



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

ON THE FOLLOWING MEASURE:

H.B. NO. 2178, H.D. 1, S.D. 1, RELATING TO PROCUREMENT.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Wednesday, April 4, 2018

TIME: 10:30 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Stella M.L. Kam,
Deputy Attorney General, at 586-1392)

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General provides the following comments on this bill.

This bill changes the amount of a cash or protest bond required for a contractor to file an administrative hearing protesting a government procurement. Under this bill, the bond requirement for projects with an estimated value of \$1,000,000 or more will be five percent of the estimated value of the contract, up to a maximum of \$10,000,000. The bill also adds a provision awarding attorneys' fees and costs to the prevailing party at the administrative hearing level.

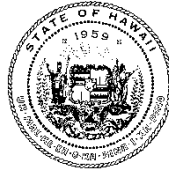
We agree that the current cap on the bond requirement (\$10,000) is too low for government projects that have an estimated value of millions of dollars. However, we do have concerns that the attorneys' fees provision added to section 103D-709(e), Hawaii Revised Statutes, on page 2, lines 2-3, will encourage contractors to pursue administrative hearings for their protests, adding to the delay of government projects. The legislative history of the State Procurement Code, chapter 103D, Hawaii Revised Statutes, indicates that the Legislature sought to establish a "comprehensive code that would: (1) Provide for fair and equitable treatment of all persons dealing with the government procurement system; (2) Foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement

process; and (3) Increase public confidence in the integrity of the system." Senate Standing Committee Report No. S8-93, 1993 Senate Journal, at 39 (emphasis added). Contractors may view the attorneys' fees provision as an encouragement to request administrative hearings to appeal protest decisions, which will further delay government projects by several months. Such a result would be contrary to the legislative intent of "efficiency in the procurement process."

We also note that the Hawaii Supreme Court has already established criteria for a protestor to recover attorneys' fees. In Carl Corp. v. State Dept. of Education, 85 Hawaii 431, 460, 946 P.2d 1, 30 (1997), the Court held that a protestor is entitled to recover its attorneys' fees incurred in prosecuting the protest if (1) the protestor has proven that the solicitation was in violation of the Procurement Code; (2) the contract was award in violation of the stay provision in section 103D-701(f), Hawaii Revised Statutes; and (3) the award of the contract was in bad faith.

Based upon the above, we respectfully request that the attorneys' fees provision be deleted from this bill.

DAVID Y. IGE
GOVERNOR



RODERICK K. BECKER
Comptroller

AUDREY HIDANO
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE ON WAYS AND MEANS
ON
WEDNESDAY, APRIL 4, 2018
10:30 AM
CONFERENCE ROOM 211

H.B. 2178, H.D. 1, S.D. 1

RELATING TO PROCUREMENT.

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 2178, H.D. 1, S.D. 1.

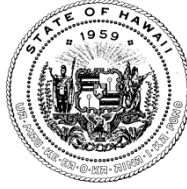
The Department of Accounting and General Services supports this bill, which increases the maximum limit on the amount of cash or bond that must be submitted to initiate administrative proceedings under Hawaii Revised Statutes (HRS) Section 103D-709 for projects with estimated values of \$1,000,000 or more, for the following reasons:

1. The proposed amendment to the cash and protest bond requirement has the potential to reduce the number of unsubstantiated protests filed for large, high-profile projects because the degree of risk to be borne by the protestor is increased.
2. The proposed amendment to the cash and protest bond requirement will allow the State to collect funds which more appropriately compensate the State for the adverse impacts on the protested project. Potential adverse impacts due to delays caused by the protest include, but are not limited to:

- a. Added costs due to delays of issuing an award and/or notice to proceed on the contract.
- b. Loss of revenue because the project could not be completed in time for the event or use of the facility.
- c. Added lease rent cost because the project could not be completed in time for scheduled use of the facility.
- d. Delayed use of the facility or improvement for the public's benefit.

The Department defers to the Department of the Attorney General with respect to the provision regarding the prevailing party's entitlement to attorneys' fees and costs.

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



Testimony by:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROY CATALANI
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

April 4, 2018, 10:30 a.m.
State Capitol, Room 211

**H.B. 2178, H.D. 1, S.D. 1
RELATING TO PROCUREMENT**

Senate Committee on Ways and Means

The Department of Transportation (DOT) **supports** HB 2178, H.D. 1, S.D. 1, which proposes to revise Hawaii Revised Statutes (HRS) § 103D-709(e)(3). S.D. 1, among other things, proposes to establish that (1) a protesting party must pay a cash or protest bond equal to five percent if the estimated value of the contract is \$1,000,000 or more (increasing the bond requirement from one-half percent), (2) a \$10,000,000 maximum limit on the cash or protest bond that must be posted for a procurement award protest, and (3) the prevailing party, in an administrative protest hearing, is entitled to attorneys' fees and costs.

When a project award is protested, the government agency replies by either denying or sustaining the protest. The protester then has an opportunity to appeal the government agency's decision to the Department of Commerce and Consumer Affairs, Office of Administrative Hearings (OAH). Under the current law, if the contract has an estimated value over \$1,000,000, a protest bond of one-half percent, capped at \$10,000, is required. If the protestor prevails, the \$10,000 bond is returned; if the protestor does not prevail, the \$10,000 bond is deposited into the general fund.

There have been two (2) recent DOT protest decisions that went through the OAH administrative hearing process. Neither protestor prevailed in their respective administrative hearings and, therefore, each of the \$10,000 protest bonds was deposited into the general fund. One project contract had an estimated value of \$11,877,594¹, the other had an estimated contract value of \$169,948,741². Should the cap on the protest bond be removed (and the existing one-half percent requirement retained), using the examples above, the amount deposited in the general fund would have been \$59,388, and \$849,744 respectively. Under S.D. 1, with the cap removed and a new five percent requirement, the amount deposited in the general fund would be \$593,879 and \$8,497,437, respectively.

Thank you for the opportunity to provide testimony.

¹ One-half percent equals \$59,388.

² One-half percent equals \$849,744.



**Testimony of Roberts Hawaii
on**

**H.B. 2178, H.D.1, S.D. 1
Relating to Procurement**

Committee on Ways and Means

Wednesday, April 4, 2018

10:30 a.m., Room 211

phone 808 523 7750

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Roberts Hawaii Inc.

680 Iwilei Road

Suite 700

Honolulu, Hawaii 96817

My name is Roy Pfund, Vice President of Robert's Hawaii, Inc., testifying in support of H.B. No. 2178, H.D.1, S.D.1, with amendments.

H.B. No. 2178, proposes to raise the amount of cash or protest bond that a person protesting the award of contract and requesting a hearing for a review of the determination shall pay from five per cent of the contract value on the cash or protest bond up to a maximum of \$10,000,000.

That section of the law already places the burden of proof on the party initiating the proceeding in a contested case proceeding. Further, if the initiating party prevails, it provides that the bond be returned to the party, failing to acknowledge that the contested case process involves attorney fees and costs.

The amendments proposed in H.B. 2178, H.D.1, S.D. 1, discourage the use of the only means to ensure that the actions of procurement officials and the awarding of public contracts are being done properly. Changes to this law have to be made carefully to discourage frivolous actions, while protecting the right of a bidder or contractor for resolution of a protest.

The Department of Accounting and General Services (DAGS) testified that the bill has the potential to reduce the number of protests. It may also have the impact of reducing bids submitted on projects or increasing the costs of the bids submitted. DAGS also testified that 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." Section 103D-709, does not acknowledge that, if the protesting party prevails, it too has incurred costs.

Rather than raising the cap on the bond that must be posted to \$10,000,000, we request that H.B. No. 2178, H.D. 1, S.D. 1, paragraph (3) be amended to leave the bond amount at "*one-half per cent of the estimated value of the contract*" and change the cap to \$25,000. We support the change that recognizes that the prevailing party incurs costs in filing a protest and provides for awarding of attorneys' fees and costs.

With the requested amendment, we support H.B. No. 2178, H.D.1, S.D.1.

Thank you for the opportunity to testify on this measure.

Corianne W. Lau
Phone: (808) 524-1800

RE: HB 2178 / HD 1/ SD 1

Testimony to the Senate Committee on Ways and Means.

Chair Dela Cruz, Vice-Chair Keith-Agaran and Members of the Committee:

My name is Corianne Lau and I am an attorney with the firm of Alston Hunt Floyd & Ing, although I submit this testimony in my personal capacity. I urge you to vote against this bill, which imposes an unconstitutional barrier to a government contractor's access to the Administrative Court.

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. I also represent contractors asserting protests in federal procurement matters.

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. 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.

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, to a neutral hearings officer outside the agency making the award.

This bill would require an aggrieved contractor to post a cash bond in an exorbitant amount for a contract of \$1,000,000 or more to obtain review of the agency procurement officer's decision. Because of the excessively high bond amount (unrelated to any actual costs to the OAH), the risk of losing the bond to the General Fund serves as a huge deterrent. It will effectively serve as a bar to those seeking fairness in the procurement process. A party would be unwilling to risk losing the bond even if the party had a legitimate argument and evidence showing the procurement officer's actions were contrary to procurement law inconsistent with the best interests of the taxpayers. This bill will effectively prevent virtually all appeals and allow bad procurement decisions to go unchallenged on any significant contract solely due to the risk of loss. The bond amounts this bill imposes will operate to deny a legitimate protest appellant its administrative due process rights to access to the administrative court.

This bill's economic barrier to the right of appeal also prevents the taxpayer and the

Legislature from having effective oversight of executive agency procurement decisions. By economically precluding protests, this bill will deprive the public of the protections against waste and abuse that exist in the federal procurement system, the Model Procurement Code (upon which the Hawai'i Code is based), and the procurement codes of the majority of other States. This oversight was always intended to exist in Hawai'i's system, to ensure all agency procurement actions complied with the legislature's directives in establishing the Hawai'i Procurement Code.

The rationale for this bill's requirement of such a exorbitant cash bond amount is apparently because agency's claimed frivolous appeals were unreasonably delaying award of important contracts and preventing timely performance. This justification is plainly contrary to the Hawai'i Procurement Code's existing provisions. Government agencies already have the means to ensure protests do not delay critical contract work. Under HRS § 103D-701(f), agencies may proceed with the contract and avoid the protest "stay" of the contract award if award of the contract without delay is necessary to "protect the substantial interests of the State."

In addition, the Code's existing provisions already protect against unwarranted delay in performance of contract work. The Code expedites the resolution of the protest appeal by requiring the OAH hearings officer to render a decision within 45 days from the date of the appeal request (HRS § 103D-709(b)). If the OAH decision is appealed to Circuit Court, the Hawaii Code already prevents delay by providing that no "stay" is imposed during the judicial review. Consequently the Code already protects against undue delay.

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 in the first place - - often many months.

Filing fees in the Federal protest system are intended to cover costs – not to prevent protests of alleged improper agency contracting actions 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 the taxpaying public will have effectively been deprived of the Procurement Code's promise of an honest and institutionalized check on agency mishandling of procurement dollars.