

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 5, 2013

TO: The Honorable Mele Carroll, Chair
House Committee on Human Services

The Honorable Della Au Belatti, Chair
House Committee on Health

FROM: Patricia McManaman, Director

SUBJECT: **H.B. 782 - RELATING TO THE AWARD OF CONTRACTS
UNDER CHAPTER 103F**

Hearing: Tuesday, February 5, 2013, 11:00 a.m.
Conference Room 329, State Capitol

PURPOSE: The purpose of the bill is to repeal existing protest procedures in Chapter 103F and replaces them with a procedure governing the award of health and human services contracts that will not involve the exercise of adjudicatory authority by the executive branch agency in order to bring Chapter 103F into compliance with recent decisions by the Hawaii Supreme Court.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) supports this Administration bill and defers to the Department of Attorney General on the technical aspects of this bill.

Thank you for the opportunity to testify on this bill.



STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

Date: 02/05/2013

Committee: House Health
House Human Services

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: HB 0782 RELATING TO THE AWARD OF CONTRACTS UNDER CHAPTER 103F.

Purpose of Bill: Repeals the existing protest procedures in chapter 103F, Hawaii Revised Statutes, and replaces them with a procedure governing the award of health and human services contracts that will not involve the exercise of adjudicatory authority by the executive branch agency in order to bring chapter 103F into compliance with recent decisions by the Hawaii Supreme Court.

Department's Position:
The DOE supports this bill.

The purpose of HB 782 is to align Hawaii's laws regarding the procurement of health or human services, chapter 103F, Hawaii Revised Statutes, with the Hawaii Supreme Court's decisions in Alakai Na Keiki v. Matayoshi, 127 Hawaii 263, 277 P.3d 988 (2012), and AlohaCare v. Dep't of Human Services, 127 Hawaii 76, 276 P.3d 625 (2012).

In these two cases, the Court held that existing 103F protest processes violated the doctrine of separation of powers by allowing the executive branch agency to exercise "judicial" or adjudicatory authority.

This bill is intended to remove any exercise of "judicial" or adjudicatory authority by the agency awarding contracts under chapter 103F, thus avoiding the separation of powers concerns expressed in Alakai and AlohaCare.

The DOE supports the need for a sound, coherent protest procedure that meet the needs of all parties involved and addresses concerns expressed by the Court.



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TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE
HOUSE COMMITTEES
ON
HUMAN SERVICES
AND
HEALTH

February 5, 2013

11:00 a.m.

HB 782

RELATING TO THE AWARD OF CONTRACTS UNDER CHAPTER 103F.

Chair Carroll, Chair Belatti, Vice-Chair Kobayashi, Vice-Chair Morikawa, and committee members, thank you for the opportunity to testify on HB 782. This bill proposes to repeal the existing protest process in HRS chapter 103F and replace it with a process by which the executive agency shall award health or human services procurement contracts without exercising any judicial or adjudicatory authority.

The State Procurement Office (SPO) opposes the protest process this bill proposes. Public procurement's primary objective is to provide vendors, contractors and service providers equal opportunity to compete for government contracts, and for purchasing agencies to award contracts in a fair manner, without favoritism, collusion or fraud. This bill creates an unfair protest process whereby the purchasing agency or the department awards contracts without regard to any objections received after the award recommendation. The award would be final and conclusive and there would be no protest of the contract award.

The protest process allows a party who is aggrieved of an award to protest a purchasing agency's failure to follow procurement statutes, rules, or the provisions of the request for proposals. It establishes a process for contesting an award. This bill would not allow fair and equitable due process to those applicants aggrieved on a contract award. By not allowing a protest process, the integrity of the public procurement process would be in question. Purchasing agencies could skew awards based on bias, prejudice, favoritism, etc., and the aggrieved party will have no recourse should the head of the purchasing agency or designee decide not to respond to comments received.

The SPO recommends that SECTIONS 2 and 3 of the bill be deleted, and chapter 103F, PART V. PROTESTS, section 103F-501 be amended, section 103F-502 be repealed, and new sections added to be appropriately designated, as follows:

§103F-501 Protested awards, paragraph (d), is amended to read:

(d) If the protest is not resolved by mutual agreement, the head of the purchasing agency, or a designee, shall promptly issue a decision in writing. The decision shall:

(1) State the reasons for the action taken; and

~~[(2) Inform the protesting person of the protestor's right to reconsideration as provided in this part.]~~

(2) Inform the protestor of the protestor's right to an administrative proceeding as provided in this part.

A copy of the written decision shall be mailed or otherwise furnished to the person who initiated the protest.

~~[**§103F-502 Right to request reconsideration.** (a) A request for reconsideration of a decision of the head of the purchasing agency under section 103F-501 shall be submitted to the chief procurement officer not later than five working days after the receipt of the written decision, and shall contain a specific statement of the factual and legal grounds upon which reversal or modification is sought.~~

~~(b) A request for reconsideration may be made only to correct a purchasing agency's failure to comply with section 103F-402 or 103F-403, rules adopted to implement the sections, or a request for proposal, if applicable.~~

~~(c) The chief procurement officer may uphold the previous decision of the head of the purchasing agency or reopen the protest as deemed appropriate.~~

~~(d) A decision under subsection (c) shall be final and conclusive.]~~

§103F-503 Award of contract suspended during a protest. In the event of a timely protest, or request for ~~[reconsideration,]~~ administrative review, no further action to award the contract until the issue is resolved shall be taken, unless the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect the health, safety, or welfare of a person, as provided by rules.

§103F- Administrative proceedings for review. (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any applicant aggrieved under sections 103F-401 or 103F-402.

(b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one days of receipt of the request. The hearings officer shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision, not later than forty-five days from the receipt of the request under subsection (a), that shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises.

(c) Only parties to the protest made and decided pursuant to sections 103F-401 or 103F-402 may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and present argument on all issues involved. Fact finding under section 91-10 shall apply.

(d) Any applicant or person that is a party to a protest of an award of a contract under section 103F-401 or 103F-402 that is decided pursuant to section 103F-501 may initiate a proceeding under this section; provided that:

- (1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or
- (2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

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

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;
- (2) \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

(f) The hearings officer shall ensure that a record of each proceeding which includes the following is compiled:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings of fact;

(5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103F- .

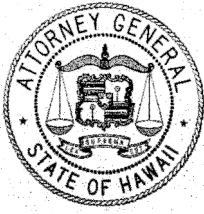
(g) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103F-503.

(h) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract and shall order such relief as may be appropriate in accordance with this chapter.

(i) The policy board shall adopt other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard.

(j) As used in this section, "estimated value of the contract" or "estimated value", with respect to an awarded contract, means the responsible applicant's responsive proposal determined in writing to be the most advantageous under section 103F-402, as applicable.

§103F- Time limitations on actions. Requests for administrative review under section 103F- shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs within seven days of the issuance of a written determination.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

H.B. NO. 782, RELATING TO THE AWARD OF CONTRACTS UNDER CHAPTER 103F.

BEFORE THE:

HOUSE COMMITTEES ON HEALTH AND ON HUMAN SERVICES

DATE: Tuesday, February 5, 2013 **TIME:** 11:00 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): David M. Louie, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chairs Belatti and Carroll and Members of the Committees:

The Department of the Attorney General strongly supports this measure. This is an administration measure, which is intended to bring the procurement of health and human services under chapter 103F, Hawaii Revised Statutes (HRS), into compliance with recent rulings from the Hawaii Supreme Court.

Generally, chapter 103D, HRS, governs the procurement of contracts made by state agencies for the procurement and disposal of goods or services or for construction. Unless it is otherwise authorized by law, all contracts are awarded by competitive sealed bidding. Aggrieved bidders have the right to request an administrative review of the agency determination using procedures similar to those set forth in the Administrative Procedure Act. Aggrieved parties to the administrative review proceedings may seek judicial review of the administrative decision. Agency decisions reviewed by the court carry a presumption of validity; thus, the court will review the administrative decision and may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if substantial rights may have been prejudiced because of the decision.

Chapter 103F, HRS, unlike chapter 103D, HRS, was intended to offer an expeditious method of finalizing health and human services contracts. Human service procurements are often used for services that cannot be delayed, such as securing health care providers for the needy, and providing services in the public schools for disabled students as required by federal law.

Section 103F-504, HRS, expressly provides that the procedures and remedies set forth in 103F were to be the “exclusive” means to resolve disputes. The Legislature’s intent, therefore, in enacting the 103F protest procedure was to have no judicial review.

Significantly, the existing chapter 103F, HRS, protest procedures were found to be unconstitutional in Alakai Na Keiki v. Matayoshi, 127 Hawaii 263, 277 P.3d 988 (2012), and AlohaCare v. Dep’t of Human Services, 127 Hawaii 76, 276 P.3d 625 (2012), as a violation of the doctrine of separation of powers. The Court reached this conclusion because the executive branch agency was acting in a “judicial” or adjudicatory capacity in deciding the procurement protest, and did so without judicial review by a court. (Alakai was the lead case for the separation of powers issue.) This bill omits the particular protest procedures found unconstitutional in Alakai (where the agency reviewed an otherwise final award) and replaces them with a new procedure, where the agency reviews a staff recommendation. This will allow the purchasing agency to award the contract without acting in a “judicial” or adjudicatory capacity, thereby making the preclusion of judicial review (which was the legislature's original intent) constitutional under Alakai.

Under Alakai, disappointed bidders for human services procurement contracts will be able to file a suit under the declaratory judgment statute, section 632-1, HRS, to challenge contract awards. In contrast to the usual methods of reviewing agency decisions (for example, under chapter 103D, HRS, or the Administrative Procedure Act), a declaratory judgment proceeding offers no deference to the purchasing agency’s decision. The declaratory judgment mechanism required by Alakai directly violates the legislative intent of 103F, by allowing a court to review (and possibly overturn) the agency’s decision. Under Alakai, however, not only is judicial review mandated, it is provided in a manner that fails to give deference to agency decisions.

If lengthy and expensive lawsuits are allowed (that is, if the declaratory judgment proceedings required by Alakai continue without change), it will increase the costs of providing services and delay or complicate the finalization of contracts. This bill preserves and restores the original legislative intent, through a staff recommendation, comment period, and award process, and does so while avoiding the separation of powers problem identified in Alakai. The comment process is intended to give interested parties an opportunity to bring any concerns to the agency’s

attention. The comment process is open to the public and therefore invites full comments and objections from any interested party. Because this open process could result in voluminous submissions, under the bill an agency may but need not respond to the comments submitted. This will avoid delay in awarding these contracts. The initial step is a staff recommendation only, and thus the agency's award of the contract does not involve any exercise of "judicial" or adjudicatory authority. Because bidders or others would comment on or object to only a staff recommendation (not a final decision on the contract award), the procuring agency, in considering those comments, will not be acting in a "judicial" or adjudicatory manner. This method of structuring the contract award process avoids the constitutional problems highlighted by the Hawaii Supreme Court in Alakai.

In addition to avoiding expensive litigation and unnecessary delay for state agencies, speedy awards of human services procurement contracts will benefit the public by allowing for better and quicker provision of services.

The Department of the Attorney General has proposed this measure because it is in direct response to recent rulings from the Hawaii Supreme Court. The more direct impact will be on the agencies that frequently award these kinds of contracts, that is, primarily the Department of Education, the Department of Health, and the Department of Human Services. The Department of the Attorney General consulted with these agencies in drafting this measure.

The Department strongly urges this Committee to pass this measure, to bring our human services procurement into compliance with the Hawaii Constitution as interpreted in Alakai, and simultaneously preserve and restore the original legislative intent to expedite procurements under chapter 103F.



AlohaCare

For a healthy Hawaii.

February 5, 2013
11:00 am
Conference Room 329

To: The Honorable Della Au Belatti, Chair
The Honorable Dee Morikawa, Vice Chair
House Committee on Health

The Honorable Mele Carroll, Chair
The Honorable Bertrand Kobayashi, Vice Chair
House Committee on Human Services

From: Paula Arcena, Director of Public Policy
Robert Toyofuku, Government Affairs

Re: HB782 Relating to the Award of Contracts Under Chapter 103F

Thank you for the opportunity to testify.

AlohaCare **opposes** HB782.

AlohaCare is a non-profit locally based health plan that primarily provides medical insurance to the Medicaid population of the State of Hawaii. As such, AlohaCare periodically goes through the procurement process of the State of Hawaii as administrated by the Department of Human Services.

This proposed legislation is designed to reverse two Hawaii Supreme Court cases that permit court review of this procurement process and most awards.

In order to understand AlohaCare's concerns, a review of the following would be helpful.

Current Health Services Procurement

- DHS and any state agency may request bids for a health related procurement under HRS103F.
- After the initial award, a bidder can lodge a protest of the contract award pursuant to HRS § 103F-501 to the head of the purchasing agency.
- If the head of the purchasing agency denies the protest, the dissatisfied bidder can submit, under HRS § 103F-502 a request for reconsideration to the Chief Procurement Officer.

- The review of the Chief Procurement Officer involves no hearings, witnesses, discovery, or evidence as such. In other words, it is a swift paper review.

Hawaii Supreme Court Decision

- Prior to the two Hawaii Supreme Court cases, there was no right of review of the decision of the Chief Procurement Officer.
- The Hawaii Supreme Court found DHS violated the doctrine of separation of powers; that is, the executive branch was acting as judge and jury over its own decisions.
- The Court ruled that there was a right of review of a procurement decision by way of a declaratory judgment case at the Circuit Court level.

Non-Health State Procurement

- In contrast with health services procurement, a different system applies to the more mundane procurements such as paving of a highway or buying a fleet of vehicles.
- From the decision of the Chief Procurement Officer, section 103D-709 H.R.S grants jurisdiction to hearings officers of the Department of Commerce and Consumer Affairs (DCCA) to review a decision of any “chief procurement officer.”
- If there is dissatisfaction with the decision of the DCCA hearings officer, a party may appeal to the Circuit Court for review (see HRS §103D-710).

Emergency Procurement

The State may argue in support of this legislation that a possible long procurement process and protest, like regular procurements, could jeopardize the health of the individuals receiving the procured services, and therefore the distinction between the two types of procurement systems are justified. However, there are two reasons why that argument fails.

- In both Chapter 103D (regular procurements) and Chapter 103F HRS (health procurements), there are specific provisions for emergency procurements which can expedite the granting of services.
- Under section 103F-406, the head of the purchasing agency can make purchases on expedited basis. And, under section 103D-307, the head of the purchasing agency can do likewise.
- Further, under a normal health procurement, when there is a request for reconsideration before the Chief Procurement Officer, the protest normally stays the award, but the Chief Procurement Officer can waive that requirement and

award the contract without delay if necessary to protect the health, safety, or welfare of a person, as provided by rules (see HRS 103F-503).

- Even without a waived stay, the Chief Procurement Officer has a very short time to make a decision (see Hawaii Administrative Rules section 3-148-402 (b) 15 days unless the officer gives notice otherwise).
- If the matter goes to the circuit court from the hearing officer's decision, there is no stay of the award.

Conclusion

The bottom line is -- health matters affect the most basic of human needs, and if the government is purchasing health services, it should be reviewed by an independent body just as the purchase of a vehicle or the paving of a highway.

Or to put another way, is it not better that a system that provides review of a bid that is seeking to provide better health care at the potentially lower cost, versus one that provides no review whatsoever?

Under any rational test, the review of the purchase of paving of a road should have less scrutiny than providing health care to the citizens of this State, not vice versa.

Finally, the ability to review of the Chief Procurement Officer's decision is consistent with judicial recognition that it is in the public interest to secure fair treatment of bidders and to promote the accountability of the procurement system (see, *In re Carl Corp. v. State*, 93 Hawaii 155, 172, 997 P.2d 567,584 (2000) recognizing the policy considerations underlying the procurement code).

We respectfully request the Committee hold this bill.

Thank you for this opportunity to testify.

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February 5, 2013



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Testimony on HB782 RELATING TO THE AWARD OF CONTRACTS UNDER CHAPTER 103F

Joint House Health and Human Services Committees

Tuesday, February 5, 2013, 11:00 a.m.

Conference Room 329, State Capitol

Testimony submitted by: Howard S. Garval, MSW, President & CEO, Child & Family Service

Aloha, Chairs Bellati and Carroll, Vice Chairs Morikawa and Kobayashi and Committee members. I am Howard S. Garval, President & CEO of Child & Family Service, Hawaii's oldest and largest human service nonprofit organization with services on every island and touching the lives of 40,000 Hawaii residents from keiki to kupuna each year. I am testifying in opposition to HB782. I am also on the State Procurement Policy Board.

Child & Family Service is the recipient of multiple Purchase of Service (POS) contracts with various state agencies under Chapter 103F. While the intent of the bill seems to have some legal or constitutional issues that the bill is designed to address, at least from my reading of the bill, the option to protest a contract award decision is eliminated and a 30-day public comment period is provided in its place. While this is a vehicle for presenting concerns, the state agency that made the award can ignore the comments and is not compelled to answer concerns raised in the 30-day period. While the concern is raised about delaying execution of contracts with the winning bidder and thereby delaying services that are needed, removing the option to protest the award decision seems to be an extreme approach. I have been party to a protest that actually led to the re-bidding of a particular contract. There needs to be a recourse for a bidder who believes the award process was flawed and this can be resolved in a reasonably short time frame. Therefore, the concern that services will be delayed due to the protest process is not necessarily the case. The state agency can extend the current provider's contract until the protest is resolved.

I am not an attorney and cannot speak to any constitutional or legal concerns, but as a frequent bidder on contracts under Chapter 103F for Health and Human Services, to completely eliminate the option of a protest deprives providers a recourse that they should have if they have reason to believe the award process was flawed.

Again, there may be compelling reasons for this bill to protect the state from lawsuits, but it appears to eliminate an important option for bidders who believe the process was flawed.

Mahalo for providing the opportunity to submit testimony.

With Aloha,

Howard S. Garval, MSW, President & CEO, Child & Family Service

