

SAH - Subcontractors Association of Hawaii

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February 12, 2021

Testimony To: House Committee on Government Reform
Representative Angus L.K. McKelvey, Chair

Presented By: Tim Lyons, President

Subject: H.B. 1054 – RELATING TO PROCUREMENT.

Chair McKelvey and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct contracting trade organizations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We are not in support of this bill.

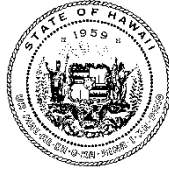
We understand that protests are a problem and that they slow up the process however, we think it is important to remember that a protest is oftentimes a private contractor doing the work of government; that is, calling to attention to some irregularity in the procurement process. The amounts referenced in this bill, it would seem to us, are punitive and discouraging, at the very least.

We think the amounts should be sufficiently high to discourage petty protests but not so high to dissuade if one has a rightful case. For a mere \$450,000.00 contract, which in the construction industry is not considered very substantial, a protest bond in the amount of \$4500.00 or a protest bond in the amount of \$23,750.00 for a \$950,000.00 contract (under \$1M) seems to us to be very steep. Not only does the initiating party have to go through the process of filing the protest and the accompanying expenses involved in the administrative hearing plus, the time and effort that it will take, they now stand to also lose the protest bond amount as well. It is not likely that the initiating party would be able to build in the cost of paying for that bond in its very next project but rather would have to spread it out as a cost of doing business.

The subject of protests has been discussed in tremendous detail over the last few legislative sessions and there are perhaps more efficient and less punitive ways to try and remedy the problem.

Based on the above, we cannot support the bill and the amounts as stated in this bill.

Thank you.



STATE OF HAWAII
STATE PROCUREMENT OFFICE

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE
TO THE HOUSE COMMITTEE
ON
GOVERNMENT REFORM

FEBRUARY 12, 2021, 10:00 A.M.

HOUSE BILL 1054
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on HB1054. The State Procurement Office (SPO) submits the following comments and recommendations.

COMMENTS:

In a National Association of State Procurement Officials (NASPO) State Bid Protest Research Brief, dated April 2013, the average protest bond is in the 1-2% percent range of the estimated value of the contract. Nevada is an exception, which can be as high as 25% of the contract's value. In California, the Chief Procurement Officer determines whether a protest is frivolous, and based on a subjective decision, may require a protest bond.

The aforementioned brief also states that there were no substantive data tests showing that protest bonds discourage frivolous protests.

The SPO also conducted research through NASPO that shows the following information as of January 2020:

- Only three states (6% of states) require bonds for all protests.
- Three other states require a protest bond under certain circumstances based on Chief Procurement Officer (CPO) judgement, or if the value is greater than \$1 Million.
- Protest bonds are not a requirement for Federal Contracting.

The following chart lists the bond formula for various states:

	State	Bond Formula	Based on
1	CA	10% of Contract Value	Only if Gov decides it's a frivolous protest
2	NV	25% of successful proposal/bid	Always
3	HI	\$1K < \$500K \$2K > \$500K < \$1M 0.5% > \$1M up to \$10K	Only 103D No protest bond for 103F
4	FL	1% of Contract value	Not applicable to protests filed by the Office of Supplier Diversity
5	SC	1% of Contract value	Only if agency asks CPO for solicitations valued at > \$1M
6	UT	Various. See list below: Ave 2%	
		\$20,000, if the total contract value is under \$500,000;	\$1,100,000, if the total contract value is \$32,000,000 or more but less than \$64,000,000;
		\$25,000, if the total contract value is \$500,000 or more but less than \$1,000,000;	\$1,900,000, if the total contract value is \$64,000,000 or more but less than \$128,000,000;
		\$50,000, if the total contract value is \$1,000,000 or more but less than \$2,000,000;	\$3,500,000, if the total contract value is \$128,000,000 or more but less than \$256,000,000;
		\$95,000, if the total contract value is \$2,000,000 or more but less than \$4,000,000;	\$6,400,000, if the total contract value is \$256,000,000 or more but less than \$512,000,000; and
		\$180,000, if the total contract value is \$4,000,000 or more but less than \$8,000,000;	\$10,200,000, if the total contract value is \$512,000,000 or more; or
		\$320,000, if the total contract value is \$8,000,000 or more but less than \$16,000,000; \$600,000, if the total contract value is \$16,000,000 or more but less than \$32,000,000;	\$20,000, for an appeal: relating to any type of procurement process other than an invitation for bids or request for proposals; relating to an invitation for bids or request for proposals, if the estimated total contract value cannot be determined; or of a debarment or suspension.

The current increases in HB1054, specifically, 2.5% (for contract values of \$500,000 to \$1 Million) and 4.5% (contract values greater than \$1 Million) are more than double the existing requirements.

Additionally, the increase in the protest bond amount may be challenging for small businesses to absorb.

RECOMMENDATION:

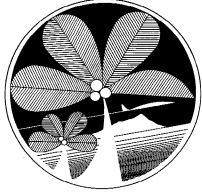
The SPO recommends adjusting the protest bond percentage to be in alignment with other states' averages, as shown below:

Contract Estimated Value

- Contract value less than \$1,000,000 1%
- Contract values greater than \$1,000,000 2%
- No cap on protest bond dollar amount

Thank you.

AIRLINES COMMITTEE OF HAWAII



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February 12, 2021

Representative Angus McKelvey, Chair
Representative Tina Wildberger, Vice Chair
Committee on Government Reform

Re: HB 1054 – RELATING TO PROCUREMENT – IN STRONG SUPPORT
Via Videoconference; 10:00 A.M.

Aloha Chair McKelvey, Vice Chair Wildberger and members of the committee:

The Airlines Committee of Hawaii (ACH), which is comprised of 19 signatory air carriers that underwrite the State of Hawaii Airports System, appreciates this opportunity to submit testimony in strong support of HB 1054, which amends Section 103D-709, Hawaii Revised Statutes, Administrative proceedings for review, to replace the protest bond amount for a contract with an estimated value of less than \$500,000 from \$1,000 to one percent; to replace the protest bond amount for a contract with an estimated value of less than \$1,000,000 from \$2,000 to two and one-half per cent; to replace the protest bond amount when the estimated value of the contract is \$1,000,000 or more from one-half per cent to four and one-half per cent; and to delete the \$10,000 cap on the protest bond amount.

Bid protests are an impediment to State growth, cause material delays to the commencement/completion of much-needed airport facility improvements, drive increased operating and maintenance costs for airlines and other airport tenants, jeopardize the reliability and integrity of existing and future airline operations, and would further stymie the much needed economic recovery. The ability to challenge an improperly awarded bid is an important tool, but not one that should be used arbitrarily or without risk to the entity challenging the award.

The greater financial risk will cause bidders to think twice about protesting an award with little or no basis for a protest, especially for the larger capital projects. For many years, numerous bid protests with little or no substantive basis have been submitted and caused delays to critical DOT-A capital projects valued in the hundreds of millions of dollars, due to the fact that the financial risk of the entity filing the protest is limited to \$10,000.

We ask for your favorable consideration in passing this measure. Thank you.

Sincerely,

Matthew Shelby
ACH Co-chair

Brendan Baker
ACH Co-chair

Mark Berg
ACH Co-chair

*ACH members are Air Canada, Air New Zealand, Alaska Airlines, All Nippon Airways/Air Japan, Aloha Air Cargo, American Airlines, China Airlines, Delta Air Lines, Federal Express, Fiji Airways, Hawaiian Airlines, Japan Airlines, Korean Air, Philippine Airlines, Qantas Airways, Southwest Airlines, United Airlines, United Parcel Service, and WestJet.

HB-1054

Submitted on: 2/11/2021 5:36:41 PM

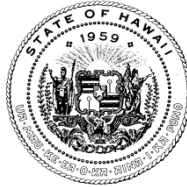
Testimony for GVR on 2/12/2021 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Tammy Lee	Hawaii DOT	Support	No

Comments:

I am with the DOT and available for comments

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

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

February 12, 2021
10:00 A.M.
State Capitol, Teleconference

**H.B. 1054
RELATING TO PROCUREMENT**

House Committee on Labor & Public Employment

The Department of Transportation (DOT) **strongly supports** the proposed revision to Hawaii Revised Statutes (HRS) § 103D-709(e) which revises the protest bond amount for a contract with an estimated value of less than \$500,000 from \$1,000 to one percent of the estimated value of the contract; and repeals the \$10,000 cap on the protest bond amount for a contract with an estimated value of \$1,000,000 or more. However, the DOT recommends a revision to the proposed bill.

The DOT recommends the protest bond amount for a contract with an estimated value of \$500,000 or more but less than \$1,000,000 be revised from \$2,000 to two percent of the estimated value of the contract; and the increase to the protest bond amount when the estimated value of the contract is \$1,000,000 or more from one-half percent to two percent of the estimated value of the contract. The DOT proposes the following revision to HRS § 103D-709(e)(2) and 103D-709(e)(3):

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

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

(2) Two percent of the estimated value of the contract if the estimated value of the contract is ~~\$2,000 for a~~

~~contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or~~

(3) Two ~~One-half~~ percent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; ~~provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.~~

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 (DCCA) 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.

For the DOT, protests delay our delivery of Highway, Airport, and Harbor improvements. Delays potentially may increase the cost of the project.¹ From 2012 to 2019, the DOT received and responded to one hundred twenty-five (125) protests. The average calendar day delay from receipt of protest to protest resolution was one hundred fifteen (115) days.

From 2015 to 2019, there have been four (4) DOT protest decisions that went through the OAH administrative hearing process. In each, the protestors did not prevail in the administrative hearing and therefore, each of the \$10,000 protest bond was deposited into the general fund. The estimated contract value was \$11,877,594²; \$169,948,741³; \$10,460,000⁴; and \$46,000,000⁵. Should the cap on the protest bond be repealed, and the protest bond amount revised from one-half percent to two-percent for an estimated contract value over \$1,000,000 using the examples above, the amount deposited in the general fund instead of \$40,000 might have been \$4,765,727.

As mentioned above, the DOT received and responded to one hundred twenty-five (125) protests since 2012. During this time, four (4) protests were sustained in the protestor's favor and one hundred twenty-one (121) were denied. Seven (7) of the

¹ The Procurement Code allows only for award to be made at the original lowest responsive, responsible bid (in other words, the increased costs may either be absorbed by the contractor or passed on to the DOT through change orders).

² Two percent equals \$237,552.

³ Two percent equals \$3,398,975.

⁴ Two percent equals \$209,200.

⁵ Two percent equals \$920,000.

one hundred twenty-one (121) denied protests were appealed to the OAH. The OAH decision in each were dismissed in favor of the DOT.

Thank you for the opportunity to provide testimony.