



**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
FEBRUARY 3, 2022, 3:00 P.M.

SENATE BILL 3015
RELATING TO PROCUREMENT

Chair Moriwaki, Vice Chair Dela Cruz, and members of the committee, thank you for the opportunity to submit testimony on SB3015. The State Procurement Office (SPO) submits the following comments:

ACT 224, SLH 2021, amended Chapter 103D-709, Hawaii Revised Statutes (HRS), changing the cash or protest bond amount to one (1) percent of the estimated value of the contract, with no cap. This bill recommends establishing new reduced bond amounts, with caps.

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

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

- In 2021, the number of appeals jumped to a total of 16:
 - Between January 1, 2021, and July 31, 2021, OAH received 8 appeals.
 - Between August 1, 2021, and December 31, 2021, OAH received an additional 8 appeals which required protest bonds.

These statistics suggests that the one percent (1%) protest bond, without cap, did not deter vendors from filing protests filled with the OAH. Instead, the number of protest fillings increased. The results appear to contradict the notion that an increase in protest bond would result in vendors filing fewer requests for an administrative hearing due to the higher cost.

Thank you.



February 3, 2022

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To: Committee on Government Operations
Sen. Sharon Y. Moriwaki, Chair
Sen. Donovan M. Dela Cruz, Vice Chair

From: Malcolm Barcarse, Jr. ABC Hawaii Legislative Committee Chair.

Associated Builders and Contractors Hawaii Chapter in **SUPPORT** of SB 3015.

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

Thank you for the opportunity to testify, my name is Malcolm Barcarse, Jr. I am currently the Legislative Committee Chair of Associated Builders and Contractors, Hawaii Chapter which represents over 150 member companies in the Construction Industry. We also have a State Approved Trade Apprenticeship Program in the trades of Carpentry, Electrical, Painting, Plumbing and Roofing.

ABC Hawaii Supported the concept of Act 224 of 2021 during the last legislative session as we felt it was necessary to hold agencies accountable for processing bid protests in a timely manner. However, late in session a provision raising the fees for bid protest bonds were raised to such a level that we believe is a barrier for contractors to submit legitimate bid protests. Therefore we SUPPORT this effort to change the bid protest bond fees to the levels that existed before Act 224 and ask that this committee pass this bill.

Thank you for the opportunity to testify

ABC Hawaii Staff

Jeffrey Durham – President/CEO Renee Rosehill – Operations Manager
Shannon Richardson – Education Director Justin Ou – CEF Service Coordinator

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



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 3, 2022

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

SUBJECT: **SUPPORT OF S.B. 3015, RELATING TO PROCUREMENT.** Amends the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

HEARING

DATE: Thursday, February 3, 2022
TIME: 3:00 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 is in **support** of S.B. 3015, which amends the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

The primary purpose of the Procurement Code is to ensure fair and ethical procurement while maximizing the use of public funds. The restoration of a cap on the cash/protest bond required for parties initiating administrative proceedings is necessary to prevent an environment where unethical procurement could go unchecked. The removal of the previous \$10,000 bond cap attempted to reduce the number of frivolous appeals of agency protest decisions. However, the unintended consequence is that it actually deterred legitimate protests from being filed. Essentially, the effect of this provision is that it prevents construction companies from appealing an agency's bid protest decision because it raises the cost of the appeal so high that it becomes unaffordable and no longer fiscally prudent. This drastically 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

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>

Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable. The cash/protest bond cap was Hawaii's safeguard.

The restoration of a cap 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:

<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 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 to be listed in bids. The prospect of having to list unlicensed noncontractor entities as subcontractors in a bid would have totally changed and disrupted procurement, bogged down jobs in protests, and cost the State millions and millions of dollars. The substantive merits of the case would not have been addressed without a bid protest and appeal, yet that is what would have happened if the current bond requirement had been in place. (see decision, https://cca.hawaii.gov/wp-content/uploads/2021/11/PDH-2021-003-MAUI-KUPONO-BUILDERS-v-DEPT-OF-TRANSPORTATION_with-Final-Judgment.pdf)

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

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

Notably, since the imposition of this requirement, there has been one (1) posted decision on procurement violations even though the statute took effect midway through 2021.

The GCA is open to finding an appropriate cap amount that both deters frivolous protests while ensuring that legitimate ones are not deterred.

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

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

AIRLINES COMMITTEE OF HAWAII



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



February 3, 2022

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

Re: SB 3015 – RELATING TO PROCUREMENT – IN OPPOSITION
Via Videoconference; 3:00 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 SB 3015, which amends Section 103D-709, Hawaii Revised Statutes, Administrative proceedings for review, to replace the protest bond amount for a contract.

Last year, the legislature passed SB 1329 (Act 184, SLH 2021), which established time limits to resolve certain procurement protests and amended the cash or protest bond amount for parties initiating administrative proceedings for review of certain protest decisions.

SB 3015 reverses Act 184, SLH 2021 by reinstating amounts for contracts with an estimated value of less than \$500,000 and less than \$1,000,000 and decreases from one percent to one half percent but not to exceed an undefined amount if the estimated value of the contract is \$1,000,000 or more.

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

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

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

Sincerely,

Brendan Baker
ACH Co-chair

Mark Berg
ACH Co-chair

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



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, February 3, 2022
3:00 P.M.
State Capitol, Teleconference



S.B. 3015
RELATING TO PROCUREMENT

Senate Committee on Government Operations

The Department of Transportation (DOT) strongly **opposes** amending subsection (e) of Section 103D-709, Hawaii Revised Statutes, which would establish a not to exceed limit on the cash or protest bond for administrative proceedings for review on protests; \$1,000 for a contract with an estimated value of less than \$500,000; \$2,000 for a contract with an estimated value of \$500,000 or more, but less than \$1,000,000; or one-half per cent of the estimated value of the contract – if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond exceed the established not to exceed limit.

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.

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.

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;”

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

Thank you for the opportunity to provide testimony.