

BENJAMIN J. CAYETANO
GOVERNOR



SAM CALLEJO
Comptroller

MARY PATRICIA WATERHOUSE
Deputy Comptroller

**STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES**

P. O. BOX 119
HONOLULU, HAWAII 96810-0119

PROCUREMENT POLICY BOARD
1151 Punchbowl Street
Conference Room 410
Honolulu, Hawaii 96813

Regular Meeting
August 1, 1995
2:00 p.m.

A G E N D A

- I. CALL TO ORDER
- II. APPROVAL OF MINUTES
Meeting of July 5, 1995
- III. NEW BUSINESS
 - A. Review and Approval of Amendments to Interim Rules
 1. Chapter 3-122, Source Selection and Contract Formation
 2. Chapter 3-124, Preferences
 3. Chapter 3-125, Modifications and Terminations of Contract
 4. Chapter 3-131, Procurement Violations
- IV. ADMINISTRATOR'S REPORT
- V. ADJOURNMENT

95 JUL 26 P 2:44

LIEUTENANT GOVERNOR'S
OFFICE

PROCUREMENT POLICY BOARD MEETING

August 1, 1995

2:00 p.m.

Comptroller's Conference Room
1151 Punchbowl Street, Room 410
Honolulu, Hawaii 96813

Members Present

Haruo Shigezawa, Chairman
Tim Johnson, Vice Chairman
Sam Callejo, Secretary
Bill Gray, Member
Robert Oyama, Member

Others

Lloyd Unebasami, Administrator
Robert Governs, State Procurement Office
Grant Turner, State Procurement Office
Kay Fujimoto, State Procurement Office
Pat Ohara, Deputy Attorney General
Eric Tom, DOE Procurement Office
Duff Zwald, University of Hawaii
Gwen Won, University of Hawaii
Clayton Wong, Honolulu City Council

Call to Order

The meeting was called to order at 2:00 p.m. by Chairman Haruo Shigezawa.

Minutes

Motion

A motion was made by Mr. Tim Johnson, seconded by Mr. Robert Oyama, to approve the minutes of the meeting held on July 5, 1995.

AYES: Mr. Haruo Shigezawa
Mr. Tim Johnson
Mr. Sam Callejo
Mr. Bill Gray
Mr. Robert Oyama

NAYS: None

(3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or to the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

- g. Section 3-122-34. The proposed amendment gives authority to the procurement officer to resolve tie bids to streamline the bid process. Mr. Callejo asked what is the justification of awarding the contract to the tie bidder farthest from the point of delivery (item (2)). Mr. Govers replied that this item was taken from the ABA Code. Ms. Ohara recommended that item (2) be deleted; the Chairman concurred. It was noted that subsection (e) should be listed as subsection (d).
- h. Section 3-122-35(b)(1). Revisions were made for clarity.
- i. Section 3-122-108. Amendments to this section were made to allow for facsimile transmission of notices of intent to bid.

2. Chapter 124, Preferences.

- a. Section 3-124-5(b). Clarified the application of the preference to the non-Hawaii product.
- b. Section 3-124-5(d). Clarified that different preference percentages are not applied.
- c. Section 3-124-6(a). The notification period for changes in class status is reduced from ninety (90) days to sixty (60) days.
- d. Section 3-124-7. Amendments allow for a thirty (30) day notification prior to the date for biennial renewal and a sixty (60) day grace period for the renewal or a new application.
- e. Section 3-124-8. Language is inserted that specifically states that if a terminated individual wishes to be reinstated on the Hawai'i Products List, a new application must be submitted.

- f. Section 3-124-33. In the qualification procedure, the issuer of the Certificate of Eligibility form has been changed from the policy board to the administrator.
 - g. Section 3-124-45. The bid evaluation procedure and preference applications are clarified when an in-state contractor preference is not selected.
3. Chapter 3-125, Modifications and Terminations of Contract.

Section 3-125-2 was revised for change orders to goods and services contracts. Included in the revision are references to "change clauses" which shall be included in all contracts for goods and services.

4. Chapter 3-131, Procurement Violations

Sections 3-131-2, 3-131-3, 3-131-4, 3-131-5, 3-131-6. The revisions in these sections were made for clarity; many were recommended by the staff of the Legislative Reference Bureau.

Motion

Mr. Bill Gray made a motion to approve the amendments to the interim rules, Chapters 3-122, 3-124, 3-125, and 3-131, as discussed above; the motion was seconded by Mr. Tim Johnson.

AYES: Mr. Haruo Shigezawa
Mr. Tim Johnson
Mr. Sam Callejo
Mr. Bill Gray
Mr. Robert Oyama

NAYS: None

The motion was unanimously approved.

Administrator's Report

Mr. Unebasami reported that he had met with the Governor and each of the Mayors of all four counties during the past month. The Governor requested that the procurement process be expeditious, with discretion, and with full disclosures.

The Mayors have stated that they have accepted the procurement code and rules and have requested that the procurement process be kept streamlined. If the process becomes too cumbersome and would require them to increase staffing, they will express their discontent.

Mr. Unebasami stated that he will be meeting with the University President, the Senate President, the House Speaker, the Department of Education Superintendent, the Administrator of OHA, and the Administrator of the Community Hospitals within the next few weeks.

Next Meeting

The Chairman announced that the next meeting will be held on Tuesday, September 5, 1995 at 2:00 p.m.

Adjournment

There being no further business, the meeting was adjourned at 3:15 p.m.

Respectfully submitted,

8.21.95

Date



SAM CALLEJO, Secretary
Procurement Policy Board



BENJAMIN CAYETANO
GOVERNOR



'95 JUL 31 A9:00

KAZU HAYASHIDA
DIRECTOR
DEPUTY DIRECTORS
GLENN M. OKIMOTO
JERRY M. MATSUDA

STATE PROCUREMENT OFFICE
STATE OF HAWAII

'95 JUL 28 AM 11:30
STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097
ADMINISTRATION
STATE PROCUREMENT OFFICE, 1995
STATE OF HAWAII

IN REPLY REFER TO:

HWY-SF
2.6685

TO: LLOYD I. UNEBASAMI
CHIEF PROCUREMENT OFFICER, STATE PROCUREMENT OFFICE

FROM: KAZU HAYASHIDA *K.H.*
DIRECTOR OF TRANSPORTATION

SUBJECT: EXEMPTION FROM BIDDING FOR SERVICES PROVIDED BY UTILITY COMPANIES

In response to recent discussions with your office, we request a proposed exemption to the procurement code for our contracts for repair, replacement, connection (activation or hookup), or relocation of equipment and/or facilities owned or controlled by utility companies.

During the course of a construction project, it may become necessary for the Department of Transportation to repair, replace, connect, or relocate equipment and/or facilities owned or controlled by utility companies such as electric company, telephone company, gas company, cable company, etc..

The utility companies allow only their employees, or duly authorized contractors, to implement the repair, replacement, or relocation of their equipment and/or facilities.

As the equipment and/or facilities are not owned or controlled by the State, we exercise no jurisdiction over its upkeep or maintenance and cannot competitively bid the contracts in accordance with the requirements of Chapter 103D, Hawaii Revised Statutes (HRS).

Due to the unique nature of these regulated industries and the ownership and control issues in question, we believe that use of competitive bidding is not practicable or advantageous to the State. For these reasons, we ask your approval of a blanket exemption to the procurement code for the services described above.

If you have any questions, please contact Gerald K.L. Dang at 587-2217.

~~PURSUANT TO 103D-102(b) (4), HRS, THE ABOVE REQUEST IS APPROVED. WHEN REQUESTING EXEMPTION FROM 103D, HRS. IN THE FUTURE, PLEASE SUBMIT YOUR REQUEST ON SPO FORM-7 (7/1/95) REQUEST FOR EXEMPTION FROM CHAPTER 103D, HRS.~~

BENJAMIN J. CAYETANO
GOVERNOR



SAM CALLEJO
~~COMPTROLLER~~
Comptroller

MARY PATRICIA WATERHOUSE
Deputy Comptroller

**STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES**

P. O. BOX 119
HONOLULU, HAWAII 96810-0119

PO-96-104.2

August 21, 1995

MEMORANDUM

TO: The Honorable Kazu Hayashida, Director
Department of Transportation

FROM: Lloyd I. Unebasami, Chief Procurement Officer
State Procurement Office

SUBJECT: Exemption from Bidding for Services
Provided by Utility Companies

This memo is in response to your letter of August 8, 1995, which requested approval for a blanket exemption from the procurement code for contracts relating to the repair, replacement, connection (activation or hookup), or relocation of equipment and/or facilities owned or controlled by utility companies.

Based on the information provided, we believe that due to the nature of these industries, and the ownership and control issues, the contracting for the subject services should more appropriately come under the provisions of Subchapter 9 of Chapter 3-122, HAR, Sole Source Procurements.

Therefore, pursuant to section 103D-306(c), we plan to present your request to the Procurement Policy Board at the next meeting for consideration to approve and include the subject expenditures on the list of sole source procurements.

Should you have any questions, please call me at 587-4700.



INFORMATION

FORTHCOMING





STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

March 7, 1995

MEMORANDUM

TO: Procurement Policy Board

FROM: Jack A. Rosenzweig, Deputy Attorney General
on behalf of the AG-D.A.G.S. Working Group *JR*

RE: COMMENTS ON PROPOSED CHANGES TO PROCUREMENT
REGULATIONS, CHAPTER 123

INTRODUCTION

At the February 7, 1995 meeting of the Procurement Policy Board, a working group of managers and representatives from the Department of the Attorney General and the Public Works Division of the Department of Accounting and General Services ("AG-D.A.G.S. working group) presented its proposals and comments on recommended changes to chapter 3-125 of the interim procurement rules.

The Board was advised that the working group was undertaking a long neglected task of reviewing the General Conditions under which all D.A.G.S. construction contracts are performed, with the intent of removing conflicts, ambiguities and contradictions, and revising them to provide tighter control over the changes and claims processes. When the project is concluded, it is anticipated that the revised General Conditions will be proposed as a model to be adopted by the dozen or so other State agencies that have some degree of construction contract oversight responsibility.

Upon reviewing the Interim Procurement Regulations it became apparent to the AG-D.A.G.S. Working Group that as written by the American Bar Association, the Model Regulations tended to undermine the ability of the government side to have closure with respect to contractor's extra compensation claims, and to properly control the costs and time of performance of

construction contracts. The proposed revisions of Chapter 3-125 presented to the Board by the Working Group were designed to overcome the bias existing in favor of the contractors and sureties.

At the request of the Procurement Officer, the Working Group has now undertaken a similar review of Chapter 123. This Chapter is much more technical in nature, establishing accounting policies regarding how costs are to be dealt with in cost reimbursement contracts and force account change work on fixed price contracts. As in Chapter 125, we have found that a number of the regulations subtly but clearly tip the costing procedures in favor of the contractor and to the prejudice of the State.

The changes proposed herein, we believe, reestablish a balance that gives greater control to the State while still being fair to the contractor. We urge that the Board adopt these proposed revisions before making the rules permanent.

If further information is needed from the Working Group, please contact Deputy Attorney General Jack Rosenzweig (6-1315) or Steve Miwa (6-0512) at D.A.G.S.

JAR:dch
[CLMS01-509]

INTERIM DRAFT
HAWAII ADMINISTRATIVE RULES
TITLE 3
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
SUBTITLE 11
PROCUREMENT POLICY BOARD
CHAPTER 123
COST PRINCIPLES

- §3-123-1 Applicability of cost principles
- §3-123-2 Allowable costs
- §3-123-3 Reasonable costs
- §3-123-4 Allocable costs
- §3-123-5 Specific costs--advertising
- §3-123-6 Specific costs--bad debts
- §3-123-7 Specific costs--contingencies
- §3-123-8 Specific costs--depreciation and
 use allowances
- §3-123-9 Specific costs--entertainment
- §3-123-10 Specific costs--fines and penalties
- §3-123-11 Specific costs--gifts,
 contributions, and donations
- §3-123-12 Specific costs--interest expense
- §3-123-13 Specific costs--losses incurred
 under other contracts
- §3-123-14 Specific costs--material costs
- §3-123-15 Specific costs--taxes
- §3-123-16 Costs requiring prior approval to
 be allowable as direct costs
- §3-123-17 Pre-contract costs
- §3-123-18 Bid and proposal costs
- §3-123-19 Insurance
- §3-123-20 Litigation costs
- §3-123-21 Applicable credits
- [\$3-123-22 Advance agreements]
- §3-123-2[3]2 Use of federal cost principles
- §3-123-2[4]3 Authority to deviate from
 cost principles

§3-123-1 Applicability of cost principles. (a) The cost principles and procedures contained in this chapter shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs.

(b) The cost principles and procedures set forth in this chapter may be used as guidance in:

- (1) The establishment of contract cost estimates and prices under contracts awarded where the award may not be based on adequate price competition: subchapters 6, 7, and 9, chapter 122;
- (2) The establishment of price adjustments for contract changes including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;
- (3) The pricing of termination for convenience settlements; and
- (4) Any other situation in which cost analysis is used.

(c) These cost principles are not applicable to:

- (1) The establishment of prices under contracts awarded on the basis of competitive sealed bidding or based on adequate price competition rather than the analysis of individual, specific cost elements, except that this chapter does apply to the establishment of adjustments of price for changes made to such contracts;
- (2) Prices which are fixed by law or regulation; and
- (3) Prices which are based on established catalogue prices or market prices pursuant to section 3-122-145. [Eff]
(Auth: HRS §103D-601) (Imp: HRS §103D-601)

THIS IS A RECOMMENDED WORKING DRAFT OF CHANGES TO INTERIM DRAFT RULE §3-123. ADDITIONS ARE IN BOLD PRINT AND UNDERLINED. DELETIONS ARE IN BOLD PRINT AND BRACKETED.

§3-123-2 Allowable costs. (a) Any contract cost proposed for estimating purposes or invoiced for cost-reimbursement purposes shall be allowable to the extent provided in the contract and, if inconsistent with these cost principles, approved as a deviation under section 3-123-24. [The contract shall provide that] [t]The total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits such as discounts, rebates, and property disposal income.

(b) All costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to its other activities. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs.

(c) [The contract shall provide that] [c]Costs [shall]may be allowed only to the extent they are:

- (1) [Reasonable]Appropriate, as defined in section 3-123-3;
- (2) Allocable, as defined in section 3-123-4;
- (3) Lawful under any applicable law;
- (4) Not unallowable under sections 3-123-5 through 3-123-15 and 3-123-17 through 3-123-20; and
- (5) In the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.
[Eff] (Auth: HRS §103D-601)
(Imp: HRS §103D-601)

COMMENT. The procurement regulations set policy and have the force of law. Thus the working group is puzzled by the directive in subsections (a) and (c) that "the contract shall provide" specific language as to what constitutes an allowable cost. The required provisions do not easily convert into language that

fits comfortably into a set of general conditions. The Working Group believes that the policy established is clear enough and that the parties will be controlled by it without the need to convert such general principles into specific language incorporated into the contract itself.

We believe that the use of the term "reasonable" in categorizing allowable costs is a mistake. Attorneys have made very good livings devoting their careers to disputes over what is "reasonable". The use of the word is equivalent to waving a red cape in front of a bull.

In the context for which it is used, the working group believes that we can substitute the term "reasonable" with the term "appropriate" without changing the intent of the provisions.

See further discussion in the comment to section 123-3.

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§3-123-3 [Reasonable] Appropriate costs. A cost is [reasonable] appropriate if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of a competitive similar business. In determining the [reasonableness] appropriateness of a given cost, consideration shall be given to:

- (1) Requirements imposed by the contract terms and conditions;
- (2) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;
- (3) The restraints inherent in, and the requirements imposed by, such factors as generally accepted sound business practices, arms' length bargaining, and federal and state laws and regulations;
- (4) The action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the State;
- (5) Significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and
- (6) The guidelines, policies and limitations the State of Hawaii establishes for travel related expenses for its employees; and
- ~~[(6)]~~ (7) Any other relevant circumstances.
[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. As discussed above, we believe that allowable costs should be categorized as "appropriate" instead of "reasonable". Other terms considered as a substitute for "reasonable" by the Working Group were "proper", "justifiable", "acceptable" and "permitted". We settled on "appropriate" and have made the changes in the language as needed.

We have also recommended an additional consideration in determining the appropriateness of costs for which a contractor seeks reimbursement. Proposed subsection (6) is intended to limit the travel

related expenses for which the State will provide reimbursement, to those that would be paid to a State employee in similar circumstances. Thus, if the travel policies existing for State employees permit only economy-class airplane travel at the lowest available rate, the rental of a compact or subcompact car, and a fixed per diem of \$130 per day for hotels and meals, it would not be appropriate for a contractor to seek reimbursement for first class or full fare plane travel, limousine or luxury car rental, and reimbursement for four star hotel rooms and restaurant meals that exceed the fixed government employee per diem rate.

§3-123-4 Allocable costs. (a) A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received and if it:

- (1) Is incurred specifically for the contract;
- (2) Benefits both the contract and other work, and can be distributed to both in reasonable proportion to the benefits received; or
- (3) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective may not be evident.

(b) Costs are allocable as direct or indirect costs. Similar costs such as those incurred for the same purpose, in like circumstances, shall be treated consistently either as direct costs or indirect costs except as provided by these rules. When a cost is treated as a direct cost in respect to one cost objective, it and all similar costs shall be treated as a direct cost for all cost objectives. Further, all costs similar to those included in any indirect cost pool shall be treated as indirect costs. All distributions to costs objectives from a cost pool shall be on the same basis.

(c) A direct cost is any cost which can be identified specifically with a particular final cost objective. A direct cost shall be allocated only to its specific cost objective. To be allowable, a direct cost must be incurred in accordance with the terms of the contract.

(d) An indirect cost is one identified with no specific final cost objective or with more than one final cost objective. Indirect costs are those remaining to be allocated to the several final cost objectives after direct costs have been determined and charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amount may be treated as indirect costs, provided that such treatment produces substantially the same results as treating the cost as a direct cost.

- (1) Indirect costs shall be accumulated into logical cost groups with consideration of the reasons for incurring the costs. Each group should be distributed to cost objectives benefiting from the costs in the group. Each indirect cost group shall be distributed to the cost objectives substantially in proportion to the benefits received by the cost objectives. The number and composition

of the groups and the method of distribution should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.

- (2) The contractor's method of indirect cost group distribution may require examination when:
- (A) Any substantial difference exists between the cost patterns of the work performed under the contract and the contractor's other work;
 - (B) Any significant change occurs in the nature of the business, the extent of subcontracting, fixed asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or
 - (C) Indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to off-site locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.
- (3) The base period for indirect cost allocation is the one in which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances. In such cases, an appropriate period should be agreed to in advance. [Eff _____] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

§3-123-5 Specific costs--advertising. (a)

Advertising costs are those incurred in using any advertising media when the advertiser has control over the form and content of what will appear, the media in which it will appear, or when it will appear.

Advertising media include newspapers, magazines, radio, television, direct mail, trade papers, billboards, window displays, conventions, exhibits, free samples, and the like. All advertising costs except those set forth in subsection (b) are unallowable.

(b) The only allowable advertising costs are those for:

- (1) The recruitment of personnel;
- (2) The procurement of scarce items;
- (3) The disposal of scrap or surplus material; and
- (4) The listing of a business's name and location in a classified directory.

[Eff
§103D-601)

] (Auth: HRS §103D-601) (Imp: HRS

§3-123-6 Specific costs--bad debts. Bad debts include losses arising from uncollectable accounts and other claims, such as dishonored checks, uncollected employee advances, and related collection and legal costs. All bad debt costs are unallowable.

[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

THIS IS A RECOMMENDED WORKING DRAFT OF CHANGES TO INTERIM DRAFT RULE §3-123. ADDITIONS ARE IN BOLD PRINT AND UNDERLINED. DELETIONS ARE IN BOLD PRINT AND BRACKETED.

§3-123-7 Specific costs--contingencies. (a) Contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in subsection (b).

(b) For the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonably anticipated range of costs may be required and is not prohibited by this subsection. However, where contract clauses are present which serve to remove risks from the contractor, there shall not be included in the contract price a contingency factor for such risks. Further, contributions to a reserve for self-insurance in lieu of, and not in excess of, commercially available liability insurance premiums are allowable as an indirect charge. Such contributions are not allowable, however, for contributions to a reserve account maintained to cover the anticipated costs of a self-insured retention plan or allowable deductible in connection with general commercial liability, automobile liability, builder's risk or other property damage insurance if, at the time of the submission of its proposal, the insurance coverage contemplated by the contractor for the project included such a self-insured retention or deductible.

[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The recommended additional language is somewhat technical in nature but necessary to maintain the "level playing field" among bidder/contractors.

The Working Group, together with a committee of the General Contractors Association dealing with Department of Transportation matters, have been working on a revision of the insurance requirements for State construction contracts. Some well capitalized contractors have been able to negotiate an arrangement with their insurers allowing them to be self-insured in the areas of commercial and automobile liability for up to the first million dollars of coverage, while the insurer provides coverage for the excess of the self-insured retention amount. The State has a direct interest in the liability coverage due to the contractual requirement that it be added as an "additional insured" for such coverage.

The debate within State circles was whether or not to abolish such self-insured retentions (thus requiring first dollar liability insurance coverage) or to take advantage of the anticipated lower bids that would result from the insurance cost savings when self-insured retentions are allowed. The decision was made that the interests of the taxpayers of the State would best be served by permitting self-insured retentions in order to save money.

The new insurance general conditions for D.A.G.S. and D.O.T. will allow for self-insured retentions that will give contractors who qualify for such arrangements a competitive bidding advantage. The language recommended to be added to this section (3-123-7) is intended to prevent a contractor who may have taken advantage of a self-insured retention in preparing its bid from having it both ways by recovering needed insurance reserves from the State through the costing of post-bid changes.

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§3-123-8 Specific costs--depreciation and use allowances. (a) Depreciation and use allowances, that is, the allowance made for fully depreciated assets, are allowable to compensate contractors for the use of buildings, capital improvements, and equipment or for the provision of such facilities on a standby basis for subsequent use when such facilities are temporarily idle because of suspensions or delays not caused by the contractor, not reasonably foreseeable, and not otherwise avoidable when the contract was awarded. Depreciation is a method of allocating the acquisition cost of an asset to periods of its useful life. Useful life refers to the asset's period of economic usefulness in the particular contractor's operation as distinguished from its physical life. Use allowances provide compensation in lieu of depreciation or other equivalent costs. [c]Consequently, these two methods may not be combined to compensate contractors for the use of any one type of property.

(b) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.

(c) Depreciation shall be computed using any generally accepted method, provided that the method is consistently applied and results in equitable charges considering the use of the property. The straight-line method of depreciation is preferred unless the circumstances warrant some other method. However, the State will accept any method which is accepted by the Internal Revenue Service.

(d) In order to compensate the contractor for use of depreciated, contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of the contract, use allowances may be allowed as a cost of that contract. Use allowances are allowable, provided that they are computed in accordance with an established industry or government schedule or other method mutually agreed upon by the parties. If a schedule is not used, factors to consider in establishing the allowance are the original cost, remaining estimated useful life, the reasonable fair market value, and the effect of any increased maintenance or decreased efficiency. Under no circumstances, however, shall the cumulative use allowance for any item of property over the course of the project exceed the actual market value of that item.

(e) No depreciation or use allowance will be permitted for equipment, tools or other items having a purchase price for any such new item or equivalent of less than one thousand dollars (\$1,000).

[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The recommended changes address some of the worst abuses occurring in the accounting for change work done under force account (i.e. cost reimbursement) provisions to fixed price contracts. We expect that with proper training State contract managers will be authorizing fewer force account changes. Nevertheless, there inevitably will be situations where the State will be required to pay for work on a cost reimbursement basis.

The custom in construction is that the use of equipment, vehicles and tools is reimbursed on a fair rental value basis. Some publishers specialize in publishing "fair rental value" schedules to be applied in determining allowable contractor costs for an amazingly wide variety of items. The use of such schedules is acknowledged herein in subsection (d) where there is reference to the use of "established industry or government schedule" in fixing the cost allowance for fully depreciated items.

The problem with this is that no upper pay limit is established for the use of such items. As a consequence, by using older, depreciated or fully expensed items for change work, a contractor can submit a claim for costs far in excess of the cost of buying the item new.

In a litigated case we had a situation where a change required an additional thirty days during which a 25 foot ladder was continuously needed. The contractor had such a ladder that probably cost not more than \$200 when purchased new five years before. It had either been written off the year of purchase as a non-depreciable expense item, or had been fully depreciated before the project in question began.

The published schedules indicated a fair rental value of \$20 per day. When multiplied by the number of days used, the State was being asked to pay three times the new purchase cost of a used ladder. We could have saved money by buying a new ladder of our own, giving it to the contractor for its use on the job and then taking it back at the conclusion of the project. The potential for abuse increases considerably when, instead of dealing with a low cost item such as a ladder, the bill submitted is for the extended use of a high cost item like a crane, a grader or a dump truck.

The Working Committee recommends two urgently needed restrictions on this practice. The first amendment to subsection (d) limits the total amount of use allowances. The amount we will pay for a fully depreciated item over the term of the project is limited to its actual value.

The second reform is set forth in subsection (e) in which depreciation or use allowances will no longer be paid for items that can be purchased new for \$1,000 or less. This reform avoids haggling over the daily value of and the overpayment for smaller tools and equipment such as the ladder discussed above. The use of such tools and equipment is more properly a cost of doing business that the contractor should include in its fee for overhead and profit.

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§3-123-9 Specific costs--entertainment. (a) Entertainment costs are unallowable. Entertainment costs include costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodging, transportation, and gratuities. [Entertainment costs are unallowable.]

(b) Nothing herein shall make unallowable a legitimate expense for job related employee [morale,] health, welfare, food service, or lodging costs; except that, where a net profit is generated by such services, it shall be treated as a credit as provided in section 3-123-21. [This section shall not make unallowable c]Costs incurred for meetings or conferences, including, but not limited to, costs of food, rental facilities, and transportation are not allowable except where the primary purpose of incurring such cost is the dissemination of technical information [or the stimulation of production] or the establishment of specific project policies, such as a partnering conference. [Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The Working Group recommends that a change in form should be made in subsection (a) as well as with similar provisions in §3-123-11, 3-123-13 and 3-123-14. In its current form, these subsections first define a type of cost and then declare whether or not such cost is allowable. We believe the first sentence should be the declaration regarding allowability, and then needed definitions and explanations may appear. In this section, the policy that entertainment costs will not be allowed to the contractor is the principle being established and should be highlighted in the first sentence, not buried later after explanations as to what are included in the term "entertainment costs".

We also recommend that an exception the current rule makes for "employee morale" costs be deleted. Just about any cost can be justified in the interest of "morale," such as a golf weekend at a Maui hotel for the contractor's executives and key personnel. We do not doubt that such an all-expenses paid weekend won't improve the morale of the employees, but clearly such expenditures should not be reimbursed, in whole or part, by the taxpayers.

The same holds true for the second sentence of subsection (b) in its current form that in very convoluted language approves of cost reimbursement for transportation, lodging and food costs for meetings and conferences where the primary purpose is "the stimulation of production". Since this can justify just about any expense and is clearly subject to abuse, we believe the better rule is disallow all meeting and conference costs except where the principal purpose is a "partnering" meeting or for the dissemination of job related technical information.

§3-123-10 Specific costs--fines and penalties.
Fines and penalties include all costs incurred as the
result of violations of, or failure to comply with,
federal, state, and local laws and regulations. Fines
and penalties are unallowable costs unless incurred as
a direct result of compliance with specific provisions
of the contract or written instructions of the
procurement officer. [Eff] (Auth: HRS
§103D-601) (Imp: HRS §103D-601)

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§3-123-11 Specific costs--gifts, contributions, and donations. Gifts, contributions, and donations are unallowable. A gift is property transferred to another person without the person providing return consideration of equivalent value. [Reasonable costs for employee morale, health, welfare, food services, or lodging are not gifts and are allowable.] Contributions and donations are property transferred to a nonprofit institution which are not transferred in exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. [Gifts, contributions, and donations are unallowable.] [Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The Working Group recommends that the prohibition on cost reimbursement for gifts should be moved to the start of the provision. See Comments to 3-123-9.

We believe that it is inappropriate to ask the taxpayers to pick up the costs expended by an employer for employee "morale" and therefore recommend that this exception be deleted. Expenditures for employee "health, welfare, food services, or lodging" are covered in §3-123-9.

Repetition here we believe can only result in an ambiguity suggesting that reimbursement for such expenses is an entitlement, not a matter that may or may not be allowed at the discretion of the Engineer/Procurement Officer.

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§3-123-12 Specific costs--interest expense.
[(a)] Interest, [is generally an unallowable cost for purposes of determining the original contract price. Compensation for any interest expense incurred in connection with work originally contemplated under the contract will be deemed to be included in the fee or profit negotiated on the contract.] whether actual or imputed, is an unallowable cost.

[(b) Imputed interest on a contractor's expenditures made to pay allowable costs which are allocable to the performance of work required by change orders, suspension of work, or other acts of the State requiring additional work over and above that required by the original contract, hereinafter called "additional work," shall be an allowable cost. Imputed interest is an allowable cost in relation to such additional work in a negotiated settlement, if one can be agreed upon, or to the extent that it is determined administratively or judicially that the State is liable for such additional work. Such imputed interest shall be computed on expenditures from the date or dates on which the contractor made expenditures for the performance of such additional work until the date of payment therefor by the State. The rate of interest shall be the prevailing prime rate charged by banks in this State as determined by the procurement officer, at the time or times the contractor made such expenditures for additional work. Imputed interest on the costs of additional work shall not be allowable to the extent that it is otherwise recovered as profit or fee.]
[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)]

COMMENT. This section, as written, attempts to establish a policy for the reimbursement of interest expenses incurred by a Contractor in order to finance its work on a cost reimbursement contract or change. Not all contractors are equal with respect to capitalization and cash flow. Some contractors will not need to borrow to carry out a cost reimbursable contract. Some may be able to borrow at terms much more favorable than others.

The provision as written provides that interest costs incurred in borrowing money to finance operations

is an allowable cost. Section (b) establishes a completely unwieldy policy that says that even if a contractor does not borrow money to finance the work, the State will pay "imputed interest" as if the contractor did indeed borrow money with attendant interest expenses.

The Working Group believes that the policy defies logic and engages the State in a no win negotiation over how much of a contractor's expended funds should be deemed to be "borrowed" even though no loan transaction was ever actually contemplated, and how much interest ("prevailing prime rate charged by banks in this State") should be allowed on the imaginary borrowed funds. In 1994 the Federal Reserve official lending rate was changed six or seven times resulting in like adjustments to the banks' prime rates. The near impossibility in making the imputed interest calculations for money never borrowed in the first place under these circumstances proves the problems this provision would create for the State.

The Working Group proposes that interest expenses, actual and imputed, real and imagined, not be allowed as a reimbursable cost. The Contractor should incorporate such expenses as part of its overhead and profit calculation.

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§3-123-13 Specific costs--losses incurred under other contracts. A loss incurred under one contract may not be charged to any other contract. A loss is the excess of costs over income earned under a particular contract. Losses may include both direct and indirect costs. [A loss incurred under one contract may not be charged to any other contract.]
[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The Working Group recommends that the order of the sentences be reversed. See Comment to §3-123-9.

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§3-123-14 Specific costs--material costs. (a) Material costs are allowable, subject to subsections (b) and (c). Material costs are the costs of all supplies, including raw materials, parts, and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary, or affiliate under the common control of the contractor), which are acquired in order to perform the contract. [Material costs are allowable, subject to subsections (b) and (c).] In determining material costs, consideration shall be given to [reasonable] appropriate spoilage, [reasonable] appropriate inventory losses, and [reasonable] appropriate overages.

(b) Material costs shall include adjustments for all available discounts, refunds, rebates, and allowances which the contractor [reasonably should take] may take under the circumstances, and for credits for proceeds the contractor received or [reasonably should] may receive from salvage and material returned to suppliers.

(c) Allowance for all materials transferred from any division including the division performing the contract, subsidiary, or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor, except the transfer may be made at the established price provided that the price of materials is not determined to be unreasonable by the procurement officer, the price is not higher than the transferor's current sales price to its most favored customer for a like quantity under similar payment and delivery conditions, and the price is established either:

- (1) By the established catalogue price; or
- (2) By the lowest price obtained as a result of competitive procurements conducted with other businesses that normally produce the item in similar quantities. [Eff]
(Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The Working Group recommends that the order of the sentences be reversed. See Comment to §3-123-9. For consistency, we also recommend that "reasonable" be substituted with "appropriate".

§3-123-15 Specific costs--taxes. (a) Except as limited in subsection (b), all allocable taxes which the contractor is required to pay and which are paid and accrued in accordance with generally accepted accounting principles are allowable.

(b) The following costs are unallowable:

- (1) Federal, state and local income taxes;
- (2) All taxes from which the contractor could have obtained an exemption, but failed to do so, except where the administrative cost of obtaining the exemption would have exceeded the tax savings realized from the exemption;
- (3) Any interest, fines, or penalties paid on delinquent taxes unless incurred at the written direction of the procurement officer; and
- (4) Income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the contractor's books of account and financial statements.

(c) Any refund of taxes which were allowed as a direct cost under the contract shall be credited to the contract. Any refund of taxes which were allowed as an indirect cost under a contract shall be credited to the indirect cost pool applicable to any contracts being priced or costs being reimbursed during the period in which the refund is made.

(d) Direct government charges for services, such as water, or capital improvements, such as sidewalks, are not considered taxes and allowable costs.

[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

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§3-123-16 Costs requiring prior approval to be allowable as direct costs. The costs described in sections 3-12[2]§-17 through 3-12[2]§-20 are allowable as direct costs [to cost-reimbursement type contracts] to the extent that they have been approved in advance in writing by the procurement officer. [In other situations the allowability of these costs shall be determined in accordance with general standards set out in these cost principles.] [Eff]
(Auth: HRS §103D- 601) (Imp: HRS §103D-601)

COMMENT. There is a typographical error in the cross-references that must be corrected to refer to 3-12§ of the regulations.

The Working Group believes that the policies established should apply to all contracts and therefore recommends that the difficult to understand distinction made in the interim rule as written be eliminated.

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§3-123-17 Pre-contract costs. Pre-contract costs are those incurred after the contract award in anticipation of, and prior to, [the effective date of the contract]notice to proceed. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the [contract]notice to proceed; provided that, in the case of a cost-reimbursement type contract, a special provision must be inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.
[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The Working Group believes that the term "effective date of the contract" is ambiguous for enforcement purposes. There should be no entitlement for costs before the notice of an award is sent to the contractor. Our new general conditions will provide that a Contractor is not authorized to make contract related expenditures before the notice to proceed is issued, unless given written authority to proceed with a certain category of work. Often a contractor is told that it may proceed with the preparation of submittals such as material samples and shop drawings before the notice to proceed is issued. The proposed revisions will clarify the Contractor's entitlement for reimbursement under such circumstances.

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§3-123-18 Bid and proposal costs. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Otherwise, such costs are not allowable as either direct or indirect costs. Bid and proposal costs are the costs incurred in preparing, submitting, and supporting bids and proposals including proposals for the charges for change work within the scope of the contract. [Reasonable ordinary bid and proposal costs are allowable as indirect costs in accordance with these cost principles. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Where bid and proposal costs are allowable as direct costs, to avoid double accounting, the same bid and proposal costs shall not be charged as indirect costs.]
[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The arrangement of the sentences has been changed to provide emphasis and clarity. The Working Group is of the firm opinion that in the absence of a specific written advance authority for reimbursement of such costs, they should not be allowed. We have had experience with contractors who look upon change work as a major profit center and have submitted grossly inflated charges for the expense of estimating the cost of proposed change work whether or not changes have been actually authorized. Such costs should be absorbed in the contractor's markup for overhead.

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§3-123-19 Insurance. (a) Ordinary and necessary insurance costs are normally allowable as [in direct]indirect costs. Direct insurance costs are the costs of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purchase of self-insurance. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.

(b) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.

(c) Actual losses which should [reasonably] have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the parties expressly agree otherwise in the terms of the contract. [Eff] (Auth: HRS §103D-601)
(Imp: HRS §103D-601)

COMMENT. There is a typographical error in the second line that needs to be corrected. The inclusion of the word "reasonably" in subsection (c) adds nothing and should be deleted.

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§3-123-20 Litigation costs. Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles except that costs incurred in litigation by or against the State are unallowable. Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims before an administrative board or in court. [Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles except that costs incurred in litigation by or against the State are unallowable.] [Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. The sentences are inverted for emphasis and clarity.

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§3-123-21 Applicable credits. (a) Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts a[d]g direct or indirect costs. Examples include purchase discounts, rebates, allowances, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and foods sales.

(b) Credits shall be applied to reduce related direct or indirect costs.

(c) The State shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement type contract.

[Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. Typographical error corrected changing the word in the third line as apparently intended, to "as".

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[§3-123-22 Advance agreements. (a) Both the State and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the solicitation and the contract the treatment to be accorded special or unusual costs which are expected to be incurred.

(b) Advance agreements may be negotiated either before or after contract award, depending upon when the parties realize the cost may be incurred, but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties, and incorporated in the contract.

(c) An advance agreement shall not provide for any treatment of costs inconsistent with these costs principles unless a determination has been made pursuant to section 3-122-24. [Eff]
(Auth: HRS §103D-601) (Imp: HRS §103D-601)]

COMMENT. This section does not establish any enforceable policy and adds nothing to the way the State does business. The Working Group recommends its deletion.

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§3-123-2[3]2 Use of federal cost principles.
(a) In dealing with contractors operating according to federal cost principles, such as Federal Acquisition Regulations, 48 C.F.R. Part 31 (1993), the procurement officer, after notifying the contractor, may use the federal cost principles as guidance in contract negotiations, subject to subsection (b).

(b) All requirements set forth in federal assistance instruments applicable to contracts let by the State under a federal assistance program must be satisfied. Therefore, to the extent that the cost principles which are specified in the assistance instrument conflict with these cost principles, the former shall control. [Eff] (Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. Rule number has been changed on account of deletion of previous rule.

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§3-123-2[4] Authority to deviate from cost principles. When the best interest of the State would be served by a deviation, the procurement officer may deviate from the cost principles set forth in these regulations; provided that a written determination shall be made by such officer specifying the reasons for the deviation. A copy of the determination shall be filed promptly with the chief procurement officer and the determination shall be effective only upon approval by the chief procurement officer and upon incorporation into the contract. However, all costs must be reasonable, lawful, allocable, and accounted for in accordance with generally accepted accounting principles to be reimbursed, and a deviation shall not contravene this principle. [Eff]
(Auth: HRS §103D-601) (Imp: HRS §103D-601)

COMMENT. Rule number has been changed on account of deletion of a previous rule.

[CLMS01-495]



COMMENTS ON PROPOSED MODIFICATIONS
TO SUBCHAPTER 1, SECTION 3-126 OF
PROCUREMENT REGULATIONS

COMMENT. SUBCHAPTER 1 OF SECTION 3-126 OF THE PROCUREMENT REGULATIONS ESTABLISHES A RELATIVELY INFORMAL, EXPEDITIOUS PROCEDURE TO DEAL WITH BID PROTESTS. THE WORKING COMMITTEE FAVORS SUCH AN APPROACH BE REQUIRED BEFORE A DISAFFECTED PARTY GOES RUNNING TO CIRCUIT COURT FOR AN INJUNCTION AGAINST THE AWARD OF A CONTRACT BASED UPON AN ALLEGEDLY DISPUTED BID PROCEDURE.

THE CHANGES RECOMMENDED BY THE WORKING COMMITTEE ARE DESIGNED TO MAKE THE DISPUTE RESOLUTION PROCEDURE MORE MEANINGFUL BY MAKING IT FAIRER TO THE PARTIES AND BY MORE SPECIFICALLY DELINEATING THE POWERS AND RESPONSIBILITIES OF THE PERSON CONDUCTING THE INVESTIGATION.

§3-126-1 Definitions. (a) As used in this subchapter:
"Affected Bidder" means each responsible, responsive bidder or offeror that has submitted a more competitive bid or offer than the Protestor, or whose standing to be awarded a contract may be otherwise adversely affected if a protest is upheld, as determined after the opening of bids or offers pursuant to the solicitation or invitation.

"Head of a purchasing agency" means the (department) head of any agency delegated the authority to enter into and administer contracts.

"Interested party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.

"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.

"Using agency" means the affected agency that has used the goods, services, or construction supplied by the contractor.
[Eff §103D-701) (Imp: HRS §103D-701)
(Auth: HRS §103D-701)

COMMENT ON §3-126-1. A definition is added for "Affected Bidder." Such an affected bidder is given certain participatory rights in the bid dispute procedure elsewhere in the subchapter.

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§3-126-2 Complaint to procurement officer. Before the courts of the State may assume jurisdiction over any lawsuit protesting the solicitation or award of a contract Complainants [should] must seek resolution of their complaints initially with the procurement officer or the office that issued the solicitation. Such complaints [should] shall be made in writing. [Eff] (Auth: HRS §103D-701) (Imp: §103D-701)

COMMENT ON §3-126-2. The working committee proposes adding language making it very clear that any party seeking to dispute a bid must follow the procedure set forth here before it may contest a bid award in court.

§3-126-3 Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate within five working days after the protestor knows or should have known of the facts giving rise therein; provided, however, that no protest can be filed later than five working days after the award of the subject contract. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after [the] either five day period shall not be considered.

(b) Protestors may file a protest on any phase of solicitation or award including but not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer, provided, however, a protest of a bid solicitation must be made before the first submitted bid is opened unless special circumstances exist that would have made the filing of such a Protest unreasonable or impossible as determined by the officer with jurisdiction over the Protest.

(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 head of a purchasing agency. The written protest shall include as a minimum the following:

- (1) The name and address of the protestor;
- (2) Appropriate identification of the procurement, and, if a contract has been awarded, its number;
- (3) A statement of reasons for the protest and a description of the relief or remedy sought by the protestor; 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.

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(d) The notice of protest shall be deemed communicated and filed within forty-eight hours from the time of mailing, if mailed as provided in this paragraph, or communicated and filed when received personally by the chief procurement officer or the head of the purchasing agency.

(e) [The chief procurement officer or the head of a purchasing agency shall submit a copy of the protest to the respective attorney general or corporation counsel within three work days of receipt of the written protest.]

If the protest is filed after competitive bids have been opened, the chief procurement officer or the head of the purchasing agency with whom the protest is filed shall transmit a copy of the protest to each affected bidder, each of which shall be informed of and given the opportunity to intervene on either side and participate in the subsequent proceedings as a party. [Eff] (Auth: HRS §103D-701) (Imp: HRS §103D-701)

COMMENT ON §3-126-3. The working committee proposes language that tightens up the time allowed to make a protest, and to meet the filing and submission requirements once a protest is underway.

(a) The change sets a cut-off for the filing of such a protest five days after the award on the contract. Without such language a protestor can file a protest long after the contract is underway, claiming it just became aware of facts supporting the protest. Since there is usually a time lag of one or more weeks from the opening of a bid until the award of a contract, the disaffected bidder should have sufficient time to study the issue and make a decision to protest the bid.

(b) The added language is designed to protect the State against "sour grapes" protests based upon problems with the invitation for bids package.

If a potential bidder has a gripe based upon the plans, specifications or the bid procedure established by the invitation, it will have to protest before the bid opening begins, assuming there is a reasonable time available to file the protest. A disaffected bidder will not be allowed to protest problems with the bid package after it finds out the bid it submitted was a loser.

(e) We recommend the deletion of the existing subsection since it does not establish an enforceable legal requirement. While the concerned agency head should notify the Attorney General of a bid protest, the A.G. is not required to participate in the proceeding. The protest may be basic enough to be handled without the involvement of the Attorney General, so why put a needless notice provision in the regulation that can only be used to invalidate the procedure if not followed?

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The working committee instead adds a new provision that requires notification to affected bidders (i.e. parties whose rights to a contract award may be affected by the protest) of the filing of a protest. Such affected bidders are given the opportunity to participate in the protest procedure. This provides for basic fairness. Furthermore, a bidder whose potential award may be affected by the protest will often be the strongest advocate for the upholding of the government's conduct in connection with the bid, and will often also provide an impetus for a quick, early decision.

§3-126-4 Request for information. [Any additional information requested by any of the parties should be submitted within the time periods established by the requesting source in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information by the chief procurement officer or the head of a purchasing agency may result in resolution of the protest without consideration of any information which is untimely filed pursuant to such request.] The chief procurement officer or head of purchasing agency may request additional information from any of the parties. The failure of a party to promptly comply with such a request may result in the resolution of the protest without consideration of the requested information, and the decision on the protest may be reached without further participation by the non-complying party. The filing of a protest shall constitute a waiver by the protestor of any right to claim privilege or confidentiality with respect to any otherwise material information or documents needed to resolve the protest. No such waiver shall apply to an intervening affected bidder. [Eff] (Auth: HRS §103D-701)
(Imp: HRS §103D-701)

COMMENT ON §3-126-4. The existing regulation is confusing regarding who has the right to request information in connection with the protest. The proposed change is designed to make clear that the hearing officer has the right to request information from any party, and that the failure to supply some may result in that party losing the protest or its right to be heard. It also provides that by filing a protest, a protestor loses the right to claim "privilege" in response to a request for information deemed relevant by the hearing officer. No such waiver applies to a non-protesting party.

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§3-126-5 Stay of procurements during protest. When a protest has been filed within five working days and before an award has been made, the chief procurement officer or the head of a purchasing agency shall make no award of the contract until the protest has been settled unless the chief procurement officer makes a written determination, after consulting with the head of the using agency or the head of the purchasing agency, that the award of the contract without delay is necessary to protect substantial interests of the State. The filing of a protest shall not affect discretionary rights granted by the procurement laws or regulations or the solicitation to the purchasing agency or the chief procurement officer to cancel the solicitation or reject all bids.
[Eff] (Auth: HRS §103D-701) (Imp: HRS §103D-701)

COMMENT ON §3-126-5. The proposed change makes it clear that the filing of a protest does not prevent the appropriate official from exercising discretionary authority to reject all bids and call for a rebid, in effect mooted the protest.

§3-126-7 Hearing; Evidence; Discretionary Hearing. Submission of Evidence and Decision by the chief procurement officer or the head of a purchasing agency. [(a) A decision on a protest shall be made by the chief procurement officer or the head of a purchasing agency as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, those set forth in subsection (b) and subchapter 4.]

(a) The chief purchasing officer or the head of a purchasing agency shall expeditiously decide the protest based upon the relevant information made available to it; however, the formal rules of evidence shall not be applicable to protest proceedings. It may, in its discretion call for a public hearing under such rules and procedures as he may set, at which all interested parties must be invited and allowed to participate. With or without a hearing it may order interested parties to submit sworn written statements. If a protest is sustained, the available remedies include, but are not limited to, those set forth in subsection (b) and subchapter 4.

(b) In addition to any other relief, the chief procurement officer or the head of a purchasing agency shall award the protesting bidder or offeror the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees, when a protest is sustained and the protesting bidder or offeror should have been but was not awarded the contract under the solicitation or as a

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(c) The chief procurement officer or the head of a purchasing agency shall issue a decision in writing either denying the protest, or granting the protest and a statement of the relief awarded. The officer may, but is not required to explain the reasoning supporting the decision. The decision shall be promptly distributed to the Protestor and all affected bidders.

(d) A decision rendered pursuant to this section shall be final and conclusive, unless any person adversely affected by the decision commences an administrative proceeding under H.R.S. section 103D-709. [Eff] (Auth: HRS §103D-701) (Imp: HRS §103D-701)

COMMENT ON §3-126-7. Several changes are proposed, each of which is designed to better define the decision process and the powers of the hearing officer.

(a) is modified to clarify that the hearing officer can make his decision on the unsworn submitted documents, can request sworn statements, and can even convene a hearing at which all interested parties may attend. In no event, however, is the process to be constrained by the formal rules of evidence.

(c) requires that the decision on the protest be in writing, with or without an explanation as to how the decision was reached.

(d) establishes the finality of the decision subject to an administrative proceeding appeal.

[§3-126-8 Request for reconsideration. (a)
Reconsideration of a decision of the chief procurement officer or the head of a purchasing agency may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modifications is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Requests for reconsideration of a decision of the chief procurement officer or the head of a purchasing agency shall be filed not later than ten working days after receipt of such decision.

(c) A request for reconsideration shall be acted upon as expeditiously as possible. The chief procurement officer or the head of a purchasing agency may uphold the previous decision or reopen the case as such officer deems appropriate.

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- (d) The decision under subsection (c) shall be final and the protesting bidder or offeror 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.
- (e) The protesting bidder or offeror shall inform the State within five working days after the final decision if an administrative appeal will be filed. An appeal shall be filed within seven calendar days of the determinations under section 3-122-110, this section, or sections 3-126-12 and 3-126-16.
[Eff] (Auth: HRS §103D-701) (Imp: HRS §103D-701)]

COMMENT ON §3-126-8. The working committee urges the deletion of this section that sets up a "Request for reconsideration" process. Such reconsiderations are usually just a rehash of the original arguments and merely delay the finality of a decision. An aggrieved party has the right to a more formal administrative hearing, and after that can take its case to court. The "reconsideration" process adds nothing to the process and should be deleted.

JAR:dch
[CLMS01-579]