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August 18, 2004

PROCUREMENT DIRECTIVE NO. 2004-01

TO: Chief Procurement Officers
Executive Department Heads
FROM: Aaron S. Fujioka, Administrator 
SUBJECT: Hawaii Administrative Rules
Chapter 3-124, Preferences
Chapter 3-126, Legal and Contractual Remedies

This directive issues Chapters 3-124 and 3-126, HAR, effective May 20, 2004.

The Ramseyer version is attached. Copies of the standard version may be downloaded from the SPO website.

The following Procurement Directives are hereby rescinded:

- No. 2002-05, dated 11/25/02;
- No. 2002-05, Amendment 1, dated 7/15/03;
- No. 2003-04, dated 7/14/03; and
- No. 2003-05, dated 11/6/03.

Any questions may be directed to me at 587-4700, or your staff may contact Justin Fo at (808) 586-0577.

To view the complete listing of all current Procurement Directives, go to the SPO homepage at <http://www.spo.hawaii.gov/>, click on "Hawaii Public Procurement Code, Chapter 103D", then "Procurement Directives".

c: Administrative Services Office (DAGS)

attachment



DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-124
Hawaii Administrative Rules

April 22, 2004

1. Chapter 124 of Title 3, Hawaii Administrative Rules, entitled "Preferences" 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 124

PREFERENCES

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§3-124-3	Qualification procedure
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Work

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printed material with recycled content
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Subchapter 6 REPEALED

§§3-124-40 to 3-124-49 REPEALED [R MAY 20 2004]

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 §3-124-62 Applicability
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 §3-124-66 Partners in employment program
 §3-124-67 Exempt from wage provision

Historical Note: (a) This chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces interim rules dated 7/03/03 (file no. 2544), which repealed sections 3-124-40, 3-124-41, 3-124-42, 3-124-43, 3-124-44, 3-124-45, 3-124-46, 3-124-47, 3-124-48, 3-124-49, and amended section 3-124-66.
 [Eff MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

(b) Subchapter 1, Chapter 124, Subtitle 11 of Title 3, Hawaii Administrative Rules, is based upon Chapter 60 of Title 3, HAR, Rules Governing Preference for Hawaii Products of the department of accounting and general services. [Eff 3/20/81; R 12/15/95]

(c) Subchapter 4, Chapter 124, Subtitle 11 of Title 3, Hawaii Administrative Rules, is based upon Chapter 62 of Title 3, HAR, Procurement of Recycled Products of the department of accounting and general services. [Eff. 11/4/93; R 12/15/95]

SUBCHAPTER 1

HAWAII PRODUCTS

§3-124-1 Purpose. [~~(a)~~] The purpose of [~~these rules~~] this subchapter is to provide procedures for qualifying and registering products on the Hawaii products list and for the application of preferences thereof. The objective is to promote the use of Hawaii products, as defined [~~below~~] in section 103D-1001, HRS, by state purchasing agencies.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).] [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp 11/20/04] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)~~

S3-124-1.01 Applicability. (a) These rules shall apply to all solicitations made pursuant to sections 103D-302 and 103D-303, HRS, issued by a purchasing agency when a registered Hawaii product is available where the product is required.

(b) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff and comp 11/17/97; comp 11/25/02; am and comp MAY 20 2004]
 (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-2 Definitions. Definitions are in section 103D-1001, HRS. The following definitions ~~[are also applicable to terms used in]~~ apply to this chapter:

"Hawaii input" means that part of the cost of a product attributable to production, manufacturing, or other expenses arising within the State. "Hawaii input" includes but is not limited to:

- (1) The cost to mine, excavate, produce, manufacture, raise, or grow the materials in Hawaii;
- (2) The added value of that portion of the cost of imported materials that is incurred after landing in Hawaii;
- (3) The cost of labor, variable overhead, utilities, and services incurred in the production and manufacturing of materials or products in the State;
- (4) Fixed overhead cost and amortization or depreciation cost, if any, for buildings, tools and equipment situated and located in the State and utilized in the production or manufacturing of a product.

"Hawaii products list" means the list published by the administrator itemizing those products that have been found qualified as Hawaii products, the names and addresses of the manufacturers, the classes and preference percentages that the products will be allocated if they meet the requirements for which

offers are solicited.

"Non-Hawaii product" means a product that is not registered on the Hawaii products list.

"Registered Hawaii product" means a Hawaii product that is registered on the Hawaii products list. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-3 Qualification procedure. (a) Any person desiring a preference pursuant to this subchapter, must have the product(s) qualified and registered on the Hawaii products list. The responsibility for qualification shall rest upon the person desiring the preference. The product(s) shall be found qualified and on the Hawaii products list before a preference may be granted. Persons desiring to qualify their product(s) shall complete an application according to instructions and file with the administrator. Financial information submitted to the administrator pursuant to these rules for the purpose of determining classification of a product shall be treated as confidential when a person has made a written request for confidentiality. In accordance with chapter 92F, HRS, the administrator shall properly safeguard such information and shall not make it available to the public.

(b) A single application may be submitted for more than one product; however, separate data sheets shall be submitted for each product for which registration is requested. Further, it is necessary that each product be specified clearly and not by broad category of product.

(c) Cost data for each product shall reflect the product's actual total production cost for the most recent full accounting period. If a product has not been in production during the full accounting period, approval may be granted based on cost data representing that shorter period.

(d) If upon completion of the review, the administrator finds that a product has qualified as a Hawaii product, the administrator shall so notify the applicant in writing, list the product on the Hawaii products list as a registered Hawaii product, and notify the chief procurement officers and heads of purchasing agencies or designees of the decision. Applicants whose products do not qualify for the Hawaii products list shall be notified in writing of the

decision and the reasons therefor. Any applicant whose product was determined not to qualify for registration on the Hawaii products list or who contests the classification may resubmit their application within thirty days addressing the reasons therefore. The administrator shall respond to the applicant within thirty days.

(e) Should the administrator receive a protest challenging the validity of the classification of a Hawaii product, the administrator may request an audit of the information provided should the need arise to determine if the proper classification of the product is as defined under Hawaii product in section 103D-1002, HRS. A request for audit shall be sent to the person having requested registration of the product on the Hawaii products list, and the person shall bear the cost of the audit. The administrator may also request any additional information determined necessary in order to determine proper classification. The administrator shall approve or reject the classification for each Hawaii product and advise the applicant or contractor within thirty days after receipt of information.

(f) Application, renewal, and other forms required shall be provided by the administrator. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §§92F-14, 103D-1002)

§3-124-4 Solicitation procedure. (a)

Solicitations to which this preference is applicable shall refer to this subchapter and shall also contain a notice referring to the place where the Hawaii products list may be examined.

(b) To be eligible for preference, a product shall be qualified and registered on the Hawaii products list. The effective date of when a product is determined to be qualified and registered on the Hawaii products list is one month after the product has been approved by the state procurement office.

(c) To be listed in a solicitation, the effective date when a product was qualified and registered on the Hawaii products list shall be no later than the date a solicitation is first publicly advertised.

(d) The classification of a registered Hawaii product on the date a solicitation is first publicly advertised shall determine the preference allowed the product.

(e) Prospective offerors shall be informed of the registered Hawaii product and its established class that meets the requirements for which offers are being solicited.

- (1) When more than one registered Hawaii product meeting minimum requirements is available, a schedule describing all registered Hawaii products and their established classes shall be included in the solicitation.
- (2) Purchasing agencies shall provide in the solicitation appropriate space(s) for offerors to indicate selection of the Hawaii products preference and to list the Hawaii product and its price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-5 Evaluation procedure and contract award.

(a) In any expenditure of public funds resulting from a contract award, a purchasing agency shall purchase any required product from the Hawaii products list where the registered Hawaii product is available, provided the product meets the specifications and the selling price f.o.b. jobsite, unloaded, including applicable general excise tax and use tax and does not exceed the lowest delivered price in Hawaii f.o.b. jobsite, unloaded, including applicable general excise tax and use tax, of a similar non-Hawaii product by more than three per cent, where class I registered Hawaii products are involved, or five per cent where class II registered Hawaii products are involved, or ten per cent where class III registered Hawaii products are involved.

(b) For evaluation purposes, no preference shall be considered when only registered Hawaii products are offered.

(c) Where offers include both registered Hawaii products and non-Hawaii products, for the purpose of determining the lowest evaluated offer, the offer for the Hawaii product shall be decreased by its applicable three per cent, five per cent, or ten per cent classification preference

(d) The contract amount shall be the amount of the price offered, exclusive of any preference.

(e) Should more than one preference allowed by

statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that [preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
 - (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
 - (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
 - (4) Recycled products, pursuant to section 103D-1005, HRS;
 - (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
 - (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
 - (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.
- (f) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical total prices, award shall be made to the offeror offering a registered Hawaii product in preference to a non-Hawaii product.
- (g) For proposals submitted pursuant to section 103D-303, HRS, and after taking into consideration all applicable preferences, the procurement officer shall award the contract pursuant to section 3-122-57. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-6 Change in class status. (a) A person whose product is on the Hawaii products list shall be responsible for informing the administrator of any change affecting the classification of the product within sixty days of the change.

(b) If, since the original application, there has been a change in either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost of the product(s), which could

affect the product(s) classification, a new application must be submitted within sixty days of the change.

[Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-7 Biennial renewal. (a) All persons whose product(s) is registered on the Hawaii products list will be notified by the State thirty days prior to the date for biennial renewal or if a new application is required. A sixty day grace period is allowed for both the renewal and the new application after the preference expiration date which normally will be the end of an accounting period.

(b) An affidavit for renewal shall be submitted if, since the filing of the original application, there has been no change in either the method of production or the relative values of the Hawaii and non-Hawaii inputs to the production cost affecting the product classification. Provided the administrator is satisfied that the classification of a registered Hawaii product is not changed, the administrator shall renew the registration and classification of the product.

(c) Failure to complete the biennial renewal or to provide any further information requested by the administrator shall be grounds for rejecting an application or for disqualification of the product.

(d) Any person receiving a notice for renewal for Hawaii products list qualification shall advise the administrator immediately if there is any reason why the person cannot comply within the sixty day grace period. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-8 Termination. If change of status is not reported as required in section 3-124-6, or if the biennial renewal is not provided as required by section 3-124-7, the administrator shall terminate the registration of the product effective at the end of the sixty day grace period allowed. Any person terminated that desires to be reinstated on the Hawaii products list shall submit a new application. [Eff 12/15/95; comp 11/17/97; comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1002)

§3-124-9 (Reserved).

SUBCHAPTER 2

PRINTING, BINDING, AND STATIONERY WORK

§3-124-10 Purpose. ~~[(a)]~~ The purpose of ~~[these rules]~~ this subchapter is to provide procedures for the application of the preference for printing, binding, and stationery work, including all preparatory work, presswork, bindery work, and any other production-related work, performed within the State. The objective is to promote the use of businesses performing the work in Hawaii by state purchasing agencies.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).] [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp~~

~~§103D-1003)~~ MAY 20 2004 1. (Auth: HRS §103D-202) (Imp: HRS §103D-1003)

§3-124-11 Applicability. (a) All bids submitted pursuant to section 103D-302, HRS, for a printing, binding, or stationery contract in which all work will be performed in-state, including all preparatory work, presswork, bindery work, and any other production-related work, to include storage and shipping costs, shall receive a fifteen per cent preference for the purposes of bid evaluation.

(b) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1003)

§3-124-12 Evaluation procedure and contract award. (a) If the in-state price is low, award shall be made to the bidder offering to perform the work in Hawaii.

(b) If an out-of-state price is low, the following applies in determining the lowest evaluated price:

(1) The amount bid for work performed out-of-

- state shall be increased by fifteen per cent.
- (2) The lowest total bid, taking the preference into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria.
 - (c) The contract amount shall be the price offered, exclusive of any preferences.
 - (d) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that [preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.
 - (1) Hawaii products list, pursuant to section 103D-1002, HRS;
 - (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
 - (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
 - (4) Recycled products, pursuant to section 103D-1005, HRS;
 - (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
 - (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
 - (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.
 - (e) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical total prices, award shall be made pursuant to section 3-122-34. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §103D-202) Imp: HRS §103D-1003)

§3-124-13 REPEALED. [R 11/17/97]

§3-124-14 (Reserved).

SUBCHAPTER 3

RECIPROCAL

S3-124-15 Purpose. ~~[(a)]~~ The purpose of ~~[these rules]~~ this subchapter is to provide procedures for the application of the reciprocal preference. The objective is to ensure fair and open competition for Hawaii businesses engaged in contracting with the State.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).] [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1004) (Imp: HRS §103D-1004)~~

S3-124-16 Definitions. As used in these rules: "Out-of-state bidder" means any person, agency, corporation, or other business entity whose principal place of business or ancillary headquarters is not located in the State or is not registered with the state department of commerce and consumer affairs to do business in the State. [Eff 12/15/95; am and comp 11/17/97; comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1004) (Imp: HRS §103D-1004)

S3-124-17 Applicability. (a) The chief procurement officer may impose a reciprocal preference against bidders from states which apply preferences.

(b) When applied to solicitations made pursuant to section 103D-302, HRS, a resident bidder of the State of Hawaii may be given a reciprocal preference equal to the preference the out-of-state bidder would be given in their own state. If the out-of-state bidder's state has a preference comparable to a Hawaii preference, the reciprocal preference shall be equal to the amount the out-of-state preference exceeds the Hawaii preference.

(c) At least annually, the administrator of the state procurement office shall make available a list of preference laws of all states to the chief procurement officers.

(d) These rules shall not apply to any transaction if the provisions of these rules conflict with any federal laws. [Eff 12/15/95; am and comp

11/17/97; am and comp 11/25/02; comp MAY 20 2004]
 (Auth: HRS §§103D-202, 103D-1004) (Imp: HRS §103D-1004)

§3-124-18 Evaluation procedure and contract award. (a) When applied, the amount of the reciprocal preference as specified in section 3-124-17 shall be added for evaluation purposes to the out-of-state bidder's price.

(b) Pursuant to section 103D-302, HRS, the responsible and responsive bidder submitting the lowest evaluated bid, taking into consideration all applicable preferences, shall be awarded the contract.

(c) The contract amount shall be the price bid, exclusive of preference.

(d) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that [preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
- (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
- (4) Recycled products, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
- (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
- (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.

(e) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical total prices, award shall be made pursuant to section 3-122-34. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp

MAY 20 2004] (Auth: HRS §§103D-202, 103D-1004)

(Imp: HRS §103D-1004)

§3-124-19 (Reserved).

SUBCHAPTER 4

RECYCLED PRODUCTS

§3-124-20 Purpose. ~~[(a)]~~ The purpose of ~~[these rules]~~ this subchapter is to establish percentages of preference, the method of determining the recycled content to qualify various products for preference, and the application of the preference. The objective is to promote the use of recycled products by state and county public purchasing agencies.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).] [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp~~
MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005)
(Imp: HRS §§103D-1005, 342G-42)

§3-124-21 Definitions. Definitions are in section 103D-1001, HRS. The following definitions ~~[are also applicable to terms used in]~~ apply to this chapter:

"End use" means the purpose for which an item has been manufactured.

"Post-consumer recovered material" means any product used by a consumer, including a business that purchases the material, that has served its intended end use, and that has been separated or diverted from the solid waste stream for the purpose of use, reuse, or recycling.

"Recovered material" means material that has been separated, diverted, or removed from the solid waste stream after a manufacturing process for the purpose of use, reuse, or recycling. This term does not include those materials that are generated and normally reused on-site for manufacturing processes (such as mill broke, in the case of paper products).

"Recycled content" means the percentage of a product composed of recovered material, or post-consumer recovered material, or both.

"Recycled product" means a product containing recovered material, or post-consumer recovered material, or both.

"Solid waste stream" means discarded material moving from the point of discard to ultimate disposition. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005) (Imp: HRS §§103D-1005, 206M-31)

§3-124-22 Applicability. (a) These rules shall apply to all solicitations issued pursuant to section 103D-302, HRS, by a purchasing agency when it is required or so stated in the solicitation.

(b) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005) (Imp: HRS §§103D-1005, 342G-42)

§3-124-23 Qualification procedure. (a) The solicitation shall contain the per cent of recycled content required to qualify various products for a preference. Any person desiring a preference pursuant to section 103D-1005, HRS, shall certify the recycled content of the product when submitting a bid. The Certification of Recycled Content form issued by the administrator shall be completed and submitted as part of the bid.

(b) Bidders shall indicate on the certification form, included as part of the solicitation, the recycled content of the products offered. Recycled content shall be expressed as a percentage of total product weight.

(c) Bidders shall submit with the certification form sufficient information to support the stated recycled content of the products offered. For purposes of this section, sufficient information shall include, but not be limited to, manufacturer's specifications, or manufacturer's certification. The procurement officer calling for bids may request additional information deemed necessary in order to qualify a product. The procurement officer calling for bids shall have sole discretion in determining acceptance of a product.

(d) Any bidder whose product is not accepted for

application of preference may appeal by filing a written request for re-examination of facts to the procurement officer calling for bids. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005) (Imp: HRS §§103D-1005, 342G-42)

§3-124-24 Bidding procedure. (a) Solicitations issued by a purchasing agency pursuant to section 103D-302, HRS, and consistent with section 3-122-21, shall contain a notice stating that a price preference will be given to recycled products. The solicitation shall contain the percent of recycled content required to qualify various products for a price preference. The price preference will be at least five per cent of the price of the item, and will be used for price evaluation.

(b) All purchasing agencies issuing bids shall provide an appropriate space for bidders to indicate use of [a] recycled [or a non-recycled product] products and to list the prices of the recycled [or non-recycled] products.

(c) When a purchase specifies only recycled products or when only recycled products are bid, the price preference shall not apply.

(d) Bidders requesting a preference shall submit a completed certification form, as required by section 3-124-23, with each bid. Previous certifications shall not apply unless allowed by the bid. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005) (Imp: HRS §§103D-1005, 342G-42)

§3-124-25 Evaluation procedure and contract award. (a) When bids received contain both recycled products and non-recycled products, for the purpose of determining the lowest evaluated bid, the original price for the [non-recycled] recycled product item shall be [increased] decreased by the percentage specified in the solicitation.

(b) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that

[preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
 - (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
 - (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
 - (4) Recycled products, pursuant to section 103D-1005, HRS;
 - (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
 - (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
 - (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.
- (c) The responsible and responsive bidder submitting the lowest evaluated bid, taking into consideration all applicable preferences shall be awarded the contract.
- (d) The contract amount shall be the original price bid, exclusive of any preference.
- (e) Should the price comparison, after taking into consideration all applicable preferences, result in identical evaluated prices, award shall be made to the responsible and responsive bidder as follows:
- (1) To the bidder bidding the product with the higher post-consumer recovered material content; or
 - (2) To the bidder bidding the product with the higher recovered material content if the products have identical post-consumer recovered material content.
- (f) If the price comparison, after taking into consideration all applicable preferences, result in identical evaluated prices for products with identical recycled content, the procurement officer shall follow the requirements of section 3-122-34 for low tie bids.
- [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005) (Imp: HRS §§103D-1005, 342G-42)

§3-124-26 Mandatory purchase of office paper and printed material with recycled content. (a) State purchasing agencies shall and county purchasing

agencies are urged to purchase only office paper and printed material with recycled content.

(b) Exceptions to this section require the written approval of the chief procurement officer and are permitted when statutory, regulatory, contractual, or agency requirements preclude the use or purchase of paper with recycled contents of the same type and quantity as virgin paper.

(c) When a solicitation calls for recycled products only, the preference stated in this subchapter shall not apply. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1005) (Imp: HRS §103D-1005)

§§3-124-27 to 3-124-29 (Reserved).

SUBCHAPTER 5

SOFTWARE DEVELOPMENT BUSINESSES

§3-124-30 Purpose. ~~[(a)]~~ The purpose of [these rules] this subchapter is to establish a percentage of preference, the method to qualify various software development businesses for the preference, and application of the preference. The objective is to promote the use of Hawaii software development business by state purchasing agencies.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).]~~ [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1006) (Imp: HRS §103D-1006)

§3-124-31 Definitions. Definitions are in section 103D-1001, HRS. The following definitions ~~[are also applicable to terms used in]~~ apply to this chapter:

"Hawaii software development business" means any person, agency, corporation, or other business entity with its principal place of business or ancillary headquarters located in the State of Hawaii that proposes to obtain eighty per cent of the labor for software development from persons domiciled in Hawaii.

"Hawaii software service center" means the high technology development corporation that shall be responsible for maintaining the listings of all state software development projects. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1006) (Imp: HRS §§103D-1006, 206M-31)

§3-124-32 Applicability. (a) These rules shall apply to all solicitations made pursuant to sections 103D-302 and 103D-303, HRS, issued by a purchasing agency when so stated in the solicitation.

(b) These rules shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid.

(c) The Hawaii software service center shall develop and make public a list of governmental agencies requesting software services including a description of the software services required and a timetable for development.

(d) The information provided on the list shall not be binding and may be changed at the discretion of state agencies, provided that any changes shall be promptly communicated to the Hawaii software service center. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1006) (Imp: HRS §§103D-1006, 206M-33)

§3-124-33 Qualification procedure. (a) A business desiring a preference pursuant to section 103D-1006, HRS, shall certify that they are a Hawaii software development business when submitting an offer. A Certificate of Eligibility form issued by the administrator shall be used to certify the business and be included as part of the offer.

(b) Offerors shall indicate on the certification form, included as part of the offer, sufficient information to substantiate that eighty per cent of the employees who will be working on the proposed software development project are domiciled in Hawaii.

(c) Offerors shall submit with the certification form sufficient information to support the Hawaii software development business preference. Sufficient information shall include, but not be limited to, the authorized officer's name, office or position held, name of offeror and its local address, date that the office was opened, and name and local addresses of

offeror's employees who will provide the labor for the required services. The procurement officer calling for offers may request additional information deemed necessary in order to qualify the offeror, and shall have sole discretion in determining acceptance of the offeror as a Hawaii software development business.

(d) Any offeror who is not accepted for the Hawaii software development business preference may appeal by filing a written request for re-examination of facts to the procurement officer who issued the solicitation. [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1006) (Imp: HRS §103D-1006)

§3-124-34 Solicitation procedure. (a)

Solicitations issued by a state purchasing agency shall contain a notice stating that a price preference will be given to Hawaii software development businesses. This price preference will be ten per cent of the price, and will be used for evaluation.

(b) All state purchasing agencies shall provide an appropriate space for offerors to indicate whether the bidder is requesting the Hawaii software development business preference.

(c) When a solicitation specifies that because of federal requirements, the Hawaii software development business preference will not be considered, the price preference shall not apply.

(d) Offerors requesting a preference shall submit a completed certification form, as required by section 3-124-33, with each offer. Previous certifications shall not apply unless allowed by the solicitation.

(e) Any offeror who fails to indicate that it is a Hawaii software development business will be presumed to be a non-Hawaii software development business and the offeror's offer will be increased by ten per cent for purposes of evaluation. [Eff 12/15/95; am and comp 11/17/97; comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1006) (Imp: HRS §103D-1006)

§3-124-35 Evaluation procedure and contract award. (a) In any expenditure of public funds for software development where offers received contain both Hawaii and non-Hawaii software development businesses, for the purpose of selecting the lowest offer only, the offer by a non-Hawaii software development business shall be increased by ten per cent.

(b) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified herein. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that [preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
- (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
- (4) Recycled products, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference, pursuant to section 103D-1004, HRS; and
- (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
- (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.

(c) The responsible and responsive offeror submitting the lowest evaluated offer(s) pursuant to section 103D-302, HRS, taking into consideration all applicable preferences shall be awarded the contract.

(d) The contract amount shall be the original price offered, exclusive of any preference.

(e) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical evaluated prices for Hawaii software development projects, the procurement officer shall award the contract resulting from an invitation for bids pursuant to section 3-122-34.

(f) For proposals submitted pursuant to section 103D-303, HRS, and after taking into consideration all applicable preferences, the procurement officer shall award the contract pursuant to section 3-122-57. [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1006) (Imp: HRS §103D-1006)

§§3-124-36 to 3-124-39 (Reserved).

[SUBCHAPTER 6]

~~[PREFERENCE TO IN-STATE CONTRACTORS BIDDING ON
STATE AGENCY CONTRACTS FOR PUBLIC WORKS PROJECTS]~~

~~[§3-124-40 Purpose. (a) The purpose of these rules is to establish the method of determining preference to in-state contractors when awarding a contract for a public works project. The objective is to promote the use of in-state contractors.]~~

~~(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).] [Eff 12/15/95; comp 11/17/97; am and comp 11/25/02; R MAY 20 2004]~~
(Auth: HRS §103D-202) (Imp: HRS §103D-1007)

~~[§3-124-41 Definitions. The following definitions are also applicable to terms used in this chapter.]~~

~~"State agency" means any board, commission, department, bureau, division, agency, or political subdivision of the state government, excluding the counties.] [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; R MAY 20 2004] (Auth: HRS §103D-202)~~
(Imp: HRS §§103D-1007, 206M-31)

~~[§3-124-42 Applicability. (a) These rules shall apply to solicitations issued pursuant to sections 103D-302 and 103D-303, HRS, for public works projects.]~~

~~(b) These rules shall not apply.~~

~~(1) Whenever the application will disqualify any state agency from receiving federal funds or aid, or~~

~~(2) To the counties.~~

~~(c) The in-state contractor preference may not be used in combination with any other preference otherwise available under state or federal law.] [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; R MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1007)~~

~~[§3-124-43 Qualification procedure. (a) Any offeror desiring an in-state contractor preference pursuant to chapter 103D, HRS, shall complete an application for a tax clearance and submit it to the~~

~~State department of taxation for a tax clearance certificate. Upon receipt of the application, the state department of taxation will verify that the applicant has filed all state tax returns, and has paid all amounts owing on such returns for the number of years and for the dollar amounts specified in section 103D-1007, HRS.~~

~~(b) The state department of taxation will issue a tax clearance certificate to the applicant upon its determination that the applicant has filed all state tax returns, and has paid all amounts owing on such returns, in accordance with section 103D-1007, HRS.]~~
 [Eff 12/15/95; am and comp 11/17/97; am and comp 11/25/02; R MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1007)

~~[§3-124-44 Bidding procedure. Solicitations for public works projects issued by a state purchasing agency and consistent with section 3-124-41, shall:~~

- ~~(1) State that a price preference will be given to in-state contractors subject to the directions in the solicitation on applicability, qualification procedures, and limitations of the in-state contractor preference,~~
- ~~(2) Provide an appropriate space for the offeror to indicate whether the in-state preference is selected by the offeror,~~
- ~~(3) State that if the in-state contractor preference is selected, the price preference percentage, as provided in section 103D-1007, HRS, shall be used for price evaluation, as specified in section 3-124-45,~~
- ~~(4) State that the in-state preference may not be used in combination with any other preference available under state or federal law and that the selection of the in-state contractor preference takes precedence over the selection of any other preference and all other selections will be ignored by the procuring agency, and~~
- ~~(5) Require the offeror requesting an in-state contractor preference to submit with the offer an tax clearance certificate obtained in accordance with section 3-124-43 and shall caution the offeror that failure to submit the tax clearance certificate automatically voids the selection of the in-state~~

~~contractor preference.]~~ [Eff 12/15/95; am
and comp 11/17/97; am and comp 11/25/02;
R MAY 20 2004] (Auth: HRS §103D-202)
(Imp: HRS §103D-1007)

~~[§3-124-45 Evaluation procedure and contract
award. (a) When the in-state contractor preference is
not selected by an offeror, the offer shall be
evaluated by applying all preferences selected by the
offeror which are allowed by statute. Calculations for
adjustments shall be based upon the original price
offered. Should more than one preference apply, the
evaluated price shall be the sum of the original price
plus applicable preference adjustments.~~

~~(b) Whenever an offeror selects and qualifies for
the in-state contractor preference, the prices offered
by those not selecting or qualifying for the in-state
contractor preference shall be increased by the
percentage allowed in section 103D-1007, HRS, for
evaluation purposes.~~

~~(c) The responsible and responsive offeror
submitting the offer with the lowest evaluated price
shall be awarded the contract.~~

~~(d) For offers submitted pursuant to 103D-302 and
after taking into consideration all applicable
preferences, the contract amount shall be the original
price offered.~~

~~(e) Should the price comparison result in
identical evaluated prices, and the tied bidders meet
the provisions of section 3-124-43, the procurement
officer shall select the winning bid resulting from an
invitation for bids, pursuant to section 3-122-34.~~

~~(f) For proposals submitted pursuant to section
103D-303, HRS, and after taking into consideration all
applicable preferences, the procurement officer shall
award the contract pursuant to section 3-122-57.] [Eff
12/15/95; am and comp 11/17/97; am and comp 11/25/02;
R MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS
§103D-1007)~~

~~[§§3-124-46 to 3-124-49 (Reserved).]~~

SUBCHAPTER 7

TAX PREFERENCE

§3-124-50 Purpose. ~~[(a)]~~ The purpose of [these rules] this subchapter is to provide procedures for the application of the tax preference for taxpaying bidders. The objective is to ensure fair competition for bidders paying the applicable Hawaii general excise tax and the applicable Hawaii use tax.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).] [Eff and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004]~~
(Auth: HRS §103D-202) (Imp: HRS §103D-1008)

§3-124-51 Definitions. As used in this chapter: "Tax exempt bidder" means a bidder that is not subject to the applicable Hawaii general excise and applicable Hawaii use tax, under chapters 237 and 238, HRS, resulting from the performance of the work required by the solicitation; or a bidder that has tax exempt status under federal or state laws or both.

"Taxpaying bidder" means a bidder that is subject to the applicable Hawaii general excise tax and applicable Hawaii use tax, under chapters 237 and 238, HRS, for the performance of the work required by the solicitation. [Eff and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1008)

§3-124-52 Applicability. These rules shall apply to all solicitations issued pursuant to section 103D-302, HRS, by a purchasing agency and the solicitation shall so state therein, except whenever the application will disqualify any government agency from receiving federal funds or aid. [Eff and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-1008)

§3-124-53 Qualification procedure. Any taxpaying bidder shall qualify for the tax preference pursuant to this subchapter by submitting tax clearance certificate(s) issued by the state department of taxation and the Internal Revenue Service to the purchasing agency. [Eff and comp 11/17/97; comp 11/25/02; comp MAY 20 2004]
(Auth: HRS §103D-202) (Imp: HRS §103D-1008)

§3-124-54 Bidding procedure. Solicitations issued by a purchasing agency shall contain a notice stating that a tax preference will be given to taxpaying bidders. [Eff and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004]
Auth: HRS §103D-202) (Imp: HRS §103D-1008)

§3-124-55 Evaluation procedure and contract award. (a) As applicable, the price submitted by the tax exempt bidder shall be increased by the applicable retail rate of the Hawaii general excise tax and applicable use tax to determine the evaluated price for award purposes.

(b) The contract amount shall be the original price bid, exclusive of any preferences used in evaluating the bid.

(c) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified herein. The preferences (1) through (7) in this [section] subsection shall be applied to the original [price] prices. The sum of the preferences, where applicable, shall be added to the original price, except that [preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products price.

- (1) Hawaii products list, if applicable, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for tax exempt bidders, pursuant to section 103D-1008, HRS;
- (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;
- (4) Recycled products, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference, pursuant to section 103D-1004, HRS; and
- (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS; and
- (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.

(d) Should the price comparison, after taking into consideration all applicable preferences, result in identical evaluated prices, the procurement officer shall award the contract pursuant to section 3-122-34. [Eff and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS

§103D-1008)

§§3-124-56 to 3-124-59 (Reserved).

SUBCHAPTER 8

QUALIFIED COMMUNITY REHABILITATION PROGRAMS

§3-124-60 Purpose. ~~[(a)]~~ The purpose of [these rules] this subchapter is to establish procedures for extending a preference for goods and services provided by qualified community rehabilitation programs.

~~[(b) This subchapter of chapter 124, subtitle 11 of title 3, Hawaii Administrative Rules, replaces rescinded interim rules subchapter previously adopted on 11/15/01 (file no. 2402).]~~ [Eff and comp 11/17/97; comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1009) (Imp: HRS §§103D-1009, 103D-1010, 103D-1011)

§3-124-61 Definitions. Definitions are in section 103D-1001, HRS. The following definitions are also applicable to terms used in this chapter:

"Department" means the state department of labor and industrial relations.

"Nonprofit corporation" means a corporation of which no part of the income or profit is distributable to its members, directors, or officers pursuant to chapter 415B, HRS.

"Partners in employment program list" means a list issued by the state procurement office that identifies goods or services offered by qualified rehabilitation programs to all State and county agencies.

"Qualified offeror" means any offeror operating a qualified community rehabilitation program who is also a nonprofit corporation and is in conformance with criteria established by the department pursuant to chapter 91, HRS. [Eff and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1009, 415B-2) (Imp: HRS §103D-1009)

§3-124-62 Applicability. These rules shall apply to all solicitations for goods and services made pursuant to sections 103D-302 and 103D-303, HRS, issued

by a purchasing agency and the solicitation shall so state therein. [Eff and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: SLH 1997, Act 352, §2, §103D-1009)

§3-124-63 Qualification procedure. (a) Qualification for obtaining a preference shall be in conformance with criteria established by this subchapter.

(b) Organizations listed in the partners in employment program qualify for a preference. All other prospective offerors desiring a preference shall submit with their offer the "Certificate of Eligibility to be Certified as a Qualified Community Rehabilitation Program" issued by the administrator. [Eff and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1009) (Imp: HRS §103D-1009)

§3-124-64 Evaluation procedure and contract award. (a) In evaluating offers for goods or services, all chief procurement officers and heads of purchasing agencies shall purchase from qualified community rehabilitation programs provided the prices submitted by a noncommunity rehabilitation program shall be increased by the percentage allowed under section 103D-1009, HRS, to determine the lowest evaluated offeror.

(b) The contract amount shall be the amount of the price offered, exclusive of any preference.

(c) Should more than one preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the order specified below. The preferences (1) through (7) in this subsection shall be applied to the original prices. The sum of the preferences, where applicable, shall be added to the original price, except that [preference] preferences (1) and (4) shall be subtracted from the Hawaii products or recycled products [prices] price.

- (1) Hawaii products list, pursuant to section 103D-1002, HRS;
- (2) Tax adjustment for tax exempt offerors, pursuant to section 103D-1008, HRS;
- (3) Preferred use of Hawaii software development businesses, pursuant to section 103D-1006, HRS;

- (4) Recycled products, pursuant to section 103D-1005, HRS;
- (5) Reciprocal preference, pursuant to section 103D-1004, HRS;
- (6) Printing, binding, and stationery work within the State, pursuant to section 103D-1003, HRS;
- (7) Preference for persons with disabilities, pursuant to section 103D-1009, HRS.
- (d) Should the price comparison for bids submitted pursuant to section 103D-302, HRS, after taking into consideration all applicable preferences, result in identical total prices, award shall be made pursuant to section 3-122-34.
- (e) For proposals submitted pursuant to section 103D-303, HRS, and after taking into consideration all applicable preferences, the procurement officer shall award the contract pursuant to section 3-122-57. [Eff and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1009) (Imp: HRS §103D-1009)

§3-124-65 Waiver to competitive bids or proposals. (a) Notwithstanding the provisions of section 3-124-66, any purchasing agency without advertising or calling for offers may purchase goods and services provided by qualified community rehabilitation programs pursuant to section 3-124-63 which have indicated an interest in supplying the goods or services and on an equitable basis may apportion the business among the interested programs; provided that:

- (1) The goods or services meet the specifications and needs of the head of the purchasing agency and are purchased at a fair market price as determined by the appropriate public agency; and
 - (2) The provider complies with section 103D-1010, HRS, and submit with their offer the "Certificate of Eligibility to be Certified as a Qualified Community Rehabilitation Program."
- (b) Purchasing agencies shall negotiate the conditions and terms for the purchase, including the price of the good or service with the qualified community rehabilitation program; provided that the price of the good or service shall not exceed the fair market price and there is assurance that the qualified community rehabilitation program proposal is in

compliance with all rules related to procurement. [Eff and comp 11/17/97; am and comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1010) (Imp: HRS §§103D-1010, 103D-1011)

§3-124-66 Partners in employment program. The state procurement office shall:

- (1) Maintain and post on the Internet a current list of ~~[partners in employment program providers with descriptions for]~~ participants in the partners in employment program and the goods ~~[or]~~ and services ~~[that have been determined by the department to meet that department's criteria and annually distribute the list to all state and county purchasing agencies;]~~ they provide; and
- (2) Ensure that any good or service available from a qualified community rehabilitation program pursuant to this subchapter is not placed on the Hawaii products list under section 103D-1002, HRS. [Eff and comp 11/17/97; am and comp 11/25/02; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-1010) (Imp: HRS §§103D-1010, 103D-1011)"

§3-124-67 Exempt from wage provision. Service contracts awarded to qualified community rehabilitation programs under this subchapter shall be exempt from wages provision of section 103-55, HRS. [Eff and comp 11/17/97; comp 11/25/02; comp MAY 20 2004] (Auth: HRS §§103-55, 103D-202) (Imp: HRS §103-55)

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

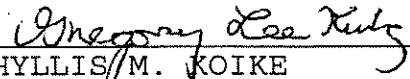
3. Additions to update source notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 3-124, 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 Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on April 22, 2004, and filed with the Office of the Lieutenant Governor.

For



PHYLLIS M. KOIKE
Chairperson
Procurement Policy Board



RUSS K. SAITO
State Comptroller

APPROVED AS TO FORM:



Deputy Attorney General

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-126
Hawaii Administrative Rules

April 22, 2004

1. Chapter 126 of Title 3, Hawaii Administrative Rules, entitled "Legal and Contractual Remedies" 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 126

LEGAL AND CONTRACTUAL REMEDIES

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Solicitations and Awards

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§3-126-2	Repealed
§3-126-3	Filing of complaint and protest prior to receipt of offers
§3-126-4	Protest of an award
§3-126-5	Stay of procurements during protest
§3-126-6	Request for information
§3-126-7	Decision by the chief procurement officer or designee
§3-126-8	Repealed
§§3-126-9 to 3-126-10	(Reserved)

Subchapter 2 Authority to Debar or Suspend

§3-126-11	Application
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§3-126-11.01 Other causes for debarment or suspension
 §3-126-12 Suspension
 §3-126-13 Notice of debarment action
 §3-126-14 Review by a chief procurement officer
 or designee
 §3-126-15 Review procedures
 §3-126-16 Determination of the review officer
 §3-126-17 Effect of debarment decision
 §3-126-18 List of debarred and suspended persons
 §§3-126-19 to 3-126-24 (Reserved)

Subchapter 3 Authority to Resolve Contract and Breach of Contract Controversies

§3-126-25 General
 §3-126-26 Repealed
 §3-126-27 Delegation of authority to procurement
 officer
 §3-126-28 Procurement officer's decision
 §3-126-29 Controversies involving state claims
 against the contractor
 §3-126-30 Repealed
 §3-126-31 Disputes clause
 §§3-126-32 to 3-126-34 (Reserved)

Subchapter 4 Determination that Solicitation or Award Violates Law

§3-126-35 Application
 §3-126-36 Violation determination
 §3-126-37 Remedies prior to an award
 §3-126-38 Remedies after an award
 §§3-126-39 to 3-126-41 (Reserved)

Subchapter 5 Administrative Proceeding for Review

§3-126-42 Commencement of proceedings
 §3-126-43 Legal counsel
 §3-126-44 Individual representing party
 §3-126-45 Consolidation
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 §3-126-47 Service, generally
 §3-126-48 Service by whom
 §3-126-49 Time

§3-126-50	Extensions of time
§3-126-51	Motions
§3-126-52	Powers of the panel or hearings officer in conducting hearing
§3-126-53	Subpoenas
§3-126-54	Absence of hearings officer
§3-126-55	Disqualification of hearings officer
§3-126-56	Evidence
§3-126-57	Decision, generally
§3-126-58	Ex parte communications
§3-126-59	Contents of a request for hearing
§3-126-60	Scheduling of hearings
§3-126-61	Notice of hearing
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Subchapter 6 Judicial Review

§3-126-78	Judicial review of contested cases
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Subchapter 7 Judicial Action

§§3-126-86 to 3-126-95	(Reserved)
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Historical Note: This chapter 126, subtitle 11 of title 3, Hawaii Administrative Rules, replaces interim rule dated 11/25/02 (file no. 2497), which amended sections 3-126-1, 3-126-3, 3-126-4, 3-126-5, 3-126-6, 3-126-7, 3-126-11, 3-126-12, 3-126-13, 3-126-14, 3-126-15, 3-126-16, 3-126-17, 3-126-18, 3-126-25, 3-126-27, 3-126-28, 3-126-29, 3-126-35, 3-126-36, 3-126-37, 3-

126-38, 3-126-42, 3-126-46, 3-126-49, and 3-126-78; and repealed sections 3-126-2, 3-126-8, 3-126-26, and 3-126-30.

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

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

SUBCHAPTER 1

AUTHORITY TO RESOLVE PROTESTED SOLICITATIONS AND AWARDS

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

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

"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.]

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

"Protestor" means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

"Using agency" means the affected agency that has used the goods, services, or construction supplied by the contractor.] [Eff 12/15/95; am and comp MAY 20 2004

] (Auth: HRS §103D-202, 103D-701) (Imp: HRS §103D-701)

[§3-126-2 Complaint to procurement officer.
Complainants should seek resolution of their complaints initially with the procurement officer or the office that issued the solicitation. Such complaints shall be made in writing.] [Eff 12/15/95; R MAY 20 2004]

(Auth: HRS §§103D-202, 103D-701) (Imp: §103D-701)

§3-126-3 Filing of complaint and protest prior to receipt of offers. (a) ~~[Protests shall be made in writing within five working days to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate within five working days after the after the protestor knows or should have known of the facts leading to the filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after the five day period shall not be considered.]~~ Protestor initially should seek an informal resolution of the protestor's complaint with the procurement officer named in the solicitation.

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

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

(d) The written protest shall include ~~[as]~~ at 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, the contract number];~~
- (3) A statement of reasons for the protest; and
- (4) Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

~~[(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 working days of receipt of the written protest.]~~ [Eff 12/15/95; am and comp
MAY 20 2004] (Auth: HRS §103D-202, 103D-701)
(Imp: HRS §103D-701)

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

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

- (1) A protest shall be filed in accordance with section 3-126-3(c) and (d), with supporting exhibits, evidence, or documents to substantiate the protest;
- (2) A decision shall be made by the procurement officer as expeditiously as possible after reviewing all relevant information, and shall be final. A decision issued in resolution of a protest shall contain the following:

- (A) A statement of the action to be taken or resolution to the protest; and
- (B) A statement that the decision is final and conclusive. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)

S3-126-5 Stay of procurements during protest.
 When a protest has been filed [~~within five working days~~] pursuant to section 3-126-3 or 3-126-4, [~~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~~] no further action shall be taken until the protest has been settled, unless the chief procurement officer makes a written determination, after consulting with [the head of the using agency or] the head of the purchasing agency, that the award of the contract [without delay] is necessary to protect the substantial interests of the State. [Eff 12/15/95; am and comp MAY 20 2004]
 (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)

S3-126-6 [Making information on protests available.] Request for information. (a) Any additional information requested by any of the parties should be submitted within the time periods established by the requesting party in order to expedite consideration of the protest unless justification is provided for a delay. Unsubstantiated delays may result in resolution of the protest without consideration of any information which is not filed within the established time period.

(b) The chief procurement officer or [the head of a purchasing agency] designee shall, upon written request, make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or rules. Persons [who wish to keep such] submitting information [submitted by them] considered proprietary, confidential, or otherwise permitted or required to be withheld by law or rules shall request that the information be kept confidential [should so request] by specifically identifying [such]

the information within documents submitted, and indicating on the front page of each document that it contains such information. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)

§3-126-7 Decision by the chief procurement officer or [the head of a purchasing agency] designee.

(a) A decision on a protest shall be made by the chief procurement officer or [the head of a purchasing agency] designee as expeditiously as possible after [receiving] reviewing all relevant[, requested] information, and shall be final. [If a protest is sustained, the available remedies include, but are not limited to, those set forth in subsection (b) and subchapter 4.]

(b) The protestor shall be informed:

(1) Whether the protest is denied or sustained;
and

(2) If the protest is denied, the protestor's right to an administrative proceeding pursuant to subchapter 5.

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

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

~~[§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.~~

~~(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 12/15/95; R MAY 20 2004] (Auth: HRS §§103D-202, 103D-701) (Imp: HRS §103D-701)]~~

§§3-126-9 to 3-126-10 (Reserved).

SUBCHAPTER 2

AUTHORITY TO DEBAR OR SUSPEND

S3-126-11 Application. This subchapter applies to the debarment or suspension of persons from consideration for award of ~~[contracts imposed by the chief procurement officer or the head of a purchasing agency]~~ all public contracts and from performance on any public contract. [Eff 12/15/95; am and comp

MAY 20 2004] (Auth: HRS §§103D-202, 103D-702)
(Imp: HRS §103D-702)

S3-126-11.01 Other causes for debarment or suspension. (a) Debarment procedures shall be initiated by the administrator of the state procurement office for any person committing an act, after the effective date of this section, for which that person is subsequently assessed an administrative fine of \$5,000 or more by the campaign spending commission under section 11-228, HRS, or convicted of a violation under section 11-229, HRS.

(b) "Person" for the purposes of this section shall be as defined under section 11-191, HRS.

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

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

S3-126-12 Suspension. (a) After consultation with the affected [using] purchasing agency, the respective attorney general or corporation counsel, and, where practicable, the [contractor or prospective contractor] person who is to be suspended, and upon written determination by the chief procurement officer or [the head of a purchasing agency] designee that probable cause exists for debarment as set forth in section 103D-702, HRS, [a contractor or prospective contractor] that person shall be suspended.

(b) A notice of suspension, including a copy of [such] the determination, shall be sent to the suspended [contractor or prospective contractor. Such notice shall state] person stating that:

- (1) The suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but [not for a period in excess of ninety days] shall not exceed three months unless the chief procurement officer or designee determines in writing that additional time is necessary to complete the

- investigation;
- (2) Bids or proposals will not be solicited from the suspended person, and if they are received, they will not be considered during the period of suspension; and
 - (3) ~~[If a hearing has not been held, the]~~ The suspended person may request a [hearing] review in accordance with section 3-126-14.
 - (c) The notice of suspension shall signal the start of the investigation for debarment.
 - (d) A ~~[contractor or prospective contractor]~~ person is suspended upon issuance of the notice of suspension. The suspension will remain in effect during any appeals~~[- The suspension]~~ and may be ~~[ended]~~ terminated by the ~~[officer who issued the notice of suspension]~~ chief procurement officer or designee, an administrative hearings officer, or by a court, but otherwise shall only ~~[be ended]~~ end when the suspension has been in effect ~~[for three months]~~ in accordance with subsection (b)(1) or a debarment decision takes effect. [Eff 12/15/95; am and comp MAY 20 2004]
(Auth: HRS §§103D-202, 103D-702, 103D-709) (Imp: HRS §§103D-702, 103D-709, 103D-710)

§3-126-13 Notice of debarment action. (a) Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the ~~[contractor or prospective contractor. This notice]~~ person and shall:

- (1) State that debarment is being considered;
 - (2) Set forth the reasons for the action;
 - (3) State that if the ~~[contractor or prospective contractor]~~ person so requests, a [hearing] review will be ~~[held]~~ conducted, provided ~~[such]~~ the request is received by the chief procurement officer or ~~[the head of a purchasing agency]~~ designee within ten ~~[calendar]~~ working days after the ~~[contractor or prospective contractor]~~ person receives notice of the proposed action; and
 - (4) State that the ~~[contractor or prospective contractor]~~ person may be represented by counsel.
- (b) The notice shall be sent to the respective attorney general or corporation counsel and the affected ~~[using]~~ purchasing agency. ~~[The affected using agency is that agency that has used the goods,~~

~~services, or construction supplied by the contractor.]~~
If more than one ~~[affected using]~~ purchasing agency is involved, the chief procurement officer or ~~[the head of a purchasing agency]~~ designee may designate one or more representatives to be consulted in respect to this action. [Eff 12/15/95; am and comp MAY 20 2004]
(Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

S3-126-14 ~~[Hearings]~~ Review by a chief procurement officer[, head of a purchasing agency,] or [disinterested] designee [of the officer]. (a) A ~~[contractor or prospective contractor that has been]~~ person notified of a proposed debarment action may request in writing that a ~~[hearing]~~ review be ~~[held]~~ conducted. ~~[Such]~~ The request must be received by the official proposing the action within ten working days of receipt of notice of the proposed action under section 3-126-12 or 3-126-13. The request for review shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

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

(c) If a ~~[hearing]~~ review is requested, the chief procurement officer ~~[or the head of a purchasing agency]~~ may appoint a ~~[disinterested hearings officer]~~ designee to conduct the ~~[hearing]~~ review and recommend a final decision. Otherwise, the chief procurement officer ~~[or the head of a purchasing agency]~~ shall ~~[act as the hearings officer]~~ conduct the review.

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

~~[(e) The hearings officer, in the conduct of the hearing, has the power, among others, to-~~

~~(1) Hold informal conferences to settle,~~

~~simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon the officer's own motion;~~

- ~~(2) Require parties to state their positions with respect to the various issues in the proceeding;~~
- ~~(3) Require parties to produce for examination those relevant witnesses and documents under their control;~~
- ~~(4) Rule on motions and other procedural items on matters pending before the officer;~~
- ~~(5) Regulate the course of the hearing and conduct of participants therein;~~
- ~~(6) Receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;~~
- ~~(7) Fix time limits for submission of written documents in matters before the officer;~~
- ~~(8) Impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:

 - ~~(A) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;~~
 - ~~(B) Excluding all testimony of an unresponsive or evasive witness; and~~
 - ~~(C) Expelling any party or person from further participation in the hearing; and~~~~
- ~~(9) Take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.] [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)~~

S3-126-15 [Hearings] Review procedures. (a)
 [Hearings] The review shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements completed within sixty days from the date set for the

review.

(b) The weight to be attached to evidence presented ~~[in any particular form]~~ will be within the discretion of the ~~[hearings]~~ review officer.
~~[Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present.]~~ The ~~[hearings]~~ review officer may require evidence in addition to that offered by the parties.

~~[(c) A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.]~~

~~[(d) Opening statements may be made unless a party waives this right.]~~

~~[(e) Witnesses shall testify under oath or affirmation. All witnesses may be cross examined.]~~

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

S3-126-16 Determination of [hearings] the review officer. (a) The ~~[hearings]~~ review officer shall prepare a written determination recommending a course of action. ~~[Such determination shall be given to the chief procurement officer or the head of a purchasing agency.]~~ Copies shall ~~[also]~~ be sent to all affected parties, including the [contractor or prospective contractor] person under consideration for debarment, the respective attorney general or corporation counsel, and the affected ~~[using]~~ purchasing agency.

(b) The ~~[contractor or prospective contractor]~~ person under consideration for debarment shall have ten working days to file comments upon the ~~[hearings]~~ review officer's determination. The chief procurement officer or ~~[the head of a purchasing agency]~~ designee may request oral argument.

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

(d) When debarment is recommended or ordered, the

length of the debarment, not to exceed three years, the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of the right to commence an administrative proceeding under subchapter 5. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

S3-126-17 Effect of debarment decision. A debarment decision will take effect upon issuance and receipt by the ~~[contractor or prospective contractor]~~ debarred person. After the debarment decision takes effect, ~~[the contractor]~~ that person shall remain debarred until a court~~[,]~~ or the chief procurement officer, or ~~[the head of the agency that]~~ designee who issued the decision, orders otherwise or until the debarment period specified in the decision expires. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-702) (Imp: HRS §103D-702)

S3-126-18 List of debarred and suspended persons.
 (a) The chief procurement officer shall ~~[maintain and update a list of debarred and suspended persons and]~~ send a copy of the ~~[list and updates shall be provided]~~ decision to debar or suspend a person to the administrator of the state procurement office~~[. The administrator shall provide the list]~~ who shall compile and distribute a list to all chief procurement officers of the State and post the list on the state procurement office's website. Each chief procurement officer shall send the list and updates of the list to all purchasing agencies. ~~[Such list shall be available to the public upon request.]~~

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

§§3-126-19 to 3-126-24 (Reserved).

SUBCHAPTER 3

AUTHORITY TO RESOLVE CONTRACT AND BREACH OF CONTRACT CONTROVERSIES

§3-126-25 General. This subchapter establishes procedures and remedies to resolve contract and breach of contract controversies between the State and a contractor. It is the State's policy~~[, consistent with this subchapter,]~~ to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreement and are encouraged. If ~~[such]~~ informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities are encouraged at this stage. [Eff 12/15/95; am and comp
MAY 20 2004] (Auth: HRS §§103D-202, 103D-703)
(Imp: HRS §103D-703)

~~[§3-126-26 Application. Section 103D-703, HRS, is applicable to controversies between the State and a contractor which arise under, or by virtue of, a contract between them. This includes, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification, reformation, or rescission. The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.] [Eff 12/15/95; R
MAY 20 2004] (Auth: HRS §§103D-202, 103D-703)
(Imp: HRS §103D-703)~~

§3-126-27 Delegation of authority to procurement officer. (a) Subject to subsection (b), unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to ~~[the chief procurement officer or]~~ the head of a purchasing agency, ~~[such]~~ the authority is hereby delegated to the procurement officer. ~~[Within this subchapter, therefore,~~

~~"procurement officer" denotes the person with such authority, whether that is the procurement officer, the chief procurement officer, the head of a purchasing agency, or a designee of the officer.]~~

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

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

(a) When a controversy cannot be resolved by mutual agreement, the procurement officer shall ~~[, after written request by the contractor for a final decision,]~~ promptly issue a final written decision. Before issuing ~~[a final]~~ the decision, the procurement officer shall:

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

(b) The procurement officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

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

officer from whose decision the complaint is taken. The notice shall indicate that a judicial action pursuant to section 103D-711, HRS, is intended, reference the decision from which the complaint is being taken, and identify the contract involved.

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

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

If the procurement officer fails to issue a decision ~~[on a claim not exceeding fifty thousand dollars within ninety calendar days after receipt, or does not issue a decision]~~ within the time ~~[promised for a claim in excess of fifty thousand dollars]~~ allowed, the contractor may proceed as if an adverse decision has been received.

(d) The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. ~~[Such]~~ The payments shall be without prejudice to the rights of either party and where such payments are required to be returned by a subsequent decision, interest on such payments shall be paid at the statutory rate from the date of payment. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-703) (Imp: HRS §§103D-703, 103D-711, 103D-712)

S3-126-29 Controversies involving state claims against the contractor. All controversies involving claims asserted by the State against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the ~~[procurement officer, the]~~ chief procurement officer~~[, or the head of a purchasing~~

agency,] or designee as applicable. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-703) (Imp: HRS §103D-703)

~~[§3-126-30 Interest. (a) Interest on amounts ultimately determined to be due to a contractor or the State shall be payable at the statutory rate applicable to judgments against the State under chapter 662, HRS, from the date the claim arose through the date of decision or judgment, whichever is later.~~

~~(b) Each contract between the State and a contractor shall contain a paragraph substantially similar to subsection (a).]~~ [Eff 12/15/95; R MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-708)

S3-126-31 Disputes clause. Language substantially similar to the following clause shall be inserted in all state contracts:

"Disputes

- (1) All controversies between the State and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the procurement officer in writing, within ninety calendar days after a written request by the contractor for a final decision concerning the controversy; provided that if the procurement officer does not issue a written decision within ninety calendar days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.
- (2) The procurement officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.
- (3) Any such decision shall be final and conclusive, unless fraudulent, or unless the contractor brings an action seeking judicial review of the decision in a circuit court of this State within the six months from the date of receipt of the decision.

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

§§3-126-32 to 3-126-34 (Reserved).

SUBCHAPTER 4

DETERMINATION THAT SOLICITATION OR AWARD VIOLATES LAW

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

§3-126-36 Violation determination. (a) A solicitation or award may be in violation of the law due to actions of state or county employees, bidders, offerors, contractors, or other persons. After consultation with the respective attorney general or the corporation counsel, as applicable, the chief procurement officer or ~~[the head of a purchasing agency]~~ designee may determine that a solicitation or contract award is in violation of the provisions of chapter 103D, HRS, or the rules adopted under the chapter.

(b) After consultation with the respective attorney general or corporation counsel, the state

ethics commission may determine that a solicitation or award violates chapter 84, HRS. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. The department of commerce and consumer affairs hearings officer designated in subchapter 5 may determine that a solicitation or contract award is in violation of the provisions of the state procurement code or the rules adopted under the code. The ~~[supreme or]~~ circuit ~~[courts]~~ court designated in subchapters 6 and 7 may find that a solicitation or award is in violation of law.

c) Specific findings showing reckless disregard of clearly applicable laws or rules must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or rules.

[Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-705)

§3-126-37 Remedies prior to an award. A finding by the chief procurement officer or designee, after consultation with the respective attorney general or corporation counsel, as applicable, that the solicitation or proposed award is in violation of law, will constitute a cogent and compelling reason to cancel, or revise a solicitation or proposed award. The cancellation shall be made in accordance with ~~[section 3-122-32]~~ subchapter 11, chapter 3-122. [Eff 12/15/95; am and comp MAY 20 2004] (Auth: HRS §103D-202) (Imp: HRS §103D-706)

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

- (1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the chief procurement officer or ~~[the head of a purchasing agency]~~ designee may ratify ~~[or]~~ and affirm, modify, ~~[the contract]~~ or terminate ~~[it]~~ the contract in accordance with this section after consultation with the respective attorney general or corporation counsel, as

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

allocable to the contract through the time of termination, other than attorney's fees.

Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance was completed.

Anticipated profits are not allowed.

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

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

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

§§3-126-39 to 3-126-41 (Reserved).

SUBCHAPTER 5

ADMINISTRATIVE PROCEEDING FOR REVIEW

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

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

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

(c) Withdrawal of legal counsel in the absence of a concurrent substitution shall be effective only upon the approval of the hearings officer and shall be subject to the guidelines of DR 2-110 of the Code of Professional Responsibility and other applicable law.

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

§3-126-44 Individual representing party. When an individual, acting in a representative capacity on behalf of a party, appears at a proceeding or signs a document submitted to the panel or hearings officer, that personal appearance or signature shall constitute a representation that the individual is lawfully authorized and qualified to so act. The individual at any time, however, may be required by the hearings officer to furnish proof of authorization and qualification to act in that capacity. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-45 Consolidation. The hearings officer may sua sponte, or upon any party's motion timely made and for good cause shown, consolidate two or more proceedings which involve substantially the same issues, arise out of the same general transaction, or involve the same person or persons, provided the consolidation shall be conducive to effectuating the ends of justice and shall not unduly delay the proceedings or hinder, harass, or prejudice any party. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-46 Format and certification of pleadings.
(a) Requests for hearings, motions, and other pleadings shall be typed or printed in ten or twelve

point pica or equivalent type size upon good quality paper, eight and one-half ~~+~~ by eleven inches in size and of at least sixteen pounds weight, except that documentary exhibits may be larger, if folded to the size of the pleadings to which they are attached.

(b) All copies shall be legible on paper eight and one-half ~~+~~ by eleven inches in size and of at least sixteen pounds weight.

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

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

(e) Unless otherwise provided, all pleadings, motions, memoranda, and other documents shall be filed with the office of administrative hearings.

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

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

(b) If personal service or service by mail is unsuccessful, the hearings officer may authorize service by publication if permitted by statute. The hearings officer may require that personal service be attempted prior to permitting service by publication. After service by publication has been authorized, whenever service is required to be made on that party thereafter, service by first class mail to the party's last known address shall be sufficient. [Eff 12/15/95;

comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709)
(Imp: HRS §103D-709)

§3-126-48 Service by whom. (a) Unless otherwise provided by this chapter, a party filing a pleading, motion, memorandum, document, or other paper shall cause a copy of the pleading, motion, memorandum, document, or other paper to be served upon each of the other parties to the proceeding, or upon any agent or attorney representing the other party. The party shall file a certificate of service.

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

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

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

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

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

§3-126-50 Extensions of time. Unless otherwise

provided, the hearings officer may extend the time within which any procedural action shall be taken, at the request of any party. The hearings officer, in the sole discretion of the hearings officer, may require that the extension be stipulated to by all parties to the proceeding or that the request be by motion for good cause shown as to why the extension should be granted. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

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

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

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

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

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

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

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

- (1) To hold hearings and issue notices;
- (2) To administer oaths and affirmations;
- (3) To consolidate hearings or sever proceedings, provided that those actions shall be conducive to effectuating the ends of justice

- and shall not unduly delay the proceedings or hinder, harass, or prejudice any party;
- (4) To subpoena and examine witnesses;
 - (5) To issue subpoenas;
 - (6) To rule upon offers of proof, to receive relevant evidence, and to exclude evidence which is admissible under the rules of evidence, and accordingly may restrict lines of questioning or testimony;
 - (7) To regulate the course and conduct of the hearing;
 - (8) To regulate the manner of any examination so as to prevent the needless and unreasonable harassment, intimidation, or embarrassment of any witness or party at the hearing;
 - (9) To remove disruptive individuals, including any party, legal counsel, witness, or observer;
 - (10) To hold conferences, including prehearing conferences, before or during the hearing, for the settlement or simplification of issues;
 - (11) To rule on motions and to dispose of procedural matters;
 - (12) To submit a written decision, including findings of fact and conclusions of law, to the parties;
 - (14) To dispose of any other matter that normally and properly arises in the course of the proceedings and to take any action authorized by this chapter, chapter 91, HRS, or any other related laws; and
 - (15) To examine, after notice to all parties, any site or tangible evidence relevant to the case. [Eff 12/15/95; comp MAY 20 2004 1
(Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)]

S3-126-53 Subpoenas. (a) The hearings officer, at the request of a party, shall have the power to issue subpoenas requiring the attendance of witnesses or the production of documents at the hearing. The hearings officer may require that any request for the issuance of a subpoena identify with particularity the person to be subpoenaed or the documents desired. Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in courts in the State

and the fees and mileage shall be paid by the party at whose instance the subpoena issues.

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

- (1) Quash or modify the subpoena if it is unreasonable and oppressive; or
- (2) Condition denial of the motion upon advancement by the requesting party of the costs of producing the documents.

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

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

§3-126-55 Disqualification of hearings officer.

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

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

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

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

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

(c) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

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

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

(c) In a contested case where notice of the hearing has been served by publication and the party so served has failed to appear at the hearing, service of the hearings officer's decision is complete upon transmission by registered or certified mail, return receipt requested, to the party at the party's last

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

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

- (1) No person shall communicate privately on the merits of the case with the hearings officer designated to hear and decide the matter unless specifically provided for by law; and
- (2) No member of any other government agency who participates in the hearing as a witness or counsel shall privately communicate on the merits of the case with the hearings officer designated to hear and decide the matter, unless specifically provided for by law.

(b) It shall be improper for any person interested in a proceeding to seek to influence the judgment of the panel or hearings officer.

(c) Except as otherwise provided herein, it shall be improper for any member of a state agency:

- (1) To disclose or reveal to the hearings officer designated to hear and decide the matter, the contents of any investigation report concerning the matter before the hearings officer; or
- (2) To furnish the report or a copy thereof to the hearings officer designated to hear and decide the matter.

(d) Nothing in this subsection, which is intended to prohibit the ex parte disclosure of the investigation report, shall prohibit the introduction of the report at the hearing pursuant to and in conformance with the rules of evidence. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

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

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

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

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

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

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

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

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

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

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

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

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

the allegations of the request for hearing.

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

§3-126-63 Disclosure. (a) Any party, by timely written demand filed with the hearings officer, and served upon any other party, may request of any other party to the proceeding, the full disclosure of:

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

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

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

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

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

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

conference, the hearings officer may require all parties to disclose to the other parties the information which may be requested pursuant to section 3-126-63.

(b) If no prehearing conference is held, the hearings officer may require each party to submit a statement disclosing and identifying all witnesses to be called at the hearing, all exhibits to be used at the hearing, and other matters as shall simplify the issues and facilitate the orderly progress of the hearing. A copy of the statement shall be served upon all other parties to the proceeding. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-65 Testimony. (a) A record shall be made of all oral testimony taken at the hearing.

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

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

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

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

(f) Unless the hearings officer has been notified

in writing of a party's request for judicial review within the time permitted for requesting the judicial review, the hearings officer, after the time for requesting judicial review has passed, may erase the electronically recorded testimony. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-66 Record. (a) The record shall consist of the following:

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

(b) Unless the hearings officer has been notified in writing of a party's request for judicial review within the time permitted for requesting judicial review, the hearings officer, after the time for requesting judicial review has passed, may cause exhibits to be returned to the party introducing the exhibits or if the party does not wish their return, order the disposal or destruction of the exhibits. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

S3-126-67 Dismissal of requests for hearings.

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

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

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

(b) Except as provided in subsection (a), a request for hearing shall not be dismissed except upon motion and on order of the hearings officer granting the motion and upon such terms and conditions as the hearings officer deems proper. Unless otherwise specified in the order, a dismissal under this subsection shall be without prejudice.

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

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

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

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

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

(b) No persons other than the hearings officer, the person requesting the hearing, representatives of the concerned state agency, legal counsel, witnesses, and persons called by the hearings officer to assist the hearings officer in reviewing a request for hearing, shall be present during any hearing or other proceedings conducted by the hearings officer, except with the permission of the hearings officer.

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

(d) If there is no dispute as to the facts involved in a particular matter, the hearings officer may permit the parties to proceed by memoranda of law in lieu of a hearing unless the procedure would unduly burden any party or is otherwise not conducive to the ends of justice. [Eff 12/15/95: comp MAY 20 2004 1
(Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)]

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

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

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

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

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

§3-126-71 Taking of further evidence. At any time before the filing of the hearings officer's final decision, the hearings officer sua sponte, or upon motion for good cause shown, may reopen a hearing for the purpose of taking further evidence, and shall do so in writing with a statement of reasons therefor. The reopening of a hearing shall be at the sole discretion of the hearings officer. Further evidence may be taken either through oral hearing or by certification of questions to the parties. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-72 Proposed findings of fact and conclusions of law. (a) No party shall file written proposed findings of fact and conclusions of law except where ordered in the discretion of the hearings officer.

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

§3-126-73 Hearings officer's decision. As expeditiously as possible after the close of the hearing, the hearings officer shall issue a final decision and order together with separate findings of fact and conclusions of law. All findings of fact, conclusions of law, final decisions, and orders issued by the hearings officer shall be based upon the whole record and supported by reliable probative and substantial evidence, including facts of which the hearings officer properly took judicial notice. [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§3-126-74 Service of hearings officer's decision. The hearings officer shall cause a copy of the hearings officer's decision, including therein findings of fact and conclusions of law, to be served upon each party by personal service or by registered or certified

mail, return receipt requested. Service of the hearings officer's decision shall be deemed complete upon its mailing to the party's last known address.
 [Eff 12/15/95; comp MAY 20 2004] (Auth: HRS §§103D-202, 103D-709) (Imp: HRS §103D-709)

§§3-126-75 to 3-126-77 (Reserved).

SUBCHAPTER 6

JUDICIAL REVIEW

S3-126-78 Judicial review of contested cases.

(a) ~~[Any person or governmental body aggrieved by a final decision of a hearings officer under section 103D-710, HRS, may apply for judicial review of the hearings officer's final decision in conformance with section 103D-710, HRS.~~

~~(b)]~~ Requests for judicial review under section 103D-710, HRS, shall be filed in the ~~[supreme]~~ circuit court within ten calendar days after the issuance of the ~~[hearings officer's]~~ written decision.

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

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

§§3-126-79 to 3-126-85 (Reserved).

SUBCHAPTER 7

JUDICIAL ACTION

§§3-126-86 to 3-126-95 (Reserved)."

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

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

4. These amendments to and compilation of chapter 3-126, 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 were adopted on April 22, 2004, and filed with the Office of the Lieutenant Governor.

FOR

Phyllis M. Koike
PHYLLIS M. KOIKE
Chairperson
Procurement Policy Board

Russ K. Saito

RUSS K. SAITO
State Comptroller

APPROVED AS TO FORM:

Deputy Attorney General

Deputy Attorney General