
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. Chapter 103D, Hawaii Revised Statutes, is
11 amended by adding a new section to part III to be appropriately
12 designated and to read as follows:

13 "§103D-A Temporary exemption of certain construction and
14 design-build procurements from protest and administrative review
15 of nonresponsible offeror determination. (a) The governor or
16 the mayor of a county, as applicable, may exempt a procurement
17 for a construction or design-build contract under the governor's
18 or mayor's jurisdiction from protest under section 103D-701 and

1 administrative review of a nonresponsible offeror determination
2 under section 103D-709 if the following conditions are met:

3 (1) The invitation for bids or request for proposals is
4 issued by the head of the purchasing agency between
5 July 1, 2012, and June 30, 2014;

6 (2) The governor or mayor requires all bidders or
7 offerors, as a condition for submitting bids or
8 proposals, to agree that all bids or offers, including
9 amendments or revisions, but not trade secrets or
10 other proprietary data designated by the bidders or
11 offerors, shall be released for public inspection upon
12 award of the contract; provided that:

13 (A) A bidder or offeror who does not agree to the
14 requirements of this paragraph shall be deemed
15 nonresponsible for the procurement; and

16 (B) After award of the contract, information
17 designated as trade secrets or other proprietary
18 data may be disclosed if required by the attorney
19 general or county corporation counsel, as
20 applicable, in accordance with rules of the state
21 procurement office; and

1 (3) The governor or mayor agrees to release for public
2 inspection, upon award of the contract, all written
3 evaluations and ratings of bids or offerors by the
4 purchasing agency or evaluation committee for the
5 procurement, if any.

6 The governor or mayor shall establish that a procurement is
7 exempt from protest and administrative review of a
8 nonresponsible offeror determination by issuing a proclamation
9 simultaneously with the issuance of the invitation for bids or
10 request for proposals for the procurement. The proclamation
11 shall be a public record.

12 (b) Simultaneously with the award of a contract for an
13 exempt procurement, the governor or mayor, as applicable, shall
14 release for public inspection the information specified under
15 subsection (a) (2) and (3).

16 (c) The governor or mayor, as applicable, shall post on
17 the state or appropriate county website, as applicable, a list
18 of all price adjustments and change orders approved for a
19 contract, for an exempt procurement. The list of price
20 adjustments and change orders shall be posted on the state or
21 county website within ten days of the end of the quarter in
22 which the price adjustment or change order is made.

1 (d) For the purpose of this section, "nonresponsible
2 offeror determination" means a determination of
3 nonresponsibility of a prospective offeror under section 103D-
4 310(b)."

5 SECTION 3. Section 103D-105, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "**§103D-105 Public access to procurement information.**

8 Government records relating to procurement shall be available to
9 the public as provided in chapter 92F[-] and, if applicable,
10 section 103D-A. Part I of chapter 92 shall not apply to
11 discussions, deliberations, or decisions required to be
12 conducted or made confidentially under this chapter[-]; provided
13 that if the governor or the mayor of a county exempts a
14 procurement pursuant to section 103D-A, this confidentiality
15 provision shall not be applied to make confidential any
16 information required to be made public under section 103D-A."

17 SECTION 4. Section 103D-303, Hawaii Revised Statutes, is
18 amended by amending subsection (h) to read as follows:

19 "(h) In cases of awards made under this section, non-
20 selected offerors may submit a written request for debriefing to
21 the procurement officer within three working days after the
22 posting of the award of the contract. Thereafter, the

1 procurement officer shall provide the non-selected offeror a
2 prompt debriefing. Any protest by the non-selected offeror
3 pursuant to section 103D-701 following debriefing shall be filed
4 in writing with the procurement officer within five working days
5 after the date upon which the debriefing is completed[~~-~~];
6 provided that the protest provision shall not apply to a
7 procurement exempt from protest under section 103D-A."

8 SECTION 5. Section 103D-701, Hawaii Revised Statutes, is
9 amended to read as follows:

10 **"§103D-701 Authority to resolve protested solicitations**
11 **and awards.** (a) [~~Any~~] Except as provided in subsection (h),
12 any actual or prospective bidder, offeror, or contractor who is
13 aggrieved in connection with the solicitation or award of a
14 contract may protest to the chief procurement officer or a
15 designee as specified in the solicitation. Except as provided
16 in sections 103D-303 and 103D-304, a protest shall be submitted
17 in writing within five working days after the aggrieved person
18 knows or should have known of the facts giving rise thereto;
19 provided that a protest of an award or proposed award shall in
20 any event be submitted in writing within five working days after
21 the posting of award of the contract under section 103D-302 or
22 103D-303, if no request for debriefing has been made, as

1 applicable; provided further that no protest based upon the
2 content of the solicitation shall be considered unless it is
3 submitted in writing prior to the date set for the receipt of
4 offers.

5 (b) The chief procurement officer or a designee, prior to
6 the commencement of an administrative proceeding under section
7 103D-709 or an action in court pursuant to section 103D-710, may
8 settle and resolve a protest concerning the solicitation or
9 award of a contract[-] within ten business days after receipt of
10 the protest. This authority shall be exercised in accordance
11 with rules adopted by the policy board.

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

16 The decision shall:

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

21 In addition, a record of the protest shall be compiled and shall
22 include evidence received or considered, including oral

1 testimony, exhibits, and a statement of the matters officially
2 noticed, and proposed findings of fact.

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

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

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

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

1 (h) This section shall not apply to a procurement for a
2 construction or design-build contract that is exempt from
3 protest under section 103D-A."

4 SECTION 6. Section 103D-709, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "**§103D-709 Administrative proceedings for review.** (a)

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

10 (1) Review and determine de novo, any request from any
11 bidder, offeror, contractor, or person aggrieved under
12 section 103D-106, or governmental body aggrieved by a
13 determination of the chief procurement officer, head
14 of a purchasing agency, or a designee of either
15 officer under section 103D-310 [~~, 103D-701,~~] or 103D-
16 702 [~~-~~] except that a determination of
17 nonresponsibility of a prospective offeror under
18 section 103D-310(b) shall not be subject to review
19 under this section if the procurement is exempt from
20 review pursuant to section 103D-A; and

21 (2) Review and determine, as provided in subsection (c),
22 any protest submitted under section 103D-701 from any

1 bidder, offeror, contractor, person, or governmental
2 body aggrieved by a determination of the chief
3 procurement officer, head of a purchasing agency, or a
4 designee of either officer.

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

8 (1) Hearings shall commence within twenty-one calendar
9 days of receipt of the request. The hearings officers
10 shall have power to issue subpoenas, administer oaths,
11 hear testimony, find facts, make conclusions of law,
12 and issue a written decision which shall be final and
13 conclusive unless a person or governmental body
14 adversely affected by the decision commences an appeal
15 in the circuit court of the circuit where the case or
16 controversy arises under section 103D-710. Hearings
17 officers shall issue written decisions not later than
18 forty-five days from the receipt of the request under
19 subsection (a) (1);

20 (2) The party initiating the proceeding shall have the
21 burden of proof, including the burden of producing
22 evidence as well as the burden of persuasion. The

1 degree or quantum of proof shall be a preponderance of
2 the evidence. All parties to the proceeding shall be
3 afforded an opportunity to present oral or documentary
4 evidence, conduct cross-examination as may be
5 required, and present argument on all issues involved.
6 Fact finding under section 91-10 (1) through (4) shall
7 apply;

8 (3) The hearings officers shall ensure that a record is
9 compiled of each proceeding which shall include the
10 following:

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

12 (B) Evidence received or considered, including oral
13 testimony, exhibits, and a statement of matters
14 officially noticed;

15 (C) Offers of proof and rulings thereon;

16 (D) Proposed findings of fact; and

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

20 (4) The hearings officer shall decide whether the
21 determinations of the chief procurement officer or the
22 chief procurement officer's designee are in accordance

1 with the state constitution, statutes, rules, and the
2 terms and conditions of the solicitation or contract,
3 and shall order such relief as may be appropriate in
4 accordance with this chapter.

5 ~~[(c) Only parties to the protest made and decided pursuant~~
6 ~~to sections 103D-701, 103D-709(a), 103D-310(b), and [103D-~~
7 ~~702(g)] may initiate a proceeding under this section. The party~~
8 ~~initiating the proceeding shall have the burden of proof,~~
9 ~~including the burden of producing evidence as well as the burden~~
10 ~~of persuasion. The degree or quantum of proof shall be a~~
11 ~~preponderance of the evidence. All parties to the proceeding~~
12 ~~shall be afforded an opportunity to present oral or documentary~~
13 ~~evidence, conduct cross-examination as may be required, and~~
14 ~~argument on all issues involved. The rules of evidence shall~~
15 ~~apply.~~

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

- 18 ~~(1) All pleadings, motions, intermediate rulings;~~
19 ~~(2) Evidence received or considered, including oral~~
20 ~~testimony, exhibits, and a statement of matters~~
21 ~~officially noticed;~~
22 ~~(3) Offers of proof and rulings thereon;~~

- 1 ~~(4) Proposed findings of fact;~~
- 2 ~~(5) A recording of the proceeding which may be transcribed~~
- 3 ~~if judicial review of the written decision is sought~~
- 4 ~~under section 103D-710.]~~

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

7 (1) Within ten calendar days of the filing of an
8 application for review pursuant to subsection (a) (2),
9 the chief procurement officer, head of a purchasing
10 agency, or a designee of either officer shall transmit
11 the record of the protest proceedings under section
12 103D-701 to the office of administrative hearings of
13 the department of commerce and consumer affairs;

14 (2) The review shall be scheduled as expeditiously as
15 practicable and be conducted based upon the record of
16 protest proceedings under section 103D-701, including
17 the briefs, and oral argument. New evidence or new
18 issues that were not raised in the proceedings before
19 the procuring agency shall not be introduced, except
20 that the hearings officer appointed to hear the case,
21 may admit new evidence if evidence offered is clearly

1 newly discovered evidence and material to the decision
2 on appeal; and
3 (3) No later than thirty days from the filing of the
4 application for administrative review, based upon
5 review of the record, the appointed hearings officer:
6 (A) Shall affirm the decision of the purchasing
7 agency;
8 (B) Remand the case with instructions for further
9 proceedings; or
10 (C) Reverse the decision, if substantial rights may
11 have been prejudiced because the findings,
12 conclusions, decisions, or orders of the
13 purchasing agency are found to be arbitrary,
14 capricious, fraudulent, or clearly erroneous in
15 view of the reliable, probative, and substantial
16 evidence on the whole record; provided that if an
17 application for review is not resolved by the
18 thirtieth day from the filing of the application,
19 the hearings officer shall lose jurisdiction and
20 the decision of the purchasing agency shall not
21 be disturbed.

1 (d) Any bidder, offeror, contractor, or person that is a
2 party to a protest of a solicitation or award of a contract
3 under section 103D-302 or 103D-303 that is decided pursuant to
4 section 103D-701 may initiate a proceeding under subsection (c);
5 provided that:

6 (1) For contracts with an estimated value of less than
7 \$1,000,000, the protest shall concern a matter with
8 estimated damage greater than \$10,000; and

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

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

16 (1) \$1,000 for a contract with an estimated value of less
17 than \$500,000;

18 (2) \$2,000 for a contract with an estimated value of at
19 least \$500,000, but less than \$1,000,000; or

20 (3) One-half of one per cent of the estimated value of the
21 contract or not more than \$10,000, whichever is less,

1 if the estimated value of the contract is \$1,000,000
2 or more.

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

8 (f) Only parties to proceedings under sections 103D-310,
9 103D-701, 103D-702, and 103D-709 may initiate a proceeding under
10 this section. All time limitations on actions, as provided for
11 in section 103D-712, shall remain in effect.

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

15 ~~[-(f)]~~ ~~The hearings officer shall decide whether the~~
16 ~~determinations of the chief procurement officer or the chief~~
17 ~~procurement officer's designee were in accordance with the~~
18 ~~Constitution, statutes, rules, and the terms and conditions of~~
19 ~~the solicitation or contract, and shall order such relief as may~~
20 ~~be appropriate in accordance with this chapter.]~~

21 ~~[-(g)]~~ (h) The policy board shall adopt ~~[such other]~~ rules
22 as may be necessary to ensure that the proceedings conducted

1 pursuant to this section afford all parties an opportunity to be
2 heard.

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

9 SECTION 7. Section 103D-710, Hawaii Revised Statutes, is
10 amended as follows:

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

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

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

18 "(e) [~~Upon~~] No later than thirty days from the filing of
19 the application for judicial review, based upon review of the
20 record the circuit court may affirm the decision of the hearings
21 officer issued pursuant to section 103D-709 or remand the case
22 with instructions for further proceedings; or it may reverse or

1 modify the decision and order if substantial rights may have
2 been prejudiced because the administrative findings,
3 conclusions, decisions, or orders are:

4 (1) In violation of constitutional or statutory
5 provisions;

6 (2) In excess of the statutory authority or jurisdiction
7 of the chief procurement officer or head of the
8 purchasing agency;

9 (3) Made upon unlawful procedure;

10 (4) Affected by other error of law;

11 (5) Clearly erroneous in view of the reliable, probative,
12 and substantial evidence on the whole record; or

13 (6) Arbitrary, or capricious, or characterized by abuse of
14 discretion or clearly unwarranted exercise of
15 discretion[-];

16 provided that if an application for judicial review is not
17 resolved on or before the thirtieth day from the filing of the
18 application, the circuit court shall lose jurisdiction and the
19 decision of the hearings officer shall not be disturbed. All
20 time limitations on actions, as provided for in section
21 103D-712, shall remain in effect."

1 SECTION 8. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun, before its effective date.

4 SECTION 9. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 10. This Act shall take effect on July 1, 2012;
7 provided that on June 30, 2014, this Act shall be repealed and
8 sections 103D-105, 103D-303(h), 103D-701, and 103D-709(a),
9 Hawaii Revised Statutes, shall be reenacted in the form in which
10 they read on June 30, 2012.

Report Title:

Procurement Code; Protest; Administrative Proceedings; Temporary Exemption from Protest and Administrative Review

Description:

Imposes time limits on 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. Temporarily authorizes the governor or a county mayor to exempt a procurement from protest concerning the procurement and administrative review of a non responsible offeror determination. Requires, as a condition of the exemption, that bids and proposals, but not trade secrets or other proprietary data, be released for public inspection. Effective July 1, 2012.

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