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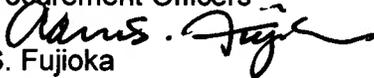
**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

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October 29, 2009

PROCUREMENT CIRCULAR NO. 2009-16

TO: Office of the Governor  
Office of the Lieutenant Governor  
Executive Department Heads  
State Librarian  
Chief Procurement Officers

FROM: Aaron S. Fujioka 

SUBJECT: ACT 175, SLH 2009: PART III, SECTIONS 7, 9 and 10  
Procurement Protests and Disputes

This circular is a follow-up to Procurement Circular No. 2009-07 on *2009 Procurement Related Legislation* for guidance and information on ACT 175, SLH 2009 effective as of July 1, 2009. PART III of ACT 175, SLH 2009 temporarily amends HRS § 103D-709 and § 103D-710 regarding the administrative and judicial review of protest decisions.

PART III of ACT 175, SLH 2009 amendments are:

SECTION 7 creates a new section requiring the State Procurement Office (SPO) to collect and maintain statistics of protested solicitations and awards for the purpose of improving procurement procedures. To implement the requirements of SECTION 7, further guidance will be forthcoming.

SECTION 9 amends HRS § 103D-709 regarding the administrative proceedings for the review of protest decisions by: 1) requiring hearings officers to conclude hearings and issue written decisions "... not later than forty-five days from receipt of the request [for review] ..."; 2) replacing the use of the rules of evidence with fact finding pursuant to HRS § 91-10; 3) requiring threshold amounts to be at issue to qualify for a review; and 4) requiring the aggrieved party to deposit with the Department of Commerce & Consumer Affairs (DCCA) cash or a protest bond to initiate a review.

SECTION 10 amends HRS § 103D-710 regarding the judicial review proceedings by: 1) requiring the hearings officer to transmit the administrative record within ten days of the filing for judicial review; 2) requiring the court to complete its review and issue a decision no later than thirty-days from the filing of an application for judicial review; and 3) removing jurisdiction from the court when the court fails to resolve its review within the thirty-days from the filing of the application for judicial review, with the result that the decision of the hearings officer is undisturbed.

The attached guidance is provided effective immediately.

PART III of ACT 175, SLH 2009 is scheduled to be repealed on July 1, 2011, at which time HRS §§ 103D-709 and 103D-710 shall revert to the prior forms which was in effect on June 30, 2009.

Your staff may contact Donn Tsuruda-Kashiwabara at 586-0565, or at [donna.tsuruda-kashiwabara@hawaii.gov](mailto:donna.tsuruda-kashiwabara@hawaii.gov) if they have any questions, or you may call me at 587-4700.

Attachments

**ATTACHMENT: Guidance for Appealing a Protest Decision of the Procurement Officer**

Procurement Officer (PO):

- I. When preparing a solicitation, include the following PROTEST provision, or similar language.

**SAMPLE: PROTEST provision to include in solicitation**

*Pursuant to HRS § 103D-701, an actual or prospective offeror who is aggrieved in connection with the solicitation or award of a contract may submit a protest. Any protest shall be submitted in writing to the Procurement Officer [ insert name, position, address ]*

*A protest shall be submitted in writing within five (5) working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest based upon the content of the solicitation shall be submitted in writing prior to the date set for receipt of offers. Further provided that a protest of an award or proposed award shall be submitted within five (5) working days after the posting of award of the contract.*

*The notice of award letter(s), if any, resulting from this solicitation shall be posted on the Procurement Reporting System on the SPO website: <http://www.hawaii.gov/spo2/source/>. [ amend to include location of notice ]*

- II. The PO's protest review process remains the same as prior to the passage of ACT 175, SLH 2009. However, ACT 175, SLH 2009 imposes additional requirements when the PO denies the protest and the protestor seeks to appeal the decision. When a protest is denied for a procurement conducted pursuant to HRS §§ 103D-302 competitive sealed bidding, or -303 competitive sealed proposals, the protestor may initiate an appeal of the protest decision to the DCCA only if the subject contract's estimated value:
  - A. Is less than \$1,000,000, and the protest concerns a matter that is greater than \$10,000; or
  - B. Is \$1,000,000 or more, and the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.
- III. The protestor must still be informed in writing (See attached SAMPLE Letter) of the protestor's right to an administrative review. When seeking an administrative review, the protestor is required by ACT175, SLH 2009 to provide DCCA with cash or protest bond in the amount of:
  - A. \$1,000 for a contract with an estimated value of less than \$500,000;
  - B. \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or
  - C. One-half (1/2) percent of the estimated contract value, if the contract is \$1,000,000 or more; but in any event the bond amount shall not exceed \$10,000.

In both items 2 and 3, the 'estimated value' means: for procurements pursuant to HRS § 103D-302, the lowest responsible and responsive bid; and for procurements pursuant to HRS § 103D-303, the amount of a responsible offeror's proposal that is determined to be the most advantageous.

A protest stays all activity on the protested procurement. No further action can be taken on the procurement once the protest is received. The only exception would be if the agency requests, and the Chief Procurement Officer (CPO) approves the agency's request to allow the procurement to continue without delay because to do so is necessary to protect the substantial interests of the State.

If the protest is resolved by the PO to the mutual agreement of the protestor and the PO, the procurement process may resume. If the protest is not resolved and the PO denies the protest and the protestor appeals the PO's decision to DCCA, the procurement is still stayed if the procurement was previously stayed and the stay was not lifted by the CPO. If DCCA approves the PO's decision to deny the protest and the protestor's appeals the DCCA decision to the circuit court, the procurement process is no longer stayed and may proceed.

If the protestor prevails in the DCCA administrative proceeding, the cash or protest bond is to be returned to that party by the DCCA. If the protestor does not prevail in the DCCA administrative proceeding, the cash or protest bond is to be deposited into the general fund.

## **SAMPLE Letter: Procurement Officer response to protestor**

[ Date ]

[ Name of Vendor or Firm representing Vendor ]  
[ Address ]

Subject: Protest to [ Solicitation No. ]  
for [ Title of solicitation ]

Mr. /Ms. [ Name ]:

This is in response to the protest of the subject solicitation submitted on behalf of [ Vendor / Company name ]. After careful review and consideration of the written submittals, the arguments therein, and discussions with the affected agencies, [ Edit this paragraph as need to fit circumstances of Procurement Officer's determination to deny or sustain protest. If protest is denied, provide details or reasons for denial ].

Consequently, the protest is denied, and this decision is final and conclusive. Pursuant to Hawaii Revised Statutes (HRS) § 103D-709, and as amended by ACT 175, SLH 2009, you may appeal this decision by filing a request for administrative review along with a cash or protest bond in the amount of \_\_\_\_\_, within seven (7) calendar days from issuance of this letter to:

Office of Administrative Hearings  
Department of Commerce and Consumer Affairs  
335 Merchant Street, Suite 100  
Honolulu, Hawaii 96813

You must also notify [ PO or the Head of the Purchasing Agency Title – if different from PO listed below ] within seven calendar days of the issuance of this decision if a request for an administrative review will be filed.

ACT 175, SLH 2009, also requires the following. The protestor may request an administrative review only when all of the following are met:

1. The subject contract is conducted pursuant to HRS §§ 103D-302 competitive sealed bidding, or -303 competitive sealed proposals;
2. The estimated value of the contract is:
  - (1) Less than \$1,000,000, and the protest concerns a matter that is greater than \$10,000; or
  - (2) \$1,000,000 or more, and the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract; and

3. A cash or protest bond is submitted with the request 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 (1/2) percent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; but in any event the bond amount shall not exceed \$10,000.

In both items 2 and 3, the 'estimated value' means: for procurements pursuant to HRS § 103D-302, the lowest responsible and responsive bid; and for procurements pursuant to HRS § 103D-303, the amount of the responsible offeror's proposal that is determined to be the most advantageous.

If you prevail in the DCCA administrative proceeding, the cash or protest bond shall be returned to you. If you do not prevail, the cash or protest bond will be deposited into the general fund.

Bonds forms are available at <http://hawaii.gov/spo>, click on 'Forms for Vendors, Contractors, and Services Providers' under the 'Quicklinks' menu.

Questions on this letter may be directed to [ provide contact name, phone number, email ].

Sincerely,

[ Name of PO ]  
Procurement Officer