

SB 2620

SD-1

**RELATING TO
PROCUREMENT**

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 SECTION 1. Section 103D-709, Hawaii Revised Statutes, is
2 amended by amending subsection (e) to read as follows:

3 "(e) The party initiating a proceeding falling within
4 subsection (d) shall pay to the department of commerce and
5 consumer affairs a cash or protest bond in the amount of:

6 (1) \$1,000 for a contract with an estimated value of less
7 than \$500,000;

8 (2) \$2,000 for a contract with an estimated value of
9 \$500,000 or more, but less than \$1,000,000; or

10 (3) One-half per cent of the estimated value of the
11 contract if the estimated value of the contract is
12 \$1,000,000 or more[; ~~provided that in no event shall~~
13 ~~the required amount of the cash or protest bond be~~
14 ~~more than \$10,000].~~

15 If the initiating party prevails in the administrative
16 proceeding, the cash or protest bond shall be returned to that
17 party. If the initiating party does not prevail in the



1 administrative proceeding, the cash or protest bond shall be
2 deposited into the general fund."

3 SECTION 2. Statutory material to be repealed is bracketed
4 and stricken.

5 SECTION 3. This Act shall take effect on July 1, 2018.



Report Title:

Procurement; Protest Bond

Description:

Removes \$10,000 maximum limit on a cash or protest bond that must be posted for a procurement award protest. (SD1)

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

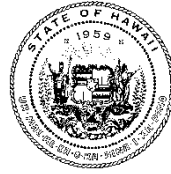


SB 2620

SD-1

TESTIMONY

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
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
ON
THURSDAY, MARCH 22, 2018
9:15 AM
CONFERENCE ROOM 309

S.B. 2620, S.D. 1

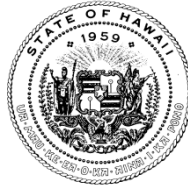
RELATING TO PROCUREMENT.

Chair Johanson, Vice Chair Holt, and Members of the Committee, thank you for the opportunity to submit testimony on S.B. 2620, S.D. 1.

The Department of Accounting and General Services (DAGS) supports this bill which removes 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 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.



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

March 22, 2018, 9:15 a.m.
State Capitol, Room 309

S.B. 2620, S.D. 1
RELATING TO PROCUREMENT

House Committee on Labor and Public Employment

The Department of Transportation (DOT) **strongly supports** S.B. 2620 S.D.1, which removes the \$10,000 maximum limit on the amount of cash or bond that must be submitted to initiate administrative proceedings under HRS Section 103D-709.

The DOT constantly executes high-profile construction project contracts that are designed to provide a safe, efficient, accessible, and sustainable inter-modal transportation system that ensures the mobility of people and goods, and enhances and/or preserves economic prosperity and a quality of life.

When a project solicitation or project award is protested, the government agency replies 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. Both protestors did not prevail in the administrative hearing and therefore, each of the \$10,000 protest bond 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, using the examples above, the amount deposited in the general fund might have been \$59,388, and \$849,744 respectively.

Bid protests account for many of the delays in the bid process, which may increase costs ultimately borne by taxpayers and, equally important, delay the delivery of the intended benefits to taxpayers. Given the size of present day contracts, DOT strongly agrees that the \$10,000 bond cap is too low and may not be given the appropriate weight in a decision to delay a public works project by submitting a bid protest.

The DOT believes that updating the statute by removing the \$10,000 maximum limit will allow our divisions to achieve their full potential while maximizing their contribution to the State economy, improve global access and inter-island mobility, and in so doing, strengthen their critical role in sustaining the social and cultural fabric of the State as construction projects will be able to be executed more efficiently.

Thank you for the opportunity to provide testimony and we urge your favorable consideration of this measure.

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
MARA SMITH
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 586-0554
email: state.procurement.office@hawaii.gov
<http://spo.hawaii.gov>
Twitter: [@hawaiispo](https://twitter.com/hawaiispo)

TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
LABOR AND PUBLIC EMPLOYMENT

Thursday, March 22, 2018, 9:15 AM

SENATE BILL 2620, SD1
RELATING TO PROTEST BOND

Chair Johanson, Vice-Chair Holt, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 2620 SD 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.

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

There were 42 states that participated in the NASPO survey. In the research brief, on page 4 of the pie chart shows 4 states require a bond with the submission of a protest (Florida, Hawaii, Nevada, and Tennessee). This chart is misleading, for Hawaii, a protest bond is not required with the submission of a protest to the procuring agency, it is only required if a protest is filed with the Office of Administrative Hearings, and therefore could it instead be included in the "Other" category.

It mentions that California requires a bond under the Alternative Protest process. Why is California not listed alongside with Hawaii? California, requires a bond, but under only the alternative protest process if the coordinator makes a preliminary determination that the protest is frivolous, a frivolous bond is assessed. The research brief does not go into detail about the 6 states that fall in the "Other" category, could it mean the process is similar to a protest bond but may call it by a different name.

It should not be a surprise that only 10 states require some sort of a protest bond or at least something relating to it, because on page 2, under “State Bid Protest Process” the bar chart shows 15 states that **have a statute** that covers the protest process, which means that 64% of States that responded do not have statutes on the protest process. In addition, on page 2, top of second column, states that “less than one fourth of the responding states have a debriefing process”.

Page 5, top of second column, mentions that many states deem protests as time consuming and expensive in terms of staff time required to respond, depending on the complexity of the procurement. Massachusetts indicated that the state chose the no protest process approach (since the late 1990s), because it was determined that there was no significant value in their protest policy and process. The research brief also mentions on page 6, that less than half of the states responding to the survey believe that bid protests occur because the law allows the process. An expressed comment, “without fee or expense to file this is an easy way to take a shot at the process, complaining about anything and everything and hope that something sticks.”

According to an article by the US Government Accountability Office (GAO) report in 2015 Journal of Contract Management, there is data that supports the notion that there is an increase in frivolous protests stating, “In the last decade, the number of protests increased substantially while the percentage of sustained protest decreased.”

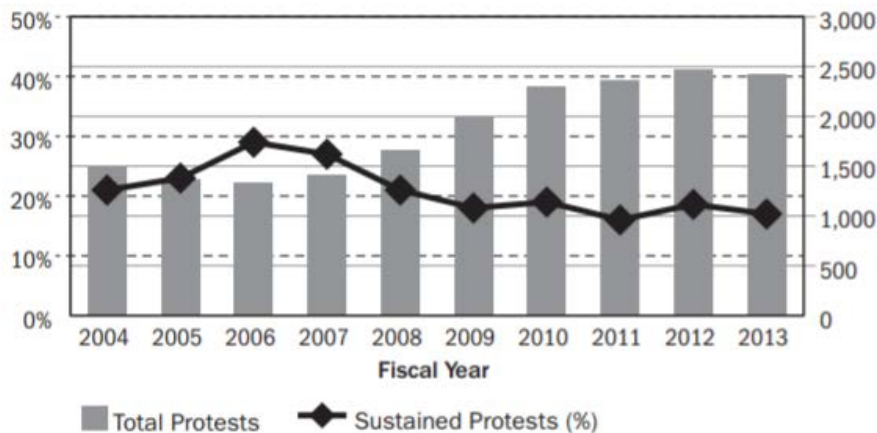


FIGURE 1. GAO PROTESTS FROM FY2004 TO FY2013^{10,11}

<https://www.ncmahq.org/docs/default-source/default-document-library/articles/jcm15---article-07>

The point to be taken is Hawaii has one of the more robust procurement statutes and regulations that address protests than many other states do.

Finally, 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.

Having a \$10,000 ceiling of the protest bond could actually encourage contractors to file frivolous protest especially for large multi- million-dollar projects. As the dollar value of the contract increase, the percent of the protest bond diminishes, example an \$80 million-dollar construction project can have a protest bond percent of .000125% and taking into account the time value of money financial concept that money available at the present time is worth more than the same amount in the future adds more to this belief.

Thank You

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

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.



Testimony of Roberts Hawaii

on

S.B. 2620, S.D. 1

Relating to Procurement

Committee on Labor & Public Employment

Thursday, March 22, 2018

9:15 a.m., Room 309

phone 808 523 7750

fax 808 522 7866

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 strong support of S.B. No. 2620, S.D.1, with amendments.

S.B. No. 2620, proposes to remove the \$10,000 maximum cap on the cash or protest bond that a person aggrieved by the determination of a procurement officer must post when requesting a hearing for a review of the determination. 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 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." It does not acknowledge that, if the protesting party prevails, it too has incurred costs.

Rather than remove the cap on the bond that must be posted, we request that S.B. No. 2620 be amended to change the cap to \$25,000. Further, we request that subsection (e) starting on page 1, line 15 be amended to read:

"If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party[-] and the prevailing party shall be awarded attorney's fees and costs in bringing the action. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund."

With the requested amendments, we support S.B. No. 2620.

Thank you for the opportunity to testify on this measure.

SB 2620

SD-1

LATE

TESTIMONY