

Bid Protests in Hawaii

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The state of Hawaii provides a detailed statutory framework for protesting state procurements to ensure fairness, accountability, and transparency in the government contracting process. This article outlines the essential protest procedures under Hawaii Revised Statutes (HRS) Chapter 103D, including initial protest requirements, administrative hearings, and judicial review.

1. Who May Protest and When?

Under HRS § 103D-701, any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may file a protest. However, the protest must adhere to strict timelines:

- **General Deadline:** Within five working days of when the aggrieved party knew or should have known of the facts.
- **Award/Proposed Award Protests:** Must be submitted within five working days of the award posting (if no request for debriefing was made).
- **Solicitation Content Protests:** Must be filed before the offer due date.

Protests must be in writing and submitted to the chief procurement officer (CPO) or the designated official named in the solicitation.

Protesters are entitled to a stay of the procurement pre-award or a stay of performance post-award.

2. Resolution by the Procurement Officer

Before any formal administrative hearing, the CPO or designee has the authority to resolve protests under HRS § 103D-701(b). If mutual resolution fails, the CPO must issue a written decision that:

- States the reasons for the decision;
- Notifies the protester of the right to pursue an administrative hearing under HRS § 103D-709.

For construction or airport contracts, this decision must be issued within 75 calendar days, with a

possible 45-day extension for good cause.

Pending the CPO's decision, no further action may be taken on the contract unless the CPO issues a written determination that proceeding is necessary to protect substantial state interests.

3. Relief Available

If a protest is sustained, and the protester should have received the award, the protester is entitled to reasonable actual costs, including bid preparation costs—but not attorneys' fees.

4. Actions if a Procurement Is Found Unlawful

Before Award:

- If prior to award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award must be cancelled or revised to comply with the law.

After Award:

- If after an award it is determined that a solicitation or award of a contract is in violation of law, and if the contractor acted in good faith, the contract may be:
 - Ratified, affirmed, or modified, or
 - Terminated with compensation for work performed (excluding attorneys' fees).
- If the contractor acted fraudulently or in bad faith:
 - The contract may be voided, or
 - Ratified/modified with damages reserved to the state.

5. Administrative Review: Hearings Officers (HRS § 103D-709)

If the protest is denied, the aggrieved party may seek de novo administrative review from hearings officers appointed by the Department of Commerce and Consumer Affairs (DCCA):

- Hearings must begin within 21 days of request receipt.
- A written decision is required within 45 days.
- Only parties to the protest may initiate this review.
- The standard of proof is preponderance of the evidence.

Jurisdictional Thresholds:

- For contracts under \$1 million, the issue under protest must exceed \$10,000.
- For contracts \$1 million or more, the issue under protest must equal at least 10% of the estimated value.

Fees & Bonds:

- A protest bond of 1% of the estimated contract value is required.
- A non-refundable filing fee is also due:
 - \$200 for contracts ? \$500,000 but < \$1 million.

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- \$1,000 for contracts ? \$1 million.

Failure to pay results in dismissal. A frivolous or bad-faith protest may lead to forfeiture of the bond to the general fund.

6. Judicial Review (HRS § 103D-710)

Only parties aggrieved by the administrative decision may seek judicial review in the circuit court. Key rules include:

- Must be filed promptly; the court generally loses jurisdiction if not resolved within 30 days.
- The review is on the record only, with exceptions for newly discovered, material evidence.
- The court may affirm, reverse, remand, or modify the decision if there is a legal or procedural defect, or if the decision is arbitrary or clearly erroneous.

Conclusion

Hawaii's protest procedures are highly structured, requiring strict adherence to filing deadlines, jurisdictional thresholds, and procedural requirements. Contractors and offerors pursuing or defending against a protest should engage with counsel familiar with the nuances of HRS Chapter 103D and related administrative rules. Understanding this framework ensures that your rights as a bidder or offeror are preserved and effectively asserted throughout the procurement process.

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