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# A BILL FOR AN ACT

RELATING TO PROCUREMENT.

**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 be appropriately designated  
3 and to read as follows:

4 "§103D- Procurement statistics. The state procurement  
5 office shall keep statistics on solicitations and awards  
6 protested under section 103D-701 for the purpose of improving  
7 procurement procedures. The statistics shall include  
8 information on protests involving inadvertent errors and amounts  
9 forfeited from procurement protests."

10 SECTION 2. Section 103D-701, Hawaii Revised Statutes, is  
11 amended by amending subsections (b) and (c) to read as follows:

12 "(b) The chief procurement officer or a designee, prior to  
13 the commencement of an administrative proceeding under section  
14 103D-709 or an action in court pursuant to section 103D-710, may  
15 settle and resolve a protest concerning the solicitation or  
16 award of a contract[-] within ten business days after receipt of  
17 the protest. This authority shall be exercised in accordance  
18 with rules adopted by the policy board.



1 (c) If the protest is not resolved by mutual agreement,  
2 the chief procurement officer or a designee shall [~~promptly~~]  
3 issue a decision in writing to uphold or deny the protest[~~-~~] no  
4 later than twenty business days after receipt of the protest.

5 The decision shall:

- 6 (1) State the reasons for the action taken; and  
7 (2) Inform the protestor of the protestor's right to an  
8 administrative proceeding as provided in this part, if  
9 applicable.

10 In addition, a record of the protest shall be compiled and shall  
11 include evidence received or considered, including oral  
12 testimony, exhibits, and a statement of the matters officially  
13 noticed, and proposed findings of fact."

14 SECTION 3. Section 103D-709, Hawaii Revised Statutes, is  
15 amended to read as follows:

16 "**§103D-709 Administrative proceedings for review.** (a)

17 The several hearings officers appointed by the director of the  
18 department of commerce and consumer affairs pursuant to section  
19 26-9(f) shall have jurisdiction to [~~review~~]:

- 20 (1) Review and determine de novo, any request from any  
21 bidder, offeror, contractor, or person aggrieved under  
22 section 103D-106, or governmental body aggrieved by a



1 determination of the chief procurement officer, head  
2 of a purchasing agency, or a designee of either  
3 officer under section 103D-310 [~~7, 103D-701, 7~~] or 103D-  
4 702 [~~7~~]; and

5 (2) Review and determine, as provided in subsection (c),  
6 any protest submitted under section 103D-701 from any  
7 bidder, offeror, contractor, person, or governmental  
8 body aggrieved by a determination of the chief  
9 procurement officer, head of a purchasing agency, or a  
10 designee of either officer.

11 (b) Hearings to review and determine any request made  
12 pursuant to subsection (a) (1) shall [~~commence~~] be conducted as  
13 follows:

14 (1) Hearings shall commence within twenty-one calendar  
15 days of receipt of the request. The hearings officers  
16 shall have power to issue subpoenas, administer oaths,  
17 hear testimony, find facts, make conclusions of law,  
18 and issue a written decision which shall be final and  
19 conclusive unless a person or governmental body  
20 adversely affected by the decision commences an appeal  
21 in the circuit court of the circuit where the case or  
22 controversy arises under section 103D-710. Hearings



1 officers shall issue written decisions not later than  
2 forty-five days from the receipt of the request under  
3 subsection (a) (1);

4 (2) The party initiating the proceeding shall have the  
5 burden of proof, including the burden of producing  
6 evidence as well as the burden of persuasion. The  
7 degree or quantum of proof shall be a preponderance of  
8 the evidence. All parties to the proceeding shall be  
9 afforded an opportunity to present oral or documentary  
10 evidence, conduct cross-examination as may be  
11 required, and present argument on all issues involved.  
12 Fact finding under section 91-10 (1) through (4) shall  
13 apply;

14 (3) The hearings officers shall ensure that a record is  
15 compiled of each proceeding which shall include the  
16 following:

17 (A) All pleadings, motions, and intermediate rulings;

18 (B) Evidence received or considered, including oral  
19 testimony, exhibits, and a statement of matters  
20 officially noticed;

21 (C) Offers of proof and rulings thereon;

22 (D) Proposed findings of fact; and



1           (E) A recording of the proceeding which may be  
2           transcribed if judicial review of the written  
3           decision is sought under section 103D-710; and

4       (4) The hearings officer shall decide whether the  
5       determinations of the chief procurement officer or the  
6       chief procurement officer's designee are in accordance  
7       with the state constitution, statutes, rules, and the  
8       terms and conditions of the solicitation or contract,  
9       and shall order such relief as may be appropriate in  
10       accordance with this chapter.

11       ~~[(c) Only parties to the protest made and decided pursuant~~  
12 ~~to sections 103D-701, 103D-709(a), 103D-310(b), and [103D-~~  
13 ~~702(g)] may initiate a proceeding under this section. The party~~  
14 ~~initiating the proceeding shall have the burden of proof,~~  
15 ~~including the burden of producing evidence as well as the burden~~  
16 ~~of persuasion. The degree or quantum of proof shall be a~~  
17 ~~preponderance of the evidence. All parties to the proceeding~~  
18 ~~shall be afforded an opportunity to present oral or documentary~~  
19 ~~evidence, conduct cross examination as may be required, and~~  
20 ~~argument on all issues involved. The rules of evidence shall~~  
21 ~~apply.~~



1       ~~(d) The hearings officers shall ensure that a record of~~  
2 ~~each proceeding which includes the following is compiled:~~

3       ~~(1) All pleadings, motions, intermediate rulings,~~

4       ~~(2) Evidence received or considered, including oral~~  
5 ~~testimony, exhibits, and a statement of matters~~  
6 ~~officially noticed;~~

7       ~~(3) Offers of proof and rulings thereon;~~

8       ~~(4) Proposed findings of fact;~~

9       ~~(5) A recording of the proceeding which may be transcribed~~  
10 ~~if judicial review of the written decision is sought~~  
11 ~~under section 103D-710.]~~

12       (c) Hearings to review and determine any request made  
13 pursuant to subsection (a)(2) shall be conducted as follows:

14       (1) Within ten calendar days of the filing of an  
15 application for review pursuant to subsection (a)(2),  
16 the chief procurement officer, head of a purchasing  
17 agency, or a designee of either officer shall transmit  
18 the record of the protest proceedings under section  
19 103D-701 to the office of administrative hearings of  
20 the department of commerce and consumer affairs;

21       (2) The review shall be scheduled as expeditiously as  
22 practicable and be conducted based upon the record of



1 protest proceedings under section 103D-701, including  
2 the briefs, and oral argument. New evidence or new  
3 issues that were not raised in the proceedings before  
4 the procuring agency shall not be introduced, except  
5 that the hearings officer appointed to hear the case,  
6 may admit new evidence if evidence offered is clearly  
7 newly discovered evidence and material to the decision  
8 on appeal; and

9 (3) No later than thirty days from the filing of the  
10 application for administrative review, based upon  
11 review of the record, the appointed hearings officer:

12 (A) Shall affirm the decision of the purchasing  
13 agency;

14 (B) Remand the case with instructions for further  
15 proceedings; or

16 (C) Reverse the decision, if substantial rights may  
17 have been prejudiced because the findings,  
18 conclusions, decisions, or orders of the  
19 purchasing agency are found to be arbitrary,  
20 capricious, fraudulent, or clearly erroneous in  
21 view of the reliable, probative, and substantial  
22 evidence on the whole record; provided that if an



1           application for review is not resolved by the  
2           thirtieth day from the filing of the application,  
3           the hearings officer shall lose jurisdiction and  
4           the decision of the purchasing agency shall not  
5           be disturbed.

6           (d) Any bidder, offeror, contractor, or person that is a  
7           party to a protest of a solicitation or award of a contract  
8           under section 103D-302 or 103D-303 that is decided pursuant to  
9           section 103D-701 may initiate a proceeding under subsection (c);  
10          provided that:

11          (1) For contracts with an estimated value of less than  
12           \$1,000,000, the protest shall concern a matter with  
13           estimated damage greater than \$10,000; and

14          (2) For contracts with an estimated value of \$1,000,000 or  
15           more, the protest shall concern a matter with  
16           estimated damage that are equal to no less than ten  
17           per cent of the estimated value of the contract.

18          (e) The party initiating a proceeding under subsection (d)  
19           shall pay to the department of commerce and consumer affairs a  
20           cash or protest bond in the amount of:

21          (1) \$1,000 for a contract with an estimated value of less  
22           than \$500,000;





- 1        (2) \$2,000 for a contract with an estimated value of at  
2        least \$500,000, but less than \$1,000,000; or  
3        (3) One-half of one per cent of the estimated value of the  
4        contract or not more than \$10,000, whichever is less,  
5        if the estimated value of the contract is \$1,000,000  
6        or more.

7        If the initiating party prevails in the proceeding  
8        initiated under subsection (d), the cash or protest bond shall  
9        be returned to that party. If the initiating party does not  
10       prevail in the proceeding initiated under subsection (d), the  
11       cash or protest bond shall be deposited into the general fund.

12       (f) Only parties to proceedings under sections 103D-310,  
13       103D-701, 103D-702, and 103D-709 may initiate a proceeding under  
14       this section. All time limitations on actions, as provided for  
15       in section 103D-712, shall remain in effect.

16       ~~[(e)]~~ (g) No action shall be taken on a solicitation or an  
17       award of a contract while a proceeding is pending, if the  
18       procurement was previously stayed under section 103D-701(f).

19       ~~[(f)]~~ ~~The hearings officer shall decide whether the~~  
20       ~~determinations of the chief procurement officer or the chief~~  
21       ~~procurement officer's designee were in accordance with the~~  
22       ~~Constitution, statutes, rules, and the terms and conditions of~~



1 ~~the solicitation or contract, and shall order such relief as may~~  
2 ~~be appropriate in accordance with this chapter.]~~

3 ~~[(g)]~~ (h) The policy board shall adopt ~~[such other]~~ rules  
4 as may be necessary to ensure that the proceedings conducted  
5 pursuant to this section afford all parties an opportunity to be  
6 heard.

7 (i) As used in this section, "estimated value of the  
8 contract" or "estimated value", with respect to a contract,  
9 means either the amount of the lowest responsible and responsive  
10 bid under section 103D-302 or the bid amount of the responsible  
11 offeror whose proposal is determined in writing to be the most  
12 advantageous under section 103D-303, as applicable."

13 SECTION 4. Section 103D-710, Hawaii Revised Statutes, is  
14 amended as follows:

15 1. By amending subsection (c) to read:

16 "(c) Within ~~[twenty]~~ ten calendar days of the filing of an  
17 application for judicial review, the hearings officer shall  
18 transmit the record of the administrative proceedings to the  
19 circuit court of the circuit where the case or controversy  
20 arises."



1           2. By amending subsection (e) to read:

2           "(e) [~~Upon~~] No later than thirty days from the filing of  
3 the application for judicial review, based upon review of the  
4 record the circuit court may affirm the decision of the hearings  
5 officer issued pursuant to section 103D-709 or remand the case  
6 with instructions for further proceedings; or it may reverse or  
7 modify the decision and order if substantial rights may have  
8 been prejudiced because the administrative findings,  
9 conclusions, decisions, or orders are:

- 10           (1) In violation of constitutional or statutory  
11           provisions;
- 12           (2) In excess of the statutory authority or jurisdiction  
13           of the chief procurement officer or head of the  
14           purchasing agency;
- 15           (3) Made upon unlawful procedure;
- 16           (4) Affected by other error of law;
- 17           (5) Clearly erroneous in view of the reliable, probative,  
18           and substantial evidence on the whole record; or
- 19           (6) Arbitrary, or capricious, or characterized by abuse of  
20           discretion or clearly unwarranted exercise of  
21           discretion[-];



1 provided that if an application for judicial review is not  
2 resolved on or before the thirtieth day from the filing of the  
3 application, the circuit court shall lose jurisdiction and the  
4 decision of the hearings officer shall not be disturbed. All  
5 time limitations on actions, as provided for in section  
6 103D-712, shall remain in effect."

7 SECTION 5. This Act does not affect rights and duties that  
8 matured, penalties that were incurred, and proceedings that were  
9 begun, before its effective date.

10 SECTION 6. Statutory material to be repealed is bracketed  
11 and stricken. New statutory material is underscored.

12 SECTION 7. This Act shall take effect on July 1, 2012.



**Report Title:**

Procurement Code; Protest; Administrative Proceedings

**Description:**

Imposes time limits on rendering administrative and judicial review decisions. Limits protests to those that are a minimum percentage of the contract value. Requires posting of a protest bond, to be forfeited if the protesting party does not prevail. Effective July 1, 2012. (HB1671 HD2)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

