

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-126
Hawaii Administrative Rules
April 22, 2004

SUMMARY

1. §3-126-1 is amended.
2. §3-126-2 is repealed.
3. §§3-126-3 to 3-126-7 are amended.
4. §3-126-8 is repealed.
5. §3-126-11 is amended.
6. §3-126-11.01 is a new section.
7. §§3-126-12 to 3-126-18 are amended.
8. §3-126-25 is amended.
9. §3-126-26 is repealed.
10. §§3-126-27 to 3-126-29 are amended.
11. §3-126-30 is repealed.
12. §§3-126-35 to 3-126-38 are amended.
13. §3-126-42 is amended.
14. §3-126-46 is amended.
15. §3-126-49 is amended.
16. §3-126-78 is amended.
15. Chapter 126 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 126

LEGAL AND CONTRACTUAL REMEDIES

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Historical Note: This chapter 126, subtitle 11 of title 3, Hawaii Administrative Rules, replaces interim rule dated 11/25/02 (file no. 2497), which amended sections 3-126-1, 3-126-3, 3-126-4, 3-126-5, 3-126-6, 3-126-7, 3-126-11, 3-126-12, 3-126-13, 3-126-14, 3-126-15, 3-126-16, 3-126-17, 3-126-18, 3-126-25, 3-126-27, 3-126-28, 3-126-29, 3-126-35, 3-126-36, 3-126-37, 3-126-38, 3-126-42, 3-126-46, 3-126-49, and 3-126-78; and repealed sections 3-126-2, 3-126-8, 3-126-26, and 3-126-30.

Also replaces interim rule dated 7/3/03 (file no. 2545), which amended sections 3-126-4 and 3-126-5.

Also replaces interim rule dated 11/3/03 (file no. 2560), which added new section 3-126-11.01.

SUBCHAPTER 1

AUTHORITY TO RESOLVE PROTESTED

SOLICITATIONS AND AWARDS

S3-126-1 Definitions. (a) In addition to the definitions in section 103D-104, HRS, the following definitions also apply to this chapter:

"Award" means the written notification of the State's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror.

"Person" includes individuals, partnerships, corporations, associations, or public or private organizations or any character other than a governmental body.

"Protestor" means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest. [Eff 12/15/95; am and comp ^{MAY 20 2004}] (Auth: HRS §103D-202, 103D-701) (Imp: HRS §103D-701)

S3-126-2 REPEALED. [Eff 12/15/95; R

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S3-126-3 Filing of complaint and protest prior to receipt of offers. (a) Protestor initially should seek an informal resolution of the protestor's complaint with the procurement officer named in the solicitation.

(b) Protestor may file a protest pursuant to section 103D-701, HRS, prior to receipt of offers on any phase of a solicitation including, but not limited to, specifications or disclosure of information marked confidential in the bid or offer.

(c) To expedite handling of protests, the envelope should be labeled "Protest" and either served personally or sent by registered or certified mail, return receipt requested, to the chief procurement officer or as otherwise specified in the solicitation.

(d) The written protest shall include at a minimum the following:

- (1) The name and address of the protestor;
- (2) Appropriate identification of the procurement;
- (3) A statement of reasons for the protest; and
- (4) Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be

indicated. [Eff 12/15/95; am and comp
MAY 20 2004] (Auth: HRS §103D-202,
103D-701) (Imp: HRS §103D-701)

§3-126-4 Protest of an award. (a) A protest of a award shall be submitted in writing to the chief procurement officer or as otherwise specified in the solicitation, within five working days after the posting of the notice of award for solicitations pursuant to section 103D-302 or 103D-303, HRS; provided a protest following a debriefing pursuant to section 103D-303(h), HRS, shall be submitting in writing within five working days after the debriefing is completed. The provisions of section 3-126-3(c) and (d) to file a protest shall be complied with. Heads of purchasing agencies shall not proceed with the award upon receipt of a timely protest, and shall comply with section 3-126-5.

(b) Protest of an award pursuant to section 103D-304, 103D-305, or 103D-306, HRS, shall be submitted in writing by the protestor to the procurement officer, within five working days of knowledge giving rise to the protest; provided a protest following a debriefing pursuant to section 103D-304(k), HRS, shall be submitted in writing within five working days after the debriefing is completed.

- (1) A protest shall be filed in accordance with section 3-126-3(c) and (d), with supporting exhibits, evidence, or documents to substantiate the protest;
- (2) A decision shall be made by the procurement officer as expeditiously as possible after reviewing all relevant information, and shall be final. A decision issued in resolution of a protest shall contain the following:
 - (A) A statement of the action to be taken or resolution to the protest; and
 - (B) A statement that the decision is final and conclusive. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)

§3-126-5 Stay of procurements during protest.
When a protest has been filed pursuant to section 3-

126-3 or 3-126-4, no further action shall be taken until the protest has been settled, unless the chief procurement officer makes a written determination, after consulting with the head of the purchasing agency, that the award of the contract is necessary to protect the substantial interests of the State.

[Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)

§3-126-6 Request for information. (a) Any additional information requested by any of the parties should be submitted within the time periods established by the requesting party in order to expedite consideration of the protest unless justification is provided for a delay. Unsubstantiated delays may result in resolution of the protest without consideration of any information which is not filed within the established time period.

(b) The chief procurement officer or designee shall, upon written request, make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or rules. Persons submitting information considered proprietary, confidential, or otherwise permitted or required to be withheld by law or rules shall request that the information be kept confidential by specifically identifying the information within documents submitted, and indicating on the front page of each document that it contains such information. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)

§3-126-7 Decision by the chief procurement officer or designee. (a) A decision on a protest shall be made by the chief procurement officer or designee as expeditiously as possible after reviewing all relevant information, and shall be final.

- (b) The protestor shall be informed:
- (1) Whether the protest is denied or sustained; and
 - (2) If the protest is denied, the protestor's right to an administrative proceeding pursuant to subchapter 5.

(c) The protestor shall inform the head of the purchasing agency within seven calendar days after the final decision if an administrative appeal will be filed. An appeal shall be filed within seven calendar days of the final decision in accordance with subchapter 5.

(d) If the protest is sustained, the available remedies include, but are not limited to, those set forth in this section and subchapter 4. In addition to any other relief, the chief procurement officer or designee shall award the protestor the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorneys' fees, when the protestor should have been but was not awarded the contract. [Eff 12/15/95; am and comp MAY 20 2004]
 (Auth: HRS §103D-202, 103D-701) (Imp: HRS §103D-701)

§3-126-8 REPEALED. [Eff 12/15/95; R]

§§3-126-9 to 3-126-10 (Reserved).

SUBCHAPTER 2

AUTHORITY TO DEBAR OR SUSPEND

§3-126-11 Application. This subchapter applies to the debarment or suspension of persons from consideration for award of all public contracts and from performance on any public contract.
 [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

§3-126-11.01 Other causes for debarment or suspension. (a) Debarment procedures shall be initiated by the administrator of the state procurement office for any person committing an act, after the effective date of this section, for which that person is subsequently assessed an administrative fine of \$5,000 or more by the campaign spending commission under section 11-228, HRS, or convicted of a violation under section 11-229, HRS.

(b) "Person" for the purposes of this section

shall be as defined under section 11-191, HRS.

(c) The campaign spending commission shall provide the administrator of the state procurement office a listing of all persons fined or convicted, including the date of the violation and date the fine or conviction was imposed.

(d) The procurement officer shall, prior to award, verify the offeror's eligibility under subsection (a). [Eff MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-702)

§3-126-12 Suspension. (a) After consultation with the affected purchasing agency, the respective attorney general or corporation counsel, and, where practicable, the person who is to be suspended, and upon written determination by the chief procurement officer or designee that probable cause exists for debarment as set forth in section 103D-702, HRS, that person shall be suspended.

(b) A notice of suspension, including a copy of the determination, shall be sent to the suspended person stating that:

- (1) The suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but shall not exceed three months unless the chief procurement officer or designee determines in writing that additional time is necessary to complete the investigation;
- (2) Bids or proposals will not be solicited from the suspended person, and if they are received, they will not be considered during the period of suspension; and
- (3) The suspended person may request a review in accordance with section 3-126-14.

(c) The notice of suspension shall signal the start of the investigation for debarment.

(d) A person is suspended upon issuance of the notice of suspension. The suspension will remain in effect during any appeals and may be terminated by the chief procurement officer or designee, an administrative hearings officer, or by a court, but otherwise shall only end when the suspension has been in effect in accordance with subsection (b)(1) or a debarment decision takes effect. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-

702, 103D-709) (Imp: HRS §§103D-702, 103D-709, 103D-710)

S3-126-13 Notice of debarment action. (a)

Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the person and shall:

- (1) State that debarment is being considered;
- (2) Set forth the reasons for the action;
- (3) State that if the person so requests, a review will be conducted, provided the request is received by the chief procurement officer or designee within ten working days after the person receives notice of the proposed action; and
- (4) State that the person may be represented by counsel.

(b) The notice shall be sent to the respective attorney general or corporation counsel and the affected purchasing agency. If more than one purchasing agency is involved, the chief procurement officer or designee may designate one or more representatives to be consulted in respect to this action. [Eff 12/15/95; am and comp MAY 20 2004]
(Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

S3-126-14 Review by a chief procurement officer or designee. (a)

A person notified of a proposed debarment action may request in writing that a review be conducted. The request must be received by the official proposing the action within ten working days of receipt of notice of the proposed action under section 3-126-12 or 3-126-13. The request for review shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) If no request is received within the ten working day period, a final determination may be made as set forth in section 3-126-16 after consulting with the respective attorney general or corporation counsel and the affected purchasing agency.

(c) If a review is requested, the chief procurement officer may appoint a designee to conduct the review and recommend a final decision. Otherwise,

the chief procurement officer shall conduct the review.

(d) The chief procurement officer or designee shall send a written notice to the person within fifteen working days of the request for review. The written notice shall be sent by certified mail, return receipt requested, and shall state the time and place, and the nature and purpose of the proceedings. Copies shall be sent to the respective attorney general or corporation counsel and the purchasing agency.

[Eff 12/15/95; am and comp ~~MAY 20 2004~~] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

§3-126-15 Review procedures. (a) The review shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements completed within sixty days from the date set for the review.

(b) The weight to be attached to evidence presented will be within the discretion of the review officer. The review officer may require evidence in addition to that offered by the parties.

[Eff 12/15/95; am and comp ~~MAY 20 2004~~] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

§3-126-16 Determination of the review officer.

(a) The review officer shall prepare a written determination recommending a course of action. Copies shall be sent to all affected parties, including the person under consideration for debarment, the respective attorney general or corporation counsel, and the affected purchasing agency.

(b) The person under consideration for debarment shall have ten working days to file comments upon the review officer's determination. The chief procurement officer or designee may request oral argument.

(c) After consultation with the affected purchasing agency and the respective attorney general or corporation counsel, the chief procurement officer or designee shall issue a final decision. Both the review officer's determination and the final decision shall recite the evidence relied upon.

(d) When debarment is recommended or ordered, the length of the debarment, not to exceed three years, the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of

the right to commence an administrative proceeding under subchapter 5. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

§3-126-17 Effect of debarment decision. A debarment decision will take effect upon issuance and receipt by the debarred person. After the debarment decision takes effect, that person shall remain debarred until a court or the chief procurement officer, or designee who issued the decision, orders otherwise or until the debarment period specified in the decision expires. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

§3-126-18 List of debarred and suspended persons.
 (a) The chief procurement officer shall send a copy of the decision to debar or suspend a person to the administrator of the state procurement office who shall compile and distribute a list to all chief procurement officers of the State and post the list on the state procurement office's website. Each chief procurement officer shall send the list and updates of the list to all purchasing agencies.

(b) Should a debarred or suspended person have a contract awarded prior to the effective date of the list, the chief procurement officer shall make a written determination as to whether to allow a debarred or suspended contractor to continue performance on that contract. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

§§3-126-19 to 3-126-24 (Reserved).

SUBCHAPTER 3

AUTHORITY TO RESOLVE CONTRACT AND BREACH OF CONTRACT CONTROVERSIES

§3-126-25 General. This subchapter establishes procedures and remedies to resolve contract and breach of contract controversies between the State and a contractor. It is the State's policy to try to resolve

all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreement and are encouraged. If informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities are encouraged at this stage. [Eff 12/15/95; am and comp MAY 20 2004]
(Auth: HRS §§103D-202, 103D-703) (Imp: HRS §103D-703)

§3-126-26 REPEALED. [Eff 12/15/95; R
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§3-126-27 Delegation of authority to procurement officer. (a) Subject to subsection (b), unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to the head of a purchasing agency, the authority is hereby delegated to the procurement officer.

(b) The settlement or resolution of controversies involving claims in excess of fifty thousand dollars is subject to the prior written approval of the head of a purchasing agency. The procurement officer shall prepare a recommended decision for the head of a purchasing agency. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-703)
(Imp: HRS §103D-703)

§3-126-28 Procurement officer's decision.

(a) When a controversy cannot be resolved by mutual agreement, the procurement officer shall promptly issue a final written decision. Before issuing the decision, the procurement officer shall:

- (1) Review the facts pertinent to the controversy; and
- (2) Secure any necessary assistance from legal, fiscal, and other advisors.

(b) The procurement officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any

other method that provides evidence of receipt, and include in the decision:

- (1) A description of the controversy;
- (2) A reference to pertinent contract provisions;
- (3) A statement of the factual areas of agreement or disagreement;
- (4) A statement of the procurement officer's decision, with supporting rationale;
- (5) A paragraph stating substantially as follows: "This is the final decision of the procurement officer. This decision may be appealed by initiating judicial action pursuant to section 103D-711, HRS. If you decide to initiate judicial action, you must file your complaint in the circuit court within six months of the date you receive this decision."; and
- (6) A copy of the complaint to initiate judicial action shall be furnished to the procurement officer from whose decision the complaint is taken. The notice shall indicate that a judicial action pursuant to section 103D-711, HRS, is intended, reference the decision from which the complaint is being taken, and identify the contract involved.

(c) The procurement officer shall issue a written decision within the following time limitations:

- (1) For claims not exceeding fifty thousand dollars: ninety calendar days after receipt of the claim.
- (2) For claims exceeding fifty thousand dollars: ninety calendar days after receipt of the claim; provided that if a decision is not issued within ninety calendar days, the procurement officer shall notify the contractor of the time within which such officer will make the decision. The reasonableness of this time period will depend on the size and complexity of the claim and the adequacy of the contractor's supporting data and other relevant factors.

If the procurement officer fails to issue a decision within the allowed, the contractor may proceed as if an adverse decision has been received.

(d) The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. The payments shall be without

prejudice to the rights of either party and where such payments are required to be returned by a subsequent decision, interest on such payments shall be paid at the statutory rate from the date of payment.

[Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-703) (Imp: HRS §§103D-703, 103D-711, 103D-712)

§3-126-29 Controversies involving state claims against the contractor. All controversies involving claims asserted by the State against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the chief procurement officer or designee as applicable. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-703) (Imp: HRS §103D-703)

§3-126-30 REPEALED. [Eff 12/15/95;
R]

§3-126-31 Disputes clause. Language substantially similar to the following clause shall be inserted in all state contracts:

"Disputes

- (1) All controversies between the State and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the procurement officer in writing, within ninety calendar days after a written request by the contractor for a final decision concerning the controversy; provided that if the procurement officer does not issue a written decision within ninety calendar 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.
- (2) The procurement officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.
- (2) Any such decision shall be final and

conclusive, unless fraudulent, or unless the contractor brings an action seeking judicial review of the decision in a circuit court of this State within the six months from the date of receipt of the decision.

- (3) The contractor shall comply with any decision of the procurement officer and proceed diligently with performance of this contract pending final resolution by a circuit court of this State of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of contract by the State; provided that in any event the contractor shall proceed diligently with the performance of the contract where the chief procurement officer has made a written determination that continuation of work under the contract is essential to the public health and safety." [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-703) (Imp: HRS §§103D-703, 103D-711)

§§3-126-32 to 3-126-34 (Reserved).

SUBCHAPTER 4

DETERMINATION THAT SOLICITATION OR AWARD VIOLATES LAW

§3-126-35 Application. The provisions of this subchapter apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-705)

§3-126-36 Violation determination. (a) A solicitation or award may be in violation of the law due to actions of state or county employees, bidders, offerors, contractors, or other persons. After consultation with the respective attorney general or the corporation counsel, as applicable, the chief procurement officer or designee may determine that a solicitation or contract award is in violation of the

provisions of chapter 103D, HRS, or the rules adopted under the chapter.

(b) After consultation with the respective attorney general or corporation counsel, the state ethics commission may determine that a solicitation or award violates chapter 84, HRS. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. The department of commerce and consumer affairs hearings officer designated in subchapter 5 may determine that a solicitation or contract award is in violation of the provisions of the state procurement code or the rules adopted under the code. The circuit court designated in subchapters 6 and 7 may find that a solicitation or award is in violation of law.

c) Specific findings showing reckless disregard of clearly applicable laws or rules must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or rules.
[Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-705)

§3-126-37 Remedies prior to an award. A finding by the chief procurement officer or designee, after consultation with the respective attorney general or corporation counsel, as applicable, that the solicitation or proposed award is in violation of law, will constitute a cogent and compelling reason to cancel, or revise a solicitation or proposed award. The cancellation shall be made in accordance with subchapter 11, chapter 3-122. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-706)

§3-126-38 Remedies after an award. (a) When there is no fraud or bad faith by a contractor:

- (1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the chief procurement officer or designee may ratify and affirm, modify, or terminate the contract in accordance with

- this section after consultation with the respective attorney general or corporation counsel, as applicable.
- (2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.
 - (3) If the violation cannot be waived without prejudice to the State or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers, the contract may be amended appropriately, ratified, and affirmed.
 - (4) If the violation cannot be waived without prejudice to the State or other bidders or offerors and if performance has begun, the chief procurement officer or designee shall determine in writing whether it is in the best interest of the State to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the State's best interest:
 - (A) The costs to the State in terminating and resoliciting;
 - (B) The possibility of returning goods delivered under the contract and thus decreasing the costs of termination;
 - (C) The progress made toward performing the whole contract; and
 - (D) The possibility of obtaining a more advantageous contract by resoliciting.
 - (5) Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, if possible, unless the determination required under paragraphs (2) through (4) is made. If the contract is terminated, the State shall, where possible and by agreement with the supplier, return the goods delivered for a refund at no cost to the State or at a minimum restocking charge. If a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the

basis of actual costs directly or indirectly allocable to the contract through the time of termination, other than attorney's fees. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance was completed. Anticipated profits are not allowed.

(b) When there is fraud or bad faith by the contractor:

- (1) Upon finding after award that a solicitation or award is in violation of law and the recipient of the contract acted fraudulently or in bad faith, the chief procurement officer or designee may, after consulting with the respective attorney general or corporation counsel, declare the contract void or ratify and affirm, or modify in accordance with this section.
- (2) The contract shall be declared void unless modification, ratification, and affirmation are found to be in the State's best interest under paragraph (3).
- (3) The contract shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the goods, services, or construction under the contract and:
 - (A) There is no time to re-award the contract; or
 - (B) The contract is being performed for less than it could be otherwise performed.
- (4) In all cases where a contract is voided, the State shall endeavor to return those goods delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the State is entitled to recover the greater of:
 - (A) The difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or
 - (B) The difference between payments under the contract and the value to the State

- of the goods, services, or construction the State obtained under the contract.
- (C) The State may in addition claim damages under any applicable legal theory.
- (5) The State shall be entitled to any damages it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the contract.
- (6) If a state or county employee knowingly and willfully lets a contract contrary to law, that employee may be personally liable for his or her actions. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-106, 103D-202) (Imp: HRS §§103D-106, 103D-707)

§§3-126-39 to 3-126-41 (Reserved).

SUBCHAPTER 5

ADMINISTRATIVE PROCEEDING FOR REVIEW

§3-126-42 Commencement of proceedings. An administrative proceeding authorized by sections 103D-310, 103D-701, 103D-702 and 103D-709, HRS, shall commence by the filing of a request for hearing with the office of administrative hearings, department of commerce and consumer affairs within seven calendar days, in accordance with section 103D-712, HRS. The office of administrative hearings shall docket the request for hearing, assign a docket number to the request for hearing, and schedule the matter for hearing. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-43 Legal counsel. (a) A protestor or respondent may, at the protestor's or respondent's own expense, be represented by legal counsel at any stage of the proceeding before the hearings officer.

(b) Substitution of legal counsel shall be effective upon filing of a notice of the substitution by the party represented.

(c) Withdrawal of legal counsel in the absence of a concurrent substitution shall be effective only upon the approval of the hearings officer and shall be

subject to the guidelines of DR 2-110 of the Code of Professional Responsibility and other applicable law.

(d) No party shall substitute or withdraw legal counsel for the purpose of delaying a proceeding. Substitution or withdrawal of counsel less than thirty calendar days before the hearing shall not be considered sufficient reason to continue the hearing, unless good cause is shown. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-44 Individual representing party. When an individual, acting in a representative capacity on behalf of a party, appears at a proceeding or signs a document submitted to the panel or hearings officer, that personal appearance or signature shall constitute a representation that the individual is lawfully authorized and qualified to so act. The individual at any time, however, may be required by the hearings officer to furnish proof of authorization and qualification to act in that capacity. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-45 Consolidation. The hearings officer may sua sponte, or upon any party's motion timely made and for good cause shown, consolidate two or more proceedings which involve substantially the same issues, arise out of the same general transaction, or involve the same person or persons, provided the consolidation shall be conducive to effectuating the ends of justice and shall not unduly delay the proceedings or hinder, harass, or prejudice any party. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-46 Format and certification of pleadings.
(a) Requests for hearings, motions, and other pleadings shall be typed or printed in ten or twelve point pica or equivalent type size upon good quality paper, eight and one-half by eleven inches in size and of at least sixteen pounds weight, except that documentary exhibits may be larger, if folded to the size of the pleadings to which they are attached.
(b) All copies shall be legible on paper eight

and one-half by eleven inches in size and of at least sixteen pounds weight.

(c) The first page of every pleading shall set forth the name, address, and phone number of the party, the party's attorney, if any, the title of the particular pleading, the docket number, and the name of the proceeding.

(d) All pleadings shall be signed in black or other photo-reproducible ink by the party filing the pleadings or by the party's authorized agent. The signature shall constitute certification that the person so signing has read the pleading and that to the best of the person's knowledge, information, and belief, the pleading is true or has good grounds to support it and is not submitted for the purpose of hindering, harassing, or delaying any party or proceeding.

(e) Unless otherwise provided, all pleadings, motions, memoranda, and other documents shall be filed with the office of administrative hearings.
[Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-47 Service, generally. (a) Unless otherwise provided by this chapter or by other applicable law, whenever service is required to be made on any party to a proceeding before the office of administrative hearings, the service shall be made personally or by first class mail, the document to be served at the party's last known address or to the party's attorney of record or to any other individual representing the party in the proceeding.

(b) If personal service or service by mail is unsuccessful, the hearings officer may authorize service by publication if permitted by statute. The hearings officer may require that personal service be attempted prior to permitting service by publication. After service by publication has been authorized, whenever service is required to be made on that party thereafter, service by first class mail to the party's last known address shall be sufficient. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-48 Service by whom. (a) Unless otherwise provided by this chapter, a party filing a pleading,

motion, memorandum, document, or other paper shall cause a copy of the pleading, motion, memorandum, document, or other paper to be served upon each of the other parties to the proceeding, or upon any agent or attorney representing the other party. The party shall file a certificate of service.

(b) The hearings officer may cause each party to be served with a copy of the request for hearing, or the hearings officer may require the party requesting the hearing to serve each other party with a copy of the request for hearing and to file a certificate of service.

(c) The panel or hearings officer shall cause the notice of hearing to be served upon the parties.

(d) Unless otherwise provided by this chapter, the hearings officer shall cause to be served all notices, documents, orders, and other papers issued by the hearings officer. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-49 Time. (a) Unless otherwise provided by statute or rule, in computing any period of time prescribed or allowed by this chapter, the day of the act, event, or default after which the designated period of time is to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal State holiday, in which event the period runs until the next day which is neither a Saturday, Sunday, nor a holiday. Intermediate Saturdays, Sundays, and holidays shall not be included in a computation when the period of time prescribed or allowed is seven days or less.

(b) The hours of a day during which documents will be accepted for filing by the panel or hearings officer shall be those specified in section 80-1, HRS. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-50 Extensions of time. Unless otherwise provided, the hearings officer may extend the time within which any procedural action shall be taken, at the request of any party. The hearings officer, in the sole discretion of the hearings officer, may require that the extension be stipulated to by all parties to the proceeding or that the request be by motion for

good cause shown as to why the extension should be granted. [Eff 12/15/95; comp ^{MAY 20 2004}] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-51 Motions. (a) An application for any relief or order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(b) Motions referring to facts not of record shall be supported by affidavits, and if involving a question of law shall be accompanied by a memorandum in support.

(c) If a hearing is held on the motion, the party filing the motion shall serve a copy of the motion and notice of hearing on the motion upon all parties not later than seventy-two hours before the hearing and the opposing party shall file and serve any counter affidavits and memorandum in opposition not less than twenty-four hours before the hearing.

(d) Motions shall be filed with the hearings officer, and all motions shall be decided by the hearings officer.

(e) Failure to comply with the requirements of this section may be the basis for denial of any motion.

(f) The decision on the motion may be made orally at the time of the hearing on the motion, or in writing, or as part of the hearings officer's written decision. [Eff 12/15/95; comp ^{MAY 20 2004}] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-52 Powers of the panel or hearings officer in conducting hearing. Unless otherwise provided by law, the panel or hearings officer shall have the power, in conducting a hearing, without limitation:

- (1) To hold hearings and issue notices;
- (2) To administer oaths and affirmations;
- (3) To consolidate hearings or sever proceedings, provided that those actions shall be conducive to effectuating the ends of justice and shall not unduly delay the proceedings or hinder, harass, or prejudice any party;
- (4) To subpoena and examine witnesses;
- (5) To issue subpoenas;
- (6) To rule upon offers of proof, to receive relevant evidence, and to exclude evidence

- which is admissible under the rules of evidence, and accordingly may restrict lines of questioning or testimony;
- (7) To regulate the course and conduct of the hearing;
 - (8) To regulate the manner of any examination so as to prevent the needless and unreasonable harassment, intimidation, or embarrassment of any witness or party at the hearing;
 - (9) To remove disruptive individuals, including any party, legal counsel, witness, or observer;
 - (10) To hold conferences, including prehearing conferences, before or during the hearing, for the settlement or simplification of issues;
 - (11) To rule on motions and to dispose of procedural matters;
 - (12) To submit a written decision, including findings of fact and conclusions of law, to the parties;
 - (14) To dispose of any other matter that normally and properly arises in the course of the proceedings and to take any action authorized by this chapter, chapter 91, HRS, or any other related laws; and
 - (15) To examine, after notice to all parties, any site or tangible evidence relevant to the case. [Eff 12/15/95; comp ^{MAY 20 2004}]
(Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-53 Subpoenas. (a) The hearings officer, at the request of a party, shall have the power to issue subpoenas requiring the attendance of witnesses or the production of documents at the hearing. The hearings officer may require that any request for the issuance of a subpoena identify with particularity the person to be subpoenaed or the documents desired. Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in courts in the State and the fees and mileage shall be paid by the party at whose instance the subpoena issues.

(b) Upon motion timely made, or sua sponte, the hearings officer may:

- (1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon advancement by the requesting party of the costs of producing the documents.

(c) A hearings officer shall not have the power to subpoena the chief procurement officer or the head of the purchasing agency for whom the case is being heard. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-54 Absence of hearings officer. When a request for hearing has been assigned to a hearings officer for hearing or further proceedings, the powers and duties to be performed by the hearings officer in connection with the proceeding, without abatement of the proceeding, may be assigned to another hearings officer, provided no hearings officer shall render a written decision unless that hearings officer was present at opening and closing arguments and all presentations of evidence concerning those matters. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-55 Disqualification of hearings officer.

(a) No matter shall be heard by a hearings officer who:

- (1) Has any direct pecuniary interest in the matter being heard;
- (2) Is related within the third degree by blood or marriage to any party to the proceeding or any party's representative or attorney;
- (3) Has participated in the investigation preceding the institution of the proceeding or has participated in the development of the evidence to be introduced in the proceeding; or
- (4) Has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding which will prevent a fair hearing by the hearings officer.

(b) Any hearings officer may be disqualified from hearing the matter sua sponte, or upon motion of any party. Any motion to disqualify the hearings officer shall be filed and decided before the evidentiary portion of the hearing. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS

§103D-709)

§3-126-56 Evidence. (a) The admissibility of evidence at the hearing shall be governed by the rules of evidence utilized by the circuit courts of the State. The hearings officer shall give effect to the privileges recognized at law.

(b) The hearings officer may take notice of judicially recognizable facts and of generally recognized technical or scientific facts. The parties, whenever possible, shall be notified before the hearing of the material to be so noticed and shall be afforded an opportunity at the hearing to contest the facts so noticed.

(c) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.

[Eff 12/15/95; comp MAY 20 2004] (Auth: HRS
§§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-57 Decision, generally. (a) Every decision and order issued by the hearings officer shall be in writing or stated in the record. Where the case has been contested and the decision is adverse to any party, the decision shall be accompanied by separate findings of fact and conclusions of law.

(b) The hearings officer shall cause a certified copy of the decision and order together with the findings of fact and conclusions of law to be transmitted by hand or by certified or registered mail, return receipt requested, to each party within a reasonable time.

(c) In a contested case where notice of the hearing has been served by publication and the party so served has failed to appear at the hearing, service of the hearings officer's decision is complete upon transmission by registered or certified mail, return receipt requested, to the party at the party's last known address. [Eff 12/15/95; comp MAY 20 2004]
(Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-58 Ex parte communications. (a) In any proceeding before the hearings officer:

- (1) No person shall communicate privately on the merits of the case with the hearings officer designated to hear and decide the matter unless specifically provided for by law; and
- (2) No member of any other government agency who participates in the hearing as a witness or counsel shall privately communicate on the merits of the case with the hearings officer designated to hear and decide the matter, unless specifically provided for by law.
 - (b) It shall be improper for any person interested in a proceeding to seek to influence the judgment of the panel or hearings officer.
 - (c) Except as otherwise provided herein, it shall be improper for any member of a state agency:
 - (1) To disclose or reveal to the hearings officer designated to hear and decide the matter, the contents of any investigation report concerning the matter before the hearings officer; or
 - (2) To furnish the report or a copy thereof to the hearings officer designated to hear and decide the matter.
 - (d) Nothing in this subsection, which is intended to prohibit the ex parte disclosure of the investigation report, shall prohibit the introduction of the report at the hearing pursuant to and in conformance with the rules of evidence. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-59 Contents of a request for hearing. Any person entitled to request an administrative hearing under this subchapter shall file a written request for hearing which shall state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought by the person requesting an administrative hearing. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-60 Scheduling of hearings. (a) Unless otherwise provided by law, upon the filing of the request for hearing, and as expeditiously as possible, the request for hearing shall be referred to a hearings officer for hearing.

(b) A hearing on a request for administrative hearing shall commence within twenty-one calendar days from the receipt of the request for hearing.

(c) A hearing, once scheduled, may be continued or rescheduled if agreed upon by all parties.

(d) If all of the parties to a hearing do not agree to continue or reschedule a hearing, any party may file an appropriate motion, and the hearing may only be continued or rescheduled for good cause.

[Eff 12/15/95; comp ~~MAY 20 2004~~] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-61 Notice of hearing. (a) In all proceedings for relief under this subchapter, the chief procurement officer or the head of a purchasing agency shall be made a party to the proceedings and shall be served accordingly.

(b) Whenever possible, all parties shall be given written notice of the hearing at least fifteen calendar days before the hearing. The notice shall include:

- (1) The date, time, place, and nature of hearing;
- (2) The legal authority under which the hearing is to be held;
- (3) The particular sections of the statutes and rules involved; and
- (4) A short and concise statement of the issues involved and the facts giving rise to the request for hearing. Attachment of a copy of the request for hearing, to the hearing notice, satisfies this requirement.

The notice shall further apprise each party of their right to retain legal counsel if so desired.

[Eff 12/15/95; comp ~~MAY 20 2004~~] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-62 Response. Before the hearing, each respondent shall file and serve upon each party and the hearings officer, a written response stating briefly therein facts, circumstances, laws, rules, or reasons in defense and shall further specifically admit or deny the allegations of the request for hearing.

[Eff 12/15/95; comp ~~MAY 20 2004~~] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-63 Disclosure. (a) Any party, by timely

written demand filed with the hearings officer, and served upon any other party, may request of any other party to the proceeding, the full disclosure of:

- (1) The identity of all witnesses to be called by the party, including their addresses and phone numbers, if known;
- (2) The identity of all persons, including their addresses and phone numbers, known by the party to have material knowledge relevant to the proceeding; and
- (3) All exhibits, including, but not limited to, documents, photographs, and other tangible evidence to be introduced at the hearing. The requesting party shall have the right to examine the exhibits and make copies thereof.

(b) A copy of the investigation report, in order to be admitted at hearing, shall be provided to all parties not later than seven calendar days before the hearing. If a copy of the investigation report is not provided to all parties, the report shall not be permitted to be introduced at the hearing.

(c) All demands for disclosure shall continue in effect for the duration of the proceeding and the party to whom the demand is directed shall be under a duty to disclose the information requested as and when it becomes available.

(d) The information requested shall be disclosed to the requesting party at the prehearing conference or at least seven calendar days before the hearing whichever occurs first. The failure to comply with the disclosure request may result in the information requested, to be disallowed at the hearing.

[Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-64 Prehearing conference. (a) The hearings officer may order that a prehearing conference be conducted and attended by all parties to the proceeding. The purpose of the prehearing conference shall be to explore the underlying reasons for the hearing, and to simplify the issues. At the prehearing conference, the hearings officer may require all parties to disclose to the other parties the information which may be requested pursuant to section 3-126-63.

(b) If no prehearing conference is held, the hearings officer may require each party to submit a

statement disclosing and identifying all witnesses to be called at the hearing, all exhibits to be used at the hearing, and other matters as shall simplify the issues and facilitate the orderly progress of the hearing. A copy of the statement shall be served upon all other parties to the proceeding. [Eff 12/15/95; comp ~~MAY 2 0 2004~~] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-65 Testimony. (a) A record shall be made of all oral testimony taken at the hearing.

(b) Testimony taken at the hearing may be electronically recorded and need not be transcribed. Unless otherwise provided, the cost of the transcription of the electronic recording of the testimony shall be paid by the requesting party.

(c) Any party may request that all of the testimony taken at the hearing be taken by a court reporter. The request shall be made in writing, at least ten calendar days before the date of the hearing and shall be within the sole discretion of the hearings officer or the panel to grant or deny. The transcript of the proceeding shall constitute the official record of the testimony taken at the hearing, and shall remain in the possession of the hearings officer. The cost of the transcript shall be paid for by the requesting party. If a party desires a copy of the transcript, the requesting party shall pay the cost of a copy of that transcript.

(d) The hearings officer shall make the electronic recording of the testimony available to the parties for use in preparing exceptions to or statements in support of a proposed decision or recommended order.

(e) If judicial review is requested, the hearings officer shall transmit the electronic recording as part of the record on appeal. If a party desires a copy of the electronic recording for their personal use, the requesting party shall pay the cost of a copy of that electronic recording.

(f) Unless the hearings officer has been notified in writing of a party's request for judicial review within the time permitted for requesting the judicial review, the hearings officer, after the time for requesting judicial review has passed, may erase the electronically recorded testimony. [Eff 12/15/95; comp

~~MAY 2 0 2004~~] (Auth: HRS §§103D-202, 103D-709)

(Imp: HRS §103D-709)

§3-126-66 Record. (a) The record shall consist of the following:

- (1) All pleadings, motions, and intermediate rulings;
- (2) All evidence received or considered, including without limitation, oral testimony, exhibits, and matters officially noted by the hearings officer;
- (3) All offers of proof and rulings thereon; and
- (4) All proposed findings and exceptions.

(b) Unless the hearings officer has been notified in writing of a party's request for judicial review within the time permitted for requesting judicial review, the hearings officer, after the time for requesting judicial review has passed, may cause exhibits to be returned to the party introducing the exhibits or if the party does not wish their return, order the disposal or destruction of the exhibits.
 [Eff 12/15//95; comp MAY 2 0 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-67 Dismissal of requests for hearings.

(a) A request for hearing relief may be voluntarily dismissed by the person requesting the hearing, without order of the hearings officer by:

- (1) Filing a notice of dismissal at any time before service of the request for hearing on the other parties; or
- (2) Filing a stipulation of dismissal signed by all parties who have been served with the request for hearing or who appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal shall be without prejudice, except that a notice of dismissal shall operate as an adjudication upon the merits when filed by a person who has once dismissed a request for hearing based on or including the same claim before the hearings officer.

(b) Except as provided in subsection (a), a request for hearing shall not be dismissed except upon motion and on order of the hearings officer granting the motion and upon such terms and conditions as the hearings officer deems proper. Unless otherwise specified in the order, a dismissal under this

subsection shall be without prejudice.

(c) The hearings officer may, upon the motion of any party, or sua sponte, issue a notice of proposed dismissal to any person requesting a hearing, based on:

- (1) The failure of the person requesting the hearing to prosecute or otherwise pursue the person's request for hearing within one year from the filing of the request, excluding periods of delay caused by a party other than the person requesting the hearing; or
- (2) The failure of the person requesting the hearing to comply with this chapter or any order of the hearings officer.

The notice of proposed dismissal shall set forth the basis for the proposed dismissal and shall provide an opportunity for the person requesting the administrative hearing to request a hearing to contest the proposed dismissal at least fifteen calendar days prior to the actual dismissal. The notice of proposed dismissal shall also provide that in the event the person adversely affected does not request a hearing to contest the proposed dismissal within the time period specified in the notice of proposed dismissal, the hearings officer may thereafter issue an order dismissing the proceedings with prejudice. If a request for a hearing to contest the proposed dismissal is filed within the time period specified in the notice of proposed dismissal, the hearings officer shall schedule a hearing in accordance with this chapter or dissolve the notice of proposed dismissal. The person requesting the hearing shall have the burden of showing why the underlying request for administrative hearing should not be dismissed pursuant to this section.

(d) Unless the order of dismissal issued by the hearings officer specifies otherwise, a dismissal under subsection (c) and any other dismissal not provided for in this section, except a dismissal for lack of jurisdiction or improper venue, shall operate as an adjudication upon the merits. [Eff 12/15/95; comp
MAY 20 2004] (Auth: HRS §§103D-202, 103D-709)
(Imp: HRS §103D-709)

§3-126-68 Hearings. (a) All hearings shall be formal, and chapters 91 and 92, HRS, shall apply to the extent practicable.

(b) No persons other than the hearings officer, the person requesting the hearing, representatives of

the concerned state agency, legal counsel, witnesses, and persons called by the hearings officer to assist the hearings officer in reviewing a request for hearing, shall be present during any hearing or other proceedings conducted by the hearings officer, except with the permission of the hearings officer.

(c) All hearings shall be heard before a duly designated hearings officer. All parties shall be afforded full opportunity to present evidence and argument on all issues involved. The hearing shall be at the time and place set forth in the notice of hearing, but at that time and place may be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing.

(d) If there is no dispute as to the facts involved in a particular matter, the hearings officer may permit the parties to proceed by memoranda of law in lieu of a hearing unless the procedure would unduly burden any party or is otherwise not conducive to the ends of justice. [Eff 12/15/95: comp MAY 20 2004]
 (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-69 Procedure at hearing. Unless otherwise stipulated by the parties, which stipulation is approved by the hearings officer, all hearings shall proceed as follows:

- (1) The parties shall have the opportunity to make opening statements before any evidence is presented, unless they waive the opportunity. The opening statement shall be heard in the following order:
 - (A) Opening statement by the party initiating the proceedings; and
 - (B) Respondent's opening statement, unless respondent chooses to reserve same until after presentation of evidence by the party initiating the proceedings;
- (2) The party initiating the proceedings shall present its evidence first, and shall be followed by the presentation of evidence in support of respondent's case;
- (3) After presentation of the evidence in support of their respective cases, the parties shall have the opportunity to introduce rebuttal evidence. Rebuttal evidence shall be introduced in the same order as was followed

- with respect to the introduction of evidence in support of their respective cases;
- (4) Each witness shall be examined first by the party calling the witness followed by cross-examination by the opposing party;
 - (5) After all evidence, including rebuttal evidence, has been presented, the parties shall have the opportunity to make final argument. Final argument shall proceed as follows:
 - (A) Final argument by the party initiating the proceedings;
 - (B) Respondent's final argument; and
 - (C) Final argument in rebuttal, by the party initiating the proceedings which shall be limited to countering matters raised in respondent's final argument; and
 - (6) The hearing shall be deemed closed after completion of all final arguments or upon filing of all permitted memoranda and other post hearing submissions or upon the expiration of the time allowed for filing submissions, unless the time is extended, or upon the completion of taking further evidence pursuant to section 3-126-72, whichever is later. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-70 Motion to dismiss. (a) After all evidence has been presented by the party initiating the proceedings in support of the underlying request for hearing, the respondent may move the hearings officer for an order denying or dismissing the claim or for similar affirmative relief.

(b) If the motion is denied or taken under advisement, respondent shall have the right to continue with the proceeding as fully as if the motion had not been made. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-71 Taking of further evidence. At any time before the filing of the hearings officer's final decision, the hearings officer sua sponte, or upon motion for good cause shown, may reopen a hearing for the purpose of taking further evidence, and shall do so

in writing with a statement of reasons therefor. The reopening of a hearing shall be at the sole discretion of the hearings officer. Further evidence may be taken either through oral hearing or by certification of questions to the parties. [Eff 12/15/95; comp
MAY 20 2004] (Auth: HRS §§103D-202, 103D-709)
(Imp: HRS §103D-709)

S3-126-72 Proposed findings of fact and conclusions of law. (a) No party shall file written proposed findings of fact and conclusions of law except where ordered in the discretion of the hearings officer.

(b) Where ordered, written proposed findings of fact and conclusions of law shall be filed within fifteen days after the close of the hearing, and shall contain specific references to the record and the legal authorities relied upon. [Eff 12/15/95; comp
MAY 20 2004] (Auth: HRS §§103D-202, 103D-709)
(Imp: HRS §103D-709)

S3-126-73 Hearings officer's decision. As expeditiously as possible after the close of the hearing, the hearings officer shall issue a final decision and order together with separate findings of fact and conclusions of law. All findings of fact, conclusions of law, final decisions, and orders issued by the hearings officer shall be based upon the whole record and supported by reliable probative and substantial evidence, including facts of which the hearings officer properly took judicial notice. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-74 Service of hearings officer's decision. The hearings officer shall cause a copy of the hearings officer's decision, including therein findings of fact and conclusions of law, to be served upon each party by personal service or by registered or certified mail, return receipt requested. Service of the hearings officer's decision shall be deemed complete upon its mailing to the party's last known address. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-75

§§3-126-75 to 3-126-77 (Reserved).

SUBCHAPTER 6

JUDICIAL REVIEW

§3-126-78 Judicial review of contested cases.

(a) Requests for judicial review under section 103D-710, HRS, shall be filed in the circuit court within ten calendar days after the issuance of the written decision.

(b) Any party requesting judicial review shall immediately serve a copy of the application for judicial review upon the hearings officer or review officer, as applicable, and all other parties to the proceeding.

(c) Within twenty calendar days after the filing of a request for judicial review, the hearings officer shall transmit the record of the administrative proceedings, including the electronic recording of the hearing, to the circuit court. A written transcript of the electronic recording of the hearing shall not be required to be submitted as part of the record on appeal, unless specifically requested and paid for by a party to the appeal. [Eff 12/15/95; am and comp
MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp:
HRS §§103D-709, 103D-710)

§§3-126-79 to 3-126-85 (Reserved).

SUBCHAPTER 7

JUDICIAL ACTION

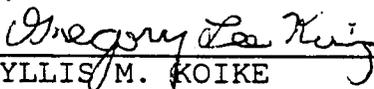
§§3-126-86 to 3-126-95 (Reserved).

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to and compilation of chapter 3-126, Hawaii Administrative Rules, on the Summary Page dated April 22, 2004 were adopted on April 22, 2004 following a public hearing held on April 8, 2004 in Honolulu, Hawaii; and via video conference from Honolulu, Hawaii on April 8, 2004 to Hilo, Hawaii; Wailuku, Maui; and Lihue, Kauai; after public notice was given in the Honolulu Star-Bulletin, Hawaii Tribune Herald, West Hawaii Today, The Maui News, and The Garden Island on March 8, 2004

This chapter 126, subtitle 11 of title 3, Hawaii Administrative Rules, replaces interim rules dated 11/25/02 (file no. 2497); 7/3/03 (file no. 2545); and 11/3/03 (file no. 2560), and shall take effect ten days after filing with the Office of the Lieutenant Governor.

FOR


PHYLLIS M. KOIKE
Chairperson
Procurement Policy Board


RUSS K. SAITO
State Comptroller

APPROVED:


LINDA LINGLE
Governor
State of Hawaii

Dated: MAY 10 2004

Filed

04 MAY 10 P1 53

LIEUTENANT GOVERNOR'S
OFFICE

APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to read "Peter A. ...". The signature is written in a cursive style with a long horizontal stroke at the end.

Deputy Attorney General