

**INSTRUCTIONS
FOR
LEGAL AND CONTRACTUAL REMEDIES [Protest]**

HRS Chapter §103D, Part VII and HAR Chapter 3-126

A. Application

Instructions apply to proceedings for protest, and administrative and judicial review pursuant to HRS §§103D-701, 103D-709 and 103D-710.

B. Protest Provision and Procedures [Reference: HRS §103D-701 and HAR chapter 3-126, Subchapter 1]

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

SAMPLE:

PROTEST. 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 (PO) [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.

2. Upon receipt of a protest, all activity on the solicitation or award shall stop, unless the chief procurement officer makes a written determination to allow the procurement to continue without delay to protect the substantial interests of the State (lift of the stay on a protest).
3. If the protest is resolved by the Procurement Officer (PO) to the mutual agreement of the protestor and the PO, the procurement process may resume.
4. The PO decision on a protest shall be made as expeditiously as possible after reviewing all relevant information. If protest is denied, the PO shall inform the protestor, in writing (See attached SAMPLE Letter), of the protestor's right to an administrative review and filing an appeal within seven calendar days after the PO issues protest decision.
5. If the protest of a construction contract or airport contract that is awarded pursuant to HRS §103D-302, competitive sealed bidding, or §103D-303, competitive sealed proposals, is not resolved by mutual agreement, the PO shall issue a written decision to uphold or deny the protest within seventy-five (75) calendar days of receipt of the protest. An extension, not to exceed forty-five (45) calendar days may be granted for extenuating circumstances.

C. Request for Administrative Hearing [Reference: HRS §103D-709 and HAR chapter 3-126, Subchapter 5]

1. For a procurement conducted pursuant to HRS §103D-302, competitive sealed bidding, or §103D-303, competitive sealed proposals, the protestor may appeal the PO protest decision to the Department of Commerce and Consumer Affairs, Office of Administrative Hearings (DCCA-OAH), and the following shall apply:

- a. If the resulting contract has an estimated value of less than \$1,000,000, and the protest concern at issue is greater than \$10,000, the request to appeal shall include a cash or protest bond in the amount of 1% of the estimated value of the contract.
- b. If the resulting contract has an estimated value of \$1,000,000 or more, and the protest concern at issue is equal to no less than 10% of the estimated value of the contract, the request to appeal shall include a cash or protest bond in the amount of 1% of the estimated value of the contract.

Note: "Estimated value of the contract" or "estimated value" means the lowest responsible and responsive bid [IFB], or the amount of the responsible offeror whose proposal [RFP] is determined most advantageous.

2. During the appeal process, the procurement is stayed, and no action shall be taken until the decision by the hearings officer is made.
3. If the protestor prevails in the DCCA administrative proceeding, the cash or protest bond is returned to the protestor by the DCCA-OHA. If the protester does not prevail in the DCCA administrative proceeding, the cash or protest bond is deposited into the general fund.
4. The protestor may elect to file an application for judicial review of the DCCA OAH hearing officer's decision.

D. Judicial Review [Reference: HRS §103D-710 and HAR chapter 3-126, Subchapter 6]

1. Appeal to circuit court for judicial review shall be requested within ten calendar days after the issuance of the written decision by DCCA-OAH hearings officer.
2. The DCCA-OAH hearings officer shall transmit the administrative record within ten calendar days of the filing for judicial review.
3. The court shall complete its review and issue a decision no later than thirty-days from the filing of an application for judicial review.
4. If the court fails to resolve its review by the thirtieth day from the filing of application for judicial review, the decision of the DCCA-OAH hearings officer stands.

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](#)].

[If protest is denied, the following language may be used.]

Consequently, the protest is denied, and this decision is final and conclusive. Pursuant to Hawaii Revised Statutes (HRS) §103D-709, you may appeal this decision by filing a request for administrative review along with a cash or protest bond in the amount of 1% of the estimated value of the contract, 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

The Procurement Officer shall be notified within seven (7) calendar days of the issuance of this decision if a request for an administrative review will be filed. Pursuant to HRS §103D-709(d) the protestor may request an administrative review when the procurement is conducted pursuant to HRS § 103D-302, competitive sealed bidding, or §103D-303, competitive sealed proposals. The following provisions for submitting an appeal are provided:

- If the resulting contract has an estimated value of less than \$1,000,000, and the protest concern at issue is greater than \$10,000; or
- If the resulting contract has an estimated value of \$1,000,000 or more, and the protest concern at issue is equal to no less than 10% of the estimated value of the contract, then request to appeal shall include cash or protest bond in the amount of 1% of the estimated value of the contract.

Note: "Estimated value of the contract" or "estimated value" means the lowest responsible and responsive bid [IFB], or the amount of the responsible offeror whose proposal [RFP] is determined most advantageous.

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

Bonds forms are available at <https://spo.hawaii.gov/>, click on ‘Forms’; select *Vendor* in the ‘Audience’ dropdown list; select *Goods, Services and Construction* in the ‘Category’ dropdown list.

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

Sincerely,

[Name of PO]
Procurement Officer

STATE PROCUREMENT OFFICE
LEGAL AND CONTRACTUAL REMEDIES
(PROTEST)

HRS Chapter 103D, Part VII
HAR Chapter 3-126

HRS 103D-701 Authority to resolve protested solicitations and awards.

Written **PROTEST**** submitted to the Procurement Officer (PO) within **five working days** after aggrieved person knows or should have known the facts.

****For HRS §103D-302 or §103D-303:**

- within **five working days** after the posting of award. Executive Dept agencies post notice of award at <https://hands.ehawaii.gov/hands/>
- protest based on content of solicitation is submitted prior to offer due date.

HAR §3-126-5 Stay of Procurement.

No further action shall be taken until protest settled; unless the Chief Procurement Officer (CPO) determines award of the contract is necessary to protect the substantial interests of the State.

Protest SUSTAINED:
Remedies pursuant to HAR Chapter 3-126, Subchapter 4. Determination that solicitation or award violates law.

Decision by PO on protest, to deny or sustain. ACT224 SLH 2021 gives agencies up to 120 days for determination for construction contracts or airport contracts for bids and proposals.

Protest DENIED:

- Protestor, within **seven calendar days** of PO decision may:
- 1) File appeal with DCCA, Office of Administrative Hearings (OAH); and
 - 2) Shall inform PO if filing an appeal with DCCA.

*If no appeal or if protest sustained, submit SPO-043, protest form, to the State Procurement Office.

Circuit Court: **HRS §103D-710, Judicial review.**
(c) Within **ten calendar days** of filing, OAH shall transmit records
(e) No later than **thirty days** from filing, court may affirm, remand or reverse or modify the decision. Court shall lose jurisdiction after the thirtieth day if not resolved; hearings officer decision prevails.

DCCA, OAH: **HRS §103D-709, Administrative proceedings for review.**
(b) Hearing shall commence within **twenty-one calendar days** of receipt; no later than **forty-five days** from receipt, the hearings officer shall issue a written decision
(d) Contracts estimated less than \$1M for protest that is greater than \$10K; or contracts estimated \$1M or more for protest that is equal to no less than 10% of estimated contract value
(e) Cash or protest bond 1 percent of the est. contract value* Submit SPO-043, protest form, to the State Procurement Office after OAH determination.