities, clearly define performance standards, or impose specific terms and conditions. Therefore, they are riskier when the services to be procured are more complex than delivery of defined quantities of product at a specified price.

⁶ FEMA Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances Fact Sheet, January 19, 2018.

⁷ FEMA Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances Fact Sheet, January 19, 2018.

⁸ NASPO Emergency Preparedness Guide, Updated February 2020.

Recommendations:

1. Purchasing should develop policies and procedures related to preparing for and procuring goods and services in disaster or emergency situations based on the NASPO Emergency Preparedness Guide or other relevant guidance, including direction on what circumstances warrant competitive versus non-competitive procurements even when Emergency Proclamations are in effect.
2. As the responsible party for procuring goods and services for the County, Purchasing (and DOF), should require that documentation for the selection of noncompetitive procurements, including justifications for fair and reasonable pricing, pricing analysis or other reasoning are maintained by the user department and reviewed and approved by Purchasing.
3. Purchasing should follow the example of the State Procurement Office (“SPO”) and develop and enforce requirements for procurements in emergency situations, even if the Procurement Law is suspended. This action would protect the County from risk, and preserve the intent of the Procurement Law, i.e., to promote the policy of fair and equitable treatment of all persons who deal with the procurement system, foster effective broad-based competition, and increase public confidence in public procurement.

Finding 3. Of the two projects identified for review related to RAIN 20, none of the project files included all federally required documents. The County still does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

The scope of this audit was extended to include the examination of the procurement of disaster-related services in response to RAIN 20. In this extended scope, we reviewed documentation for seven projects related to the 2020 flooding as agreed upon by the Council, namely 150529, 148309, 152809, 152959, 148411, 148295, 148311, and requested any updates to policies and standard operating procedures (“SOPs”) for soliciting bids, awarding contracts, and issuing contract amendments and change orders.

Of the seven projects reviewed, procurement documents were provided only for three identified by the County as completed: 148295, 148291, and 148411. No evidence was provided that contracts or POs for these projects were reviewed for federal compliance. The County states that the FEMA checklists were not used.

No evidence was provided that contracts or POs were reviewed to ensure compliance with State or County requirements, if any. Rather, the County points to a FEMA summary document which states, “[a]ll procurement documents attached have been reviewed.” While this indicates that FEMA reviewed the documents, it does not necessarily mean that the County reviewed the contracts or POs to ensure compliance with State or County requirements.

The County did not provide new or updated procurement policies or procedures. The County stated that there are no written or verbal complaints or concerns known to it regarding any projects.

Given the responses from the County, there do not appear to be any notable changes in the way it handled the RAIN 18 and RAIN 20 procurements. The County still does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances. Therefore, our recommendations related to the RAIN 20 procurements are the same as for the RAIN 18 procurements.

Recommendations:

For FEMA compliance:

1. In order to minimize the risk of funding de-obligations, Purchasing should develop policies and procedures related to procurements seeking FEMA reimbursements. The policies and procedures should include federal procurement requirements and be accompanied by examples of a complete contract file.
2. Purchasing should conduct regular training on procurement during disasters, which can include explanations on when to seek FEMA reimbursement and lessons learned from prior disaster-related procurements.
3. Departments should utilize FEMA Checklists consistently, and Purchasing should monitor the departments to ensure compliance with federal procurement requirements prior to contract awards and to mitigate the risk of funding de-obligations.

For procurements:

1. Purchasing should develop policies and procedures related to preparing for and procuring goods and services in disaster or emergency situations based on the NASPO Emergency Preparedness Guide or other relevant guidance, including direction on what circumstances warrant competitive versus non-

competitive procurements even when Emergency Proclamations are in effect.

2. As the responsible party for procuring goods and services for the County, Purchasing should require that documentation for the selection of noncompetitive procurements, including justifications for fair and reasonable pricing, pricing analysis, or other reasoning are maintained by the user department and reviewed and approved by Purchasing.
3. Purchasing should follow the example of the SPO and develop and enforce requirements for procurements in emergency situations, even if the Procurement Law is suspended. This action would protect the County from risk, and preserve the intent of the Procurement Law, i.e., to promote the policy of fair and equitable treatment of all persons who deal with the procurement system; foster effective broad-based competition; and increase public confidence in public procurement.

CHAPTER 1

Introduction

The Kaua‘i County Council issued a Memorandum of Concurrence, dated April 25, 2019, which called for a performance audit to be conducted to determine whether the County is following the proper policies, processes, rules, and laws (County, State, and federal) as it relates to the procurement of services for construction contracts involving disaster response or recovery cleanup work.

This performance audit examines the procurement of disaster-related funding and awards in response to the flooding on Kaua‘i in April 2018 (“RAIN 18”) and March 2020 (“RAIN 20”).⁹ We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

This audit was conducted pursuant to the authority of the Council, as provided in the County Charter. For a complete definition of performance audits see Government Auditing Standards § 1.21.¹⁰

Information deemed confidential under the Hawai‘i state open records law (HRS chapter 92F) was omitted from this report. The determination of whether information was confidential was based on Office of Information Practices (“OIP”) Guideline No. 3, effective September 7, 2011, and OIP memorandum dated May 1, 2002, “OIP Guidance Regarding Disclosure of Agency Records and Information to Auditors.” Under the guidance of these documents, the following were omitted as confidential: employee names, employee social security numbers, and actual base rates of pay and gross salaries for employees covered by or included in bargaining units as defined in the Hawai‘i collective bargaining law (HRS chapter 76).

⁹ Selected procurements related RAIN 20 were added to the audit scope by contract amendment dated April 10, 2023.

¹⁰ Government Auditing Standards, 2018 Revision.

Audit Objectives and Scope

The audit was designed to answer the following questions:

- Whether processes followed for soliciting bids, awarding contracts, and issuing contract amendments and change orders complied with all legal (County, State, and federal) requirements.
- Whether the Governor's Emergency Proclamations and the Mayor's Emergency Proclamation have been utilized properly.

Audit Methodology

We developed an overall audit plan and risk-based strategy to approach and address the audit objectives, which included three distinct stages: planning, fieldwork, and reporting.

The planning stage involved obtaining an understanding of Purchasing's general policies and procedures pertaining to disaster-related funding. Through telephone interviews and written requests, we reviewed various documents from Purchasing including contracts, change orders, email communications, and other supporting documents.

We reviewed HRS chapter 127A Emergency Management, the Governor's Emergency Proclamations pertaining to flooding on Kaua'i, FEMA reimbursement guidelines, and HRS § 103D-307 to familiarize ourselves with laws and regulations. We identified areas of risk and selected personnel for interviews to gather data and increase our understanding of the County's emergency procurement process and its effort to comply with applicable laws.

Once we established our understanding of the processes surrounding procurements following emergency proclamations, we reviewed procurement related documentation for all contracts and purchase orders over \$30,000 related to RAIN 18 and RAIN 20. We requested supporting documents for each contract and purchase order exceeding \$30,000, identified the procurement method and justification, and then analyzed whether proper procedures were followed.

Of the five components of internal control, control environment, control activities and monitoring are significant to the audit objectives. The overall tone at the top regarding (1) appropriate awarding of contracts/purchase orders, (2) appropriate issuance of change orders, and (3) addressing any problems/complaints related to contracts/POs/change orders are significant to the audit objectives. Monitoring the impact of whether complaints are appropriately addressed is also significant to the audit objectives to evaluate whether the policies are designed to address and resolve complaints.

Our audit period spanned from April 18, 2018, through October 2, 2023 (“Period Under Scope”).

Background – 2018 flooding

Flooding

On April 13, 2018, heavy rainfall caused flooding on Kaua‘i and in the following two days, Kaua‘i experienced record rainfall and landslides. Torrential flooding and landslides caused damages to homes, businesses, and roads across the island.

Table 1 – Rainfall During the 48-hour Period Ending 6 PM HST on April 15, 2018¹¹

Kaua‘i County, Community	Total Rainfall (Inches)
Wainiha	32.35
Hanalei	28.41
Mount Wai‘ale‘ale	22.34
Princeville Airport	14.60
Kilohana	13.19
North Wailua Ditch	10.62
Kapahi	10.12
Wailua	8.21
Anahola	3.20

According to the National Weather Service, flash flooding in Hanalei River put portions of Kūhiō Highway near Hanalei Bridge under five to eight feet of water. Rainfall rates of five to seven plus inches per hour were recorded during the peak of the rainfall episode on April 15, 2018.

Emergency Proclamations

In response to the flooding, Governor David Ige (“Governor”) issued an Emergency Proclamation pertaining to the disaster occurrence of heavy rains that caused extensive damage to the slopes adjacent to Kūhiō Highway and impacted the Wainiha and Hā‘ena communities in the County of Kaua‘i on April 15, 2018.¹²

¹¹ Source is National Weather Service.

¹² Kaua‘i County Emergency Proclamation, 04-15-2018.

Under HRS § 127A-14 State of emergency, the Governor has the authority to declare a state of emergency by issuing a proclamation if an emergency or disaster has occurred or there is imminent danger or threat of an emergency or disaster. Similarly, HRS § 127A-14 authorizes the Mayor to declare a local state of emergency in the County by issuing a proclamation if an emergency or disaster has occurred or there is imminent danger or threat of an emergency or disaster. The state of emergency and local state of emergency automatically terminate sixty days after the issuance of the proclamation or by a separate proclamation of the governor or mayor, whichever occurs first.¹³

The Emergency Proclamation stated the Legislature of the State of Hawai‘i had appropriated general revenues from the State monies as may be necessary for expenditure by or under the direction of the Governor for the immediate relief of the conditions created by the disaster. The Emergency Proclamation granted the Governor discretion to suspend the Procurement Law, and HRS §§ 103-50, 103-53, 104-55, 105-1 to 105-10, and 464-4 if he found they impede or tend to impede the expeditious discharge of emergency disaster relief functions for this occurrence and the compliance therewith is impracticable due to existing conditions. By suspending HRS chapter 103D, the Emergency Procurement process as mandated by HRS § 103D-307 was also suspended.

The Governor issued 15 supplemental Emergency Proclamations, the last of which was issued on July 21, 2020, and continued through September 19, 2020. The last Mayor’s Emergency Proclamation was issued on August 19, 2020, and continued through October 19, 2020.

Act 12

On May 10, 2018, the Governor signed S.B. No. 192 (“Act 12”) which appropriated \$25,000,000 for fiscal year 2017-2018 to provide relief from disaster damages caused by RAIN 18. The funding would be used to repair public facilities including roads, bridges, parks, and infrastructure that were badly damaged by the flooding.

Various County departments such as the Department of Public Works (“Public Works”) and Department of Parks and Recreation (“DPR”) were subrecipients of Act 12 funds. Funds were wired directly from the State to the County and managed by the DOF.

Projects funded by Act 12 funds were not all eligible for assistance from the Federal Emergency Management Agency (“FEMA”), as FEMA reimbursement depended on the nature and timing of the projects. Contracts seeking FEMA reimbursement were required to follow federal rules including but not limited to maintaining records that document the rationale for method

¹³ HRS § 127A-14 State of emergency.

of procurement, selection of contract type, contractor selection or rejection, and basis for contract price.

Act 35

Act 12, SLH 2018 (sections 5 and 6), as amended by Act 35 (collectively, “Act 35”) was signed by the Governor on June 5, 2019, and amended the Kaua‘i flooding disaster relief appropriation made in Act 12 to include flood mitigation measures. Act 35 also extended the lapse date of the appropriation to June 30, 2020. Essentially, Act 35 changed how Act 12 monies could be spent to include mitigation.

Emergency Procurement Terminology

FEMA is an agency of the United States Department of Homeland Security (“Homeland Security”) that coordinates the response to a disaster that overwhelms the resources of local and state authorities.

FEMA defines an “incident” as “an occurrence or event, natural or human-caused, that requires an emergency response to protect life or property.” When local and state resources are inadequate to respond to an incident, federal assistance can be obtained through FEMA.

Response is one of the five mission areas as defined by FEMA. This phase takes place immediately after the incident occurs and refers to accomplishing “the capabilities necessary to save lives, protect property and the environment, and meet basic human needs.” The core capabilities of this stage include logistic and supply chain management, critical transportation, operational coordination, etc.

Recovery occurs after the initial response takes place and is “composed of the core capabilities necessary to assist communities affected by an incident to recover effectively.” The core capabilities in this stage include planning, economic recovery, housing, public information, and warning.¹⁴

¹⁴ National Association of State Procurement Officials, Emergency Preparedness Guide, updated February 2020.

FEMA Reimbursement Process

As required by § 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”),¹⁵ the Governor issued a Request for Presidential Disaster Declaration for the City and County of Honolulu and Kaua‘i County on May 2, 2018. Included in the request was a joint public assistance preliminary damage assessment (“PDA”) which estimated the extent of the disaster and its impact on individuals and public facilities. The joint PDA was completed by the State, County, and federal agencies. The Governor requested authorization of the Public Assistance Grant Program, Individual Assistance Program, Small Business Administration (“SBA”) Disaster Assistance Program, and the Hazard Mitigation Grant Program.

FEMA disaster assistance is categorized in three ways:

1. Individual Assistance – aid to individuals and households;
2. Public Assistance – aid to public (and certain private non-profit) entities for certain emergency services and the repair or replacement of disaster-damaged public facilities; and
3. Hazard Mitigation Assistance – funding for measures designed to reduce future losses to public and private property.

Individual assistance provides money and services to people in the disaster area whose property has been damaged or destroyed and whose losses are not covered by insurance. SBA disaster assistance falls under individual assistance and makes available federally subsidized loans to repair or replace homes, personal property or businesses that sustained damages not covered by insurance. Public assistance can fund the repair, restoration, reconstruction, or replacement of a public facility or infrastructure which is damaged or destroyed by a disaster.

President Donald J. Trump (“President Trump”) approved the Governor’s request for disaster declarations for the City and County of Honolulu and Kaua‘i County on May 8, 2018. At that time, federal funding through FEMA was made available to the State and eligible local governments on a cost-sharing basis for emergency work in the City and County of Honolulu and Kaua‘i County.

¹⁵ Stafford Act, as Amended - FEMA P-592 vol. 1 May 2021

FEMA Reimbursement

The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“Uniform Rules”), codified at 2 CFR §§ 200.317 through 200.326, were adopted on December 19, 2014. The Uniform Rules apply to all new grant awards under emergencies and major disasters declared on or after December 26, 2014.

In order to be eligible for FEMA reimbursement, projects must be completed within regulatory timelines. Emergency work, as defined by FEMA, is work that must be performed to reduce or eliminate an immediate threat to life, protect public health and safety, and to protect improved property that is significantly threatened due to disasters or emergencies declared by the president. Examples of emergency work include debris removal and emergency protective measures. Emergency work must be completed within six months. Permanent work, defined by FEMA, is work that is required to restore a damaged facility, through repair or restoration, to its pre-disaster design, function, and capacity in accordance with applicable codes and standards. Examples of permanent work include restoration of roads, bridges, water control facilities, buildings, equipment, public utilities, parks, and other facilities. Permanent work must be completed within eighteen months. If a time extension is needed, applicants may submit a request in writing.

Non-state entities, such as the County, which seek FEMA reimbursement must follow their own documented procurement procedures which reflect applicable state, local, and tribal laws, and procurements must comply with the CFR’s requirements, in particular 2 CFR §§ 200.318-200.326.

Federal regulations allow for noncompetitive procurements under certain circumstances, including when immediate action is required that cannot be delayed by a competitive solicitation. FEMA approval is not required for use of noncompetitive procurements under the emergency or exigency exception, however the justification for using noncompetitive procurement must be documented, and compliance with other procurement requirements, including reasonableness of costs, must be included in the record of each FEMA award. The differences between Exigency and Emergency are stated in a January 2018 FEMA Fact Sheet:

- Emergency involves a threat to life, public health or safety, or improved property requiring immediate action to alleviate the threat; usually short lived.
- Exigency involves a need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise, to the non-state entity; can last weeks or months.¹⁶

¹⁶ FEMA Fact Sheet, Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances, January 19, 2018. Page 2, paragraph 1.

Use of an exigency or emergency exception is only permissible during the actual exigent or emergency circumstances, which will vary for each incident. Upon awarding the noncompetitive contract, counties should immediately begin competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.

If a county fails to comply with federal laws, regulations, executive orders, and the terms and conditions of a federal award, FEMA can take action to address noncompliance (2 CFR §§ 200.338-339), including:

1. Temporarily withhold cash payments pending correction of the deficiency by the non-federal entity or more severe enforcement action by the federal awarding agency or pass-through entity
2. Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance
3. Wholly or partly suspend or terminate the federal award
4. Initiate suspension or debarment proceedings (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency)
5. Withhold further awards for the program
6. Take other remedies that may be legally available

Contracts and Purchase Orders

Based on information provided to us by Purchasing, we evaluated 34 contracts and POs related to RAIN 18 projects that were greater than \$30,000. Of the 34 contracts and POs, nine sought FEMA reimbursement, 21 were procured under the basis of the Governor's Emergency Proclamation, and four were procured under normal procurement methods such as Invitation for Bid and Professional Services but did not seek FEMA reimbursement.

Table 2 – Summary of RAIN 18 Contracts and Purchase Orders Over \$30,000

<u>Contract Category</u>	<u>Quantity</u>	<u>Total Amount</u>
FEMA reimbursement	9	\$ 10,263,523
Governor's Proclamation contracts	5	3,544,169
Governor's Proclamation purchase orders	16	1,756,989
Other Contracts (IFB, professional services), no FEMA	4	2,164,619
Total	34	\$ 17,729,300

CHAPTER 2

Summary of Findings

Finding 1. Of the nine projects seeking FEMA reimbursement related to RAIN 18, the project files for five included all federally required documents, and four did not include all federally required documents.

Finding 2. The County's position that all procurement laws are suspended under a Governor's Emergency Proclamation allows for non-competitive procurements to occur. However, the County does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

Finding 3. Of the two projects identified for review related to the RAIN 20, none of the project files included all federally required documents. The County still does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

Finding 1. Of the nine projects seeking FEMA reimbursement related to RAIN 18, the project files for five included all federally required documents, and four did not include all federally required documents.

According to the DOF, nine projects totaling \$10,263,523 sought FEMA reimbursement. In our communications with DOF, management stated "with regard to projects for which FEMA reimbursements were pursued, all federal requirements under 2 CFR Part 200 were adopted and enforced. Procurement boilerplates and associated documents were customized accordingly so as to gain compliance with these federal requirements."¹⁷

In order to seek FEMA reimbursement, procurements must comply with federal standards in 2 CFR §§ 200.218 through 200.326. If the entity meets local or state procurement standards, but fails to meet federal procurement standards, reimbursement of all otherwise eligible funds is jeopardized.¹⁸

The relevant 2 CFR procurement standards are summarized below.¹⁹

¹⁷ March 13, 2020, communication with DOF.

¹⁸ Procurement Under FEMA Awards presentation.

¹⁹ Appendix 2 for the full text of 2 CFR §§ 200.218 through 200.326.

Table 3 – 2 CFR Part 200 Procurement Standards

Regulatory Reference	Summary of Requirement
§ 200.318-326	Procurement
§ 200.318 General procurement standards	General procurement standards require non-federal entities to use their own documented procurement procedures which reflect applicable State and local laws and regulations. Contracts must be awarded only to responsible contractors with the ability to perform successfully in the contract terms.
§ 200.319 Competition	All procurement transactions must be conducted in a manner providing full and open competition. Written procedures for procurement transactions are required.
§ 200.320 Methods of Procurement	Methods of procurement include micro-purchases, small purchase procedures, sealed bids (formal advertising), competitive proposals, and non-competitive proposals.
§ 200.321 Contracting with Small and Minority Owned Businesses, Women’s Business Enterprises, and Labor Surplus Area Firms	The non-federal entity must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor surplus firms are used when possible.
§ 200.322 Procurement of Recovered Materials ²⁰	The non-federal entity must comply with § 6002 of the Solid Waste Disposal Act, which requires procuring items with the highest percentage of recovered material practicable with maintaining a satisfactory level of competition.
§ 200.323 Contract Cost and Price	A cost or price analysis is required if procurement is in excess of the simplified acquisition threshold including contract modifications. Profit must be negotiated as a separate element for each contract in all cases where a cost analysis is performed and cases in which there is no price competition. Procurement methods that are prohibited are: (1) cost plus a percentage of cost and (2) percentage of construction cost.
§ 200.324 Federal Awarding Agency or Pass-through Entity Review	The non-federal entity must make available technical specifications on proposed procurements where the federal agency or passthrough entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition.
§ 200.325 Bonding Requirements	For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-federal entity provided that the Federal awarding agency or passthrough entity has made a determination that the Federal interest is adequately protected.
§ 200.326 Contract Provisions	The non-federal entity’s contracts must contain the applicable provisions described in Appendix II to Part 200— Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

²⁰ As of November 12, 2020, § 200.322 is Domestic Preferences for Procurement. Sections previously known as § 200.322 – § 200.326 are now referred to as § 200.323 – § 200.327.

To test contracts for 2 CFR Part 200 requirements, we reviewed contract documentation related to each requirement. The table below lists project files with deficient documentation.

Table 4 – Summary of Missing Documentation for Projects Seeking FEMA Reimbursement

Regulatory Requirement (2 CFR)	Missing Document	Number of Projects with Missing Documentation²¹
§ 200.318	Executed Contract	1
§§ 200.318, 319, 323	Price Analysis	2
§ 200.318	MFR - Basis for Contract Type and Contractor Selection	1
§ 200.320	Scope of work in IFB	2
§ 200.321	MFR - Solicitation to Small Businesses, Minority-Owned Firms, and Women's Business Enterprises	3
§ 200.322	Procurement of recovered materials requirement	1
§ 200.325	Performance bond, payment bond	1
§ 200.326	Federal Provisions, 2 CFR Part 200, Appendix II	1

²¹ The total number of projects listed in this table is greater than nine because certain project files had multiple documents missing.

The following table summarizes the missing documentation and the current status of FEMA’s review and approval process.

Table 5 – Summary of Missing Documentation for Projects Seeking FEMA Reimbursement

Project	Amount	Missing 2 CFR Part 200 Documents	Project Status
9725	\$ 475,000	None	Funds received.
9744	\$1,769,950	None	FEMA rejected the project. The County has appealed. The appeal is under review in FEMA District 9.
9753	\$ 144,825	None	Deemed ineligible by FEMA, appeal filed on 8/26/22, appeal pending. Project is on hold.
9758	\$1,189,630	Price Analysis; MFR-Solicitation to Small Businesses, Minority-Owned Firms, and Women’s Business Enterprises	Cost share de-obligated by FEMA and no longer subject to FEMA reimbursement. Act 12 funds used.
9760	\$2,289,900	None	Approved. Project completed and closed.
9770	\$ 370,000	Price Analysis; MFR-Solicitation to Small Businesses, Minority-Owned Firms, and Women’s Business Enterprises; Procurement of Recovered Materials Requirement; Federal Provisions, 2 CFR Part 200, Appendix II	Service contract was divided between two projects. PW94, Weke Road Reconstruction, was approved. Fifty per cent of the contract was dedicated to the contract for the other project, PW64, which was rejected by FEMA and is being appealed by the County. Project is on hold.
210144	\$ 287,950	Contract; MFR Basis for Contract Type and Contractor Selection; Scope of work in IFB; Performance bond, Payment bond	Project completed and closed.
211579	\$1,892,190	Scope of work in IFB; MFR-Solicitation to Small Businesses, Minority-Owned Firms, and Women’s Business Enterprises	FEMA determined that the project was partially ineligible. The County appealed and the appeal is pending. Project on hold.
212091	\$ 211,966	None	Project completed and closed.

In total, five out of the nine projects seeking FEMA reimbursement were wholly or partially rejected.

Of the nine projects seeking FEMA reimbursement, project files for five included all federally required documents and four did not include all federally required documents. One project file lacked required State compliance documentation.²²

One of the five projects, 9744, was rejected by FEMA because the County had started work prior to permit approval by FEMA's Environmental and Historical Preservation ("EHP") department. Public Works appealed this decision in a letter to the State of Hawai'i Office of the Director of Emergency Management/Civil Defense. The appeal stated under the Stafford Act and applicable regulations, the subrecipient (the County, through Public Works) was required to complete repairs and restore the facility to pre-disaster condition within 18 months after the date of the declared incident, i.e., April 16, 2018. The completion date of this project by this regulation was October 15, 2019. However, FEMA EHP was still working on clearances 21 months after the incident. Additionally, around this time, Public Works was advised that Biological Assessment Best Practices needed to be implemented as part of the project in order to minimize the effects on endangered species. Public Works implemented these best practices in February 2020. EHP clearance was received in the first quarter of 2020. As of October 2, 2023, FEMA has not responded to this appeal.

As noted in Table 5 above, one project (210144) for road repair and repaving was not fully executed and did not have the MFR - Basis for Contract Type and Contractor Selection, as required by 2 CFR § 200.318. This procurement was also missing the scope of work in the IFB, as required by 2 CFR § 200.320, and the Performance and Payment Bonds, as required by 2 CFR § 200.325.

A County procurement violation was issued for the contract for work on project 210144 in October 2019. The procurement violation stated that the bid was properly procured through Public Works' Roads Division, the fund certification had been obtained, the contract had been approved by the County Attorney, and the work had been completed. However, the required contract, insurance, bonding, and notice to proceed were not completed or produced. The Roads Division has asserted the need for better administrative oversight to avoid recurrence of this problem in the future. This matter was forwarded to the County Attorney's office to determine whether the vendor would receive its final outstanding payment. This project sought FEMA reimbursement and

²² One project file with all FEMA required documents did not contain a Certificate of Vendor Compliance, a state procurement required document under HRS § 103D-328, HRS § 103D-310 and HAR § 3-122-112.

FEMA paid the full amount requested by the County. This project is completed and closed.

In addition to the road repaving project above, another project (211579) for road and culvert repairs was missing the scope of work in IFB as required by 2 CFR § 200.320. The file for this project, in addition to two others, was missing the MFR - Solicitation to Small Businesses, Minority-Owned Firms, and Women's Business Enterprises, as required by 2 CFR § 200.321. Project 211579 was deemed partially ineligible by FEMA on February 28, 2020, and the determination was appealed by the County. Determination of the appeal is pending, and the project is on hold.

The other two project files missing the MFR solicitation, one for reconstruction of a comfort station (9758) and the other for construction management services ((9770), were also without a price analysis, as required by 2 CFR § 200.318, § 200.319, and § 200.323. The project for the comfort station (9758) originally sought FEMA reimbursement but was de-obligated by FEMA because the construction commenced prior to FEMA completing its environmental review. According to , the County submitted the project to FEMA for review in July 2018. FEMA's EHP division did not complete its review despite having the project for approximately 18 months. Act 12 funds were ultimately used for this project.

The construction management services contract (for project 9770) also failed to include the Procurement of Recovered Materials requirement, as required by CFR § 200.322, and the Federal Provisions, 2 CFR Part 200, Appendix II as required by CFR § 200.326. This construction management services contract was divided among two FEMA projects, with one approved and the second rejected by FEMA. The rejected project is the same project related to contract 9744 discussed earlier. The County is appealing the rejection.

Inconsistent Use of FEMA Checklist

A FEMA Checklist, created by FEMA and adopted by the County, was used to assist agencies seeking FEMA reimbursement for procurements associated with the April 2018 flooding. The FEMA Checklist stated:

“Purpose:

This checklist was created by FEMA and **amended by the County of Kaua'i to assist its agencies with RAIN 18 procurements.** This checklist is intended to provide general guidance only and makes no guarantee that adherence to this checklist will result in full reimbursement of eligible expenses.

If any questions arise, please contact the Division of Purchasing for assistance.

Effect of Emergency Proclamations Waiver of State Procurement Code:

Even though the State waived the HRS chapter 103D (“Procurement Code”), which is applicable to the County, “neither the State nor the County can waive the applicable Federal procurement standards, which continue to apply.” (Emphasis added.)

All nine project files for projects seeking FEMA reimbursement included FEMA Checklists. However, no FEMA Checklists were completed fully.

Although the County intended to implement the FEMA Checklist as an internal control to meet the federal requirements, there were several incomplete or improperly completed sections, and, more importantly, no assurance that the minimum federal procurement standards for FEMA reimbursement were met.

For example, there were instances where questions on the FEMA Checklist were left blank, instances where the FEMA Checklist indicated that a contract log was completed when it was not, and instances where a question of whether a required document was completed was left blank, but the related document was in fact in the contract file.

In general, projects seeking FEMA reimbursement could be subject to an OIG audit. The OIG periodically performs audits of FEMA grant awards. Funding de-obligations (returns) may occur when there is ineligible spending or non-compliance with federal procurement or documentation requirements. Audits are performed on a sample basis. However, if partial costs are unsupported or ineligible according to grant requirements, the full project may be disallowed. During an audit, the FEMA recipient must submit all required FEMA grant documentation which is then reviewed by the OIG. Some of the most common OIG audit findings that have resulted in de-obligation include poor contracting practices, unsupported costs, poor project accounting, duplication of benefits, excessive equipment charges, excessive labor and fringe benefit charges, unrelated project charges, unapplied credits, and direct administrative costs. Following the audit, the OIG DHS can recommend to FEMA that de-obligations be made.²³ Over 30 percent of the OIG DHS audits have resulted in the OIG recommending de-obligations of all or part of project funding.²⁴ If FEMA de-obligates funds, there is a sixty-day window which allows the recipient to appeal the determination in an attempt to reinstate funds.²⁵

²³ November 2, 2017, Overview of FEMA and Disaster Relief Funding.

²⁴ <https://www.govstar.org/oig-reports/da-13-06>.

²⁵ <https://www.fema.gov/assistance/individual/after-applying/appeals>.

The County has implemented changes to its procurement process and guidance and has tried to educate departments on federal requirements when seeking FEMA reimbursement. In March 2020, the DOF issued Procurement Instructions for COVID-19 Emergency Response to all County departments, divisions, and agencies. The instructions stated that the Procurement Code has been suspended as to COVID-19 procurements. However, for those COVID-19 procurements that the County intends to seek reimbursement from FEMA, the County must follow federal procurement laws.²⁶ The County needed to follow the same federal procurement laws for the RAIN 18 procurements.

Recommendations:

1. In order to minimize the risk of funding de-obligations, Purchasing should develop policies and procedures related to procurements seeking FEMA reimbursements. The policies and procedures should include federal procurement requirements and be accompanied by examples of a complete contract file.
2. Purchasing should conduct regular training on procurement during disasters, which can include explanations on when to seek FEMA reimbursement and lessons learned from RAIN 18.
3. Departments should utilize FEMA Checklists consistently, and Purchasing should monitor the departments to ensure compliance with federal procurement requirements prior to contract awards and to mitigate the risk of funding de-obligations.

²⁶ Purchasing Memo 2020-2 Re Emergency Procurement re COVID 19 Dated March 18, 2020.

Finding 2. The County’s position that all procurement laws are suspended under a Governor’s Emergency Proclamation allows for non-competitive procurements to occur. However, the County does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

Of the 34 contracts and purchase orders we reviewed related to RAIN 18 projects, 21 were procured non-competitively on the basis of the Governor’s Emergency Proclamation, which the County maintains suspends the typical competitive procurement process required by Hawai‘i Revised Statutes chapter 103D.

For these 21 contracts and POs, we asked Purchasing for:

1. Any documentation on how the awardee was selected;
2. Reasons the contract was not competitively bid; and
3. Any documentation of such decisions.

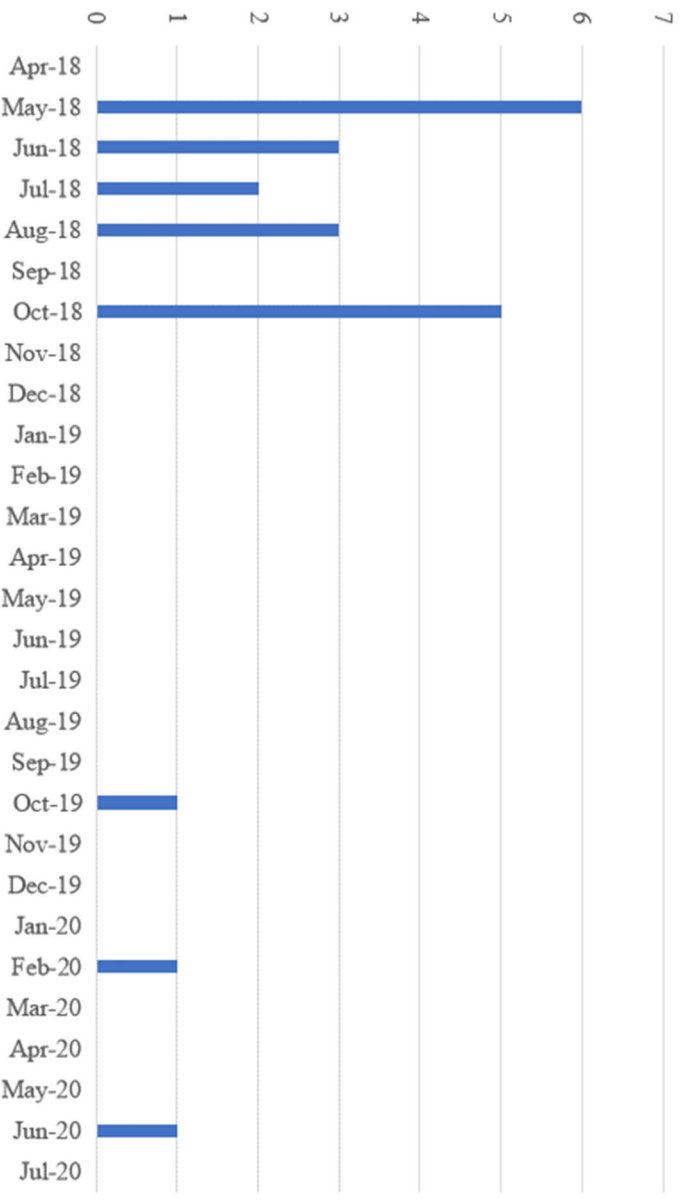
Purchasing did not answer any of these questions, and only stated, “[t]he Governor’s proclamation suspends the requirements under HRS 103D and allows for expediting contracts for goods, services, and construction in order to quickly respond to the disaster. Please note that the Governor’s proclamation is still in effect.”

Under Purchasing’s interpretation of the Governor’s Proclamation, department heads were granted discretion over which vendors were awarded work. Department heads were responsible for conducting due diligence over the vendors and ensuring vendors fulfilled the minimum insurance requirements. Contracts and POs were then ultimately approved by Purchasing.

The Chief Procurement Officer of the County is the Director of Finance (HRS § 103D-203(b)(1)), with procurement duties delegated to the head of Purchasing in writing under HRS § 103D-208. Consistent with the HRS directive of centralization of procurement authority in HRS § 103D-207, Purchasing has the sole delegated authority to procure goods and services on behalf of the Chief Procurement Officer.²⁷ As such, the responsibility for procurement compliance is Purchasing.

The following chart shows the number of Emergency Proclamation Procurements executed in each month from April 2018 through July 2020.

²⁷ Except for the County Department of Water.



HRS § 127A-11 does grant the Governor and Mayor flexibility to proclaim a state of emergency, extend the state of an emergency, or terminate the state of emergency. However, the Governor’s powers are not limitless.

In a challenge to the Governor’s extended emergency proclamations related to the COVID pandemic, the Third Circuit Court of Hawai’i dismissed a lawsuit that argued that supplementary or additional emergency declarations were invalid since the Governor’s powers lapsed after the initial 60-day period following the declared state of emergency. The State argued that no language prohibits supplementary or additional emergency proclamations from being issued, and that HRS § 127A provides that the Governor or Mayor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency. The court agreed with the State, finding that the use of supplementary proclamations is lawful and that the purpose of Hawai’i’s emergency powers statute is to confer comprehensive powers to protect the public and save lives. Although the court reaffirmed the validity of successive emergency proclamations, it stated that each must be based on the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency. When the facts on the ground no longer justify such a determination, the Governor’s emergency powers will cease.²⁸

²⁸ The National Law Review, “When Governors Bite Back: Circuit Court Upholds Hawai’i Governor’s Emergency Powers,” October 23, 2020.

Despite the broad powers associated with emergency proclamations and the suspension of procurement requirements of HRS chapter 103D, the County's Code of Ethics and the State ethics law under HRS chapter 84 are not suspended during emergencies.

Further, the intent of waiving the Procurement Law during emergency situations is to expedite the procurement of goods and services. However, the waiving of the Procurement Law during emergencies does not mean the abandonment of principles such as protecting, and being fiduciaries of, public funds.

The contract and PO documentation provided to us for the 21 Emergency Proclamation procurements shows that all contracts and POs reference the "RAIN 18" procurements as related to the "Governor's emergency proclamation." However, only one project file contained documentation that attempted to justify how the vendor was chosen.

For project 9808, email correspondence in November 2019 shows that the Purchasing asked the user department, "[h]ow did we determine [Vendor] to be the awardee? (not a problem, but we should include in our files for public record)." The user department stated, "[p]ast performance based on similar size and scope." Purchasing responded, "I would like to help strengthen your fair and reasonable justification. Can you help me fill in the blanks? Please adjust or add to as needed to help strengthen our f/r determination:

The County determined that the contract price is fair and reasonable by analyzing the cost per square foot. The County has determined that a price range of \$500 to \$1240 is acceptable for the type of design and construction services being sought. The contract price of \$2,228,669.00 breaks down to a per square foot cost of \$700.00, which is within the anticipated and acceptable range."²⁹

Email correspondence related to another project (9818), shows that in January 2020, over 19 months after the flooding, the user department emailed Purchasing, "[p]er your instruction, there is greater flexibility for procurement of this Act 12 funded project versus FEMA funded projects and **therefore the contracting agency can hand pick the Contractor to perform the desired scope of work as allowed by provisions under the Governor's Emergency Proclamation of April 15, 2018.** Further, once the Contract Award is made to encumber the Act 12 funds, the subject project retains all entitlements provided under the Governor's Emergency Proclamation of April 15, 2018, and related Supplementary Proclamations." (Emphasis added.)

²⁹ The underlined text was originally blank and then subsequently filled in by the user department.

In comparison, FEMA does not take the viewpoint that all procurements that occur during the disaster period are exempt from normal procurement procedures. Federal regulations limit noncompetitive procurements to certain circumstances, including when a “non-state applicant determines that immediate actions required to **address the public exigency or emergency cannot be delayed by a competitive solicitation**. This represents an exception to requirements for full and open competition. FEMA approval is not required for use of noncompetitive procurements under the emergency or exigency exception however, the use of noncompetitive procurements does not relieve non-state applicants from complying with other procurement requirements or from ensuring that costs are reasonable.” (Emphasis added.)³⁰

Further, FEMA states “..use of the public exigency or emergency exception is **only permissible during the actual exigent or emergency circumstances**. Exigency or emergency circumstances will vary for each incident, thus it is difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months or even longer in some cases. Non-state applicants must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in effect at the time of procurement. **Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, applicants should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.**” (Emphasis added.)³¹

³⁰ FEMA Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances Fact Sheet, January 19, 2018.

³¹ FEMA Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances Fact Sheet, January 19, 2018.

Purchasing does not have any policies or procedures for the solicitation of bids, issuing awards, contracts and contract amendments relating specifically to emergency procurement. We are also not aware of any policies and procedures that Purchasing or DOF follows in the event of emergencies.

We noted that Purchasing had used the same “Request for Emergency Procurement” Form SPO 02 document from April 16, 2018, to justify four Emergency Proclamation Procurements between July 2018 and October 2019. The Request for Emergency Procurement is a document typically used for emergency procurements pursuant to HRS § 103D-307, and was approved for “multiple” requisition numbers, “varied” contractors and amounts, and an “Estimated Time Required to cure the emergency” of “1 month.”

Purchasing stated to us, “[p]lease note that some of the purchasing documentation which made reference to Emergency Procurement per HRS 103D-307, as evidenced by the creation of Form SPO 02, (Request for Emergency Procurement) immediately after the event, was only for the purpose of pointing to the ultimate authority of the Governor’s Proclamation. The proclamation pursuant to HRS Chapter 127A was the governing authority with regard to our response.”

However, the sporadic use of this form (only contained in the contract files of two POs and two contracts) and its use to justify an Emergency Proclamation Procurement 18 months after the disaster, shows that Purchasing should consider developing clear policies and procedures on how to respond to emergency situations and when competitive versus non-competitive procurements should be used.

According to the NASPO Emergency Preparedness Guide, “[g]ood planning and preparation minimize risk to life and property. Inadequate planning can turn disaster into tragedy or scandalous headlines. Preparation and planning efforts should be focused on the lowest level of government first before interacting with the Federal government.”³² According to the NASPO Emergency Preparedness Guide, best practices for preparing for emergencies include:

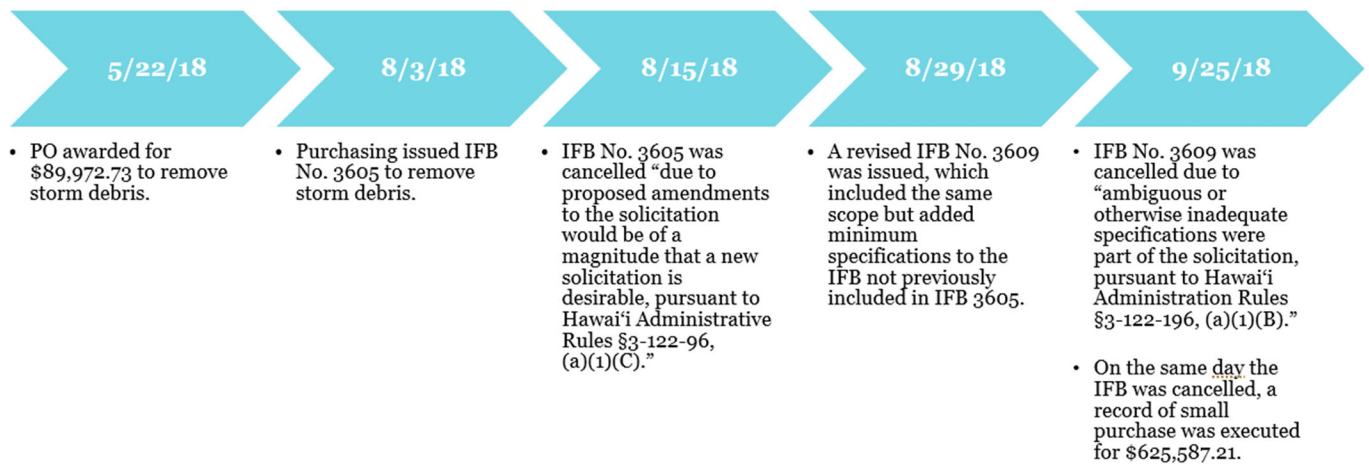
1. Creating procedures and policies governing the acquisition of resources in support of emergency operations, which should, at a minimum, identify:
 - a. Chain of command
 - b. Authorized purchase authority
 - c. All internal approval requirements
 - d. Financial approval of procurements

³² NASPO Emergency Preparedness Guide, Updated February 2020.

2. Working with the state and local emergency management agencies to pre-establish potential sourcing contracts (statewide term contracts) for items typically used in a declared emergency. These term contracts should be for statewide coverage and established with selected vendors who supply necessary items that are time-sensitive or scarce during the early stages of emergency response activities.
3. Multidisciplinary and multi-jurisdictional training and exercising for procurement personnel. Procurement personnel may not be part of the on-site Emergency Response Team (“ERT”), but they will likely be part of the logistics, resource, or financial units in the Emergency Operations Center.
4. Developing Procurement Response Kits, which should include at a minimum:
 - a. Emergency-related contracts
 - b. Procurement office emergency contact information
 - c. Other state and local government emergency contact information
 - d. Other agency procurement staff contact information that can be used to supplement emergency procurement staff
 - e. Commodity group/vendor emergency contact information
 - f. Materials that can be used to establish and maintain a written log of activities.
5. Developing standardized emergency purchase request forms and establishing procedures for:
 - a. Requesting resources
 - b. Approval of requests
 - c. Tracking requests
 - d. Receiving resources
 - e. Logging incoming and outgoing assignments as part of the procurement office’s emergency/disaster plan.
6. Maintaining accurate and complete documentation, including detailed logs of:
 - a. All purchases
 - b. Bidding information (including all bids obtained)
 - c. Vendors contacted when no bids were secured
 - d. Delivery and acceptance
 - e. Other procurement activities
 - f. Messages, approvals (signatures)
 - g. Correspondence relating to a purchase request

7. Using term contracts or bidding whenever possible. If it is not possible to use a term contract or seek bids, document why the process was not used.
8. Relentlessly use the terms “response” and “recovery” to focus conversations on the application of relevant procurement rules. “Recovery” differs from “response” as it refers to the actions needed to assist communities affected by an incident to rebuild while “response” refers to the immediate actions needed after the emergency. Procurement statutes and rules are usually effective during the recovery period. While some supplies and services may meet state and local standards for emergency or urgency during the recovery phase, many do not. Personnel who have been working on the emergency may have grown accustomed to a procurement process that now must be adjusted to accommodate previously existing state requirements for competition and compliance with other procurement policies during the recovery period.

Purchasing should also consider developing policies and procedures relating to the use of POs, small purchase awards, and IFBs during emergency situations. POs and small purchases are riskier for the County because unlike IFBs, which require contracts, they do not identify responsibilities, clearly define performance standards, or impose specific terms and conditions. Therefore, they are riskier when the services to be procured are more complex than delivery of defined quantities of product at a specified price. In projects examined during the audit involving debris removal, POs and IFBs were used for similar work, based on which was the most convenient to the user department, without regard to risk to the County.



In one case, a vendor was issued a PO for \$89,972.73 to remove storm debris. Three months later, on August 3, 2018, Purchasing issued an IFB for similar work at the same location. This IFB was cancelled soon after issuance, on August 15, 2018. The reasons for cancelling the IFB were varied. One explanation was that proposed amendments to the solicitation would be of a magnitude that a new solicitation was desirable pursuant to the State procurement regulations, and another was that the IFB was cancelled due to the changing environmental conditions and resulting scope changes.

A revised IFB was issued on August 29, 2018, but after the bids were opened, this IFB was also cancelled on September 25, 2018. On the same day as the cancellation, a small purchase award in the amount of \$625,587.21 was issued for the same work. In the Fair and Reasonable Pricing section of the Record of Small Purchase, it was indicated that the price submitted was fair and reasonable “[g]iven the urgency of the work and rush to mobilize for the safety of the public and the unknown quantity of material to haul...” As justification for “impracticality of inability to obtain minimum three quotations,” the Record of Small Purchase indicated “[w]ork is deemed an emergency for the sake of health and safety of individuals and the environment.”

The sequence of events for debris removal indicates that when there are no Purchasing guidelines for emergencies, there is no logic behind using POs and small purchases instead of IFBs. We note also that the State procurement office limits the use of POs in emergency situations such as COVID-19 responses, to awards below \$50,000.³³ Further, the Procurement Law places a small purchase cap of \$250,000 for State executive agencies procuring construction services. Purchasing should consider adopting similar caps appropriate to

³³ https://spo.hawaii.gov/wp-content/uploads/2020/03/SPO-Message_COVID19FEMAProcurement_3-18-2020.pdf

emergency situations. After our examination of the project files, we provided specific information from the audit field work to County governance, as required by the Yellow Book.

Recommendations:

1. Purchasing should develop policies and procedures related to preparing for and procuring goods and services in disaster or emergency situations based on the NASPO Emergency Preparedness Guide or other relevant guidance, including direction on what circumstances warrant competitive versus non-competitive procurements even when Emergency Proclamations are in effect.
2. As the responsible party for procuring goods and services for the County, Purchasing (and DOF), should require that documentation for the selection of noncompetitive procurements, including justifications for fair and reasonable pricing, pricing analysis or other reasoning are maintained by the user department and reviewed and approved by Purchasing.
3. Purchasing should follow the example of the State Procurement Office (“SPO”) and develop and enforce requirements for procurements in emergency situations, even if the Procurement Law is suspended. This action would protect the County from risk, and preserve the intent of the Procurement Law, i.e., to promote the policy of fair and equitable treatment of all persons who deal with the procurement system, foster effective broad-based competition, and increase public confidence in public procurement.

Finding 3. Of the two projects identified for review related to the RAIN 20, none of the project files included all federally required documents. The County still does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

The County suffered from RAIN 20, another severe flooding incident, from March 27, 2020, to March 28, 2020. On July 9, 2020, President Trump issued a major disaster declaration, and four emergency proclamations were issued by the Governor. The last proclamation by the Governor was issued on October 18, 2020, and was effective until December 27, 2020.

The scope of this audit was extended to include the examination of the procurement of disaster-related services in response to RAIN 20. The planned methodology was similar to RAIN 18, which is to:

1. Request and review any notifications/complaints to the County Council, Council staff, from contractors and the public regarding the award of certain projects, review contract awards.
2. Review documentation for seven projects related to RAIN 20 as agreed upon by the Council, namely 150529, 148309, 152809, 152959, 148411, 148295, 148311.
3. Obtain an update on the status of all projects related to RAIN 18 and RAIN 29 that sought FEMA funds.
4. Request any updates to policies and SOPs for soliciting bids, awarding contracts, and issuing contract amendments and change orders. Compare to applicable County and State Procurement laws and procedures, HRS sections, and FEMA requirements for procurement.
5. Request and review any updates to policies and SOPs for soliciting bids, awarding contracts, and issuing contract amendments and change orders relating to procurements for the 2020 flooding response.
6. Compare to applicable County and State procurement laws and procedures, HRS sections, and FEMA requirements for procurement.
7. Provide findings and recommendations as appropriate.

Our fieldwork consisted of issuing document requests, interviewing past and present County employees, and reviewing the results of the requests and interviews.

The amounts, subject matter, and status of the seven projects selected for examination in the extended scope is shown on the table below.

**Table 6 – Summary of Projects Seeking FEMA Reimbursement Related to RAIN
20**

Project	Best Available Cost	Project	Project Status
150529	\$ 104,659	Kīlauea Rock Quarry Road	FEMA approval pending, time extension approved.
148309	\$ 54,686	Kaua‘i War Memorial	Procured by DPR and completed using County funds.
152809	\$ 379,561	Kapahi Stream Bridge Repair	Project has been obligated by FEMA, time extension approved.
152959	\$ 35,069	Kaehulua Road Repair	Project has been obligated by FEMA, time extension approved.
148411	\$ 43,430	Islandwide Debris Removal	Procured and received FEMA funds.
148295	\$ 385,900	Debris Removal from Lydgate Park	Procured and received FEMA funds.
148311	\$ 33,999	Wailua Golf Course	Completed by DPR received FEMA funds.

The County reported that procurement activity occurred on only two projects, 148411 and 148295, and therefore provided contract documentation for these two projects only.

Project No. 148311 was completed by DPR using in-house labor and materials and was not contracted to a third-party.

The County states it withdrew its request to FEMA for one project, 148309. The reason for the withdrawal is that after discussion with FEMA, the County determined that FEMA funding was highly unlikely due to the condition of the Kaua‘i War Memorial Convention Hall roof prior to the rain event. The project was done using County funding.

The areas of fieldwork and a summary of the results is shown below:

1. Procurement: Areas of fieldwork: identification of all construction contracts or POs involved in each project, whether the contract or PO was procured by competitive or non-competitive means, and the justification

for the procurement vehicle utilized, the total amount actually paid on each contract or PO, and policies for soliciting bids, awarding contracts, and issuing contract amendments and change orders related to emergency procurements.

Results: Of the seven projects, procurement documents were provided for only two, 148411 and 148295. The procurement documents for these projects consisted of price quotations, POs and change orders. The project files were missing MFR Basis for Contract Type and Contractor Selection documentation and MFR-Solicitation to Small Businesses, Minority-Owned Firms, and Women's Business Enterprises documentation.

2. Funding: Areas of fieldwork: identification of the source of funding for each contract or purchase order.

Results: Projects 148411, 148295, and 148311 received \$32,572.44, \$347,310.00, and \$39,086.93 in FEMA funds, respectively. The remaining funds were sourced from the County.

3. FEMA compliance: Areas of fieldwork: for contracts or POs wholly or partially funded by FEMA, how each was reviewed to ensure compliance with FEMA-required procurement process and other FEMA requirements for vendors and subcontractors.

Results: There is no evidence that the contracts or POs for 148295, 148291, and 148411 were reviewed by the County to ensure compliance with FEMA requirements. The County states that FEMA Checklists were not prepared for these projects.

4. State compliance: Areas of fieldwork: for contracts or POs wholly or partially funded by the State, how each was reviewed to ensure compliance with State-required procurement process and other State requirements for vendors and subcontractors.

Results: There is no evidence that contracts or purchase orders for 148295, 148291, and 148411 were reviewed to ensure compliance with State requirements, if any.

5. County compliance: Areas of fieldwork: for all contracts or purchase orders wholly or partially funded by the County, how each was reviewed to ensure compliance with County requirements for procurement and other County requirements for vendors and subcontractors.

Results: There is no evidence that the contracts or POs for 148295, 148291, and 148411 were reviewed to ensure compliance with County requirements.

For 148309, which the County states was conducted using County funds, there is no evidence that this project was reviewed to ensure compliance with County requirements.

6. Complaints: Areas of fieldwork: inquiry into any written or verbal complaints or concerns known to the County regarding any of the contracts or POs or the work performed under these contracts or POs and disposition of the complaints.

Results: The County stated that there are no written or verbal complaints or concerns known to it regarding any projects.

Given the responses from the County, there do not appear to be any notable changes in the way it handled the RAIN 18 and RAIN 20 procurements. The County still does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances. Therefore, our recommendations related to the RAIN 20 procurements are the same as for the RAIN 18 procurements.

Recommendations:

For FEMA compliance:

1. In order to minimize the risk of funding de-obligations, Purchasing should develop policies and procedures related to procurements seeking FEMA reimbursements. The policies and procedures should include federal procurement requirements and be accompanied by examples of a complete contract file.
2. Purchasing should conduct regular training on procurement during disasters, which can include explanations on when to seek FEMA reimbursement and lessons learned from prior disaster-related procurements.
3. Departments should utilize FEMA Checklists consistently, and Purchasing should monitor the departments to ensure compliance with federal procurement requirements prior to contract awards and to mitigate the risk of funding de-obligations.

For procurements:

1. Purchasing should develop policies and procedures related to preparing for and procuring goods and services in disaster or emergency situations based

on the NASPO Emergency Preparedness Guide or other relevant guidance, including direction on what circumstances warrant competitive versus non-competitive procurements even when Emergency Proclamations are in effect.

2. As the responsible party for procuring goods and services for the County, Purchasing should require that documentation for the selection of noncompetitive procurements, including justifications for fair and reasonable pricing, pricing analysis, or other reasoning are maintained by the user department and reviewed and approved by Purchasing.
3. Purchasing should follow the example of the SPO and develop and enforce requirements for procurements in emergency situations, even if the Procurement Law is suspended. This action would protect the County from risk, and preserve the intent of the Procurement Law, i.e., to promote the policy of fair and equitable treatment of all persons who deal with the procurement system; foster effective broad-based competition; and increase public confidence in public procurement.

AUDITEE RESPONSE

A draft of the audit report was provided to the County administration. The Finance Director provided an Auditee Response, which is attached in its entirety as Appendix 1 to this report.

The Auditee Response acknowledged Findings 1 and 3. With regard to Finding 2, the response expressed an understanding and acknowledgement that the Governor's Emergency Proclamation does not waive federal procurement law. The response stated that the County would take the recommendations in the report under advisement.

The Auditee Response is a positive approach to the audit findings and recommendations. We encourage the County to expedite review and implementation of the recommendations and set deadlines for completion since the need for disaster related procurements may occur at any time.

No amendments to the audit report were required because of the Auditee Response.

DEPARTMENT OF FINANCE

MICHELLE L. LIZAMA, DIRECTOR OF FINANCE

CHELSIE A. SAKAI, DEPUTY DIRECTOR OF FINANCE



DEREK S.K. KAWAKAMI, MAYOR
REIKO MATSUYAMA, MANAGING DIRECTOR

January 8, 2024

Tyler Kimura
Partner
Spire Hawaii LLP
700 Bishop Street, Suite 2001
Honolulu, HI 96813

Re: Department of Finance, Disaster Related Procurement Audit Report Draft

Dear Mr. Kimura,

We would like to thank Spire Hawaii LLP for their audit as it relates to Disaster-Related Procurements for the 2018 and 2020 flood events. We understand that the nature of this audit was indeed complex, based on the challenges and immense demands for swift and timely public service that were involved in both flood events. We appreciate the opportunity to respond to the findings and recommendations.

Finding 1. Of the nine projects seeking FEMA reimbursement related to RAIN 18, project files for five included all federally required documents, and four did not include all federally required documents.

We acknowledge this finding and will take it as an opportunity to look into our policies and procedures. We acknowledge that the contract files do not include all federally required documents, noting that not all of the projects are complete, or federally funded.

The recommendations will be taken under advisement. We will continue to have our Division of Purchasing work with our Office of the County Attorney to further understand the intent of HRS 127A as it relates to procurement and 2 CFR 200 relating to federal procurement requirements. These continued conversations will then be passed on to our various departments doing procurement during disasters. We will continue to work closely with our departments as well as the Emergency Operations Center to ensure that we are providing guidance on disaster-related procurement.

We acknowledge the recommendation that the use of the internal FEMA checklist, while not a requirement, will be useful in assisting departments with meeting the federal procurement requirements.

Finding 2. The County's position that all procurement laws are suspended under a Governor's Emergency Proclamation allows for non-competitive procurements to occur. However, the County does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.

We fully understand and acknowledge that the Governor's Emergency Proclamation does not waive federal procurement law. All County departments and agencies acted in good faith and with necessary due diligence with regard to the swift and deliberate actions that were needed to address the response and recovery needs of the people we serve.

Appendix 1

The recommendations will be taken under advisement. Through our management and execution of the ARPA funding received by the County, we recently explored how best to document the use of non-competitive procurement with federal funds (2 CFR 200.320(c)) when HRS 103D does not apply due to HRS 127A. A sample of the form used for ARPA can be found at the end of this response. We will continue to look into the use of this form to document when the use of non-competitive procurement is appropriate as circumstances apply.

We will continue to work closely with our departments as well as the Emergency Operations Center to ensure that we are providing guidance on what warrants competition in procurements.

Finding 3. Of the two projects identified for review related to RAIN 20, none of the project files included all federally required documents. The County still does not have policies or procedures over preparing for emergencies, how to procure goods and services in emergency situations, or how to differentiate between response and recovery circumstances.


We acknowledge this finding and will take it as an opportunity to look into our policies and procedures. We acknowledge that the contract files do not include all federally required documents, noting that not all of the projects are complete, or federally funded.

The recommendations will be taken under advisement. We will continue to have our Division of Purchasing work with our Office of the County Attorney to further understand the intent of HRS 127A as it relates to procurement and 2 CFR 200 relating to federal procurement requirements. These continued conversations will then be passed on to our various departments doing procurement during disasters. We will continue to work closely with our departments as well as the Emergency Operations Center to ensure that we are providing guidance on disaster-related procurement.

We acknowledge the recommendation that the use of the internal FEMA checklist, while not a requirement, will be useful in assisting departments with meeting the federal procurement requirements.

Again, we thank you for the opportunity to respond.

Sincerely,

 Digitally signed by
Michelle L. Lizama
Date: 2024.01.08
16:31:32 -10'00'

Michelle L. Lizama
Director of Finance

Attachment – Request to Use Non-Competitive Procurement with Federal Funds (2 CFR 200.320(c))

Request to Use Non-Competitive Procurement with Federal Funds (2 CFR 200.320(c))

Objective:

- To document the use of *federal funds* for non-competitive procurement determinations *when HRS 103D does not apply due to HRS 127A*.
- If HRS 103D does apply, but a non-competitive procurement is necessary and justifiable (sole source, emergency, exempt), do not use this form. Instead use SPO forms to document the non-competitive procurement and cite the appropriate subsection of 2 CFR 200.320(c) *in the SPO form*.
- In all instances non-competitive procurement requires a factual basis justifying the decision.

Instructions:

- Complete all five sections;
- Attach documentation, if necessary; and
- Keep a signed electronic copy in the procurement file.

Section 1. Provide the name of the selected vendor, the estimated cost, the term of contract/delivery, and whether additional documentation is attached.

Name of Contractor:
Estimated Cost:
Term of Contract/Delivery
Description of Goods and/or Services:
Is additional documentation attached? Yes - <input type="checkbox"/> No - <input type="checkbox"/>

Section 2. Explain why HRS 103D does not apply by checking box #1 or #2 and provide the information required for that reason.

1	HRS 103D is currently waived pursuant to an <i>emergency proclamation</i> issued by the Governor of Hawaii.	<input type="checkbox"/>
	Cite Proclamation Number and Date:	
2	Pursuant to <i>HRS 127A-12(c)(6)</i> the Assistant Chief Procurement Officer ¹ (or designee) has found that HRS 103D shall not apply.	<input type="checkbox"/>
	Confirm that a “Request for HRS 127A-12(c)(6) Determination” is simultaneously being submitted with this request, or has already been approved	<input type="checkbox"/>

Section 3. Noncompetitive procurement with federal funds can only happen if one or more of the following circumstances from 2 CFR 200.320(c) apply. Check the boxes of all applicable circumstances:

2 CFR 200.320(c)		
1	The acquisition of property or services, the aggregate dollar amount of which does not exceed the federal micro-purchase threshold of \$10,000;	<input type="checkbox"/>

¹ Pursuant to HRS 127A-11(a) the Mayor has delegated authority to the Assistant Chief Procurement Officer to make findings under HRS 127A-12(c)(6).

Appendix 1

2	The item is available only from a single source;	<input type="checkbox"/>
3	The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;	<input type="checkbox"/>
4	The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or	<input type="checkbox"/>
5	After solicitation of a number of sources, competition is determined inadequate.	<input type="checkbox"/>

Section 4. Provide sufficient facts to justify the box(es) checked in Section 3.

Justification:

Section 5. This form must be electronically signed by the County employee responsible for *authorizing* a non-competitive procurement. (This means a department or agency head, their designee, or an ICS section head).

As a reminder:

- Pursuant to 2 CFR 200.327, the County's contracts must contain the applicable provisions described in appendix II to 2 CFR 200.
- Of note, Appendix II requires that "contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement." The County's General Terms and Conditions for Goods and Service contracts, General Provisions for Construction Contracts, and General Terms and Conditions for Professional Services Contracts (collectively "General Terms") all address termination and settlement. If not using one of the General Terms you must ensure that you are otherwise addressing termination and settlement.
- Prior approval from Assistant Chief Procurement Officer is required for any contract amendment.
- A copy of this approved request must accompany any contract document submitted to the Division of Purchasing for processing.
- Tax compliance is required as a pre-requisite to contract and for final payment (HRS 103-55), unless waived by emergency proclamation or found inapplicable pursuant to HRS 127A-12(c)(6).
- The contractor shall be informed of the requirements of HRS 11-355 relating to the prohibition of campaign contributions by State and County Contractors during the term of the contract (Contact State Campaign Spending Commission: 808 586-0285; www.hawaii.gov/campaign).

Appendix 1

By signing below I hereby affirm that I have no conflict of interest in the selection of this contractor, nor will I receive personal or financial benefit from this purchase. Further, I hereby affirm that the information provided above is to the best of my knowledge, true and correct.

Electronic Signature & Date:

For Finance Use Only

Approved:
