



GOV. MSG. NO. 1391

EXECUTIVE CHAMBERS  
HONOLULU

NEIL ABERCROMBIE  
GOVERNOR

July 10, 2012

The Honorable Shan Tsutsui, President  
and Members of the Senate  
Twenty-Sixth State Legislature  
State Capitol, Room 409  
Honolulu, Hawaii 96813

The Honorable Calvin Say, Speaker  
and Members of the House  
Twenty-Sixth State Legislature  
State Capitol, Room 431  
Honolulu, Hawaii 96813

Dear President Tsutsui, Speaker Say and Members of the Legislature:

I am transmitting herewith HB1671 HD2 SD2, without my approval, and with the statement of objections relating to the measure.

HB1671 HD2 SD2

RELATING TO PROCUREMENT.

*Aloha*  
Sincerely,  
*Neil Abercrombie*

NEIL ABERCROMBIE  
Governor, State of Hawaii

EXECUTIVE CHAMBERS

HONOLULU

July 10, 2012

STATEMENT OF OBJECTIONS TO HOUSE BILL NO. 1671

Honorable Members  
Twenty-Sixth Legislature  
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, House Bill No. 1671, entitled "A Bill for an Act Relating to Procurement."

The purposes of this bill are to: (1) require the State Procurement Office to keep statistics on various aspects of protests for the purpose of improving procurement procedures; (2) replace references to the "chief procurement officer" with "procurement officer"; (3) make final and not subject to appeal, the written determination of a procurement officer to lift the automatic stay imposed by the receipt of a protest; (4) require the procurement officer to compile a record of the protest; (5) establish and require different procedures for the administrative review of protests of solicitations and awards, and the administrative review of decisions to assess fines, suspend, and debar; and (6) impose time limits to expedite the protest review process, including time limits in which (a) the procurement officer must resolve a protest, issue a decision, and transmit the protest record to the hearings officer, (b) the hearings officer must commence an administrative review and issue a decision, and (c) the circuit court must issue a decision.

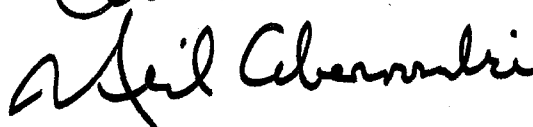
The legislative intent that this bill will expedite the protest review process may be difficult to achieve because of the operational burdens the bill imposes on the procuring agencies. This bill requires procuring agencies to compile a record of the protest, and states the record shall include as applicable, oral testimony, exhibits, and proposed findings of fact. These elements suggest a contested case type of proceeding must occur at the procuring agency level. I believe that requiring procuring agencies to conduct such a contested case proceeding may prove difficult for those agencies that

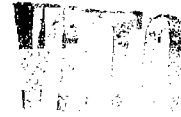
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do not otherwise conduct contested case hearings and lack experienced staff for such purpose. All agencies, regardless of their resources, will need to assign and train personnel to conduct these proceedings and compile a record of the proceedings. Currently, the protest review process at the agency level is much more informal. The formal review of the agency decision is conducted by the hearings officers at the Department of Commerce and Consumer Affairs, who already are trained and experienced in conducting contested case type administrative hearings. This bill may create delays by shifting the adjudicatory process from the hearings officers to the agencies and requiring the agencies to grapple with the details of conducting a contested case type of hearing.

Further, because this bill would take effect on July 1, 2012, it would be difficult for the State Procurement Office to timely draft and conduct procurement training for all state agencies so that they could comply with the new protest review procedures required by this bill.

For the foregoing reasons, I am returning House Bill No. 1671 without my approval.

*Olona*  
Respectfully,  
  
NEIL ABERCROMBIE  
Governor of Hawaii



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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 as follows:

12 1. By amending subsections (a), (b), and (c) to read:

13 "(a) Any actual or prospective bidder, offeror, or  
14 contractor who is aggrieved in connection with the solicitation  
15 or award of a contract may protest to the [~~chief~~] procurement  
16 officer [~~or a designee~~] as specified in the solicitation.

17 Except as provided in sections 103D-303 and 103D-304, a protest  
18 shall be submitted in writing within five working days after the



1 aggrieved person knows or should have known of the facts giving  
2 rise thereto; provided that a protest of an award or proposed  
3 award shall in any event be submitted in writing within five  
4 working days after the posting of award of the contract under  
5 section 103D-302 or 103D-303, if no request for debriefing has  
6 been made, as applicable; provided further that no protest based  
7 upon the content of the solicitation shall be considered unless  
8 it is submitted in writing prior to the date set for the receipt  
9 of offers.

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

18 (c) If the protest is not resolved by mutual agreement,  
19 the [~~chief~~] procurement officer [~~or a designee~~] shall [~~promptly~~]  
20 issue a decision in writing to uphold or deny the protest[-] no  
21 later than twenty working days after receipt of the protest,



1 unless a longer period is determined necessary for cause. The  
2 decision shall:

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

7 In addition, a record of the protest shall be compiled and  
8 include evidence received or considered, including oral  
9 testimony, exhibits, and a statement of the matters officially  
10 noticed, and proposed findings of fact, as applicable."

11 2. By amending subsection (f) to read:

12 "(f) In the event of a timely protest under subsection  
13 (a), no further action shall be taken on the solicitation or the  
14 award of the contract until the chief procurement officer makes  
15 a written determination that the award of the contract without  
16 delay is necessary to protect substantial interests of the  
17 State. A decision under this subsection shall be final,  
18 conclusive, and not subject to appeal."

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

21 "**§103D-709 Administrative proceedings for review.** (a)

22 The several hearings officers appointed by the director of [the



1 ~~department of]~~ commerce and consumer affairs pursuant to section  
2 26-9(f) shall have jurisdiction to ~~[review]~~:

3 (1) Review and determine de novo, any request from any  
4 bidder, offeror, contractor, or person aggrieved under  
5 section 103D-106, or governmental body aggrieved by a  
6 determination of the ~~[chief]~~ procurement officer~~[~~  
7 ~~head of a purchasing agency, or a designee of either~~  
8 ~~officer]~~ under section 103D-310~~[~~ ~~103D-701,~~ or  
9 103D-702~~[~~]; and

10 (2) Review and determine, as provided in subsection (c),  
11 any protest submitted under section 103D-701 from any  
12 bidder, offeror, contractor, person, or governmental  
13 body aggrieved by a determination of the procurement  
14 officer.

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

18 (1) Hearings shall commence within twenty-one calendar  
19 days of receipt of the request. The hearings officers  
20 shall have power to issue subpoenas, administer oaths,  
21 hear testimony, find facts, make conclusions of law,  
22 and issue a written decision which shall be final and



1 conclusive unless a person or governmental body  
2 adversely affected by the decision commences an appeal  
3 in the circuit court of the circuit where the case or  
4 controversy arises under section 103D-710. Hearings  
5 officers shall issue written decisions no later than  
6 forty-five days from the receipt of the request under  
7 subsection (a) (1);

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

18 (3) The hearings officers shall ensure that a record is  
19 compiled of each proceeding which shall include the  
20 following:

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





1           (B) Evidence received or considered, including oral  
2           testimony, exhibits, and a statement of matters  
3           officially noticed;

4           (C) Offers of proof and rulings thereon;

5           (D) Proposed findings of fact; and

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

9           (4) The hearings officer shall decide whether the  
10           determinations of the procurement officer are in  
11           accordance with the state constitution, statutes,  
12           rules, and the terms and conditions of the  
13           solicitation or contract, and shall order such relief  
14           as may be appropriate in accordance with this chapter.

15           ~~[(e) Only parties to the protest made and decided pursuant~~  
16           ~~to sections 103D-701, 103D-709(a), 103D-310(b), and [103D-~~  
17           ~~702(g)] may initiate a proceeding under this section. The party~~  
18           ~~initiating the proceeding shall have the burden of proof,~~  
19           ~~including the burden of producing evidence as well as the burden~~  
20           ~~of persuasion. The degree or quantum of proof shall be a~~  
21           ~~preponderance of the evidence. All parties to the proceeding~~  
22           ~~shall be afforded an opportunity to present oral or documentary~~



1 ~~evidence, conduct cross examination as may be required, and~~  
2 ~~argument on all issues involved. The rules of evidence shall~~  
3 ~~apply.~~

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

- 6 ~~(1) All pleadings, motions, intermediate rulings,~~
- 7 ~~(2) Evidence received or considered, including oral~~  
8 ~~testimony, exhibits, and a statement of matters~~  
9 ~~officially noticed,~~
- 10 ~~(3) Offers of proof and rulings thereon,~~
- 11 ~~(4) Proposed findings of fact,~~
- 12 ~~(5) A recording of the proceeding which may be transcribed~~  
13 ~~if judicial review of the written decision is sought~~  
14 ~~under section 103D-710.]~~

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

- 17 (1) Within ten calendar days of the filing of an  
18 application for review pursuant to subsection (a)(2),  
19 the procurement officer shall transmit the record of  
20 the protest proceedings under section 103D-701 to the  
21 office of administrative hearings of the department of  
22 commerce and consumer affairs;

- 1       (2) The review shall be scheduled as expeditiously as  
2       practicable and be conducted based upon the record of  
3       protest proceedings under section 103D-701, including  
4       the briefs, and oral argument. New evidence or new  
5       issues that were not raised in the proceedings before  
6       the procuring agency shall not be introduced, except  
7       that the hearings officer appointed to hear the case  
8       may admit new evidence if evidence offered is clearly  
9       newly discovered evidence and material to the decision  
10       on appeal;
- 11       (3) No later than thirty days from the filing of the  
12       application for administrative review, based upon  
13       review of the record, the appointed hearings officer:
- 14       (A) Shall affirm the decision of the purchasing  
15       agency;
- 16       (B) Remand the case with instructions for further  
17       proceedings; or
- 18       (C) Reverse the decision, if substantial rights may  
19       have been prejudiced because the findings,  
20       conclusions, decisions, or orders of the  
21       purchasing agency are found to be arbitrary,  
22       capricious, fraudulent, or clearly erroneous in



1 view of the reliable, probative, and substantial  
2 evidence on the whole record; and

3 (4) If an application for review is not resolved by the  
4 thirtieth day from the filing of the application, the  
5 hearings officer shall lose jurisdiction and the  
6 decision of the purchasing agency shall not be  
7 disturbed.

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

13 (1) Less than \$1,000,000, the protest shall concern a  
14 matter with estimated damage greater than \$10,000; and

15 (2) \$1,000,000 or more, the protest shall concern a matter  
16 with estimated damage that are equal to no less than  
17 ten 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."

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



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

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

21 provided that if an application for judicial review is not  
22 resolved on or before the thirtieth day from the filing of the



1 application, the circuit court shall lose jurisdiction and the  
2 decision of the hearings officer shall not be disturbed. All  
3 time limitations on actions, as provided for in section  
4 103D-712, shall remain in effect."

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

8 SECTION 6. Statutory material to be repealed is bracketed  
9 and stricken. New statutory material is underscored.

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

APPROVED this            day of            , 2012

GOVERNOR OF THE STATE OF HAWAII

