

HB 2176

**RELATING TO
EDUCATION**

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 be appropriately designated
3 and to read as follows:

4 "§302A- Procurement process limitations for
5 transportation and construction. (a) Notwithstanding any
6 provision of chapter 103D to the contrary, no decision resulting
7 from an administrative hearing, pursuant to section 103D-709,
8 reviewing the chief procurement officer's or chief procurement
9 officer's designee's decision to uphold or deny a protest to the
10 award of a contract relating to the procurement of student
11 transportation services or education facility construction shall
12 be eligible for judicial review.

13 (b) If, following an administrative hearing pursuant to
14 section 103D-709, the hearings officers appointed by the
15 director of the department of commerce and consumer affairs
16 upholds the chief procurement officer's or chief procurement
17 officer's designee's decision to deny a protest to the award of



1 a contract relating to the procurement of student transportation
2 services or education facility construction pursuant to section
3 103D-701(c), the protesting party shall be liable:

4 (1) For the attorney fees of any opposing party, if
5 applicable; and

6 (2) To the department for any costs resulting from the
7 delay in providing student transportation services or
8 beginning construction caused by adjudication of the
9 protest."

10 SECTION 4. This Act does not affect rights and duties that
11 matured, penalties that were incurred, and proceedings that were
12 begun before its effective date.

13 SECTION 3. New statutory material is underscored.

14 SECTION 4. This Act shall take effect upon its approval.

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H.B. NO. 2176

Report Title:

Department of Education; Department of Commerce and Consumer Affairs; Procurement Contracts; Student Transportation; Construction; Protest Adjudication; Appeal; Attorney Fees

Description:

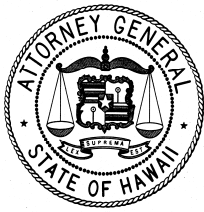
Bars judicial review of Department of Commerce and Consumer Affairs' decisions on protests to the award of procurement contracts for student transportation or education facility construction. Requires parties who protest the award of a contract to pay attorney fees and costs resulting from the delay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

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



HB 2176

TESTIMONY



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Thursday, February 1, 2018 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 309

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

Chair Johanson 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 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 Hawaii 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 understand that the intent and goal of this bill are to streamline and expedite the procurement process for the subject services. Unfortunately, the proposed method is likely subject to constitutional challenge. The Legislature may be able to accomplish

its goal 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. If you would like to consult with our Department on wording that would remedy the constitutional issues, please let us know.

We respectfully ask the Committee to hold this bill until the constitutional issues are remedied.

HB 2176

**LATE
TESTIMONY**

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
MARA SMITH
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
LABOR & PUBLIC EMPLOYMENT
Thursday, February 1, 2018, 9:00 AM

HOUSE BILL 2176
RELATING TO EDUCATION

Chair Johanson, Vice-Chair Holt, and members of the committee, thank you for the opportunity to submit testimony on House Bill 2176. 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.



LATE

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

Date: 02/01/2018
Time: 09:00 AM
Location: 309
Committee: House Labor & Public
Employment

Department: Education

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

Title of Bill: HB 2176 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.

Department's Position:

The Department of Education (DOE) supports this measure, subject to consideration from the Attorney General's office as to the legality of the proposed amendment. The DOE 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.