

DAVID Y. IGE
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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
Tuesday, March 13, 2018, 2:45 PM

HOUSE BILL 2178 HD1
RELATING TO PROTEST BOND

Chair Kim and Vice-Chair Ruderman and members of the committee, thank you for the opportunity to submit testimony on House Bill 2178 HD 1. The State Procurement Office (SPO) **supports** the intent of this bill which removes the \$10,000 maximum limit on a cash or protest bond that must be posted for a procurement award protest.

In 2013, the National Association of State Procurement Officials (NASPO) conducted a research brief that examined bid protest policies and practices in state central procurement offices across the nation. Appendix IV, Bid Protest Bonds survey revealed a protest bond range of 1% to 25% among states with such a provision. Of the states in the study, only Hawaii had a protest bond cap not to exceed \$10,000.

Below is a link to the report.

http://www.naspo.org/dnn/portals/16/documents/FINAL_NASPO_BidProtests_Research_Brief_042413.pdf

Thank You

DAVID Y. IGE
GOVERNOR



RODERICK K. BECKER
Comptroller

AUDREY HIDANO
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

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TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE ON GOVERNMENT OPERATIONS
ON
TUESDAY, MARCH 13, 2018
2:45 P.M.
CONFERENCE ROOM 224

H.B. 2178, H.D. 1

RELATING TO PROCUREMENT.

Chair Kim, Vice Chair Ruderman, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 2178, H.D. 1.

The Department of Accounting and General Services supports this bill which removes the maximum limit on the amount of cash or bond that must be submitted to initiate administrative proceedings under HRS Section 103D-709 for the following reasons:

1. The proposed change has the potential to reduce the number of protests filed for large, high-profile projects because the degree of risk to be borne by the protestor will increase.
2. The proposed change will allow the State to collect funds which more appropriately compensate for the required level of defense of the protest and the adverse impacts on the protested project.

Thank you for the opportunity to submit testimony on this matter.

Corianne W. Lau
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RE: HB 2178 / SB 2620 / SD 1

My name is Corianne Lau and I am an attorney with the firm of Alston Hunt Floyd & Ing, although I submit this testimony is my personal capacity. I practice in the area of Government Contracts/Procurement Law and have represented contractors who have been awarded and who have been denied contracts by the City, the Counties, the State and various other governmental departments that handle their own procurements.

A contractor who believes it was unfairly denied award of a contract must first protest the award to the Chief Procurement Officer, who is often an agency director or deputy who has received delegation of procurement authority. Protests of contract awards are the only means available to review the actions of procurement officials to ensure they are handling awards of publicly funded contracts properly. If the procurement officer denies the protest (or sustains it), the aggrieved party has the right to appeal the decision to the Office of Administrative Hearings (OAH) at the Department of Commerce and Consumer Affairs.

The OAH administrative appeals level is where the appealing party must post a cash bond. Currently, the bond amount varies from \$1,000 (for contracts with an estimated value of less than \$500,000), to \$2,000 (for contracts with an estimated value of \$500,000 or more, but less than \$1,000,000) to ½% of the estimated value of the contract if it is estimated to be over \$1M, to a maximum bond amount of \$10,000. The \$10,000 cap is what this proposed amendment to HRS § 103D-709(e)(3) seeks to remove.

Requiring a cash bond in the first place can discourage a contractor from appealing an adverse protest decision. It serves to chill a contractor's right to appeal the decision because if the contractor loses at the OAH, the cash bond is forfeited to the General Fund. Creating barriers to the right of appeal prevents oversight of procurement decisions. That oversight was always intended to exist, to ensure compliance with the legislature's directives in the Hawai'i Procurement Code.

With this amendment, not only will a contractor who has been forced to risk cash resources in order to appeal a protest decision be discouraged from appealing, but the contractor risks losing a huge sum of money if the contract is a large contract. For example, a \$5M contract would require the appealing party to post and risk losing \$25,000.

The reason behind the amendment to the protest appeal law to require a cash bond a few years back was apparently because people thought there were frivolous appeals that held up the progress of contract awards and performance. A government agency however, already has the means of progressing with the contract if it can show under

HRS § 103D-701(f) that there should not be a "stay" on the award of the contract because the award of the contract without delay is necessary to "protect the substantial interests of the State."

In addition, the hearings officer at the OAH is required to render a decision within 45 days from the date of the appeal request (HRS § 103D-709(b)), which expedites a decision. And if the OAH decision is appealed to Circuit Court, the "stay" of the contract is lifted.

Further, the perception of undue delay fails to take into account the sometimes protracted length of time it takes the agency to decide the protest. Even though HAR § 3-126-7(a) says "[a] decision on a protest shall be made by the chief procurement officer or designee as expeditiously as possible after reviewing all relevant information . . ." there is often significant delay on the agency level in deciding the protest.

Filing fees are intended to cover costs – not to prevent bad protest decisions from being examined on appeal. If this bill is passed it will serve as a big -- potentially insurmountable -- hurdle, for a contractor to exercise its right to appeal an adverse decision and this check on agency mishandling of procurement will be lost.