
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 ~~[(c) 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.



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.
(SD2)

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