

## ACT 162

S.B. NO. 1101

A Bill for an Act Relating to Remedies of Part VII, Chapter 103D, Hawaii Revised Statutes.

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

SECTION 1. Section 103D-701, Hawaii Revised Statutes, is amended to read as follows:

**“[[§103D-701]] Authority to resolve protested solicitations and awards.** (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or [the head of a purchasing agency. The] a designee as specified in the solicitation. A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto[.]; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract either under section 103D-302 or 103D-303, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

(b) The chief procurement officer[, the head of a purchasing agency,] or a designee [of either officer], prior to the commencement of an administrative proceeding under section 103D-709 or an action in court [concerning the controversy,] pursuant to section 103D-710, may settle and resolve a protest [of an aggrieved bidder, offeror, or contractor, actual or prospective,] concerning the solicitation or award of a contract. This authority shall be exercised in accordance with rules adopted by the policy board.

(c) If the protest is not resolved by mutual agreement, the chief procurement officer[, the head of a purchasing agency,] or a designee [of either officer] shall promptly issue a decision in writing[.] to uphold or deny the protest. The decision shall:

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

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

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

(f) In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer[, after consultation with the head of the using agency, or the head of the purchasing agency,] makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State.

(g) In addition to any other relief, when a protest is sustained and the [protesting bidder or offeror] protestor should have been awarded the contract under the solicitation but is not, then the [protesting bidder or offeror] protestor shall be entitled to the [reasonable] actual costs reasonably incurred in connection with the solicitation, including bid or proposal preparation costs [other than] but not attorney's fees."

SECTION 2. Section 103D-702, Hawaii Revised Statutes, is amended to read as follows:

**"[§103D-702] Authority to debar or suspend.** (a) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the chief procurement officer [or the head of a purchasing agency], after consultation with the using agency and the [department of the] attorney general[, or corporation counsel, may debar a person for cause from consideration for award of all public contracts[.] and from performance on any public contract. The debarment period shall not [be for a period of more than] exceed three years. The same officer, after consultation with the using agency and the [department of the] attorney general[, or corporation counsel, may suspend a person from consideration for award of all public contracts and from performance on any public contract if there is probable cause for debarment. The suspension period shall not [be for a period exceeding] exceed three months. The authority to debar or suspend shall be exercised in accordance with the procedures prescribed by rules adopted by the policy board.

(b) The causes for debarment or suspension include the following:

- (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;
- (2) Conviction under state or federal statutes relating to embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a contractor;
- (3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (4) Violation of contract provisions, as set forth below, of a character which is regarded by the chief procurement officer [or the head of a purchasing agency] to be so serious as to justify debarment action:
  - (A) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
  - (B) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance

caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

- (5) Any other cause the chief procurement officer [or the head of a purchasing agency] determines to be so serious and compelling as to affect responsibility as a contractor, including debarment by another governmental entity for any cause listed in the rules of the policy board; and
- (6) Violation of the ethical standards set forth in chapter 84 and its implementing rules, or the charters and ordinances of the several counties and their implementing rules.

(c) The chief procurement officer [or the head of a purchasing agency] shall issue a written decision to debar or suspend. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the debarred or suspended person involved of [its] the person's rights to review as provided in this part.

(d) A copy of the decision under subsection (c) shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(e) The chief procurement officer shall transmit a copy of the decision to debar or suspend a contractor to the state procurement office, which shall distribute a list to all governmental bodies containing the names of persons or firms debarred or suspended from consideration for award of all public contracts [by the State.] and from performance on any public contract.

(f) Upon written notification under subsection (e), the chief procurement officer shall make a written determination whether to allow the debarred or suspended person or firm to continue performance on any contract awarded prior to the effective date of the debarment or suspension.

[f)] (g) A decision under subsection (c) shall be final and conclusive, unless [fraudulent, or] the debarred or suspended person commences an administrative proceeding under section 103D-709."

SECTION 3. Section 103D-703, Hawaii Revised Statutes, is amended as follows:

1. By amending subsections (b) and (c) to read:

"(b) The chief procurement officer[, the head of a purchasing agency,] or a designee [of either officer] is authorized, prior to commencement of an action in a court [concerning the controversy,] brought pursuant to section 103D-711, to settle and resolve a controversy described in subsection (a). This authority shall be exercised in accordance with rules adopted by the policy board.

(c) If such a controversy is not resolved by mutual agreement, the chief procurement officer[, the head of a purchasing agency,] or [the] a designee [of either officer] shall promptly issue a decision in writing. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the contractor of [its] the contractor's right to initiate a judicial action as provided in this part."

2. By amending subsections (e) and (f) to read:

"(e) The decision under subsection (c) shall be final and conclusive unless [fraudulent, or] the contractor commences a judicial action in accordance with section 103D-711.

(f) If the chief procurement officer[, the head of the purchasing agency,] or [the] a designee [of either officer] does not issue the written decision required under subsection (c) within ninety days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received."

SECTION 4. Section 103D-705, Hawaii Revised Statutes, is amended to read as follows:

“**[§103D-705] Solicitations or awards in violation of law.** The provisions of section 103D-706 and section 103D-707 apply where it is determined [administratively] by the chief procurement officer or a designee under [sections] section 103D-701[,], or 103D-703[, and] or where it is determined administratively under section 103D-709, or upon judicial review [or action] under [sections] section 103D-710 [and] or judicial action under section 103D-711, that a solicitation or award of a contract is in violation of the law.”

SECTION 5. Section 103D-707, Hawaii Revised Statutes, is amended to read as follows:

“**[§103D-707] Remedies after an award.** If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
  - (A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or
  - (B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, [prior to the] with such expenses and profit calculated not for the entire term of the contract but only to the point of termination;
- (2) If the person awarded the contract has acted fraudulently or in bad faith:
  - (A) The contract may be declared null and void; or
  - (B) The contract may be ratified and affirmed, or modified, if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate.”

SECTION 6. Section 103D-708, Hawaii Revised Statutes, is amended to read as follows:

“**[§103D-708] Interest.** Interest on amounts ultimately determined to be due to a contractor or the [State] governmental body shall be payable at the statutory rate applicable to judgments against the State under chapter 662 from the date the governmental body receives notice of the written claim [arose] through the date of decision or judgment, whichever is later[.]; except that if an action is initiated in circuit court pursuant to section 103D-711, interest under this section shall only be calculated until the time such action is initiated.”

SECTION 7. Section 103D-709, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (c) to read:

“(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(f) 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 argument on all issues involved. The rules of evidence shall [be strictly adhered to.] apply.”

2. By amending subsection (f) to read:

“(f) [Hearings officers] The hearings officer shall decide whether the determinations of the chief procurement officer or the [head of the purchasing agency, or their respective designees] chief procurement officer’s designee were in accordance with the Constitution, statutes, [regulations,] 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.”

SECTION 8. Section 103D-710, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) [Any person or governmental body] Only parties to proceedings under section 103D-709 who are aggrieved by a final decision of a hearings officer under that section [103D-709] may apply for judicial review of that decision. The proceedings for review shall be instituted in the supreme court.”

SECTION 9. Section 103D-711, Hawaii Revised Statutes, is amended by amending subsections (a), (b), and (c) to read as follows:

“(a) [A person] Only parties to the contract aggrieved by a decision issued pursuant to section 103D-703 by a state chief procurement officer or [head of a purchasing agency] a designee may initiate an action under section 661-1.

(b) A person aggrieved by a decision issued pursuant to section 103D-703 by a county chief procurement officer or [head of a purchasing agency] a designee may initiate an action under, or by virtue of, the contract in controversy in the circuit court.

(c) A governmental body aggrieved by a decision issued pursuant to section 103D-703 by a state or county chief procurement officer or [head of a purchasing agency] a designee may initiate an action under, or by virtue of, the contract in controversy in the circuit court.”

SECTION 10. Section 103D-712, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Requests for administrative review under section 103D-709 shall be made directly to the office of administrative hearings of the department of commerce and consumer affairs within seven calendar days of the issuance of a written determination under [sections] section 103D-310, 103D-701, or 103D-702.”

SECTION 11. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 12. This Act shall take effect on July 1, 1999.

(Approved June 28, 1999.)