



**STATE OF HAWAII**  
**STATE PROCUREMENT OFFICE**

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TESTIMONY  
OF  
BONNIE KAHAKUI, ACTING ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE  
ON  
GOVERNMENT REFORM  
MARCH 16, 2022, 9:00 AM

SENATE BILL 2335, SD2  
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 2335, SD2. The State Procurement Office (SPO) opposes the bill in its entirety and provides the following comments.

SB2335, SD2 proposes to add a new section to part III of Chapter 103D, Hawaii Revised Statutes called **“§103D - Competitive sealed bidding; median bid method.”**

The language proposed in SB2335, SD2 is almost identical to §103D-302, Hawaii Revised Statutes (HRS), which already addresses the competitive sealed bidding process and awarding to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. The only difference between §103D-302, Hawaii Revised Statutes (HRS) and the new proposed section in §103D is the following:

*“For construction projects, a purchasing agency may choose to award the bid to the responsible and responsive bidder whose bid is closest to the median of all bids submitted and meets the requirements and criteria set forth in the invitation for bids; provided that the agency shall stipulate in the invitation for bids that the median award method shall be used.*

*For purposes of this subsection, if there is an even number of bidders, the median bidder shall be the bidder whose bid is closest to and lower than the arithmetic mean of the two middle bids.”*

The SPO does not see any additional value to awarding a contract to the bid closest to the median of all bids submitted when another bid may be lower, responsive, and responsible. SB2335, SD2 does not offer any explanation when it is appropriate to accept the “bidder with bid closest to the median of all bids submitted”. Vendors will not have the incentive to submit

their best offers if award will be made to the bid closest to the median of all bids submitted. In this case, vendors will be encouraged to submit higher prices, so they do not have the lowest bid. The bill also does not address how an award is made if only two bids are submitted.

The Hawaii Public Procurement Code is the single source of public procurement policy to be applied equally and uniformly while providing fairness, open competition, a level playing field, government disclosure, and transparency in the procurement and contracting process vital to good government.

Competitive sealed bidding's primary objective is that the contract shall be awarded with reasonable promptness by written notice to the **lowest, responsible, and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids**. It is also a best practice that bids are evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening, and no criteria may be used in bid evaluation that is not set forth in the solicitation.

“Responsible bidder or offeror” means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that will assure good faith performance, pursuant to the responsibility determination standards adopted by the policy board.

“Responsive bidder” means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

The State of Hawaii follows the American Bar Association (ABA) Model Code regarding competitive sealed bidding.

A 2018 Survey Summary by the National Association of State Procurement Officials (NASPO) reported that NASPO supports implementing the 2000 American Bar Association (ABA) Model Procurement Code’s provisions into state procurement laws. *“Sixty percent of the jurisdictions responding to the survey indicated that they have adopted the provisions of the Model Code partially or in its entirety. Of these states, the majority implemented all provisions of the 2000 ABA Model Code, or modeled their procurement codes after it.”*

Additionally, the ABA 2007 Model Code for Public Infrastructure Procurement in design-bid-build projects identifies the competitive sealed bidding process as the appropriate method for the construction phase, where the award is to the lowest responsible and responsive bidder, whose bid meets all the requirements.

Act 188, SLH 2021, amended HRS §103D-302, Competitive sealed bidding, (f) by requiring procurement officers to also consider past performance, if available, as part of the criteria that will affect the bid price and be considered in evaluation for award. The SPO is currently working on a past performance database and administrative rules to enforce this Act.

The SPO opposes the language of SB2335, SD2, in its entirety, as it does not address why a competitive sealed bidding award should be made to the bid closest to the median of all bids submitted. An agency selects the procurement method they will utilize and releases their solicitation notifying vendors how the contract will be awarded. The SPO would question why

an agency would choose a median-award process, which would require them to choose the median bidder, rather than award to the responsible and responsive low bidder, especially when there are budget constraints. In addition, there may be unintended consequences. For instance, vendors may collude to have more predictable outcomes, or vendors may not submit their best offers, resulting in higher costs for the State.

Each year new procurement laws are applied to state agencies causing state agency contracts to become more complex and costly. It is difficult to justify a new method of procurement titled, "Competitive sealed bidding; median bid method" to award to the bid closest to the median of all bids submitted.

Thank you.



STATE OF HAWAII  
DEPARTMENT OF EDUCATION  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

**Date:** 03/16/2022

**Time:** 09:00 AM

**Location:** 309 Via Videoconference

**Committee:** House Government Reform

**Department:** Education

**Person Testifying:** Keith T. Hayashi, Interim Superintendent of Education

**Title of Bill:** SB 2335, SD2 RELATING TO PROCUREMENT.

**Purpose of Bill:** Allows purchasing agencies to use the median bid method of procurement. Effective 7/1/2050. (SD2)

**Department's Position:**

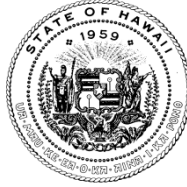
The Hawaii State Department of Education (Department) supports SB2335, SD2. This bill provides options and encourages contractors to submit fair and reasonable pricing due to the selection of the median bid.

For past Department construction contracts, the low bid process resulted in an average of 11% in contract change orders. Unscrupulous contractors lowball the winning bid then subsequently submit a series of change orders during the course of construction. The Department had 3,407 construction contracts that resulted in \$1.742 billion in contract bid price end up in \$185 million in change orders, representing an 11% average of contract price in change orders.

Currently, the Department has 175 construction contracts totaling \$673 million. An average of 11% in change orders represents an additional \$74 million in cost increase to complete construction.

Thank you for the opportunity to provide testimony in support of this measure.

DAVID Y. IGE  
GOVERNOR



**TESTIMONY BY:**

JADE T. BUTAY  
DIRECTOR

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

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

March 16, 2022  
9:00 AM  
State Capitol, Teleconference

**S.B. 2335, S.D. 2**  
**RELATING TO PROCUREMENT**

House Committee on Government Reform

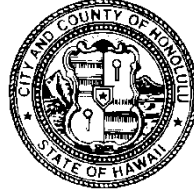
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The Department of Transportation (DOT), **supports** this bill that proposes to allow procuring agencies to use the median bid method of procurement.

The Hawaii Administrative Rules § 3-122 may be revised to develop rules providing for the requirements and procedures in implementing the median bid method of competitive sealed bidding. In general, the process should follow requirements under competitive sealed bidding provisions except with award not to the lowest responsive responsible bidder and instead to the responsive and responsible median bidder. The competitive sealed bid in HRS 103D-302 should be the default method and the median bid should be an allowable exception should the head of the purchasing agency determine in writing that is advantageous and in the best interest of the state to use.

Thank you for the opportunity to provide testimony.

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 HOUSE COMMITTEE ON GOVERNMENT REFORM  
**March 16, 2022, 9:00 AM, Conference Room 309 and Videoconference**

TO: The Honorable Angus L.K. McKelvey, Chair  
and Members of the House Committee on Government Reform

RE: OPPOSITION OF SENATE BILL 2335, SD2, RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **strongly opposes** Senate Bill (SB) 2335, SD2, Relating to Procurement.

The bill does not provide enough information as to why the median bid method is being proposed. The proposed procurement method is unclear, will lead to more protests and increased time and costs to the City.

A contractor is entitled to all rights and remedies afforded under its contract, including the right to submit a change proposal, but all change orders are still subject to review and approval of the governmental contracting party. All change orders deemed legitimate will add to the cost of the total contract, regardless if the award is to the lowest bidder or the median bidder.

If other factors need to be considered where the competitive sealed bidding method pursuant to HRS 103D-302 is not sufficient, the competitive sealed proposals method pursuant to HRS 103D-303 is available and includes the evaluation of past performance, price, and other factors as stated in the solicitation. The competitive sealed proposals method also includes the possibility of conducting discussions with offerors to better understand an offeror's proposal, including the price submitted.

For the reasons stated above, the City respectfully opposes Senate Bill 2335, SD2.

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](mailto:bfspurchasing@honolulu.gov).

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**GCA of Hawaii**

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 16, 2022

TO: HONORABLE ANGUS MCKELVEY, CHAIR, HONORABLE TINA WILDBERGER, VICE CHAIR, COMMITTEE ON GOVERNMENT REFORM

SUBJECT: **OPPOSITION OF S.B. 2335 SD2, RELATING TO PROCUREMENT.**  
Allows purchasing agencies to use the median bid method of procurement.

HEARING

DATE: Wednesday, March 15, 2022  
TIME: 9:00 a.m.  
PLACE: Capitol Room 309

Dear Chair McKelvey, Vice Chair Wildberger 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 **opposition** of S.B. 2335 SD2, which allows purchasing agencies to use the median bid method of procurement.

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

The median bid method does not maximize the use of public funds when there are lower responsible bidders. If the purpose of this measure is to prevent contractors from lowballing their bid, then the original form of the bill allowing for the second low bid method would be better for the State.

Additionally, the Legislature adopted a past performance database last year that should identify these problem bidders.

Instead, this measure will encourage bidders to submit higher prices in hopes of being the median bid.

GCA is concerned of the unintended consequences of this bill that will ultimately increase the cost of construction for the taxpayers.