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S.B. NO. 1213

A Bill for an Act Relating to Procurement Filing Fee.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that procurement bid challenges often result in project delays, funding lapses, and project cost increases. These concerns have been partly addressed by the requirement that the department of commerce and consumer affairs' office of administrative hearings process and hear these cases within twenty-one days and issue decisions within forty-five days of the filing of the bid challenges. However, these proceedings can involve complex issues, multiple litigants, and days or weeks of hearing. To meet these strict deadlines and issue written decisions that can withstand appellate review, the department must assign these cases the highest priority in terms of time and resources. Hearings for other non-procurement cases must be delayed, and the hearings officers must commit substantial time to completing the bid challenge proceedings by the statutory deadlines.

The legislature further finds that even though the department has been tasked with this critical responsibility, it has received no appropriation of funds to defray the costs of these proceedings. As a result, these costs have been indirectly paid for by the license registration fees assessed by the department.

The purpose of this Act is to provide a funding mechanism to partially cover the costs to conduct bid challenge hearings by authorizing the department to assess a non-refundable filing fee upon the party initiating the bid challenge for contracts with an estimated value of \$500,000 or more.

SECTION 2. Section 103D-709, Hawaii Revised Statutes, is amended to read as follows:

“§103D-709 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 bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

(b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers 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 under section 103D-710.

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g) 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 bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 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) In addition to the bond required in subsection (e), the initiating party shall pay to the department of commerce and consumer affairs a non-refundable filing fee of:

- (1) \$200 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
- (2) \$1,000 for a contract with an estimated value of \$1,000,000 or more.

Failure to pay the filing fee shall result in the rejection or dismissal of the request for review. The fee shall be deposited into the compliance resolution fund established pursuant to section 26-9(o) and used to help defray the costs of conducting the administrative proceeding for review.

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

- (1) All pleadings, motions, and 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;

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(5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710.

~~[(g)]~~ (h) 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 103D-701(f).

~~[(h)]~~ (i) 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)]~~ (j) 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)]~~ (k) As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract, means the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

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

(Approved June 7, 2019.)