
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 SECTION 1. The purpose of this Act is to amend chapter
2 103F, Hawaii Revised Statutes, purchases of health and human
3 services, to add remedies comparable to those provided in
4 chapter 103D, Hawaii Revised Statutes, the Hawaii public
5 procurement code.

6 SECTION 2. Chapter 103F, Hawaii Revised Statutes, is
7 amended as follows:

8 1. By adding eight new sections to part V to be
9 appropriately designated and to read:

10 "§103F-A Solicitations or awards in violation of law. The
11 provisions of sections 103F-B and 103F-C apply where it is
12 determined by the chief procurement officer or a designee under
13 section 103F-502 or 103F-F, or administratively under section
14 103F-D, or upon judicial review under section 103F-E or judicial
15 action under section 103F-G, that a solicitation or award of a
16 contract is in violation of the law.

17 §103F-B Remedies prior to an award. If prior to an award
18 of contract it is determined that a solicitation or proposed



1 award is in violation of law, then the solicitation or proposed
2 award shall be:

3 (1) Cancelled; or

4 (2) Revised to comply with the law.

5 **§103F-C Remedies after an award.** If after an award of a
6 contract it is determined that a solicitation or award is in
7 violation of law, then:

8 (1) If the person awarded the contract has not acted
9 fraudulently or in bad faith:

10 (A) The contract may be ratified and affirmed, or
11 modified; provided it is determined that doing so
12 is in the best interests of the State; or

13 (B) The contract may be terminated and the person
14 awarded the contract shall be compensated for the
15 actual expenses, other than attorney's fees,
16 reasonably incurred under the contract, plus a
17 reasonable profit; provided that the expenses and
18 profit shall be determined as of the date of
19 termination;

20 and

21 (2) If the person awarded the contract has acted
22 fraudulently or in bad faith:



- 1 (A) The contract may be declared null and void; or
2 (B) The contract may be ratified and affirmed, or
3 modified, if the action is in the best interests
4 of the State, without prejudice to the State's
5 rights to such damages as may be appropriate.

6 §103F-D Administrative proceedings for review. (a) Any
7 hearings officer appointed pursuant to section 26-9(f) shall
8 have jurisdiction to review and determine de novo any request
9 for reconsideration under section 103F-502.

10 (b) Hearings to review and determine any request made
11 pursuant to subsection (a) shall commence within twenty-one
12 calendar days of receipt of the request. The hearings officer
13 shall have power to issue subpoenas, administer oaths, hear
14 testimony, find facts, make conclusions of law, and issue a
15 written decision which shall be final and conclusive unless a
16 party adversely affected by the decision commences an appeal in
17 the circuit court pursuant to section 103F-E.

18 (c) The party initiating the proceeding shall have the
19 burden of proof, including the burden of producing evidence as
20 well as the burden of persuasion. The degree or quantum of
21 proof shall be a preponderance of the evidence. All parties to
22 the proceeding shall be afforded an opportunity to present oral



1 or documentary evidence, conduct cross-examination as may be
2 required, and argument on all issues involved. The rules of
3 evidence shall 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; and

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

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

18 (f) The hearings officer shall decide whether the
19 determinations of the chief procurement officer or the chief
20 procurement officer's designee were in accordance with law, and
21 the terms and conditions of the solicitation or contract, and



1 shall order such relief as may be appropriate in accordance with
2 this part.

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

6 **§103F-E Judicial review.** (a) Only parties to proceedings
7 under section 103F-D who are aggrieved by a final decision of a
8 hearings officer may apply for judicial review of the decision.
9 The proceedings for review shall be instituted in the circuit
10 court of the circuit where the case or controversy arose.

11 (b) An application for judicial review shall not operate
12 as a stay of the decision rendered under section 103F-D.

13 (c) Within twenty calendar days of the filing of an
14 application for judicial review, the hearings officer shall
15 transmit the record of the administrative proceedings to the
16 circuit court.

17 (d) The review shall be scheduled as expeditiously as
18 practicable. It shall be conducted on the record of the
19 administrative proceedings, and briefs and oral argument. No
20 new evidence shall be introduced, except that the circuit court
21 may, if evidence is offered which is clearly newly discovered



1 evidence and material to the just decision of the appeal, admit
2 the same.

3 (e) Upon review of the record the circuit court may affirm
4 the decision of the hearings officer issued pursuant to section
5 103F-D or remand the case with instructions for further
6 proceedings; or it may reverse or modify the decision and order
7 if substantial rights may have been prejudiced because the
8 administrative findings, 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.



1 (f) Any party aggrieved by the decision of the circuit
2 court may appeal in accordance with part I of chapter 641 and
3 the appeal shall be given priority.

4 **§103F-F Authority to resolve contract and breach of**
5 **contract controversies.** (a) This section applies to
6 controversies between an agency and a contractor which arise
7 under, or by virtue of, a contract between them, including,
8 without limitation, controversies based upon breach of contract,
9 mistake, misrepresentation, or other cause for contract
10 modification or rescission.

11 (b) The chief procurement officer or a designee is
12 authorized, prior to commencement of an action in a court
13 brought pursuant to section 103F-G, to settle and resolve a
14 controversy described in subsection (a). This authority shall
15 be exercised in accordance with rules adopted by the policy
16 board.

17 (c) If such a controversy is not resolved by mutual
18 agreement, the chief procurement officer or a designee shall
19 promptly issue a decision in writing. The decision shall:

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

21 (2) Inform the contractor of the contractor's right to
22 initiate a judicial action as provided in this part.



1 (d) A copy of the decision under subsection (c) shall be
2 mailed or otherwise furnished immediately to the contractor.

3 (e) The decision under subsection (c) shall be final and
4 conclusive unless the contractor commences a judicial action in
5 accordance with section 103F-G.

6 (f) If the chief procurement officer or a designee does
7 not issue the written decision required under subsection (c)
8 within ninety days after written request for a final decision,
9 or within such longer period as may be agreed upon by the
10 parties, then the contractor may proceed as if an adverse
11 decision had been received.

12 **§103F-G Judicial action.** (a) Only parties to the
13 contract aggrieved by a decision issued pursuant to section
14 103F-F by a state chief procurement officer or a designee may
15 initiate an action under section 661-1.

16 (b) A person aggrieved by a decision issued pursuant to
17 section 103F-F by a county chief procurement officer or a
18 designee may initiate an action under, or by virtue of, the
19 contract in controversy in the circuit court.

20 (c) An agency aggrieved by a decision issued pursuant to
21 section 103F-F by a chief procurement officer or a designee may



1 initiate an action under, or by virtue of, the contract in
2 controversy in the circuit court.

3 (d) To the extent the remedies provided in this part,
4 including provisions for interest, differ from the remedies
5 available against the State under chapter 661, the remedies
6 shall be as provided in this part. Only the attorney general
7 may settle and resolve a matter filed in the courts against the
8 State pursuant to this section.

9 §103F-H Time limitations on actions. (a) Requests for
10 administrative review under section 103F-D shall be made
11 directly to the office of administrative hearings of the
12 department of commerce and consumer affairs within seven
13 calendar days of the issuance of a written determination under
14 section 103F-502.

15 (b) Requests for judicial review under section 103F-E
16 shall be filed in the circuit court of the circuit where the
17 case or controversy arose within ten calendar days after the
18 issuance of a written decision by the hearings officer under
19 section 103F-D.

20 (c) Complaints to initiate judicial actions under section
21 103F-G shall be filed in the circuit court within six months of
22 the issuance of a written determination under section 103F-F."



1 2. By amending the title of part V to read:

2 "Part V. [~~Protests~~] Legal and Contractual Remedies"

3 SECTION 3. Section 103F-102, Hawaii Revised Statutes, is
4 amended by adding two new definitions to be appropriately
5 inserted and to read as follows:

6 "Contractor" means any person having a contract with an
7 agency.

8 "Policy board" means the procurement policy board created
9 in section 103D-201."

10 SECTION 4. Section 103F-502, Hawaii Revised Statutes, is
11 amended as follows:

12 "~~+~~\$103F-502~~+~~ **Right to request reconsideration.** (a) A
13 request for reconsideration of a decision of the head of the
14 purchasing agency under section 103F-501 shall be submitted to
15 the chief procurement officer not later than five working days
16 after the receipt of the written decision, and shall contain a
17 specific statement of the factual and legal grounds upon which
18 reversal or modification is sought.

19 (b) A request for reconsideration may be made only to
20 correct a purchasing agency's failure to comply with section
21 103F-402 or 103F-403, rules adopted to implement the sections,
22 or a request for proposal, if applicable.



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

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

6 SECTION 5. Section 103F-504, Hawaii Revised Statutes, is
7 amended as follows:

8 "[~~+~~§103F-504~~+~~] **Exclusivity of remedies.** The procedures
9 and remedies provided for in this part, and the rules adopted by
10 the policy board, shall be the exclusive means available for
11 persons aggrieved in connection with the solicitation or award
12 of a contract, or in connection with a contract controversy, to
13 resolve their [~~concerns~~] claims or differences. The contested
14 case proceedings set out in chapter 91 shall not apply to
15 protested solicitations and awards, or the resolution of
16 contract controversies."

17 SECTION 6. In codifying the new sections added by section
18 3 of this Act, the revisor of statutes shall substitute
19 appropriate section numbers for the letters used in designating
20 the new sections in this Act.



1 SECTION 7. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 8. This Act shall take effect on July 1, 2007.



Report Title:

Procurement of Health and Human Services; Remedies

Description:

Adds to the Purchase of Health and Human Services laws, remedies comparable to those provided in the Hawaii Public Procurement Code. (HB1105 HD1)

