

AIRLINES COMMITTEE OF HAWAII



Honolulu International Airport
300 Rodgers Blvd., #62
Honolulu, Hawaii 96819-1832
Phone (808) 838-0011
Fax (808) 838-0231

Senator Sharon Moriwaki, Chair
Senator Donovan Dela Cruz, Vice Chair
Committee on Government Operations

Re: HB 2007 HD2 – RELATING TO PROCUREMENT – IN OPPOSITION
March 17, 2022; 3:10 p.m.

Aloha Chair Moriwaki, Vice Chair Dela Cruz, 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 HD2, which requires cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

This bill is unnecessary. Current law already states if the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party, and if the initiating party does not prevail, the cash or protest bond shall be deposited in the general fund. The purpose of Act 224, SLH 2021 was to address the lengthy procurement protest review process, which causes project delays, by increasing the cash or protest bond amount based on the estimated value of the contract, and establishing time limits to resolve the protests of construction and airport contracts. As Act 224 has only been in effect for less than a year, no changes to this statute should be made at this time, especially ones that could further delay projects.

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 were submitted causing 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 to \$10,000.

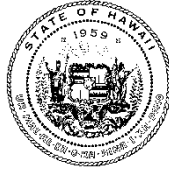
For these reasons, we ask that you hold this measure. Thank you.

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.*



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>

TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
March 17, 2022, 3:10 P.M.

HOUSE BILL 2007, HD 2
RELATING TO PROCUREMENT

Chair Moriwaki, Vice Chair Dela Cruz, and members of the committee, thank you for the opportunity to submit testimony on House Bill 2007 HD 2. The State Procurement Office (SPO) opposes the bill and submits the following comments.

On July 7, 2021, Act 224, SLH 2021, was enacted into law amending HRS § 103D-701 to expedite the protest process and increase the protest bond to one percent (1%).

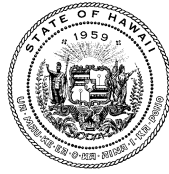
The purpose of a cash or protest bond is to discourage “frivolous” protests, or protests submitted in “bad faith.” However, approximately eight (8) months later, HB2007, HD2 would amend HRS section 103D-709, which would return the cash or protest bond, minus administrative costs, without sufficient data or justification why the amendments are necessary.

The new language would encourage more protests as there is no deterrent, except for the loss of administrative fees. The results would be further delays and possibly higher costs for projects. Full forfeiture of the bond would only occur when the protester does not prevail **AND** the Office of Administrative Hearings determines the appeal is in “bad faith” or “frivolous.” Determining whether a protest is “frivolous” or was made in “bad faith” can be subjective, complex, and difficult to prove. This lowers the risk of losing cash or protest bonds and defeats the purpose of discouraging frivolous protests. According to the Office of Administrative Hearing, there have been no cases submitted that were deemed to be frivolous or in bad faith.

The existing statute is clear and simple to understand, and its application is straightforward. SPO recommends no changes to the current statute.

Thank you.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

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

WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE

SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS

THURSDAY, MARCH 17, 2022, 3:10 P.M.
CONFERENCE ROOM 016, STATE CAPITOL

H.B. 2007, H.D. 2

RELATING TO PROCUREMENT

Chair Moriwaki, Vice Chair Dela Cruz, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 2007, H.D. 2. The Department of Accounting and General Services (DAGS) opposes the proposed revisions to Section 103D-709, Hawaii Revised Statutes, and we offer the following comments.

DAGS recommends that the current language of Section 103D-709 remain unchanged:

1. It is premature and without evidence of a need to change the current law.
2. Since the impact of protests on the cost of construction can exceed 1%, it is not unreasonable to leave the current practice of requiring an unsuccessful protestor to forfeit its bond in place.

In addition, the proposed language on page 1, lines 7-10, will penalize the prevailing party by requiring it to pay for the State's administrative costs. While the procuring agency and

the Office of Administrative Hearings do incur costs, it would be unfair for the prevailing party to have to pay for this cost on top of the costs that they have already incurred for the protest and its appeal to the Office of Administrative Hearings.

We recommend H.B. 2007, H.D. 2, be deferred.

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

HB-2007-HD-2

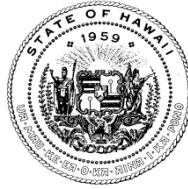
Submitted on: 3/16/2022 3:01:23 PM

Testimony for GVO on 3/17/2022 3:10:00 PM

Submitted By	Organization	Testifier Position	Testify
Christine Kinimaka	Testifying for DAGS	Oppose	Remotely Via Zoom

Comments:

I am attending to support State Comptroller/Deputy Comptroller, and I am available to answer any questions.



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

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

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

Thursday, March 17, 2022
3:10 P.M.
State Capitol
Conference Room 016
VIA VIDEOCONFERENCE

H.B. 2007, H.D. 2
RELATING TO PROCUREMENT

Senate Committee on Government Operations

The Department of Transportation (DOT) offers **comments** on the bill amending subsection (e) of Section 103D-709, Hawaii Revised Statutes, requiring 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; the cash or protest bond shall be returned to that party minus administrative costs as determined by the office of administrative hearings of the department of commerce and consumer affairs; 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, in which case the cash or protest bond shall be deposited into the general fund.

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;”

Thank you for the opportunity to provide testimony.

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcahawaii.org
Website: www.gcahawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 17, 2022

TO: HONORABLE SHARON MORIWAKI, CHAIR, HONORABLE DONOVAN DELA CRUZ, VICE CHAIR, COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT OF H.B. 2007 HD2, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: Thursday, March 17, 2022

TIME: 3:10 p.m.

PLACE: Capitol Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz 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 **supports** H.B. 2007 HD2, which requires the cash or protest bonds be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

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 passed 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 or protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous appeals without the unintended consequence of also deterring legitimate appeals on large projects.

Essentially, the effect of the removal of a bond cap provision last year without adopting this 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.

Allowing for the return of the cash or 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:**

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:

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>

<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 findings, 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.

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

HB-2007-HD-2

Submitted on: 3/16/2022 11:39:00 AM

Testimony for GVO on 3/17/2022 3:10:00 PM

Submitted By	Organization	Testifier Position	Testify
Anna Oshiro	Individual	Support	Remotely Via Zoom

Comments:

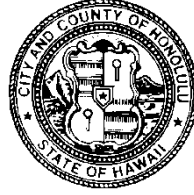
I write in favor of the legislation pending before this office, and out of concern that the due process afforded by the appeal provisions set forth in the procurement code must not be denied to bidders seeking to enforce the law. The imposition of an uncapped bond requirement has and will result in the lack of any meaningful oversight over the procurement decisions made on large projects, because the risk of loss will be too great for the average bidder to bear. I understand that concerns have been raised that the Office of Administrative Hearings has not made findings of frivolous or bad faith appeals in past decisions, and that the pending legislation will therefore only encourage bid protests. There is a simple reason for this lack of past decisions finding bad faith or frivolous appeals: the procurement code has no provision for such findings. The procurement code was originally drafted without any bond requirement at all, therefore, there would have been no reason for the hearings office to make a determination as to whether an appeal of a bid protest decision was made in good or bad faith, or whether it was frivolous. When the bond requirement was first enacted, there was no provision for return of the bond. Therefore, no agency and no party would ever request such a finding, because such a finding would have been irrelevant to the proceeding! This is like complaining that that the hearing office never issued a guilty verdict -- of course not, because the law never contemplated it making such a finding.

As noted in prior testimony submitted in favor of this legislation, there are very few states in the country that even impose a bond requirement at all, much less bond requirement with no cap, such as Hawaii imposes. Of the seven states that impose bond requirements for bid protests or appeals, Hawaii is the lone state that imposes an immediate punitive seizure of funds. All that this legislation seeks to do is to bring this State in line with the few others that impose bond requirements, and to maintain the modicum of protection of the public trust and public funds afforded and envisioned by the procurement code.

Thank you for this opportunity to testify.

Anna Oshiro

RICK BLANGIARDI
MAYOR



ANDREW T. KAWANO
DIRECTOR

CARRIE CASTLE
DEPUTY DIRECTOR

TESTIMONY OF ANDREW T. KAWANO
DIRECTOR OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
BEFORE THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS
March 17, 2022, 3:10 PM, Conference Room 016 and Videoconference

TO: The Honorable Sharon Y. Moriwaki, Chair
and Members of the Senate Committee on Government Operations

RE: OPPOSITION OF HOUSE BILL 2007, HD2, RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **opposes** House Bill (HB) 2007, HD2, Relating to Procurement.

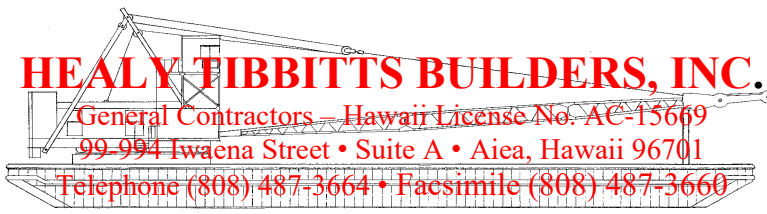
The City wishes to retain the current provision of Hawaii Revised Statutes (HRS) §103D-709(e), "The party initiating a proceeding falling within subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of one per cent of the estimated value of the contract.

If the initiating party prevails in the administrative proceeding, the 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."

The required cash or protest bond should protect more than an appeal that was frivolous or made in bad faith. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion and make a determination if an administrative hearing is the appropriate step after it was already subjected to a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer.

For the reasons stated above, the City respectfully opposes House Bill 2007, HD2.

Mahalo for the opportunity to testify on this bill. Should you have any questions or concerns, please feel free to contact the Department of Budget & Fiscal Services' Division of Purchasing at 808-768-5535 or bfspurchasing@honolulu.gov.



March 17, 2022

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ,
AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT
OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2007, HD2, RELATING TO PROCUREMENT.** Requires
cash or protest bonds to be returned to the initiating parties, minus administrative
costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 17, 2022

TIME: 3:10 p.m.

PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

Healy Tibbitts Builders, Inc. (HTBI) is a general contractor in the State of Hawaii and has been actively engaged in construction work in Hawaii since the early 1960's. In addition to being a general contractor, HTBI also performs work as a subcontractor for foundation work.

HTBI supports H.B. 2007, HD2, Relating to Procurement, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HTBI supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every other state that requires a cash or protest bond to appeal an agency's bid protest decision has adopted some form of this concept.

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 passed 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 or protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous appeals without the unintended consequence of also deterring legitimate appeals on large projects.

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Allowing for the return of the cash or 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:

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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:

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>
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NO STATUTORY BOND REQUIRED	BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL	BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION
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	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
	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.	
	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.	
	South Carolina - Bond possible but not required, state can only recover costs and charges associated with the protest from the bond. Remaining bond funds are returned to the protestor.	

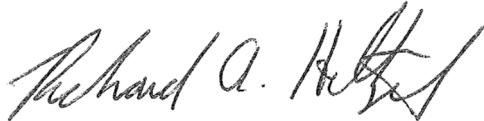
	TENNESSEE - Bond is 5%, small business owners can apply for an exemption, and bond amount is to be used for costs and subject to forfeiture only upon a finding of bad faith or frivolous action.	
	UTAH - Protest bond depends upon the contract price, bond forfeiture upon losing appeal is only if the government 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 Kupono case, the crucial public scrutiny, and findings, 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.

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

Very truly yours,
Healy Tibbitts Builders, Inc.

A handwritten signature in black ink, reading "Richard A. Heltzel". The signature is written in a cursive style with a large, stylized initial "R".

Richard A. Heltzel
President



S & M SAKAMOTO, INC.
GENERAL CONTRACTORS

March 17, 2022

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ,
AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT
OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2007, HD2, RELATING TO PROCUREMENT.** Requires
cash or protest bonds to be returned to the initiating parties, minus administrative
costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 17, 2022
TIME: 3:10 p.m.
PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

S & M Sakamoto, Inc., General Contractor

S & M Sakamoto, Inc. supports H.B. 2007, HD2, Relating to Procurement, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

S & M Sakamoto, Inc. supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every other state that requires a cash or protest bond to appeal an agency's bid protest decision has adopted some form of this concept.

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

Last year, the Legislature passed 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 or protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous appeals without the unintended consequence of also deterring legitimate appeals on large projects.

Essentially, the effect of the removal of a bond cap provision last year without adopting this 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.

Allowing for the return of the cash or 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:**

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.

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NO STATUTORY BOND REQUIRED	BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL	BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION
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	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
	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.	
	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.	
	South Carolina - Bond possible but not required, 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.	
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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 Kupono case, the crucial public scrutiny, and findings, 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.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Dale S. Yoneda". The signature is fluid and cursive, written in a professional style.

Dale S. Yoneda, President



Alan Shintani INC.
GENERAL CONTRACTOR BC 13068

March 17, 2022

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ, AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2007, HD2, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 17, 2022
TIME: 3:10 p.m.
PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

My name is Fred Kim and I represent Alan Shintani, Inc. I am sharing our support for H.B. 2007, HD2. Since 1984, Alan Shintani, Inc. has been providing quality general contractor services and construction management for homes, commercial buildings, and government projects in a timely and cost-efficient manner. ASI has earned a solid reputation in Hawaii by continuously striving to succeed in all its construction endeavors through innovative and reliable means of construction services.

Alan Shintani, Inc. supports H.B. 2007, HD2, Relating to Procurement, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

Alan Shintani, Inc. supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every other state that requires a cash or protest bond to appeal an agency's bid protest decision has adopted some form of this concept.

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 passed 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 or protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous appeals without the unintended consequence of also deterring legitimate appeals on large projects.

Essentially, the effect of the removal of a bond cap provision last year without adopting this 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.

Allowing for the return of the cash or 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:**

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.

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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	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
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- 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.
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a civil action. In the Maui Kupono case, the crucial public scrutiny, and findings, 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.

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

A handwritten signature in black ink, appearing to read 'FKM', with a small dot at the end.

Fred Kim
President
Alan Shintani, Inc.



RALPH S. INOUE CO LTD
GENERAL CONTRACTOR

500 Alakawa St., #220E
Honolulu, Hawaii 96817

T: 808.839.9002
F: 808.833.5971

License No. ABC-457
Founded in 1962

March 16, 2022

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ, AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2007, HD2, RELATING TO PROCUREMENT.**
Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 17, 2022

TIME: 3:10 p.m.

PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

Ralph S Inouye Co, Ltd (RSI), a Hawaii general contractor for nearly 60 years, **supports H.B. 2007, HD2, Relating to Procurement**, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

RSI supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every state other than Hawaii that requires a cash or protest bond to appeal an agency's bid protest decision has adopted some form of this concept.

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

Last year, the Legislature passed 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 or protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous appeals without the unintended consequence of also deterring legitimate appeals on large projects.

Essentially, the effect of the removal of a bond cap provision last year without adopting this 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.

Allowing for the return of the cash or 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:**

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.

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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:

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>

NO STATUTORY BOND REQUIRED	BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL	BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION
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	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
	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.	
	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.	

	South Carolina - Bond possible but not required, 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 Kuponu 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 Kupono case, the crucial public scrutiny, and findings, 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.

- 6. TRANSPARENT AND FAIR GOVERNMENT IS CURRENTLY UNDER SERIOUS QUESTION.** It is especially important now to ensure the procurement process is transparent and fair. Suppressing bid protests questioning perceived unfair procurement awards conveys the wrong message to the public during these times of questionable practices by government officials in the news.

- 7. FEAR OF LAPSING FUNDS.** Some may fear that projects may be lost due to lapsing funds because of protest delays. A review of HRS Section 103D-701(f) provides the opportunity, however strict, to have the chief procurement officer proceed with an award if necessary to protect the substantial interest of the state. Of course there must be a well-reasoned written determination of the substantial interest being protected. Nevertheless this determination may be made pending an appeal to the department of commerce and consumer affairs under HRS section 103D-709, wherein the protest bond requirements apply. Hence, loss of a project due to lapsing of funds may be within the hands of the procuring entity before the issue of chilling bond requirements come into play.

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

JHC JONN H. CONNORS INSURANCE

2 WATERFRONT TOWER # 303

500 ALA MOANA BLVD.

TEL: 808-534-7319 FAX: 808-521-5995 CEL: 808-927-6774

EMAIL TO : TSOFOS@CONNORSHAWAII.COM

March 16, 2022

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ, AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: SUPPORT FOR H.B. 2007, HD2, RELATING TO PROCUREMENT.

Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 17, 2022

TIME: 3:10 p.m.

PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

Tom Sofos, Bond Manager of John H. Connors Insurance supports H.B. 2007, HD2, Relating to Procurement, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

Tom Sofos of John H. Connor Insurance supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every other state that requires a cash or protest bond to appeal an agency's bid protest decision has adopted some form of this concept.

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

Last year, the Legislature passed 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 or protest bond is to prevent the filing of frivolous appeals. This was a punitive action again protest of bids of which 99% are legitimate questions.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous appeals without the unintended consequence of also deterring legitimate appeals on large projects.

Essentially, the effect of the removal of a bond cap provision last year without adopting this 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.

Allowing for the return of the cash or 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:**

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

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

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. This is ridiculous.

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**

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

Sincerely,



Tom Sofos
Bond Manager.

Lindemann Construction Inc.

LATE

March 17, 2022

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ,
AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT
OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2007, HD2, RELATING TO PROCUREMENT.** Requires
cash or protest bonds to be returned to the initiating parties, minus administrative
costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 17, 2022
TIME: 3:10 p.m.
PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

Lindemann Construction Inc. is a small General Contractor that has been practicing in the Hawaiian Islands for the last 35 plus years and we usually perform in the Commercial market. We subscribe to perform most of our projects in the commercial work and get most of our business by working with contacts on previous projects.

Lindemann Construction Inc. **supports H.B. 2007, HD2, Relating to Procurement**, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

Lindemann Construction Inc. supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every other state that requires a cash or protest bond to appeal an agency's bid protest decision has adopted some form of this concept.

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

Last year, the Legislature passed 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 or protest bond is to prevent the filing of frivolous appeals.

However, we believe that the Legislature inadvertently left out safeguard language that the other states who require cash or 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. This provision ensures a balance that deters frivolous

	body. Remainder returned to bidder.	
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- 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 Kuponono 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

NO STATUTORY BOND REQUIRED	BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL	BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION
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	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
	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.	
	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	

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 Kupono case, the crucial public scrutiny, and findings, 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.

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



LATE

**SENATE COMMITTEE ON GOVERNMENT OPERATIONS
State Capitol, Via Videoconference
415 South Beretania Street
3:10 PM**

March 17, 2022

RE: HB 2007 HD2 - Relating to Procurement.

Chair Moriwaki, Vice Chair Dela Cruz, and members of the committee:

My name is Daryl Takamiya, 2022 President of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii. Our members build the communities we all call home.

BIA-Hawaii is in support of HB 2007, Relating to Procurement. This bill would require that cash or protest bonds be returned to the initiating parties, minus administrative costs, except in cases where the appeal was found to be frivolous or in bad faith.

The intent of this bill is to insert safeguard language which protects the bid protest filer from losing their bond money, which is currently required when filing a bid protest. While we understand that the bond requirement was implemented to prevent the filing of frivolous bid protests, this bill lends balance to the bid protest and procurement process.

We are in support of HB 2007 HD2, and appreciate the opportunity to provide our comments on this matter.