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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
JUDICIARY
Thursday, February 9, 2018, 2:00 PM

HOUSE BILL 2176 HD 1
RELATING TO EDUCATION

Chair Nishimoto, Vice-Chair San Buenaventura, and members of the committee, thank you for the opportunity to submit testimony on House Bill 2176 HD 1. The State Procurement Office (SPO) opposes the exemption language on page 1, SECTION 1, lines 5 to 12 set forth below.

(a) Notwithstanding any provision of chapter 103D to the contrary, no decision resulting from an administrative hearing, pursuant to section 103D-709, reviewing the chief procurement officer's or chief procurement officer's designee's decision to uphold or deny a protest to the award of a contract relating to the procurement of student transportation services or education facility construction shall be eligible for judicial review.

This bill is removing two very specific procurements from accessing further judicial review which could be perceived to be punitive in nature. This is in essence an exemption to the normal course of the procurement process which concerns the SPO. With no justification for this exemption, it would be difficult to support the bill as written. The fact that it could take a long period of time to complete the judicial process is not, in itself, justification to eliminate this process. It would be expeditious to eliminate free speech and due process from all law but it is unlikely we would appreciate the result.

Dan Gordon, the former Obama administration head of the Office of Federal Procurement Policy and now associate dean for government procurement law studies at George Washington University Law School, talks¹ to the positive reasons to maintain a fair protest process.

Overall, Gordon finds the bid protest process to be positive for the procurement system, citing several advantages:

- Protests introduce a relatively low-cost form of accountability into acquisition systems by providing disgruntled participants a forum for airing their complaints;
- They can increase potential bidders' confidence in the integrity of the procurement process if the <State> is directly responsive to participants' complaints, leading more players to participate;
- Protests can increase the public's confidence in the integrity of the public procurement process; --The known availability of the protest avenue empowers those in contracting agencies who face pressure to act improperly;
- Protest decisions made public provide a high level of transparency into what is happening in the federal procurement system; and
- Protests provide guidance.

Exemptions from the Procurement Code is not recommended. The code is the single source of public procurement policy to be applied equally and uniformly, while providing fairness, open competition, a level playing field, government disclosure and transparency in the procurement and contracting process vital to good government.

Public procurement's primary objective is to provide everyone equal opportunity to compete for government contracts, to prevent favoritism, collusion, or fraud in awarding of contracts. To legislate that any one entity should be exempt from compliance with both HRS chapter 103D and 103F conveys a sense of disproportionate equality in the law's application.

Exemptions to the code mean that all procurements made with taxpayer monies will not have the same oversight, accountability and transparency requirements mandated by those procurements processes provided in the code. It means that there is no requirement for due diligence, proper planning or consideration of protections for the state in contract terms and conditions, nor are there any set requirements to conduct cost and price analysis and market research or post-award contract management. As such, Agencies can choose whether to compete any procurement or go directly to one contractor. As a result, leveraging economies of scale and cost savings efficiencies found in the consistent application of the procurement code are lost. It also means Agencies are not required to adhere to the code's procurement integrity laws.

The National Association of State Procurement Officials state: "Businesses suffer when there is inconsistency in procurement laws and regulations. Complex, arcane procurement rules of numerous jurisdictions discourage competition by raising the costs to businesses to understand and comply with these different rules. Higher costs are recovered through the prices offered by

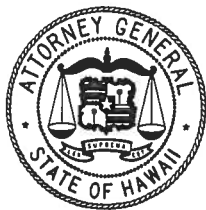
¹ Clark, Charles, March 12, 2013, Government Executive, "Bid Protests Are Worth Their Costs, Ex-Procurement Chief Says"

a smaller pool of competitors, resulting in unnecessarily inflated costs to state and local governments.”

When public bodies, are removed from the state’s procurement code it results in the harm described above. As these entities create their own procurement rules, businesses are forced to track their various practices. Moreover, a public body often can no longer achieve the benefits of aggregation by using another public body’s contract because different state laws and regulations may apply to the various public bodies making compliance more difficult.

Each year new procurement laws are applied to state agencies causing state agency contracts to become more complex and costly, while other public bodies, such as agencies with strong legislative influence, are exempted. Relieving some public bodies from some laws by exempting or excluding them from compliance with a common set of legal requirements creates an imbalance wherein the competitive environment becomes different among the various jurisdictions and the entire procurement process becomes less efficient and costlier for the state and vendors.

Thank you.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018**

ON THE FOLLOWING MEASURE:

H.B. NO. 2176, H.D. 1, RELATING TO EDUCATION.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 9, 2018

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Acting Attorney General, or
Melissa J. Kolonie, Deputy Attorney General, or
Anne T. Horiuchi, Deputy Attorney General

Chair Nishimoto and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purposes of this bill are to: (1) bar judicial review of Department of Commerce and Consumer Affairs' decisions on protests to the award of procurement contracts for student transportation or education facility construction; and (2) require parties who protest the award of a contract to pay attorney's fees and costs resulting from the delay of the contract if the Department of Commerce and Consumer Affairs upholds the Chief Procurement Officer's decision denying the protest.

This bill is likely subject to a constitutional challenge because the Department of Education would retain the right to the administrative hearing process that is "judicial" or adjudicatory, but the bill eliminates any judicial review of that process. Although in general, appellate jurisdiction is determined by statute, an argument could be made that the bill is contrary to Alakai Na Keiki v. Matayoshi, 127 Hawai'i 263, 277 P.3d 988 (2012). Alakai Na Keiki raises the question whether the exercise of an adjudicatory function by a state agency in the procurement context means that judicial review cannot be precluded under the State Constitution.

We submitted similar testimony on this bill to the House Committee on Labor & Public Employment on February 2, 2018. The Department of the Attorney General offered assistance in drafting wording that would remedy the constitutional issues by

eliminating the “judicial” or adjudicatory function currently performed by the executive branch, and making the procurement of these services a purely internal executive function, not subject to a hearing. We worked with Representative Yamashita on the wording contained in H.B. No. 2176, H.D. 2, PROPOSED, attached hereto.

We respectfully ask the Committee to consider the proposed draft and hold this bill until the constitutional issues are remedied.

A BILL FOR AN ACT

RELATING TO EDUCATION.

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

1 SECTION 1. Chapter 302A, Hawaii Revised Statutes, is
2 amended by adding a new section to part VI, subpart A, to be
3 appropriately designated and to read as follows:

4 "§302A- Facility construction and renovation contracts.

5 (a) Notwithstanding any other law to the contrary, contracts
6 made by the State for the procurement of construction of a new
7 department facility or renovation of an existing department
8 facility shall be exempt from part VII of chapter 103D; provided
9 that any contract awarded shall comply with the requirements
10 established by this section.

11 (b) Notwithstanding any conflicting provision under
12 chapter 103D, the department shall request bids, proposals, or
13 submissions from prospective contractors to provide services for
14 the construction of a new department facility or renovation of
15 an existing department facility. Following the closing of the
16 submission period, the department shall review the bids,
17 proposals, or submissions and prepare a written recommendation



1 regarding the award of the contract or contracts. The
2 recommendation shall be submitted to the superintendent and made
3 available to the public. The written recommendation shall not
4 be binding on the department and shall not be construed as a
5 decision.

6 (c) Within thirty days after the recommendation has been
7 made available to the public pursuant to subsection (b), any
8 person may submit comments to the superintendent. The
9 superintendent shall review the comments and may publicly
10 respond to any comment. During or following the close of the
11 public comment period, the superintendent may request another
12 written recommendation from the department. An additional
13 comment period shall be provided if an additional written
14 recommendation is requested by the superintendent.

15 (d) No less than five days after the close of the last
16 comment period provided under subsection (c), the superintendent
17 shall award the contract. The award shall constitute the
18 decision of the department. The award of the contract by the
19 superintendent shall be final and conclusive. Protest or
20 judicial review of the award of a contract under this section
21 shall be prohibited."



1 SECTION 2. Section 302A-407, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§302A-407 School bus contracts. (a) Notwithstanding any
4 other law to the contrary, contracts made by the State for the
5 procurement of transportation pursuant to section 302A-406 shall
6 be exempt from part VII of chapter 103D; provided that any
7 contract awarded shall comply with the requirements established
8 by this section.

9 (b) Notwithstanding any conflicting provision under
10 chapter 103D, no less than once every _____ years, the
11 department shall request bids, proposals, or submissions from
12 prospective contractors to provide transportation to school
13 children pursuant to section 302A-406. Following the closing of
14 the submission period, the department shall review the bids,
15 proposals, or submissions and prepare a written recommendation
16 regarding the award of the contract or contracts. The
17 recommendation shall be submitted to the superintendent and made
18 available to the public. The written recommendation shall not
19 be binding on the department and shall not be construed as a
20 decision.



1 (c) Within thirty days after the recommendation has been
2 made available to the public pursuant to subsection (b), any
3 person may submit comments to the superintendent. The
4 superintendent shall review the comments and may publicly
5 respond to any comment. During or following the close of the
6 public comment period, the superintendent may request another
7 written recommendation from the department. An additional
8 comment period shall be provided if an additional written
9 recommendation is requested by the superintendent.

10 (d) No less than five days after the close of the last
11 comment period provided under subsection (c), the superintendent
12 shall award the contract. The award shall constitute the
13 decision of the department. The award of the contract by the
14 superintendent shall be final and conclusive. Protest or
15 judicial review of the award of a contract under this section
16 shall be prohibited.

17 ~~[(a)]~~ (e) Any school bus contract between the State and
18 the contractor shall include a provision requiring the
19 contractor to equip the contractor's vehicles with the signs and
20 visual signals described in section 291C-95(d) and (g). The
21 contract shall also include other provisions as may be deemed



1 necessary by the State for the safety of school bus passengers
2 and shall include provisions requiring compliance with the rules
3 and standards described in section 286-181.

4 ~~[-(b)-]~~ (f) All moneys received from students and parents or
5 guardians of students by public schools for state-provided
6 school busing services, as authorized by section 302A-406, shall
7 be deposited into the school bus fare revolving fund. Except as
8 otherwise provided by the legislature, expenditures for the
9 operation of state-contracted school bus services, as authorized
10 by section 302A-406, shall be made from this fund."

11 SECTION 3. This Act does not affect rights and duties that
12 matured, penalties that were incurred, and proceedings that were
13 begun before its effective date.

14 SECTION 4. Statutory material to be repealed is bracketed
15 and stricken. New statutory material is underscored.

16 SECTION 5. This Act shall take effect upon its approval.



H.B. NO. 2176
H.D. 2
PROPOSED

Report Title:

DOE; Procurement Contracts; Student Transportation;
Construction; Protest Adjudication

Description:

Prohibits protests and judicial review of Department of Education contract awards for education facility construction or student transportation. Establishes a process for awarding contracts that includes public comment. (HD2 PROPOSED)

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



LATE

DAVID Y. IGE
GOVERNOR



DR. CHRISTINA M. KISHIMOTO
SUPERINTENDENT

STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

Date: 02/09/2018
Time: 02:00 PM
Location: 325
Committee: House Judiciary

Department: Education

Person Testifying: Dr. Christina M. Kishimoto, Superintendent of Education

Title of Bill: HB 2176, HD1 RELATING TO EDUCATION.

Purpose of Bill: Bars judicial review of Department of Commerce and Consumer Affairs' decisions on protests to the award of procurement contracts for student transportation or education facility construction. Requires parties who protest the award of a contract to pay attorney fees and costs resulting from the delay of the contract if the Department of Commerce and Consumer Affairs upholds the Chief Procurement Officer's decision denying the protest. (HB2176 HD1)

Department's Position:
The Department of Education (DOE) supports this measure, but defers to the appropriate subject matter experts as to the constitutional due process requirements being met by the proposed change.

The Hawaii State Department of Education seeks to advance the goals of the Strategic Plan which is focused on student success, staff success, and successful systems of support. This is achieved through targeted work around three impact strategies: school design, student voice, and teacher collaboration. Detailed information is available at www.hawaiipublicschools.org.