



March 31, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT OF S.B. 1135 HD1, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: Friday, March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Capitol Room 308

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

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

GCA supports S.B. 1135 HD1, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

GCA prefers the bill as introduced, but believes the HD1 is a step in the right direction.

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

Two years ago, 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 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.<sup>1</sup> 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](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**

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<sup>1</sup> [https://www.civilbeat.org/?p=1443162&mc\\_cid=4772bbfeef&mc\\_eid=7e39375e0a](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>



GENERAL  
CONTRACTORS  
ASSOCIATION  
OF HAWAII

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:

QUALITY PEOPLE. QUALITY PROJECTS



**GENERAL CONTRACTORS ASSOCIATION OF HAWAII**

**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**

QUALITY PEOPLE. QUALITY PROJECTS

<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, state can only recover costs and charges associated with the protest from the bond. Remaining bond funds are returned to the protestor.</p>	
	<p>TENNESSEE - Bond is 5%, small business owners can apply for an exemption, and bond</p>	

	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](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.



**GENERAL  
CONTRACTORS  
ASSOCIATION  
OF HAWAII**

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.

QUALITY PEOPLE. QUALITY PROJECTS



Hawaii Operating Engineers Industry  
Stabilization Fund PAC  
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Kapolei, HI 96707  
Phone: (808) 845-6221  
Website: [www.hoeisf.com](http://www.hoeisf.com)

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March 31, 2023

House Committee on Finance  
Representative Kyle Yamashita, Chair  
Representative Lisa Kitagawa, Vice Chair

**TESTIMONY IN SUPPORT**  
Senate Bill 1135 HD1, Relating to Procurement

Aloha Chair Yamashita, Vice Chair Kitagawa, and Members of the Committee:

Thank you for the opportunity to submit testimony on behalf of the Hawaii Operating Engineers Industry Stabilization Fund Political Action Committee (HOEISF PAC). The HOEISF PAC is a non-profit labor management organization whose core mission is to represent the interests of the Operating Engineers Local Union No. 3 and Hawaii's leading contractors and ensure that the industry is thriving and sustainable for the future.

We are writing in **support of SB1135 HD1**, 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.

We support this bill because it seeks to discourage frivolous appeals while at the same time not potentially deterring legitimate appeals. Hawaii is one of only seven states in the country that impose a bond requirement to submit a bid protest or seek an appeal of a bid protest decision. In addition, the federal government also does not impose this requirement. By passing this bill, the legislature would align our state with the vast majority of the country.

Thank you for the opportunity to provide our testimony in support and we urge you to pass this measure.



# **S & M SAKAMOTO, INC.**

## **GENERAL CONTRACTORS**

March 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

### HEARING

DATE: March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Conference Room 308

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

**S & M Sakamoto, Inc., general contractor.**

**S & M Sakamoto, Inc. supports S.B. 1135 HD1 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the 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.

Two years ago, 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 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.<sup>1</sup> 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](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**

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<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
<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</p>	

	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

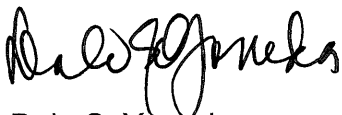
to be listed in bids. The prospect of having to list unlicensed noncontractor entities as subcontractors in a bid would have totally changed and disrupted procurement, bogged down jobs in protests, and cost the State millions and millions of dollars. The substantive merits of the case would not have 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](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,  
S & M Sakamoto, Inc.



Dale S. Yoneda  
President



**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 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA,  
VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Conference Room 308

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

Ralph S Inouye Co, Ltd (RSI), a Hawaii general contractor for over 60 years, **supports S.B. 1135 HD1 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the 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 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.

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<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>

<b>NO STATUTORY BOND REQUIRED</b>	<b>BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL</b>	<b>BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION</b>
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.	
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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 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 non-contractor 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](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.



# JAS. W. GLOVER, LTD.

GENERAL CONTRACTORS

License No. ABC-3

March 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.**

Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

## HEARING

DATE: March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Conference Room 308

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

Jas. W. Glover, Ltd. is a native Hawaiian owned company that has been doing business in Hawaii since 1935 and constructs many government projects.

Jas. W. Glover, Ltd. **supports S.B. 1135 HD1 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

Jas. W. Glover, Ltd. 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 maximizing the use of public funds.

Two years ago, 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 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.

### Honolulu

P.O. Box 579 • Honolulu, HI 96809  
tel (808) 591-8977 • fax: (808) 591-9174

### Hilo

890 Leilani St. • Hilo, HI 96720  
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### Kona

P.O. Box 4116 • Kailua-Kona, HI 96745  
tel: (808) 329-4113 • fax: (808) 326-6017

### Lihue

P.O. Box 1929 • Lihue, HI 96766  
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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.<sup>1</sup> 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](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:

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<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>

<b>NO STATUTORY BOND REQUIRED</b>	<b>BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL</b>	<b>BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION</b>
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 if 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.	

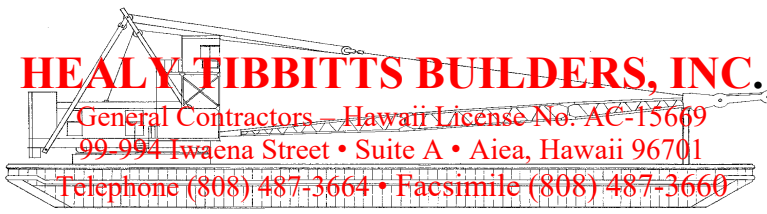
	<p>UTAH - Protest bond depends upon the contract price, bond forfeiture upon losing appeal is only if the government finds that the protest was frivolous or filed only to delay.</p>	
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3. **THE BOND AMOUNT HURTS COMPETITION AND THE PERCEPTION OF HAWAII 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](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.

Jas. W. Glover, Ltd.  
*John Romanowski*  
 John Romanowski  
 Vice President



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March 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Conference Room 308

Dear Chair Yamashita, Vice Chair Kitagawa 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 S.B. 1135 HD1 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the 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 to is ensure fair and ethical procurement while maximining the use of public funds.

Two years ago, 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 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.<sup>1</sup> 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:**

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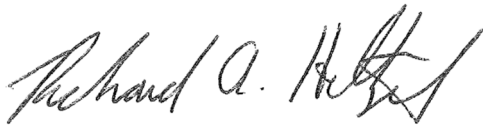
**5. BOND FORFEITURE OF AN UNCAPPED AMOUNT IN EVERY INSTANCE IN WHICH A BIDDER FAILS TO PREVAIL WILL ELIMINATE OVERSIGHT AND**

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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, appearing to read "Richard A. Heltzel". The signature is written in a cursive, flowing style with some loops and flourishes.

Richard A. Heltzel  
President

# Tom Sofos Insurance & Bonding, Inc.

500 Ala Moana Blvd. # 2-303

Honolulu, Hawaii 96813

[www.tsofos@connorshawaii.com](mailto:www.tsofos@connorshawaii.com)

Tel: 808-534-7319

Cell: 808-927-6774

March 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA,  
VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

## HEARING

DATE: March 31, 2023

TIME: 3:00 p.m.

PLACE: Conference Room 308

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

**Tom Sofos Ins. & Bonding, Inc. We provide surety bonding and insurance services to contractors**

**Tom Sofos Ins. & Bonding, Inc. supports S.B. 1135 HD1 Relating to Procurement,** which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

**Tom Sofos Ins. & Bonding, 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.

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<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->

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.

Thomas Sofos

President

PS: I've been involved in 7 protests. And our contractor won 6 out of the 7 protests. The protest they didn't win was because the project was cancelled. All were disputes were due to the State Agencies misunderstanding of the contracts and specifications.



## JAYAR CONSTRUCTION, INC.

1176 Sand Island Parkway ▼ Honolulu, Hawaii 96819  
Tel (808) 843-0500 ▼ Fax (808) 843-0067  
Contractor's License ABC-14156

March 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA,  
VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

### HEARING

DATE: March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Conference Room 308

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

**Jayar Construction, Inc. is a site work company who has been in business in Hawaii for over 33 years.**

**Jayar Construction, Inc. supports S.B. 1135 HD1 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

**Jayar 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 is to ensure fair and ethical procurement while maximizing the use of public funds.

Two years ago, 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 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.<sup>1</sup> 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](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,

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<sup>1</sup> [https://www.civilbeat.org/?p=1443162&mc\\_cid=4772bbfeef&mc\\_eid=7e39375e0a](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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**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:

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.	
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	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](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.

Leonard K.P. Leong  
President

March 30, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.**  
Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.



HEARING  
DATE: March 31, 2023  
TIME: 3:00 p.m.  
PLACE: Conference Room 308

Dear Chair Yamashita, Vice Chair Kitagawa and Members of the Committee,  
**Royal Contracting Co., Ltd – We contract with various agencies**

**Royal Contracting Co., Ltd supports S.B. 1135 HD1 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

Royal Contracting Co., Ltd 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.

Two years ago, 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 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.<sup>1</sup> Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable.

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

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<https://www.bizjournals.com/pacific/news/2021/05/26/hawaii-bill-drive-up-cost-appeal-bid-protest-rule.html>  
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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:







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"An Equal Employment Opportunity Employer"



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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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"An Equal Employment Opportunity Employer"

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> )



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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.

Sincerely,

A handwritten signature in black ink, appearing to read 'Leonard K.P. Leong'.

Leonard K.P. Leong  
President

March 31, 2023

TO: HONORABLE KYLE T. YAMASHITA, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT FOR S.B. 1135 HD1, RELATING TO PROCUREMENT.**  
Requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith

Hearing Date: March 31, 2023  
Hearing Time: 3:00 p.m.  
Hearing Place: Capitol Room 308

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

I am a director of Damon Key Leong Kupchak Hastert, and represent contractors both in defense and opposition to bid protests and bid protest appeals. I write in strong support of S.B. 1135 HD1 Relating to Procurement, which requires cash or protest bonds to be returned to the initiating party, less twice the amount of the administrative costs, except in cases where the appeal was frivolous or made in bad faith.

#### BACKGROUND

In July 2021, Governor Ige signed into law a change to the procurement code that effectively ended meaningful procurement oversight over large procurement projects in this State. This happened through a last minute bill change whereby the legislature eliminated the \$10,000.00 cap on the filing fee or “protest bond” required to appeal the decision of public agencies on pending bid protests. Prior to July 2021, a disappointed bidder whose bid protest was denied, or a bidder whose bid was being rejected because of a bid protest, could file an appeal seeking administrative review of the public agency’s decision. These appellants would have to post a bond or cashier’s check of up to \$10,000.00, depending upon the size of the bid at stake, to get a hearing. Considering that it costs \$315.00 to file a complaint in court, a \$10,000 filing fee was a daunting price, and as a result, this process yielded only a handful of administrative appeals a year. However, the threat of administrative oversight was enough to provide additional protection to bidders that the procurement code was being followed and enforced.

Even this handful of appeals, however, was apparently too much oversight for some. Now, if you want to seek a third party review of an agency's decision on a bid protest, you have to post a bond of not less than 1% of the total bid price. If the bid is for a large job or is bid out as a multi-year contract, say 100,000,000.00, you have to put up \$1,000,000 in cash or in a bond just to get a hearing. What country requires a litigant to pay \$1,000,000 just for a chance to be heard? And if you don't win, you immediately lose the \$1,000,000.00, even if your protest and issue was a close call on the law and was an issue that needed to be addressed.

In 2021, we warned that this change in the law would cause an immediate and dramatic chilling effect on administrative appeals and on public oversight over the procurement process. We were told that the bill was "new" and we should wait to see what happened before taking action against it.

We now know what happened. The bill basically killed all administrative hearing review of bid protests over large procurement projects in the State of Hawaii.

There were three filed bid protest decisions published online by the Office of Administrative Hearings for the whole of 2022.

One of the protests was thrown out for a failure to meet the bond requirements of the law. *Soderholm Sales and Leasing, Inc. v. Hawaii State Department of Education*, PDH-2022-01, (May 26, 2022).

The second protest was a protest of a solicitation, therefore no bond was required (it was also thrown out for lack of jurisdiction). *Soderholm Sales and Leasing, Inc. v. Department of Transportation Services, City and County of Honolulu*, PDH 2022-002 (June 6, 2022).

The third and *only* administrative appeal that was actually decided by the OAH on its merits, required the posting of a nearly \$60,000.00 bond just to allow the appeal to be heard (and rejected). This is one matter out of the thousands of procurements issued in this state on a yearly basis. This does not allow for oversight. Even more backward, the more public monies that are at stake, the less possibility there is for oversight, because the higher the cost will be for a bidder to have the chance of being heard.

As we previously noted, Hawaii is the **ONLY** state in the entire country that imposes this kind of barrier to procurement due process. Hawaii is the **ONLY** state that immediately takes the bond amount in the event an appeal is denied. As a result

of its outlier status with respect to bonds, Hawaii will soon be the ONLY state with no practicable means for oversight over large procurement jobs.

According to a 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:

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	<p>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.</p>	
	<p>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.</p>	
	<p>UTAH - Protest bond depends upon the contract price, bond forfeiture upon</p>	

	losing appeal is only if the government finds that the protest was frivolous or filed only to delay.	
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1. **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.
2. **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. 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.
3. **TRANSPARENT AND FAIR GOVERNMENT IS CURRENTLY UNDER SERIOUS QUESTION.** It is especially important now to ensure the procurement process is transparent and fair. Hawaii is currently in the process of procurement of investment of enormous sums of public infrastructure funds. Effectively eliminating appeals of bid protest decisions conveys the wrong message to the public and fosters the impression that our legislature is not concerned with maintaining oversight over how these public funds are spent.

The procurement code was supposed to take the place of the due process afforded to protestors who formerly had to rush to court and seek a TRO to prevent a wrongful



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bid from being awarded in violation of the law. The procurement code was supposed to provide an orderly process through which these types of inquiries could be dealt with through administrative hearings on an expedited basis. However, through lobbying efforts, these rights to a timely hearing have been eroded bit by bit, first through imposition of a jurisdictional threshold of “amount in controversy” before an issue will be decided. Then, through imposition of a filing fee, then an administrative hearing bond that was capped at \$10,000.00 (which, again, is more than 31 times the cost of filing a complaint in Circuit Court). But now, that “right” has been virtually priced out of reach for most large projects – precisely because no bidder can afford to risk a million or multi million dollar “filing fee” they will automatically forfeit unless they prevail at hearing. This law has placed a barrier to due process that hurts procurement, and it cannot stand. We write in strong favor of a modification that either restores the cap or provides for return of the bond except when the appeal is found to be frivolous or brought in bad faith.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'AHO', with a horizontal line extending to the right.

Anna H. Oshiro

AHO:kynf  
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