



STATE OF HAWAII
STATE PROCUREMENT OFFICE

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
CONSUMER PROTECTION & COMMERCE
March 1, 2022, 1:00 P.M.

HOUSE BILL 2007 HD 1
RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Kitagawa, and members of the committee, thank you for the opportunity to submit testimony on House Bill 2007 HD 1. The State Procurement Office (SPO) submits the following comments.

Act 224, SLH 2021, amended Chapter 103D-709, Hawaii Revised Statutes (HRS), changing the cash or protest bond amount to one (1) percent of the estimated value of the contract, with no cap. This bill recommends establishing new reduced bond amounts, with caps, without providing explanation for such action.

The Department of Commerce and Consumer Affairs (DCCA) - Office of Administrative Hearings (OAH), provided the following summary of appeals:

2017 – 9 appeals
2018 – 10 appeals
2019 – 8 appeals
2020 – 10 appeals

In 2021, the number of appeals jumped to a total of 16:

- Between January 1, 2021, and July 31, 2021, OAH received 8 appeals.
- Between August 1, 2021, and December 31, 2021, OAH received an additional 8 appeals which required protest bonds.

These statistics suggest that the one percent (1%) protest bond, without cap, did not deter vendors from filing protests with the OAH. Instead, the number of protest filings increased. The results appear to contradict the notion that an increase in protest bond would result in vendors filing fewer requests for an administrative hearing due to the higher cost. It has been less than one year in which the 1% cash or protest bond went into effect. There is insufficient evidence to determine the actual impact the increase has on protests.

The SPO does not support amendments to chapter 103D-709 without substantive data to justify.

SPO recommends no changes to the current statute 103D-709, which reads.

“(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 one percent of the estimated value of the contract.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.”

Thank you.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 28, 2022

TO: HONORABLE AARON LING JOHANSON, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

SUBJECT: **SUPPORT OF H.B. 2007 HD1, RELATING TO PROCUREMENT.** Amends the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

HEARING

DATE: Tuesday, March 1, 2022
TIME: 1:00 p.m.
PLACE: Capitol Room 329

Dear Chair Johanson, Vice Chair Kitagawa and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA is in **support with amendments** of H.B. 2007 HD1, which amends the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

The primary purpose of the Procurement Code is to ensure fair and ethical procurement while maximizing the use of public funds.

Last year, the Legislature enacted legislation that requires a party protesting an agency decision to put up a 1% cash or protest bond without a cap. The purpose of the cash/protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out the safeguard language that the other states who require cash/protest bonds without a cap use for appeals to also prevent the chilling effect of deterring legitimate protests on large projects. The safeguard language that the other states use allows for the return of the bond, minus the administrative costs associated with hearing the appeal, unless the appeal is found to be frivolous or in bad faith.

There are two ways to prevent the chilling effect of deterring legitimate appeals on large projects. You can have a bid cap (which this measure currently does) or you can allow for the

return of the bond, minus the administrative costs associated with hearing the appeal, unless the appeal is found to be frivolous or in bad faith.

Essentially, the effect of the removal of a bond cap provision last year without adopting other safeguard language is that it prevents bidders from appealing an agency's bid protest decision on large projects because it raises the cost of the appeal so high that it becomes unaffordable and no longer fiscally prudent. This altered the landscape of the procurement code by reducing one of its checks and balances. This provision removed any realistic oversight of decisions on large projects and allows agencies to go unchecked.

The impact of this legislation has already drawn the attention of several media outlets. Public trust and confidence in government should not be further eroded.¹ Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable. The cash/protest bond cap was Hawaii's safeguard.

However, we believe that an easier way to address the issue is to just adopt the safeguard language that every other state has in place regarding bonds for appeals.

Therefore, the measure should be amended to read:

Subsection (e) of section 103D-709, HRS, is amended by:

(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 one per cent of the estimated value of the contract.

~~[If the initiating party prevails in the administrative proceeding, the]~~ The cash or protest bond shall be returned to that party[-], minus administrative costs as determined by the Office of Administrative Hearings; provided that full forfeiture of the cash or protest bond shall occur [±]if the initiating party does not prevail in the administrative proceeding and the Office of Administrative Hearings finds that the appeal was frivolous or made in bad faith.

Allowing for the return of the cash/protest bond, minus administrative costs, unless the appeal is found to be frivolous or in bad faith will promote fair and ethical procurement for the following reasons:

1. **REQUIRING A BID PROTEST BOND IS OUT OF STEP WITH THE MAJORITY OF STATES AND THE FEDERAL GOVERNMENT:**

¹ https://www.civilbeat.org/?p=1443162&mc_cid=4772bbfeef&mc_eid=7e39375e0a
<https://www.bizjournals.com/pacific/news/2021/05/26/hawaii-bill-drive-up-cost-appeal-bid-protest-rule.html>
<https://www.hawaiiconstructionlaw.com/blog/2021/05/a-bill-awaiting-governors-signature-will-be-bad-for-procurement.html>

In the entire country, only seven (7) states impose a bond requirement to submit a bid protest or seek an appeal of a bid protest decision. This includes Hawaii. Other than these seven (7) states, every other state does not impose such a requirement, and the federal government does not either. This is because most states recognize “the value of having workable procedures for bidders and contractors to file bid protests, appeals, complaints and contract claims, noting that “[a] procurement system that is truly open isn’t afraid to be challenged on its contract award and management decisions.” Current bid protest practices among the states suggest that incorporating a fair mechanism to evaluate bid protests helps to ensure a level playing field for all vendors. The approach recommended in the NASPO Practical Guide is to have procedures established by law providing the opportunity for a bid protestor or contractor to appeal decisions on bid protests and contract claims, a fair hearing on the issues and prompt resolution. See NASPO Research Brief on State Bid Protests dated April 2013, https://www.naspo.org/wp-content/uploads/2019/12/FINAL_NASPO_BidProtests_Research_Brief_042413.pdf.

2. **AMONG THE FEW STATES THAT REQUIRE A BOND, HAWAII IS THE SOLE OUTLIER -- THE ONLY STATE -- THAT REQUIRES IMMEDIATE FORFEITURE OF BOND FUNDS**

According to the 2013 NASPO study, it found only seven (7) out of fifty states, which require a protest bond of some sort. This includes Hawaii. Of these seven states, **Hawaii is the ONLY state that imposes immediate forfeiture of the bond to the State’s general fund if a protestor loses an appeal.** Every one of the other six states that impose a bond requirement, only require either partial forfeiture to pay for costs, or forfeiture under certain conditions, most often a frivolous or bad faith protest:

<p>NO STATUTORY BOND REQUIRED</p>	<p>BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL</p>	<p>BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION</p>
<p>Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming</p>	<p>CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.</p>	<p>Hawaii</p>
	<p>FLORIDA - Bond only limited to Department of Transportation projects, bond recovery limited to costs and charges incurred during the protest, and forfeiture only if administrative judge finds the protest was frivolous or improper.</p>	
	<p>NEVADA - Protest bond is only required when the chief procurement officers require it. Bond is lesser of 25% of the bid or \$250,000. If protest is rejected a claim can be brought against the protestor for the expenses incurred by the public body. Remainder returned to bidder.</p>	
	<p>South Carolina - Bond possible but not required,</p>	

	state can only recover costs and charges associated with the protest from the bond. Remaining bond funds are returned to the protestor.	
	TENNESSEE - Bond is 5%, small business owners can apply for an exemption, and bond amount is to be used for costs and subject to forfeiture only upon a finding of bad faith or frivolous action.	
	UTAH - Protest bond depends upon the contract price, bond forfeiture upon losing appeal is only if the government finds that the protest was frivolous or filed only to delay.	

3. THE BOND AMOUNT HURTS COMPETITION AND THE PERCEPTION OF HAWAII AS A STATE THAT SUPPORTS OPEN AND FAIR PROCUREMENT.

Hawaii is already the sole outlier punishing bidders who seek independent review of State agency actions, by imposing a bond requirement plus immediate forfeiture, on unsuccessful bid protest appellants. By making the amount of the bond so high, the State is effectively eliminating appeals except for those companies large enough to bear the risk of such punishment. Enabling justice only for those who can afford it, is exactly at odds with the purpose of the procurement code.

- 4. THE BOND AMOUNT IS AN INEFFECTIVE REVENUE GENERATOR.** If the idea of increasing the bond amount is to generate revenue for the State, this is short sighted, because half of the bid protests and appeals are made by **low** bidders whose bids have been rejected for reasons the bidder disputes. For example, in the Maui Kupono bid protest, they were the low bidder by \$700,000.00. Their bid was rejected. If they had been required to post a bond for \$250,000 on that \$25 million dollar job, they would not have pursued it. The State and its taxpayers would have had to pay \$700,000 more for the work. Moreover, the issue in that case was subcontractor listing, and whether non-construction contractor entities like truckers and other service providers, needed to be listed in bids. The prospect of having to list unlicensed noncontractor entities as subcontractors in a bid would have totally changed and disrupted procurement, bogged down jobs in protests, and cost the State millions and millions of dollars. The substantive merits of the case would not have been addressed without a bid protest and appeal, yet that is what would have happened if the current bond requirement had been in place. (see decision, https://cca.hawaii.gov/wp-content/uploads/2021/11/PDH-2021-003-MAUI-KUPONO-BUILDERS-v-DEPT-OF-TRANSPORTATION_with-Final-Judgment.pdf)

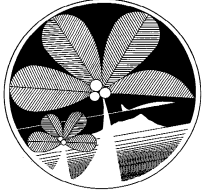
- 5. BOND FORFEITURE OF AN UNCAPPED AMOUNT IN EVERY INSTANCE IN WHICH A BIDDER FAILS TO PREVAIL WILL ELIMINATE OVERSIGHT**

AND OPEN GOVERNMENT – THE PURPOSE OF BID PROTESTS. It should be noted that the filing fee for an action in Circuit Court is \$315.00. The previous cap on a request for administrative review of bid protest decisions was \$10,000.00, nearly 32 times the cost of a civil action. In the Maui Kuponono case, the crucial public scrutiny, and the findings of procurement ethics violations, would have been impossible without the filing of an appeal and a request to review such actions. Public procurement cannot be beyond the public's review, yet imposing an uncapped bond requirement as a condition of review, that subjects a bidder to immediate punitive loss in the event its legitimate concerns do not result in a reversal of the agency's actions, would accomplish the same thing.

For these reasons we ask that the Committee pass this measure with the requested amendment.

Thank you for this opportunity to testify in support of this measure.

AIRLINES COMMITTEE OF HAWAII



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Representative Aaron Ling Johanson, Chair
Representative Lisa Kitagawa, Vice Chair
Committee on Consumer Protection & Commerce

Re: HB 2007 HD1 – RELATING TO PROCUREMENT – IN OPPOSITION
March 1, 2022; 1:00 p.m.

Aloha Chair Johanson, Vice Chair Kitagawa, and members of the committee:

The Airlines Committee of Hawaii (ACH), comprised of 20 signatory air carriers that underwrite the State of Hawaii Airports System, is in opposition to HB 2007 HD1, which amends the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

Last year, the legislature passed SB 1329 (Act 224, SLH 2021), which established time limits to resolve certain procurement protests and amended the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

The intent of HB 2007 HD1 is to reverse Act 224, SLH 2021. Although the HD1 changes the cash or protest bond amounts to unspecified amounts, the original bill reinstated amounts for contracts with an estimated value of less than \$500,000 and less than \$1,000,000 and decreased from one percent to one half percent but not to exceed \$15,000 if the estimated value of the contract is \$1,000,000 or more.

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 airlines operations, and would further stymie 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 larger capital projects. For many years, numerous bid protests with little or no substantive basis have been submitted which have 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 was limited.

For these reasons, we ask that you hold the bill. Thank you for the opportunity to submit testimony.

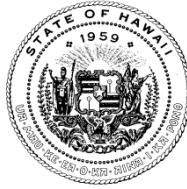
Sincerely,

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, Sun Country Airlines, United Airlines, United Parcel Service, and WestJet.*

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROSS M. HIGASH
EDUARDO P. MANGLALLAN
PATRICK H. MCCAIN
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LATE

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

March 1, 2022
1:00 P.M.
State Capitol, Teleconference

**H.B. 2007, H.D. 1
RELATING TO PROCUREMENT**

House Committee on Consumer Protection & Commerce

The Department of Transportation (DOT) **strongly opposes** amending subsection (e) of Section 103D-709, Hawaii Revised Statutes, which would establish new not to exceed limit(s) on the cash or protest bond for administrative proceedings for review on protests; new-proposed limits not designated on current bill and to be determined.

With understanding the impact of protests to timely start and completion of public works projects, the current cash or protest bond requirement of one per cent of the estimated value of the contract with **no limit**, as amended in ACT 224, SLH 2021, effective July 6, 2021, should stand with no caps or limits.

Procurement protests can be lengthy and may adversely impact project timelines in varying degrees. In construction protests, the protest issues are not always straightforward. Time and effort by respective stakeholders to collaborate in order to clearly identify and fully understand the actual protest issue(s) are required before any action can commence to respond to the issue(s). The protest issues, whether directly from the protestor or through their respective legal counsel, are often presented in a manner that is convoluted, complex, vague, and virtually impossible to identify at first pass. The requirement of protestors to submit clear and concisely stated protest(s) to the State, with statements of facts and law to support the protest issues, would be ideal, however, format and content in which protest letters are submitted are beyond the State's control. The efforts by the State to decode and clarify the specific protest issues, in itself, are time-consuming and have an adverse impact to the timely start of the investigative vetting process required to address each issue in order to formulate a defensible and responsible formal response.

When a protest is received and the immediate stay of procurement goes into effect, the impacted project comes to a halt. Timelines to start and proceed, along with potential cost escalation to budget now come into play, adversely affecting the project and its scheduled completion. In the event the protest is appealed to administrative hearing

and, with the possibility of further escalation, the more significant and critical the impact of these factors to the project.

Upon notification of appeal for an administrative hearing, the timeline to properly prepare for the hearing conference is aggressive and requires significant, dedicated preparation in order to appropriately support the State's position on the protest. Per statute, the respective protestor may initiate an appeal to hearing, of which this information is explicitly stated in every protest response at the close of the letter. However, with the decision to appeal, there should be an inherent and recognized responsibility that the protestor's decision to appeal was given due consideration and the protestor is fully committed to furthering the protest matter. The protest bond is a means of securing this commitment.

The protestor shall appreciate the impact of the appeal if the decision to appeal is the elected option. By securing a cash or protest bond, payable upon receipt, all parties acknowledge the conviction and commitment to proceed. With the amended language to now include limits, there may be a diminished appreciation and respect for the appeal process and all its requirements. The appeal is an opportunity for all parties to present their position, reviewed by an impartial party, with the assurance of an appropriate decision toward protest resolution in order to complete public works projects in the best interest of the State and taxpayers.

The standard of proof for the party appealing the agency decision and filing the request for administrative hearing is a preponderance of the evidence. This threshold tips the scale sufficiently to the appealing party side of the protest issue and the hearings officer decision is based on whether the party appealing the agency decision met its burden of proof by a preponderance of the evidence.

Should the appealing party not meet its burden of proof, the appealing party may apply for judicial review in circuit court. The Hawaii Revised Statutes 103D-710(e) provides the authority for the circuit court to affirm, reverse, or modify the hearings officer's decision based on six distinct reasons:

“affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion;”

Proposing a not to exceed cap on the protest bond amount for contracts with an estimated value of \$1,000,000 or more after the legislature passed its repeal last legislative session is premature. The law has only been in effect for six months, data on

whether the legislative purpose was satisfied from last sessions' repeal is needed before a proposed protest bond cap is contemplated.

Finally, before the protest bond statute is revised, a review of data including how many appeals for judicial review decisions have been reversed or modified in the last ten years should be performed.

Thank you for the opportunity to provide testimony.