



February 9, 2023

TO: HONORABLE ANGUS L.K. MCKELVEY, CHAIR, HONORABLE MIKE GABBARD, VICE CHAIR, COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: **SUPOORT OF OF S.B. 1135, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: Thursday, February 9, 2023
TIME: 3:00 p.m.
PLACE: Capitol Room 225

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

The primary purpose of the Procurement Code 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.¹ Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable.

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

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

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

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

According to the 2013 NASPO study, it found only seven (7) out of fifty states, which require a protest bond of some sort. This includes Hawaii. Of these seven states, **Hawaii is the ONLY state that imposes immediate forfeiture of the bond to the State’s general fund if a protestor loses an appeal.** Every one of the other six states that impose a bond requirement,

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



only require either partial forfeiture to pay for costs, or forfeiture under certain conditions, most often a frivolous or bad faith protest:

**GENERAL
CONTRACTORS
ASSOCIATION
OF HAWAII**

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 Kuponu bid protest, they were the low bidder by \$700,000.00. Their bid was rejected. If they had been required to post a bond for \$250,000 on that \$25 million dollar job, they would not have pursued it. The State and its taxpayers would have had to pay \$700,000 more for the work. Moreover, the issue in that case was subcontractor listing, and whether non-construction contractor entities like truckers and other service providers, needed to be listed in bids. The prospect of having to list unlicensed noncontractor entities as subcontractors in a bid would have totally changed and disrupted procurement, bogged down jobs in protests, and cost the State millions and millions of dollars. The substantive merits of the case would not have been addressed without a bid protest and appeal, yet that is what would have happened if the current bond requirement had been in place. (see decision, https://cca.hawaii.gov/wp-content/uploads/2021/11/PDH-2021-003-MAUI-KUPONO-BUILDERS-v-DEPT-OF-TRANSPORTATION_with-Final-Judgment.pdf)

5. BOND FORFEITURE OF AN UNCAPPED AMOUNT IN EVERY INSTANCE IN WHICH A BIDDER FAILS TO PREVAIL WILL ELIMINATE OVERSIGHT AND OPEN GOVERNMENT – THE PURPOSE OF BID PROTESTS.

It should be noted that the filing fee for an action in Circuit Court is \$315.00. The previous cap on a request for administrative review of bid protest decisions was \$10,000.00, nearly 32 times the cost of a civil action. In the Maui Kuponu 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
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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.

QUALITY PEOPLE. QUALITY PROJECTS

SAH - Subcontractors Association of Hawaii

1188 Bishop St., Ste. 1003**Honolulu, Hawaii 96813-2938

Phone: (808) 537-5619 ✦ Fax: (808) 533-2739

February 9, 2023

Testimony To: Senate Committee on Government Operations
Senator Angus L.K. McKelvey, Chair

Presented By: Tim Lyons, President

Subject: S.B. 1135 – RELATING TO PROCUREMENT.

Chair McKelvey and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct contracting trade organizations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We fully support this bill.

We understand that protests are a problem and that they slow up the process however, we think it is important to remember that a protest is oftentimes a private contractor doing the work of government; that is, calling to attention to some irregularity in the procurement process.

We think the process should be sufficiently difficult to discourage petty protests but not so high as to dissuade if one has a rightful case. Not only does the initiating party have to go through the process of filing the protest and the accompanying expenses involved in the administrative hearing plus, the time and effort that it will take, they now stand to also lose the protest bond amount as well. It is not likely that the initiating party would be able to build in the cost of paying for that bond in its very next project but rather would have to spread it out as a cost of doing business.

Based on the above, we support this bill.

Thank you.



S & M SAKAMOTO, INC.
GENERAL CONTRACTORS

February 9, 2023

TO: HONORABLE ANGUS L.K. MCKELVEY, CHAIR, HONORABLE MIKE GABBARD, VICE CHAIR, AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

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

HEARING

DATE: February 9, 2023
TIME: 3:00 p.m.
PLACE: Conference Room 225

Dear Chair McKelvey, Vice Chair Gabbard and Members of the Committee,

S & M Sakamoto, Inc., General Contractor

S & M Sakamoto, Inc. supports S.B. 1135 Relating to Procurement, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

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

The primary purpose of the Procurement Code 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.¹ Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable.

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

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

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

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

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

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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	

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	South Carolina - Bond possible but not required, state can only recover costs and charges associated with the protest from the bond. Remaining bond funds are returned to the protestor.	
	TENNESSEE - Bond is 5%, small business owners can apply for an exemption, and bond amount is to be used for costs and subject to forfeiture only upon a finding of bad faith or frivolous action.	
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3. THE BOND AMOUNT HURTS COMPETITION AND THE PERCEPTION OF HAWAII AS A STATE THAT SUPPORTS OPEN AND FAIR PROCUREMENT.

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

- 4. THE BOND AMOUNT IS AN INEFFECTIVE REVENUE GENERATOR.** If the idea of increasing the bond amount is to generate revenue for the State, this is short sighted, because half of the bid protests and appeals are made by **low** bidders whose bids have been rejected for reasons the bidder disputes. For example, in the Maui Kuponu bid protest, they were the low bidder by \$700,000.00. Their bid was rejected. If they had been required to post a bond for \$250,000 on that \$25 million dollar job, they would not have pursued it. The State and its taxpayers would have had to pay \$700,000 more for the work. Moreover, the issue in that case was subcontractor listing, and whether non-construction contractor entities like truckers and other service providers, needed

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

- 5. BOND FORFEITURE OF AN UNCAPPED AMOUNT IN EVERY INSTANCE IN WHICH A BIDDER FAILS TO PREVAIL WILL ELIMINATE OVERSIGHT AND OPEN GOVERNMENT – THE PURPOSE OF BID PROTESTS.** It should be noted that the filing fee for an action in Circuit Court is \$315.00. The previous cap on a request for administrative review of bid protest decisions was \$10,000.00, nearly 32 times the cost of a civil action. In the Maui Kupono case, the crucial public scrutiny, and findings, would have been impossible without the filing of an appeal and a request to review such actions.

Public procurement cannot be beyond the public's review, yet imposing an uncapped bond requirement as a condition of review, that subjects a bidder to immediate punitive loss in the event its legitimate concerns do not result in a reversal of the agency's actions, would accomplish the same thing.

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

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F: 808.833.5971

License No. ABC-457
Founded in 1962

February 7, 2023

TO: HONORABLE ANGUS L.K. MCKELVEY, CHAIR, HONORABLE MIKE GABBARD, VICE CHAIR, AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

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

HEARING

DATE: February 9, 2023
TIME: 3:00 p.m.
PLACE: Conference Room 225

Dear Chair McKelvey, Vice Chair Gabbard and Members of the Committee,

Ralph S Inouye Co, Ltd (RSI), a Hawaii general contractor for nearly 60 years, **supports S.B. 1135 Relating to Procurement**, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

RSI supports this measure because it promotes fair and ethical procurement by adopting safeguard language that prevents the chilling effect of deterring legitimate appeals of agency decisions regarding bid protests. In fact, every 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.¹ Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable.

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

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

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Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
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3. THE BOND AMOUNT HURTS COMPETITION AND THE PERCEPTION OF HAWAII AS A STATE THAT SUPPORTS OPEN AND FAIR PROCUREMENT.

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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.

- 6. TRANSPARENT AND FAIR GOVERNMENT IS CURRENTLY UNDER SERIOUS QUESTION.** It is especially important now to ensure the procurement process is transparent and fair. Suppressing bid protests questioning perceived unfair procurement awards conveys the wrong message to the public during these times of questionable practices by government officials in the news.
- 7. FEAR OF LAPSING FUNDS.** Some may fear that projects may be lost due to lapsing funds because of protest delays. A review of HRS Section 103D-701(f) provides the opportunity, however strict, to have the chief procurement officer proceed with an award if necessary to protect the substantial interest of the state. Of course there must be a well-reasoned written determination of the substantial interest being protected. Nevertheless this determination may be made pending an appeal to the department of commerce and consumer affairs under HRS Section 103D-709, wherein the protest bond requirements apply. Hence, loss of a project due to lapse of funds may be within the hands of the procuring entity before the issue of chilling bond requirements come into play.

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

February 7, 2023

Honorable Angus L.K. McKelvey, Chair
senmckelvey@capitol.hawaii.gov
Honorable Mike Gabbard, Vice Chair
sengabbard@capitol.hawaii.gov
Committee on Government Operations
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Testimony in Support of S.B. 1135, RELATING TO
PROCUREMENT: Requires cash or protest bonds to be returned to
the initiating parties, minus administrative costs, except in cases
where the appeal was frivolous or made in bad faith
Hearing Date: Thursday, February 9, 2023
Hearing Time: 3:00 p.m.
Hearing Place: Capitol Room 225

Dear Chair McKelvey, Vice Chair Gabbard, and
Members of the Committee,

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.

In July 2021, Governor Ige signed into law 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.

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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. 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.

At the time, 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.

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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:

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,	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii

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<p>South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming</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 if 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</p>	

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	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.	

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.

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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 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,

Anna H. Oshiro

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Alan Shintani INC.
GENERAL CONTRACTOR ABC 13068

February 9, 2023

TO: HONORABLE ANGUS L.K. MCKELVEY, CHAIR, HONORABLE MIKE GABBARD, VICE CHAIR, AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

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

HEARING

DATE: February 9, 2023

TIME: 3:00 p.m.

PLACE: Conference Room 225

Dear Chair McKelvey, Vice Chair Gabbard and Members of the Committee,

I am sharing our support for S.B. 1135 Relating to Procurement. Alan Shintani, Inc. has been providing quality general contractor services and construction management for homes, commercial buildings, and government projects in a timely and cost-effective manner since 1984. ASI has earned an solid reputation in Hawaii by continuously striving to succeed in all its construction endeavors through innovation and reliable means of construction services.

Alan Shintani, Inc. supports S.B. 1135 Relating to Procurement, which requires the cash or protest bonds to be returned to the initiating parties, minus administrative costs, except in cases where the appeal was frivolous or made in bad faith.

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

The primary purpose of the Procurement Code 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.¹ Every state that requires a bond to appeal an agency decision implements safeguards to ensure that the protest is fair and affordable.

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

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

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

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

According to the 2013 NASPO study, it found only seven (7) out of fifty states, which require a protest bond of some sort. This includes Hawaii. Of these seven states, **Hawaii is the ONLY state that imposes immediate forfeiture of the bond to the State's general fund if a protestor loses an appeal.** Every one of the other six states that impose a bond

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

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, 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 losing appeal is only if the government finds that the protest was frivolous or filed only to delay.</p>	

3. THE BOND AMOUNT HURTS COMPETITION AND THE PERCEPTION OF HAWAII AS A STATE THAT SUPPORTS OPEN AND FAIR PROCUREMENT. Hawaii is already the sole outlier punishing bidders who seek independent review of State agency actions, by imposing a bond requirement plus immediate forfeiture, on unsuccessful bid protest appellants. By making the amount of the bond so high, the State is effectively eliminating appeals except for those companies large enough to

bear the risk of such punishment. Enabling justice only for those who can afford it, is exactly at odds with the purpose of the procurement code.

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

5. BOND FORFEITURE OF AN UNCAPPED AMOUNT IN EVERY INSTANCE IN WHICH A BIDDER FAILS TO PREVAIL WILL ELIMINATE OVERSIGHT AND OPEN GOVERNMENT – THE PURPOSE OF BID PROTESTS. It should be noted that the filing fee for an action in Circuit Court is \$315.00. The previous cap on a request for administrative review of bid protest decisions was \$10,000.00, nearly 32 times the cost of a civil action. In the Maui Kupono case, the crucial public scrutiny, and findings, would have been impossible without the filing of an appeal and a request to review such actions.

Public procurement cannot be beyond the public's review, yet imposing an uncapped bond requirement as a condition of review, that subjects a bidder to immediate punitive loss in the event its legitimate concerns do not result in a reversal of the agency's actions, would accomplish the same thing.

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



Fred Kim
President
Alan Shintani, Inc.