

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 JUL 26 A 10:15

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

HEARINGS OFFICE

In the Matter of)	PDH-2012-001
)	
DERRICK'S WELL DRILLING AND PUMP SERVICES, LLC,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION; EXHIBIT "A"
)	
Petitioner,)	
)	Senior Hearings Officer:
vs.)	David H. Karlen
)	
COUNTY OF MAUI, DEPARTMENT OF FINANCE,)	
)	
Respondent.)	
_____)	

**HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION**

I. INTRODUCTION

By petition submitted July 3, 2012, Petitioner Derrick's Well Drilling and Pump Services, LLC, (hereinafter "Petitioner" or "Derrick's Well Drilling") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PDH-2012-001. Respondent was the County of Maui, Department Finance (hereinafter "Respondent" or "County").

Petitioner did not include or file any bond with its RFAH.

A Notice of Hearing and Pre-Hearing Conference was filed on July 3, 2012. A pre-hearing conference was set for July 16, 2012 and a hearing was set for July 24, 2012.

On July 13, 2006, Respondent filed its Pre-Hearing Conference Statement. This statement did not mention Petitioner's failure to file a bond.

A Pre-Hearing Conference in this matter was held on July 16, 2012. Petitioner was represented by Wray H. Kondo, Esq. The Respondent was represented by Thomas Kolbe, Esq. A Pre-Hearing Order was filed on July 16, 2012.

At the Pre-Hearing Conference, the Hearings Officer requested that the parties file memoranda concerning the failure of Petitioner to file a bond with the RFAH filed July 3, 2012. In addition, with the agreement of both parties, the hearing in the matter was bifurcated so that only motions would be considered on July 24, 2012. If, after these motions were heard, an evidentiary hearing was still necessary, that evidentiary hearing would commence on July 25, 2012.

On July 18, 2012, Petitioner filed a cash Procurement Protest Bond in the amount of \$1,000.00. On July 18, 2012, Petitioner also filed its Memorandum Regarding Act 173 [2012] Bond Requirement.

On July 18, 2012, Respondent filed by e-mail its Motion to Dismiss Untimely Appeal and its Motion to Dismiss Appeal.

On July 23, 2012, Petitioner filed its Memorandum in Opposition to Respondent's Motion to Dismiss Untimely Appeal and its Memorandum in Opposition to Respondent's Motion to Dismiss Appeal.

On July 23, 2012, Respondent filed by e-mail its Reply to Petitioner's Memorandum Regarding Act 173 [2012] Bond Requirement.

Respondent's motions came on for hearing on July 24, 2012. Thomas Kolbe, Esq., represented the Respondent. Wray H. Kondo, Esq., and Summer H. Fergerstrom, Esq., represented Petitioner.

Respondent's Motion to Dismiss Untimely Appeal was heard first. At the conclusion of argument on that Motion, the Hearings Officer orally granted Respondent's Motion. In

view of that decision, there was no need for argument or a ruling on Petitioner's Motion to Dismiss Appeal, and the Hearings Officer orally dismissed that motion as moot.

This Decision, based on the record as of the conclusion of oral argument on July 24, 2012, more fully sets forth those rulings and stands as the formal order with respect to both of the aforesaid motions.

As a result of the ruling on the Respondent's Motion to Dismiss Untimely Appeal, all issues in the case were resolved, and there was no need for an evidentiary hearing.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. The County posted its Invitation to Bidders, Job No. IFB# DWSP 202-14, for bidders to "[f]urnish of all labor, tools, materials, equipment to remove and replace the existing line shaft deep well pumps with submersible pumps at Hamakuapoko Well 1 (5420-20) and Well 2 (53200-01) for the Department of Water Supply, County of Maui ("IFB").
2. Sealed bids were to be received by the County on or before May 8, 2012, at 10:00 a.m.
3. On May 7, 2012, in response to the IFB, Petitioner submitted its proposal for the project.
4. At the bid opening, Petitioner's bid at \$280,000.00 was the lowest submitted bid.
5. The next lowest bid was submitted by Beylik Drilling & Pump in the amount of \$461,570.00.
6. By letter dated May 21, 2012, the County rejected Petitioner's bid for the project on the basis that Petitioner's bid was non-responsive.

7. By letter dated May 24, 2012, Petitioner submitted to the County its formal protest in response to the County's rejection of Petitioner's bid.

8. By letter dated June 25, 2012, and mailed on June 26, 2012, the County denied Petitioner's Protest.

9. By letter dated June 29, 2012, and received and filed by the Office of Administrative Hearings ("OAH") on July 3, 2012, Petitioner requested an administrative review in this matter ("RFAH").

10. Petitioner did not submit or file a bond with its RFAH.

11. On the morning of July 18, 2012, Petitioner submitted to the OAH a cash Procurement Protest Bond in the amount of \$1,000.00.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

Respondent's Motion to Dismiss Untimely Appeal is based on HRS §103D-709.

The scope of the Department of Commerce and Consumer Affairs' ("DCCA") jurisdiction to hear and decide an administrative review of a procurement decision is set forth in HRS §103D-709(a), which provides that:

(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, 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.
(Emphasis supplied)

On June 27, 2012, Governor Neil Abercrombie signed into law HB2265 HD2 SD2 CD1, now known as Act 173 of the 2012 Legislature. Pursuant to Section 7 of Act 173, the

effective date of Act 173 was June 30, 2012, a Saturday. A copy of Act 173 of the 2012 Legislature is attached hereto as Exhibit "A"

Act 173 modified subsections (d) and (e) of HRS §103D-709 to read as follows:

(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.

Act 173 made two other major changes to the procurement protest process: (1) it modified HRS §103D-709(b) to require the hearings officer to conclude the protest matter within 45 days of the receipt of the RFAH; and (2) it modified HRS §103D-710(e) to require any application for judicial review in the circuit court to be concluded within 30 days or the circuit court would lose jurisdiction and the hearings officer's decision would not be disturbed.

Petitioner has contended that Act 173 was not in effect when Petitioner prepared its RFAH on June 29, 2012. However, the parties herein agree, and the Hearings Officer independently concludes, that Act 173 was in effect when the RFAH was filed on July 3, 2012.

Act 173 was designed to accomplish two purposes with respect to procurement protests:

(a) It was designed to reduce the number of protests by establishing a minimum threshold amount at issue and by requiring protestors to stand by their protests rather than filing them for delay purposes or for other perceived strategic reasons. To accomplish the latter requirement, it required the posting of a bond, i.e., the protestor had to “put its money where its mouth was.”

(b) It was designed to speed up the protest process by putting time limits on both proceedings before the hearings officer and on appeals to the circuit court.

The various portions of Act 173 were all part of a “package” and cannot be considered in isolation.

The statutory changes made by Act 173 of the 2012 were essentially identical to amendments to HRS §§103D-709 and 103D-710 made by Act 175 of the 2009 legislature. The statutory changes made by Act 175 were in effect for two years and “sunsetting” as of June 30, 2011.

Under HRS §103D-712(a), there is a strict time limit for filing procurement protests:

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 section 103D-310, 103D-701, or 103D-702.

“Issuance” as used in HRS §103D-712(a) means the date of mailing, as evidenced by the postmark. Nihi Lewa, Inc. v. Dept. of Budget and Fiscal Services, 103 Haw. 163, 80 P.2d 984 (2003). Because the County’s denial of Petitioner’s protest was not mailed until June 26, 2012, although dated June 25, 2012, the County’s denial was “issued” June 26, 2012. Filing of the RFAH on July 3, 2012 was therefore within seven calendar days of the issuance of the County’s denial of Petitioner’s protest.

Petitioner contends that the bond is not required by the terms of Act 173 to be filed within the seven calendar days required for the filing of the RFAH by HRS §103D-712(a). Petitioners' Memorandum in Opposition to Respondent's Motion to dismiss Untimely Appeal, pages 5-7. However, the filing of an RFAH must be complete within that seven calendar day period. For example, a procurement protest is not like civil litigation in circuit court with notice pleading and a discovery process to determine the basis of a complaint's allegations—the full basis of the protest must be stated at the outset. Ali'i Security Systems, Inc. v. Department of Transportation, State of Hawaii, PCY 2012-002 (February 24, 2010).¹ The issue then is whether an RFAH is complete when no bond is filed within that seven calendar day period.

In addition, HRS §103D-712(a) is a timeliness provision and one of three component subparts of HRS §103D-712 which is entitled “time limitations on actions.” Subpart (b) of that statute concerns timeliness of requests for judicial review of a hearings officer's decision, and subpart (c) concerns the time limits for filing a court action to review procurement officers' decision on breach of contract claims. There is no reason to expect a statute focusing on timeliness in three different contexts to also define the scope of a “request for administrative review.”

Attention should instead be directed to the terms of HRS §103D-709 as amended by Act 173 where the bond requirement is found. Read together, as they must, subpart (d) limits requests for hearings that may be “initiated” to those of a certain minimum monetary value, and subpart (e) states that those “initiating” such a protest meeting the minimum monetary

¹ HAR §3-126-4(b)(1) requires an RFAH to be filed with “supporting exhibits, evidence, or documents to substantiate the protest.” Since this rule was adopted in 1991, it does not refer to a bond which was not required, at the earliest, until 2009. Nevertheless, it is instructive that all documentation to substantiate the protest must be submitted with the RFAH.

threshold must submit a bond. The use of a form of the word “initiate” in both subparts strongly supports the conclusion that the required bond must be filed when the protest is “initiated.”

Such a reading is consistent with the legislative intent to impose restrictions limiting the number of bid protests. In the usual case, a procurement protest stops the procurement process in its tracks and stays all procurement actions, including the award of a contract, until the OAH hearing has concluded. HRS §§103D-701(f) and 103D-709(g). It would make no sense to pass a law ostensibly limiting protests, and thus limiting the imposition of automatic procurement stays, but at the same time allow the necessary protest bond to be filed at any time before a final hearings officer decision is issued. Such an interpretation would allow a protestor to file with OAH for purposes of delay and/or harassment and avoid filing a bond throughout the course of the entire OAH proceeding. Dismissal at the end of the proceeding (either on the merits or for lack of a bond) would impose no monetary consequence on such a protestor. This is hardly consistent with the legislative intent of requiring a protestor to “put their money where their mouth is.”

Petitioner urges a contrary interpretation based on Madden v. Madden, 43 Haw. 148 (1959), which interpreted a version of Rule 73, Hawaii Rules of Civil Procedure, that has now been “deleted” and is no longer in existence. In that case, the late filing of a cost bond on appeal did not automatically warrant a dismissal of the appeal. Instead, a court “may or may not” dismiss the appeal depending on the circumstances. In the Madden case, the Court held dismissal of the appeal was not warranted. In Clifford v. Clifford, 43 Haw. 48 (1958), and In re Matthewman, 43 Haw. 90 (1959), late filings of the cost bond contributed to the dismissals of the appeals.

At oral argument on the County’s Motion, Petitioner was unable to articulate a proposed definite standard as to when being late with a protest bond was too late or what

circumstances would excuse being late. Under the Madden holding and Petitioner's proposed procedure, each case would be decided on its own *ad hoc* basis. A procurement protest, however, is not a private affair but is subject to important public policy considerations such as limiting the number of protests to those that involve a minimum amount at stake and those where the protestor is willing to back up its protest with a monetary amount that could be lost. The Hearings Officer does not believe that these purposes, plus the purpose of expediting protests, that are behind Act 173 were envisioned by the Legislature to involve *ad hoc* mini-trials on a side issue not directly tied to the merits of the protest.

Further, despite Petitioner's repeated assertions at oral argument that the procurement protest bond is a "costs bond" (which would give it some similarity to the bond involved in the Madden case), the procurement protest bond is decidedly not a "cost bond." It does not go to pay any costs of the prevailing party. It does not go to paying any costs incurred by the OAH or the DCCA. Instead, pursuant to the terms of HRS §103D-709(e), if the protestor does not prevail the cash or protest bond "shall be deposited into the general fund."² In keeping with the purposes of Act 173, the bond is analogous to a very substantial filing fee that might be later refundable, but its initial purpose is to reduce the number of bid protests to those "serious" enough to put up the filing fee.³ This filing fee concept is in fact further support for the conclusion that the bond must be filed at the initiation of the request for hearing with the OAH.⁴

² The Hearings Officer takes judicial notice that the DCCA is "self funded" and does not depend upon appropriations from the general fund. Thus, the DCCA does not share or receive any benefit from any bond proceeds deposited into the general fund.

³ Under the former version of HRS §103D-709, outside of the two years when Act 175 was in effect, no fee was required to file an RFAH with the OAH.

⁴ An appellate cost bond is used to compensate the prevailing party at the conclusion of the appeal. The decidedly slower timetable of an appeal as involved in the Madden case has no parallel in a procurement protest hearing before the OAH with its 45 day limit.

The parties and the Hearings Officer are aware, of course, of the prior OAH decision in Friends of He'eia State Park v. Department of Land and Natural Resources, State of Hawaii, PCX 2009-4 (November 19, 2009), which was decided on very similar, although not identical facts under the provisions of then-effective Act 175 of the 2009 Legislature. The essence of this decision is that a bond must be filed with the OAH along with the request for hearing within the seven calendar day limit of HRS §103D-712(a).

The legal analysis by the Hearings Officer set forth above in this Decision does not depend upon the Friends of He'eia decision. However, the Hearings Officer agrees with the Friends of He'eia decision. While the Hearings Officer is not necessarily bound by that decision, the Hearings Officer sees no reason for disagreement. Although Petitioner strenuously argues that the decision should be of no effect, primarily by invoking the principles of Madden v. Madden, as has already been stated above, the Hearings Officer is not persuaded by that approach.

The jurisdiction of a hearings officer to consider and decide procurement protests under HRS §103D-709(a) is not unlimited but is instead constrained by other provisions in HRS §103D-709 such as the bond provision that is the focus of this proceeding. The question of lack of jurisdiction can be raised at any time in procurement protest proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural resources, 113 Haw. 184, 193,-194, 150 P.3d 833, 842-843 (Haw. 2006); Koga Engineering & Construction, Inc., v. State of Hawaii, 122 Haw.60, 84, 222 P.3d 979, 1003 (Haw. 2010); Kiewit Infrastructure West Co., v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (June 6, 2011), Exhibit "B" at page 5. Following the practice of the Hawaii Supreme Court in the Koga Engineering case, when jurisdiction issues arise after the initiation of the proceeding, the parties are

entitled to notice and an adequate time to prepare arguments on the jurisdiction issue. Kiewit Infrastructure West Co., v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (June 6, 2011), Exhibit "B" at page 5. Here, the parties were informed of the jurisdictional issue at the pre-hearing conference and provided an opportunity to research and brief the issue. Neither party requested additional time in which to file their memoranda.

Accordingly, the County's Motion to Dismiss Untimely Appeal should be granted. The granting of this Motion makes the County's Motion to Dismiss Appeal, which argues the substantive aspects of the protest, moot.

The DCCA lacks jurisdiction to hear and consider Petitioner's RFAH herein.

Petitioner's untimely filed bond should be returned to under the conditions set forth in the Friends of He'eia Park decision.

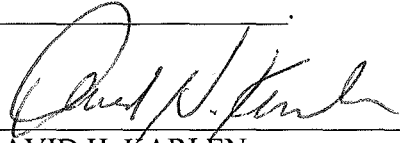
III. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. The County's Motion to Dismiss Untimely Appeal is granted.
- b. The County's Motion to Dismiss Appeal is dismissed as moot.
- c. Petitioner's Request for Administrative Hearing herein is dismissed with prejudice for lack of jurisdiction.
- d. Because the Hearings Officer lacks jurisdiction to hear this matter, Petitioner's untimely filed bond shall be returned to Petitioner upon the filing of a declaration by Petitioner or its counsel attesting that the time to appeal has lapsed and that no appeal has been timely filed. In the event a timely application for judicial review of this decision is filed, the disposition of the bond shall be subject to any determination by the court.
- e. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

JUL 26 2012

DATED: Honolulu, Hawaii, _____.



DAVID H. KARLÉN

Senior Hearings Officer

Department of Commerce and Consumer Affairs



GOV. MSG. NO. 1276

EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

June 27, 2012

The Honorable Shan Tsutsui, President
and Members of the Senate
Twenty-Sixth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Calvin Say, Speaker
and Members of the House
Twenty-Sixth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

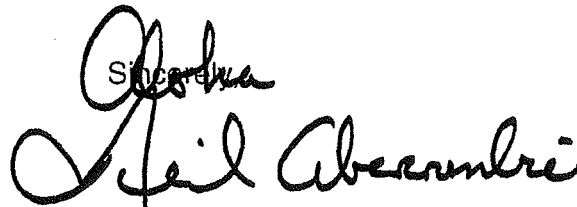
Dear President Tsutsui, Speaker Say and Members of the Legislature:

This is to inform you that on June 27, 2012, the following bill was signed into law:

HB2265 HD2 SD2 CD1

RELATING TO THE STATE PROCUREMENT
CODE.

Act 173 (12)



NEIL ABERCROMBIE
Governor, State of Hawaii

EXHIBIT A

Approved by the Governor

ORIGINAL

ACT 173

JUN 27 2012

On _____
HOUSE OF REPRESENTATIVES
TWENTY-SIXTH LEGISLATURE, 2012
STATE OF HAWAII

H.B. NO. 2265
H.D. 2
S.D. 2
C.D. 1

A BILL FOR AN ACT

RELATING TO THE STATE PROCUREMENT CODE.

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."

9 SECTION 2. Section 103D-305, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "§103D-305 Small purchases; prohibition against parceling.

12 (a) Procurements of less than \$100,000 for goods or services,
13 or \$250,000 for construction shall be made in accordance with
14 procedures set forth in rules adopted by the policy board that
15 are designed to ensure administrative simplicity and as much
16 competition as is practicable; provided that multiple
17 expenditures shall not be created at the inception of a
18 transaction or project so as to evade the requirements of this



1 chapter; and provided further that procurement requirements
2 shall not be artificially divided or parceled so as to
3 constitute a small purchase under this section.

4 (b) Procurements [~~e~~] greater than \$50,000 for
5 construction under subsection (a) shall require security by [~~a~~]
6 performance [~~bond~~] and payment bonds, pursuant to section
7 103D-324, delivered to the [~~purchasing agency~~] procurement
8 officer, that [~~is~~] are:

9 (1) In a form prescribed by the rules of the policy board;

10 (2) Executed by a surety company authorized to do business
11 in this State; and

12 (3) In an amount equal to one hundred per cent of the
13 price specified in the contract,

14 or shall otherwise be secured by a performance bond in a manner
15 satisfactory to the [~~purchasing agency~~] procurement officer.

16 (c) Procurements of \$25,000 to less than [~~\$100,000~~]
17 \$250,000 shall be made in accordance with small purchase
18 procedures; provided that such small purchase procurements
19 through an electronic system shall be required [~~after the policy~~
20 ~~board has adopted rules for electronic procurement and provided~~
21 ~~training to the affected agency]."~~



1 SECTION 3. Section 103D-709, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§103D-709 Administrative proceedings for review. (a)
4 The several hearings officers appointed by the director of the
5 department of commerce and consumer affairs pursuant to section
6 26-9(f) shall have jurisdiction to review and determine de novo,
7 any request from any bidder, offeror, contractor, or person
8 aggrieved under section 103D-106, or governmental body aggrieved
9 by a determination of the chief procurement officer, head of a
10 purchasing agency, or a designee of either officer under section
11 103D-310, 103D-701, or 103D-702.

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



1 (c) Only parties to the protest made and decided pursuant
2 to sections 103D-701, 103D-709(a), 103D-310(b), and [†]103D-
3 702(g) [†] may initiate a proceeding under this section. The
4 party initiating the proceeding shall have the burden of proof,
5 including the burden of producing evidence as well as the burden
6 of persuasion. The degree or quantum of proof shall be a
7 preponderance of the evidence. All parties to the proceeding
8 shall be afforded an opportunity to present oral or documentary
9 evidence, conduct cross-examination as may be required, and
10 present argument on all issues involved. [~~The rules of evidence~~
11 ~~shall apply.~~] Fact finding under section 91-10 shall apply.

12 (d) Any bidder, offeror, contractor, or person that is a
13 party to a protest of a solicitation or award of a contract
14 under section 103D-302 or 103D-303 that is decided pursuant to
15 section 103D-701 may initiate a proceeding under this section;
16 provided that:

- 17 (1) For contracts with an estimated value of less than
18 \$1,000,000, the protest concerns a matter that is
19 greater than \$10,000; or
- 20 (2) For contracts with an estimated value of \$1,000,000 or
21 more, the protest concerns a matter that is equal to



1 no less than ten per cent of the estimated value of
2 the contract.

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

6 (1) \$1,000 for a contract with an estimated value of less
7 than \$500,000;

8 (2) \$2,000 for a contract with an estimated value of
9 \$500,000 or more, but less than \$1,000,000; or

10 (3) One-half per cent of the estimated value of the
11 contract if the estimated value of the contract is
12 \$1,000,000 or more; provided that in no event shall
13 the required amount of the cash or protest bond be
14 more than \$10,000.

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

20 ~~[(d)]~~ (f) The hearings officers shall ensure that a record
21 of each proceeding which includes the following is compiled:

22 (1) All pleadings, motions, intermediate rulings;



- 1 (2) Evidence received or considered, including oral
2 testimony, exhibits, and a statement of matters
3 officially noticed;
- 4 (3) Offers of proof and rulings thereon;
- 5 (4) Proposed findings of fact;
- 6 (5) A recording of the proceeding which may be transcribed
7 if judicial review of the written decision is sought
8 under section 103D-710.

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

12 ~~[(f)]~~ (h) The hearings officer shall decide whether the
13 determinations of the chief procurement officer or the chief
14 procurement officer's designee were in accordance with the
15 Constitution, statutes, rules, and the terms and conditions of
16 the solicitation or contract~~[7]~~ and shall order such relief as
17 may be appropriate in accordance with this chapter.

18 ~~[(g)]~~ (i) The policy board shall adopt ~~[such]~~ other rules
19 as may be necessary to ensure that the proceedings conducted
20 pursuant to this section afford all parties an opportunity to be
21 heard.



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

7 SECTION 4. Section 103D-710, Hawaii Revised Statutes, is
8 amended as follows:

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

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

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

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



1 may have been prejudiced because the administrative findings,
2 conclusions, decisions, or orders are:

- 3 (1) In violation of constitutional or statutory
4 provisions;
- 5 (2) In excess of the statutory authority or jurisdiction
6 of the chief procurement officer or head of the
7 purchasing agency;
- 8 (3) Made upon unlawful procedure;
- 9 (4) Affected by other error of law;
- 10 (5) Clearly erroneous in view of the reliable, probative,
11 and substantial evidence on the whole record; or
- 12 (6) Arbitrary, or capricious, or characterized by abuse of
13 discretion or clearly unwarranted exercise of
14 discretion[-];

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



1 SECTION 5. Act 175, Session Laws of Hawaii 2009, section
2 14, as amended by section 1 of Act 107, Session Laws of Hawaii
3 2010, is amended to read as follows:

4 "SECTION 14. This Act shall take effect on July 1, 2009;
5 provided that[+]

6 ~~(1) Part I] section 1~~ shall be repealed on July 1, 2012,
7 and [sections] section 103D-102 [~~and 103D-305~~], Hawaii
8 Revised Statutes, shall be reenacted in the form in
9 which [~~they~~] it read on the day before the effective
10 date of this Act[+and

11 ~~(2) Sections 7, 9, and 10 of this Act shall be repealed on~~
12 ~~July 1, 2011, and sections 103D-709, 103D-710(c), and~~
13 ~~103D-710(e), Hawaii Revised Statutes, shall be~~
14 ~~reenacted in the form in which they read on the day~~
15 ~~before the effective date of this Act]."~~

16 SECTION 6. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 7. This Act shall take effect on June 30, 2012.



Report Title:

Procurement; Small Purchases; Electronic Procurement

Description:

Makes permanent the amendments made to section 103D-305, Hawaii Revised Statutes, by Act 175, Session Laws of Hawaii 2009. Amends section 103D-305, Hawaii Revised Statutes, to clarify procurement officer responsibilities; require procurements greater than \$50,000 for construction to require performance and payment bonds; and require procurements of \$25,000 to less than \$250,000 to be made in accordance with small purchase procedures. Reenacts the amendments made to sections 103D-709, 103D-710(c), and 103D-710(e), Hawaii Revised Statutes, by Act 175, Session Laws of Hawaii 2009. (CD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

