

S.B. NO. 1012

JAN 24 2013

A BILL FOR AN ACT

RELATING TO THE AWARD OF CONTRACTS UNDER CHAPTER 103F.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this bill is to align Hawaii's
2 laws regarding the procurement of health or human services,
3 chapter 103F, Hawaii Revised Statutes, with the Hawaii Supreme
4 Court's decisions in Alakai Na Keiki v. Matayoshi, 127 Hawaii
5 263, 277 P.3d 988 (2012), and AlohaCare v. Dep't of Human
6 Services, 127 Hawaii 76, 276 P.3d 625 (2012). In these two
7 cases, particularly Alakai, the Hawaii supreme court determined
8 that the existing protest process in sections 103F-501 to 103F-
9 504, Hawaii Revised Statutes, violated the doctrine of
10 separation of powers because the executive branch agency was
11 exercising "judicial" or adjudicatory authority.

12 It is the intent of this bill to amend chapter 103F to
13 remove any exercise of "judicial" or adjudicatory authority by
14 the agency in awarding contracts under chapter 103F, Hawaii
15 Revised Statutes. By doing so, the executive branch agency will
16 not be exercising "judicial" power, and thus will avoid the
17 separation of powers concerns addressed in Alakai and AlohaCare.

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1 When chapter 103F, Hawaii Revised Statutes, was enacted, it
2 was the intent of the legislature to create a simpler, more
3 streamlined process to finalize contract awards for critical
4 services. The legislature reaffirms this purpose now. Health
5 or human services procurement contracts for critical services
6 should not be subject to lengthy disputes about contract awards.

7 This Act repeals the existing protest process in chapter
8 103F, Hawaii Revised Statutes, and replaces it with a process by
9 which the executive agency shall award health or human services
10 procurement contracts without exercising any judicial or
11 adjudicatory authority, in line with the Hawaii supreme court's
12 recent rulings.

13 SECTION 2. Chapter 103F, Hawaii Revised Statutes, is
14 amended by adding a new part to be appropriately designated and
15 to read as follows:

16 **"PART . AWARD OF CONTRACT**

17 §103F- **Staff recommendation.** After reviewing bids,
18 proposals, or submissions from prospective contractors under
19 this chapter, the purchasing agency shall, through an
20 appropriate division, branch, or personnel, prepare a written
21 staff recommendation regarding the award of the contract. This
22 staff recommendation shall be forwarded to the head of the
23 purchasing agency or a designee and, at that time, made

1 available to the public. The written staff recommendation is
2 not binding and shall not be construed as a decision of the
3 agency.

4 **§103F- Public comments.** Any person may submit comments
5 to the head of the purchasing agency or a designee about the
6 staff recommendation regarding the contract award within thirty
7 days after the recommendation has been made available to the
8 public. The head of the purchasing agency or a designee shall
9 receive the comments but need not respond to the comments
10 submitted.

11 **§103F- Contract award.** The head of the purchasing
12 agency or a designee shall award the contract no earlier than
13 five days after the thirty-day public comment period has closed.
14 This award shall constitute the decision of the agency. If
15 appropriate, the head of the purchasing agency may request
16 another written staff recommendation before awarding the
17 contract. An additional comment period shall be provided if a
18 new written staff recommendation is requested by the head of the
19 purchasing agency.

20 **§103F- Conclusiveness of award.** The award of the
21 contract by the head of the purchasing agency or a designee is
22 final and conclusive. There shall be no protest or judicial
23 review of the award of a contract under this chapter."

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1 SECTION 3. Chapter 103F, Hawaii Revised Statutes, is
2 amended by adding to part IV a new section to be appropriately
3 numbered and to read as follows:

4 "§103F- Awards of contracts under this chapter. All
5 contracts awarded under this chapter shall be governed by part
6 of this chapter."

7 SECTION 4. Chapter 103F, part V, Hawaii Revised Statutes,
8 is repealed.

9 SECTION 5. New statutory material is underscored.

10 SECTION 6. This Act shall take effect upon its approval.

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INTRODUCED BY:



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BY REQUEST

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Report Title:

Health and Human Services; Purchases

Description:

Repeals the existing protest procedures in chapter 103F, Hawaii Revised Statutes, and replaces them with a procedure governing the award of health and human services contracts that will not involve the exercise of adjudicatory authority by the executive branch agency in order to bring chapter 103F into compliance with recent decisions by the Hawaii Supreme Court.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT RELATING TO THE AWARD OF CONTRACTS UNDER CHAPTER 103F.

PURPOSE: To bring the procurement of health and human services contracts into compliance with recent Hawaii Supreme Court rulings.

MEANS: Add a new part to chapter 103F, add a new section to part IV of chapter 103F, and repeal part V of chapter 103F, Hawaii Revised Statutes.

JUSTIFICATION: The existing protest procedures in chapter 103F were found to be unconstitutional in Alakai Na Keiki v. Matayoshi, 127 Hawaii 263, 277 P.3d 988 (2012), and AlohaCare v. Dep't of Human Services, 127 Hawaii 76, 276 P.3d 625 (2012), as a violation of separation of powers, because the executive branch agency was acting in a "judicial" or adjudicatory capacity. This bill omits those protest procedures and replaces them with a procedure by which the agency can award the contract without acting in a "judicial" or adjudicatory capacity.

Under Alakai, disappointed bidders for human services procurement contracts will be able to file a suit under the declaratory judgment statute, section 632-1, Hawaii Revised Statutes, to challenge contract awards. A declaratory judgment proceeding offers no deference to the agency. Under these proceedings, the circuit courts will be reviewing procurement disputes in the first instance. By our reading, when chapter 103F was enacted, the protest process was supposed to be the "exclusive" means to resolve disputes. Section 103F-504, Hawaii Revised Statutes. The

declaratory judgment mechanism required by Alakai, however, is contrary to that intent - indeed, any form of judicial review would be contrary to that intent. Chapter 103F was intended to offer an expeditious method of finalizing contracts generally. If lengthy and expensive lawsuits are allowed (i.e., the declaratory judgment proceedings allowed under Alakai), it will increase the costs of providing services and delay or complicate the finalization of contracts. Human service procurements are often used for services which cannot be delayed, such as securing health care providers for the needy and providing services in the public schools for disabled students as required by federal law. As originally enacted, the existing protest process allows disappointed bidders and others to raise concerns regarding the agency's initial inclinations on contract awards. This bill preserves and restores that intent, through a staff recommendation, comment period, and award process. The comment process is intended to give interested parties an opportunity to bring any concerns to the agency's attention. The comment process is open to public and could therefore result in voluminous submissions. To avoid delay in awarding these contracts, an agency may but need not respond to the comments submitted.

Impact on the public: Speedy awards of human services procurements will benefit the public by allowing for better and quicker provision of services and reduction of litigation costs in defending awards from suits raised by disappointed bidders.

Impact on the department and other agencies: The Attorney General proposes this measure because it is in direct response to recent rulings from the Hawaii Supreme Court. The more direct impact will be on the agencies that award these kinds of contracts, that is, primarily the Department of Education,

Department of Health, and the Department of Human Services.

GENERAL FUND: None. The bill will ultimately save money because it will reduce litigation costs about health and human services procurement contracts.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION:

OTHER AFFECTED
AGENCIES: Department of Education, Department of Health, Department of Human Services.

EFFECTIVE DATE: Upon approval.