

---

---

## A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1           SECTION 1. The legislature finds that a meaningful protest  
2 procedure must be embodied in the procurement code in order to  
3 achieve its enumerated purposes: to ensure fairness, to provide  
4 increased economy, to foster competition, to encourage  
5 transparency, and to increase public confidence in the process.

6           Currently, the chief procurement officer can delegate the  
7 authority to resolve protests to the contracting officer, who  
8 often is also the person who prepared and issued the  
9 procurement. This creates a situation in which a protestor must  
10 appeal to the very person who may have directly or indirectly  
11 caused the problem being protested. The legislature finds that  
12 the chief procurement officer should no longer delegate the  
13 authority to settle protests pursuant to section 103D-701.

14           In addition, protestors are currently prohibited from being  
15 reimbursed for their reasonable attorney's fees, except in the  
16 cases of bad faith. However, this does not promote the central  
17 need for a "private attorney general", which is a recognized  
18 judicial doctrine that allows for citizens to be reimbursed for



1 their attorney's fees when pursuing a cause in the public  
2 interest. The legislature finds that promoting and enhancing  
3 public trust in the government--and in particular, government  
4 spending--is an interest that should be promoted through the  
5 private attorney general doctrine.

6 Finally, the administrative review of determinations made  
7 by the chief procurement officer is currently handled by another  
8 state executive agency, the department of commerce and consumer  
9 affairs. Given that the task of rendering a determination and  
10 the task of reviewing the fairness of that determination both  
11 lie with executive branch agencies, this presents a possible  
12 conflict of interest. In order to enhance the procurement  
13 process and to provide for a more unbiased rendering and review  
14 of procurement determinations, this Act transfers the review of  
15 procurement determinations to the office of the ombudsman, a  
16 legislative agency. This change effectuates a model similar to  
17 the federal government, where protests are handled by an arm of  
18 Congress, the Government Accountability Office. While the  
19 Government Accountability Office does not have any affirmative  
20 authority to change the decisions of the federal agencies, it  
21 makes recommendations that are often followed, because the



1 checks and balances of the separation of powers doctrine  
2 recognize that Congress holds the power of the purse strings.

3 The legislature finds that the functions of protest review  
4 should be conducted within the legislative branch in order to  
5 enhance and improve the accountability of Hawai'i's procurement  
6 code. However, because the protests may be sporadic and  
7 intermittent, the office of the ombudsman is authorized to  
8 solicit a hearings officer under an "indefinite-delivery,  
9 indefinite-quality" contract.

10 SECTION 2. Section 96-3, Hawaii Revised Statutes, is  
11 amended by amending subsection (a) to read as follows:

12 "(a) The ombudsman shall appoint a first assistant, one or  
13 more administrative hearings officers pursuant to section 103D-  
14 709(a), and other officers and employees as may be necessary to  
15 carry out this chapter. All employees, including the first  
16 assistant, shall be hired by the ombudsman and shall serve at  
17 the ombudsman's pleasure."

18 SECTION 3. Section 96-5, Hawaii Revised Statutes, is  
19 amended to read as follows:

20 "**§96-5 Jurisdiction.** The ombudsman has jurisdiction to  
21 [investigate]:



1       (1) Investigate the administrative acts of agencies and  
2       ~~[the ombudsman]~~ may exercise the ombudsman's powers  
3       without regard to the finality of any administrative  
4       act~~[-]~~; and

5       (2) Review and determine de novo, pursuant to section  
6       103D-709(a), determinations of the chief procurement  
7       officer, head of a purchasing agency, or a designee of  
8       either officer under section 103D-310 or 103D-702, or  
9       the chief procurement officer under section 103D-701."

10       SECTION 4. Section 96-6, Hawaii Revised Statutes, is  
11       amended to read as follows:

12       "**§96-6 Investigation of complaints; duties.** (a) The  
13       ombudsman may investigate any complaint which the ombudsman  
14       determines to be an appropriate subject for investigation under  
15       section 96-8.

16       (b) The ombudsman may investigate on the ombudsman's own  
17       motion if the ombudsman reasonably believes that an appropriate  
18       subject for investigation under section 96-8 exists.

19       (c) Pursuant to section 103D-709(a), the ombudsman shall  
20       assign an administrative hearings officer to review and  
21       determine de novo, determinations of the chief procurement  
22       officer, head of a purchasing agency, or a designee of either



1 officer under section 103D-310 or 103D-702, or the chief  
2 procurement officer under section 103D-701; provided that the  
3 ombudsman shall contract for the administrative hearings officer  
4 through a professional services indefinite-delivery, indefinite-  
5 quantity contract with a qualified procurement consultant."

6 SECTION 5. Section 103D-208, Hawaii Revised Statutes, is  
7 amended to read as follows:

8 **"§103D-208 Delegation of authority by the chief**  
9 **procurement officer.** Subject to the rules of the policy board,  
10 each chief procurement officer may delegate any authority or  
11 duty conferred upon the chief procurement officer by this  
12 chapter to designees or to any department, agency or official  
13 within their respective jurisdictions[~~-~~]; provided that the  
14 chief procurement officer shall not delegate the chief  
15 procurement officer's authority to resolve protests under  
16 section 103D-701."

17 SECTION 6. Section 103D-701, Hawaii Revised Statutes, is  
18 amended to read as follows:

19 **"§103D-701 Authority to resolve protested solicitations**  
20 **and awards.** (a) Any actual or prospective bidder, offeror, or  
21 contractor who is aggrieved in connection with the solicitation  
22 or award of a contract may protest to the chief procurement



1 officer [~~or a designee as specified in the solicitation~~].  
2 Except as provided in sections 103D-303 and 103D-304, a protest  
3 shall be submitted in writing within five working days after the  
4 aggrieved person knows or should have known of the facts giving  
5 rise thereto; provided that a protest of an award or proposed  
6 award shall in any event be submitted in writing within five  
7 working days after the posting of award of the contract under  
8 section 103D-302 or 103D-303, if no request for debriefing has  
9 been made, as applicable; provided further that no protest based  
10 upon the content of the solicitation shall be considered unless  
11 it is submitted in writing prior to the date set for the receipt  
12 of offers.

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

19 (c) If the protest is not resolved by mutual agreement,  
20 the chief procurement officer [~~or a designee~~] shall promptly  
21 issue a decision in writing to uphold or deny the protest. The  
22 decision shall:



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

5           (d) A copy of the decision under subsection (c) shall be  
6 mailed or otherwise furnished immediately to the protestor and  
7 any other party intervening.

8           (e) A decision under subsection (c) shall be final and  
9 conclusive, unless any person adversely affected by the decision  
10 commences an administrative proceeding under section 103D-709.

11           (f) In the event of a timely protest under subsection (a),  
12 no further action shall be taken on the solicitation or the  
13 award of the contract until the chief procurement officer makes  
14 a written determination that the award of the contract without  
15 delay is necessary to protect substantial interests of the  
16 State.

17           (g) In addition to any other relief, when a protest is  
18 sustained and the protestor should have been awarded the  
19 contract under the solicitation but is not, then the protestor  
20 shall be entitled to the actual costs reasonably incurred in  
21 connection with the solicitation, including bid or proposal



1 preparation costs [~~but not~~], including reasonable attorney's  
2 fees[~~-~~] incurred in the pursuit of the protest."

3 SECTION 7. Section 103D-709, Hawaii Revised Statutes, is  
4 amended by amending subsection (a) to read as follows:

5 "(a) [~~The several hearings officers appointed by the~~  
6 ~~director of the department of commerce and consumer affairs~~  
7 ~~pursuant to section 26-9(f)~~] An administrative hearings officer  
8 in the office of the ombudsman shall have jurisdiction to review  
9 and determine de novo, any request from any bidder, offeror,  
10 contractor, person aggrieved under section 103D-106, or  
11 governmental body aggrieved by a determination of the chief  
12 procurement officer, head of a purchasing agency, or a designee  
13 of either officer under section 103D-310[~~, 103D-701~~] or 103D-  
14 702[~~-~~], or the chief procurement officer under section 103D-  
15 701."

16 SECTION 8. Section 103D-712, Hawaii Revised Statutes, is  
17 amended by amending subsection (a) to read as follows:

18 "(a) Requests for administrative review under section  
19 103D-709 shall be made directly to the [~~office of administrative~~  
20 ~~hearings of the department of commerce and consumer affairs~~]  
21 office of the ombudsman within seven calendar days of the





1 issuance of a written determination under section 103D-310,  
2 103D-701, or 103D-702."

3 SECTION 9. Notwithstanding any other law to the contrary,  
4 all the rights, powers, functions, and duties of the  
5 administrative hearings officer under the department of commerce  
6 and consumer affairs reviewing procurement matters shall be  
7 transferred to the office of the ombudsman.

8 SECTION 10. All appropriations, records, equipment,  
9 machines, files, supplies, contracts, books, papers, documents,  
10 maps, and other personal property heretofore made, used,  
11 acquired, or held by the department of commerce and consumer  
12 affairs relating to the functions transferred to the office of  
13 the ombudsman shall be transferred with the functions to which  
14 they relate.

15 SECTION 11. There is appropriated out of the general  
16 revenues of the State of Hawaii the sum of \$ or so  
17 much thereof as may be necessary for fiscal year 2008-2009 to  
18 fund the salaries of one or more newly appointed administrative  
19 hearings officers.

20 The sum appropriated shall be expended by the office of the  
21 ombudsman for the purposes of this Act.



# H.B. NO. 2267

1 SECTION 12. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 13. This Act shall take effect upon its approval.  
4

INTRODUCED BY:

*[Signature]*  
*[Signature]*  
*[Signature]*  
*[Signature]*

JAN 15 2008



**Report Title:**

Procurement; Ombudsman

**Description:**

Prohibits the chief procurement officer from delegating its authority to resolve protested awards; allows reimbursement of attorney's fees for protesting parties that prevail; transfers the review function of state procurement determinations to the office of the ombudsman.

