DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-148
Hawaii Administrative Rules

2016

1. Chapter 3-148, Hawaii Administrative Rules, entitled "Protest and Request for Reconsideration" is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 148

PROTEST AND REQUEST FOR RECONSIDERATION

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SUBCHAPTER 1

PURPOSE & SCOPE

§3-148-101 Scope. The provisions of this chapter shall apply to all protests and grievances arising in connection with the award of a contract issued through competitive or restrictive purchases of services under chapter 103F, HRS and these rules. [Eff: 6/19/99; comp] (Auth: HRS §103F-106) (Imp: HRS §§103F-501 - 103F-504)

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§3-148-102 Purpose. The purpose of this chapter is to implement sections 103F-501 - 103F-504, HRS, by establishing a fair and efficient procedure for resolving protests that simultaneously allows and encourages the settlement of protests by mutual agreement. [Eff: 6/19/99; comp] (Auth: HRS §103F-106) (Imp: HRS §§103F-501 - 103F-504)

§3-148-103 Allowable protests. (a) Only awards of contracts made under the competitive or restrictive purchase of service methods of procurement may be protested. In connection with such awards, only the following matters may be protested:

(1) A purchasing agency's failure to follow procedures established by chapter 103F, HRS;

(2) A purchasing agency's failure to follow these rules; and

(3) In the case of a competitive purchase of service, a purchasing agency's failure to follow any procedure, requirement, or evaluation criterion in a request for proposals issued by the purchasing agency.

(b) All other awards and determinations final. Except as provided in subsection (a) above, all other awards and determinations made under chapter 103F, HRS, shall be final and conclusive when made, including, but not limited to:

(1) Awards of contracts under the treatment purchase of service method of procurement, and related matters;

(2) Awards of contracts under the small purchase of service method of procurement, and related matters;

(3) Awards of contracts under the crisis purchase of service method of procurement, and related matters;

(4) Amounts payable under a contract awarded under either the competitive or restrictive purchase of service method of procurement; or

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(5) Any other award or matter not specifically and expressly enumerated in subsection (a) above.

(c) Procedures mandatory. All allowable protests shall be made in compliance with the procedures established under this chapter. [Eff: 6/19/99; comp] (Auth: HRS §§103F-106, 103F-501) (Imp: HRS §§103F-501, 103F-504)

SUBCHAPTER 2

INFORMAL RESOLUTION OF PROTESTS

§3-148-201 Informal request for explanation. (a) In order to promote more efficient dispute resolution, any applicant may informally request an explanation or justification for a purchasing agency's award of a contract or apparent failure to follow the procedures established for the award of a contract.

(b) Response by purchasing agencies. Purchasing agencies may respond as practicable to informal requests for explanations. The failure of a purchasing agency to respond to an informal request shall not be grounds for a formal protest or objection.

(c) No extension of protest period. An informal request made under this section shall not extend the running of the protest period established by section 103F-501, HRS, and sections 3-148-301 and 3-148-401.

(d) No expansion of rights and remedies. The sole purpose of this section is to provide a mechanism for informal explanations to be requested by applicants and given by purchasing agencies. This section shall not be construed to expand the scope of the protest rights and remedies established by chapter 103F, HRS. [Eff: 6/19/99; comp] (Auth: HRS §103F-106) (Imp: HRS §§103F-501 - 103F-504)

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§3-148-202 [~~Resolution~~] Informal resolution of protest [~~by mutual agreement~~]. (a) A protest may, at any time, be informally resolved [~~by mutual agreement~~] between the protestor and the purchasing agency. A protest resolved informally shall be communicated in writing by the purchasing agency to all parties and included in the procurement file.

[~~(b) Form of mutual agreement. Any resolution Resolution of a protest under this section shall be reduced to written form, and signed by both parties.~~]

[~~(c)~~] (b) Remedies available. [~~In order to resolve a protest by mutual agreement,~~] For an informal resolution of a protest, only the following remedies, singularly or in any combination may be used:

(1) Amending or canceling a request for proposals;
(2) Terminating the contract which was awarded;
(3) Initiating a new process to award a contract by either re-opening the evaluation process or commencing a new procurement process;
(4) Declaring the contract null and void from the time of its award;
(5) Affirming the purchasing agency's contract award decision; and
(6) Dismissing the protestor's protest.

[Eff: 6/19/99; am and comp] (Auth: HRS §103F-106) (Imp: HRS §§103F-501 - 103F-504)

SUBCHAPTER 3

PROCEDURE FOR PROTESTS

§3-148-301 Notice of protest. (a) Protestors shall commence the protest procedure by submitting a notice of protest to the head of the purchasing agency [~~that conducted the protested procurement,~~] and to the procurement officer [~~who handled~~] of the protested procurement.

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(b) Form of notice of protest. A notice of protest may be made by using a form provided by the administrator, or by any other document that conforms with the requirements of this subsection. A notice of protest shall include, at a minimum, the following information:

(1) The name and address of the protestor;

(2) The name of the procurement officer or other personnel who oversaw the protested procurement;

(3) The reference number of the protested procurement; and

(4) A brief statement of the grounds for the protest.

(c) Protest period for competitive purchase of service awards. Protests regarding awards of contracts and related matters that arise in connection with a procurement made under a competitive purchase of service shall be submitted within five working days [of] after the postmark date of the notice of findings and decision, or notice of rejection sent to the protestor.

(d) Protest period for restrictive purchase of service awards. Protests regarding awards of contracts and related matters that arise in connection with a procurement made under a restrictive purchase of services shall be submitted by the deadline given in the notice of the restrictive purchase of service.

(e) Late notice of protests. Any notice of protest that is not submitted within the protest periods established in this section is late and shall be dismissed.

(f) Submission of notice of protest. [~~Notices of protests may be submitted only by United States mail, or by hand delivery. Notices of protests submitted by hand-delivery shall be deemed to have been submitted when actually received, and protests submitted and received by United States mail shall be deemed to have been submitted on the date they are post-marked rather than the date they are actually received.~~] Notice of protests shall be considered submitted when it is actually received by the

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purchasing agency. Notice of protests may be submitted by various means, i.e., electronically, hand delivered, United States mail, courier service. It shall be the protestor's responsibility to ensure that the purchasing agency receives the notice of protest by the submittal deadline. [Eff 6/19/99; am and comp] (Auth: HRS §§ 103F-106, 103F-501) (Imp: HRS § 103F-501)

§3-148-302 [~~Settlement and scheduling conference.~~] Protest settlement conference and schedule. (a) Within three working days of receiving a notice of protest, the [~~head of the purchasing agency~~] procurement officer or designee shall [~~organize and conduct~~] schedule a protest settlement [~~and scheduling~~] conference with the protestor [~~and the procurement officer in charge of the protested award and issue a scheduling order in accordance with this section~~].

(b) Procedure [~~for settlement and scheduling conference~~]. The protest settlement [~~and scheduling~~] conference may be conducted face to face, by telephone [~~conference~~], or other electronic communications medium. [~~At a minimum, the conference will address the following topics:~~

~~[(1) Whether the protest can be resolved by mutual agreement without submitting the matter to the head of the purchasing agency for decision; and~~

~~(2) Whether there will be any requests for clarification under section 3-148-502, and how much time the parties will need to make and respond to such requests.~~]

(1) At a minimum, the settlement conference shall address:

(A) The protestor's grounds for protest; and

(B) Whether the protest can be informally resolved by mutual agreement.

(2) If the protest cannot be resolved informally by mutual agreement, a protest schedule

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shall be established by the purchasing agency in accordance with (c) and (d) and provided to the protestor within two days of the settlement conference.

(c) Contents of [~~scheduling order.~~] protest schedule. The [~~scheduling order~~] protest schedule shall set the deadlines for the following:

(1) Requests for clarification and responses if any;

(2) Submission of formal protest;

(3) Submission of the purchasing agency's response to the protest;

(4) Submission of the protestor's reply to the purchasing agency's response; and

(5) Issuance of a written decision by the head of the purchasing agency.

(d) Standard times allowed. Every protest shall be resolved as speedily as possible.

(1) [~~To the extent practicable, the submission of protests, responses, requests for clarification, and replies~~]Items (c)(1) to (c)(3)shall be completed within ten working days.

(2) [~~To the extent practicable, written decisions~~] The written decision by the head of the purchasing agency shall be issued within five working days[~~.~~]from receipt of the protestor's reply to the purchasing agency's response, item (c)(4).

(3) More or less time may be provided in the [~~scheduling order~~] protest schedule at the discretion of the head of the purchasing agency. [Eff 6/19/99; am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

§3-148-303 [~~Written~~] Formal protest. (a) A protestor shall file a [~~written~~] formal protest in accordance with this section[~~.~~]and the established protest schedule.

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(b) Form and contents of protests. [~~Protests~~] Formal protests shall be made in writing and shall [~~contain~~] include, at a minimum, the following [~~information and materials~~]:

(1) The name and address of the protestor;

(2) Appropriate identification of the procurement;

(3) A statement of reasons for the protest;

(4) Supporting exhibits, evidence, or documents to substantiate the protest;

(5) Any additional relevant information that would help the purchasing agency reach a decision; and

(6) A declaration by the protestor that all [~~facts alleged~~] the information provided in the protest are true and correct to the best of the protestor's knowledge.

(c) Submission of [~~written~~] formal protest. A [~~written~~] formal protest shall be submitted to the head of the purchasing agency[~~,~~] and the procurement officer in charge of the contested procurement. [~~Replies may be submitted by hand-delivery or by United States mail. Replies submitted by hand-delivery shall be deemed to have been submitted when actually received and replies submitted and received by United States mail shall be deemed to have been submitted on the date they are post-marked rather than the date they are actually received.~~] Formal protests shall be considered submitted when it is actually received by the purchasing agency. Formal protests may be submitted by various means, i.e., electronically, hand delivered, United States mail, courier service. It shall be the protestor's responsibility to ensure that the formal protest is received by the submittal deadline. [Eff 6/19/99, am and comp] (Auth: HRS §§ 103F-106, 103F-501) (Imp: HRS §103F-501)

§3-148-304 Response to formal protest. (a) A purchasing agency shall respond in writing to the formal protest in accordance with this section.

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(b) Form and contents of response. Every response to a protest shall be made in writing and shall contain at a minimum the following [~~information and materials~~]:

(1) The name and address of the procurement officer in charge of the protested award;

(2) The purchasing agency's position with respect to the protest, and the reasons for the purchasing agency's position;

(3) Supporting exhibits, evidence, or documents to substantiate the purchasing agency's position; and

(4) Any additional relevant information [~~that would help the head of the purchasing agency reach a decision~~].

(c) [~~Submission~~] Transmittal of response. The response from the purchasing agency shall be submitted to the protestor[~~, the head of the purchasing agency, and the chief procurement officer. Responses may be submitted only by United States mail, or by hand-delivery. Responses submitted by hand-delivery shall be deemed to have been submitted when actually received, and responses submitted and received by United States mail shall be deemed to have been submitted on the date they are post-marked, rather than the date they are actually received.~~] within the time frame established by the protest schedule and may be transmitted to the protestor by various means, i.e., electronically, hand delivered, United States mail, courier service. [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

§3-148-305 Reply by [~~provider.~~]protestor. (a) [~~A provider~~] The protestor may make a reply to a purchasing agency's response under section 3-148-304 in accordance with this section.

(b) Form and contents of reply. A reply may contain the following [~~information and materials~~]:

(1) Additional reasons or arguments supporting the position of the [~~applicant;~~] protestor;

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(2) Additional evidence or materials supporting the position of the [~~applicant~~] protestor; or

(3) Any additional relevant information that would help the head of the purchasing agency reach a decision.

(c) Submission of reply. [~~A~~] Protestor's reply shall be submitted to the head of the purchasing agency[~~,~~] and the procurement officer [~~in charge~~] of the [~~contested procurement.~~] solicitation. [~~Replies may be submitted by hand-delivery or by United States mail. Replies submitted by hand-delivery shall be deemed to have been submitted when actually received and replies submitted and received by United States mail shall be deemed to have been submitted on the date they are post-marked rather than the date they are actually received.~~] Protestor's reply shall be considered submitted when it is actually received by the purchasing agency. Protestor's reply may be submitted by various means, i.e., electronically, hand delivered, United States mail, courier service.

[Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

§3-148-306 Decision by the head of the purchasing agency. (a) When a protest cannot be resolved by mutual agreement, the head of the purchasing agency shall resolve the protest by a written decision issued in accordance with this section.

(b) Time for issuance of decision. The written decision shall be issued within the time frame established by the [~~scheduling order,~~] protest schedule unless the head of the purchasing agency determines that an extension [~~to a certain date~~] is necessary, and gives written notice of the extended deadline to the [~~parties.~~] protestor.

(c) Form and contents of decision. Every decision issued in resolution of a protest shall [~~contain~~] include the following:

(1) [~~A statement of the~~] The action to be taken

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or resolution to the protest;

(2) [~~A detailed statement of the~~] The reason for the resolution, including factual findings;

(3) A statement of the protestor's right to reconsideration; and

(4) A statement that the decision is final and conclusive, unless a timely request for reconsideration is made.

(d) Allowed [~~methods for resolving protests.~~] protest resolutions. The head of the purchasing agency may use only the following methods, singularly or in any combination, to settle and resolve a protest:

(1) [~~Amending or canceling a~~] Amend or cancel the request for proposals;

(2) [~~Terminating~~] Terminate the awarded contract [~~that was awarded~~];

(3) [~~Initiating~~] Initiate a new process to award a contract by either re-opening the evaluation process or commencing a new procurement process;

(4) [~~Declaring~~] Declare the contract null and void from the time of its award;

(5) [~~Affirming~~] Affirm the purchasing agency's contract award decision; and

(6) [~~Dismissing~~] Dismiss the protestor's protest.

(e) [~~Submission~~] Transmittal of decision. [~~Copies of the~~] The head of the purchasing agency's decision shall be [~~submitted~~] sent to the protestor[~~,~~] and the procurement officer [~~in charge of the protested procurement, and the chief procurement officer by~~

~~(1) Hand delivery; or~~

~~(2) By United States mail and, to the extent practicable, by telefacsimile transmission.~~] within the time frame established by the protest schedule. If the head of the purchasing agency requires additional time to issue the decision, the protestor shall be notified in writing of the extension. The decision may be transmitted by various

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means, i.e., electronically, hand delivered, United States mail, courier service.
[Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

SUBCHAPTER 4

PROCEDURE FOR REQUESTS FOR RECONSIDERATION

§3-148-401 Request for reconsideration. (a) A request to the chief procurement officer for the reconsideration of a decision of the head of a purchasing agency may be made in accordance with this section.

(b) Time for request. A request for reconsideration shall be made within five working days after the receipt of the decision of the head of the purchasing agency.

(c) Form and contents of request. A request for reconsideration shall[~~, contain~~] include the following [~~materials and information~~]:

(1) A detailed statement of the factual and legal grounds for reconsideration based on the materials presented to the head of the purchasing agency during the initial protest procedure.

(2) Copies of the [~~scheduling order,~~] protest schedule, formal protest, [~~answer~~,] purchasing agency's response, protestor's reply, head of the purchasing agency's decision and supporting materials submitted during the initial protest procedure.

(d) Submission of request. The request for reconsideration shall be submitted to the chief procurement officer and the [~~opposing party by hand-delivery or United States mail. Requests for reconsideration submitted by hand-delivery shall be deemed to have been submitted when actually received, and requests for reconsideration submitted and received by United States mail shall be deemed to have~~

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~~been submitted on the date they are post-marked, rather than the date they are actually received.~~] solicitation's procurement officer. Protestor's request for reconsideration shall be considered submitted when it is actually received by the chief procurement officer. Protestor's request may be submitted by various means, i.e., electronically, hand delivered, United States mail, courier service.

(e) [~~Reply.~~] Purchasing agency's response to request. Within five working days after the submittal of the request for reconsideration, the [~~opposing party~~] purchasing agency may submit a [~~reply~~] written response to the chief procurement officer [~~to the request~~] based on the request and the materials submitted to the head of the purchasing agency during the initial protest procedure. [~~The reply shall be submitted in the same manner as the request for reconsideration.~~] [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-502)

§3-148-402 Decision by the chief procurement officer. (a) After [~~a~~] receipt of the request for reconsideration and any [~~reply~~] purchasing agency response [~~thereto have been received~~], the chief procurement officer shall issue a written decision in accordance with this section.

(b) Time for issuance of decision. The written decision shall be issued within fifteen calendar days [~~of~~] after the receipt of the request for reconsideration, unless the chief procurement officer determines that an extension [~~to a certain date~~] is necessary[~~,~~] and gives written notice of the extended deadline to the parties.

(c) Form and contents of decision. Every [~~decision issued in resolution of a protest~~] protest resolution decision shall be in writing, and [~~shall,~~] at a minimum, [~~contain~~] include the following:

(1) The chief procurement officer's decision [~~of the chief procurement officer~~] to uphold the decision of the head of the purchasing

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agency, or to re-open the protest and award an appropriate remedy; and

(2) [A ~~detailed statement of the reason~~] Details for the decision, including factual findings.

(d) Allowed remedies upon re-opening a protest. Upon re-opening a protest, the chief procurement officer may use only the following [~~methods,~~] remedies, singularly or in any combination, to settle and resolve a protest:

(1) [~~Amending or canceling~~] Amend or cancel a request for proposals;

(2) [~~Terminating~~] Terminate the awarded contract [~~which was awarded~~];

(3) [~~Initiating~~] Initiate a new process to award a contract by either re-opening the evaluation process or commencing a new procurement process; and

(4) [~~Declaring~~] Declare the contract null and void from the time of its award[;].

[~~(5)Affirming the purchasing agency's contract award decision; and~~

~~(6) Dismissing the protestor's protest.~~]

(e) [~~Submission~~] Transmittal of decision. [~~Copies of the~~] The chief procurement officer's written decision shall be [~~submitted~~] sent to the protestor, the procurement officer in charge of the protested procurement, and the head of the purchasing agency [~~by~~

~~(1) Hand delivery; or~~

~~(2) By United States mail and, to the extent practicable, by telefacsimile transmission~~]. The decision may be transmitted by various means, i.e., electronically, hand delivered, United States mail, courier service. [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-502)

SUBCHAPTER 5

MISCELLANEOUS PROCEDURES

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§3-148-501 Suspension of Award. (a) When a notice of protest has been submitted within the applicable protest period established in section 3-148-301, the award shall be suspended, and no further award action [~~to make the protested award~~] shall be taken until the protest is resolved, including but not limited to:

(1) Execution of a contract;

(2) [~~The delivery~~] Delivery of services in anticipation of the award; or

(3) Negotiations or discussions with a provider regarding an intended award or contract.

(b) Waiver of suspension. The chief procurement officer may waive the suspension of an award under this section upon making a written determination that includes the following:

(1) [~~A determination that the~~] The award of the contract without delay is necessary to protect the health, safety, or welfare of a person from an imminent and serious threat;

(2) A brief factual description of the current situation, and how a delay would create an imminent and serious threat;

(3) [~~A determination that the~~] The purchasing agency's lack of planning [~~has not caused the necessity of~~] is not the cause for the award delay;

(4) [~~A determination that the~~] The waiver [~~of the suspension has not been granted in order~~] is not being granted to frustrate the fair and speedy resolution of the protest; and

(5) A certification[~~,~~] that all the information and determinations in the written waiver are true and correct to the best of the chief procurement officer's knowledge. [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-106)

§3-148-502 Requests for clarification. (a)

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During a protest, the protestor and the purchasing agency may request relevant information from each other in accordance with this section.

(b) Purchasing agency procurement records. The protestor may make a written request for access to the purchasing agency's relevant procurement records, and the purchasing agency shall provide such access except to the extent that information is required or permitted to be withheld by law.

(c) Additional information. Both parties may make written requests for additional relevant information to each other. Parties from whom additional information is requested shall respond by producing such additional information except to the extent that such information is required or permitted to be withheld by law.

(d) Time for requests and responses. The deadlines for requests and responses under this section shall be as provided by the [~~scheduling order issued~~] protest schedule established in accordance with section 3-148-302.

(e) Disputes. The parties shall make all requests and responses in good faith, and shall make good faith efforts to resolve any disputes as to requests and responses that arise. In the event that a dispute arises that the parties cannot resolve, then the head of the purchasing agency may resolve such dispute as fairly as possible in the light of all the circumstances. [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

§3-148-503 Form of evidence submitted during a protest or reconsideration. (a) During a protest or reconsideration, all evidence shall be submitted in the form provided by this section.

(b) Documentary evidence. [~~Either originals or photocopies~~] Photocopies of documentary evidence may be submitted, [~~but every photocopy shall be accompanied~~] with [~~an original~~] a signed declaration that the [~~photocopy is~~] each document is a true and correct copy of the original.

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(c) Witness testimony. Testimony from a witness or other person with knowledge may be submitted in the form of an original, signed declaration made under penalty of perjury.

(d) Other forms of evidence. Other forms of evidence such as photographs, or video or audio tapes may be submitted, provided that they are accompanied by an original, signed declaration. [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

§3-148-504 Conduct of the head of purchasing agency during protests. [~~(a)~~] During the resolution of a protest proceeding under this chapter, the head of a purchasing agency shall conduct him or herself as a neutral and impartial party[~~.~~] and any decision made regarding the protest shall be based on factual, documented evidence submitted in accordance with this chapter. If the head of a purchasing agency cannot meet this standard of conduct because of a conflict of interest arising from the head's involvement in the protested procurement, or other good cause, the head shall designate another state employee to act in his or her place.

~~(b) Communications with the head. Neither the protestor nor the procurement officer in charge of the protested procurement shall communicate with the head of the purchasing agency in connection with the merits of a protest without first informing the other. The head of the purchasing agency shall not communicate singly with either the protestor or the procurement officer in charge of the protested procurement as to the merits of the protest without first informing the other.~~]" [Eff 6/19/99, am and comp] (Auth: HRS § 103F-106) (Imp: HRS § 103F-501)

2. Material, except source notes, to be repealed is bracketed. New material is underscored.

3. Additions to update source notes to reflect these amendments and compilation are not underscored.

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4. These amendments to and compilation of chapter 3-148, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which are adopted on _____ and filed with the Office of the Lieutenant Governor.

_____

Chairperson
Procurement Policy Board

_____

State Comptroller

APPROVED AS TO FORM

_____
Deputy Attorney General

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