



February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT OF H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: Thursday, February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Capitol Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

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

GCA **supports** H.B. 2070, which requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

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

Three 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 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 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.



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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



February 1, 2024

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HEARING

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TIME: 9:00 a.m.

PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

**Koga Engineering & Construction, Inc.** is General Contractor that specializes in Earthwork & Underground Utility construction. Koga Engineering just celebrated its 50<sup>th</sup> Anniversary and employs approximately 70 salaried and hourly workers throughout the State of Hawaii.

**Koga Engineering & Construction, Inc. supports H.B. 2070 Relating to Procurement**, which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

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

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

Three 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.

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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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<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>

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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**

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  
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**BOND REQUIRED, BUT  
CLAIMS AGAINST THE  
BOND ARE LIMITED  
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FORFEITURE UPON  
FAILURE TO PREVAIL ON  
BID PROTEST OR APPEAL**

**BOND REQUIRED,  
IMMEDIATE  
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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>	
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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

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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 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.

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

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HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

**Healy Tibbitts Builders, Inc.** 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.

**Healy Tibbitts Builders, Inc. supports H.B. 2070 Relating to Procurement,** which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

**Healy Tibbitts Builders, 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.

Three 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

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

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>

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:



NO STATUTORY BOND REQUIRED	BOND REQUIRED, BUT CLAIMS AGAINST THE BOND ARE LIMITED AND/OR NO INSTANT FORFEITURE UPON FAILURE TO PREVAIL ON BID PROTEST OR APPEAL	BOND REQUIRED, IMMEDIATE FORFEITURE UPON LOSING APPEAL OF BID PROTEST DECISION
Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming	CALIFORNIA - Bond may be required, may be subjected to forfeiture if found in bad faith/frivolous.	Hawaii
	FLORIDA - Bond only limited to Department of Transportation projects, bond recovery limited to costs and charges incurred during the protest, and forfeiture only if administrative judge finds the protest was frivolous or improper.	
	NEVADA - Protest bond is only required when the chief procurement officers require it. Bond is lesser of 25% of the bid or \$250,000. If protest is rejected a claim can be brought against the protestor for the expenses incurred by the public	

	body. Remainder returned to bidder.	
	South Carolina - Bond possible but not required, state can only recover costs and charges associated with the protest from the bond. Remaining bond funds are returned to the protestor.	
	TENNESSEE - Bond is 5%, small business owners can apply for an exemption, and bond amount is to be used for costs and subject to forfeiture only upon a finding of bad faith or frivolous action.	
	UTAH - Protest bond depends upon the contract price, bond forfeiture upon losing appeal is only if the government finds that the protest was frivolous or filed only to delay.	

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

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

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

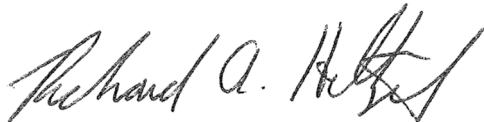
entities as subcontractors in a bid would have totally changed and disrupted procurement, bogged down jobs in protests, and cost the State millions and millions of dollars. The substantive merits of the case would not have been addressed without a bid protest and appeal, yet that is what would have happened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

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

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

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

Very truly yours,  
Healy Tibbitts Builders, Inc.

A handwritten signature in black ink, appearing to read "Richard A. Heltzel". The signature is fluid and cursive, with the first name being the most prominent.

Richard A. Heltzel  
President



Contractor's License No. ABC1036

MAIN OFFICE: 648 PIILANI STREET, PO BOX 4669, HILO, HAWAII 96720  
PHONE (808) 935-7194 FAX (808) 961-6417

KONA BRANCH: 74-5039B QUEEN KAAHUMANU HWY, PO BOX 3169, KAILUA-KONA, HI 96740  
PHONE (808) 329-8051 FAX (808) 329-3261

ESTABLISH 1926

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February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

My name is Leslie Isemoto, President of Isemoto Contracting Co., Ltd. We are a Hawaii Island contractor established in 1926. Approximately 90% of our business volume is State of Hawaii and County of Hawaii construction projects.

**Isemoto Contracting Co., Ltd. supports H.B. 2070 Relating to Procurement,** which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

**Isemoto 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.

Three 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).

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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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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:

<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	

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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.	
	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) )

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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.



# JAS. W. GLOVER, LTD.

GENERAL CONTRACTORS

License No. ABC-3

Page 1 of 4

February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

### HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

Jas. W. Glover, Ltd. (License No. 003) is a native Hawaiian owned construction company that has been in business since 1935.

Jas. W. Glover, Ltd **supports H.B. 2070 Relating to Procurement**, which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, 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.

Three 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

Honolulu	Hilo	Kona	Lihue
P.O. Box 579 • Honolulu, HI 96809	890 Leilani St. • Hilo, HI 96720	P.O. Box 4116 • Kailua-Kona, HI 96745	P.O. Box 1929 • Lihue, HI 96766
tel (808) 591-8977 • fax: (808) 591-9174	tel: (808) 935-0871 • fax: (808) 961-9237	tel: (808) 329-4113 • fax: (808) 326-6017	tel: (808) 245-3609 • fax: (808) 246-6209

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**BOND REQUIRED, BUT  
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ARE LIMITED AND/OR NO  
INSTANT FORFEITURE UPON  
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**BOND REQUIRED, 8 of 4  
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>	
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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.

Jas. W. Glover, Ltd.



John Romanowski  
Vice President

Testimony of  
Pacific Resource Partnership

House Committee On Labor & Government Operations  
Representative Scot Z. Matayoshi, Chair  
Representative Andrew Takuya Garrett, Vice Chair

HB 2070—Relating To Procurement  
Friday, February 1, 2024  
9:00 A.M.

Aloha Chair Matayoshi, Vice Chair Garrett, and Members of the Committee:

Pacific Resource Partnership (PRP) is a nonprofit organization that represents the Hawai'i Regional Council of Carpenters, the largest construction union in the state with approximately 6,000 members, in addition to more than 240 diverse contractors ranging from mom-and-pop owned businesses to national companies.

PRP writes in **support** of HB 2070, which requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

Three 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 to prevent the filing of frivolous appeals. However, the existing law does not allow for the cash or protest bond to be returned to the initiating part even when a legitimate protest is filed, unless they prevail in the administrative proceeding. The proposed amendments in HB 2070 will improve the law by preventing frivolous appeals without deterring legitimate appeals on large projects.

As such, we respectfully request your favorable decision on this measure. Thank you for this opportunity to submit written testimony.





# JAYAR CONSTRUCTION, INC.

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

February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

## HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

**Jayar Construction, Inc. is a sitework company that has been doing business in the State of Hawaii for over 30 years.**

**Jayar Construction, Inc. supports H.B. 2070 Relating to Procurement,** which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, 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 to is ensure fair and ethical procurement while maximizing the use of public funds.

Three 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, **Hawaii is the ONLY state that imposes immediate forfeiture of the bond to the**

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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>



**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.	
	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.	
	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.

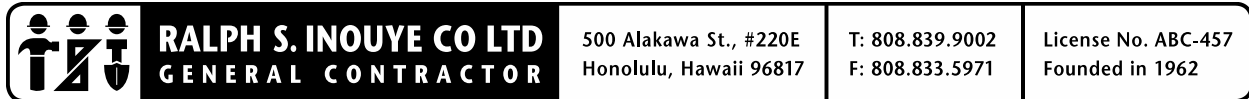
**4. THE BOND AMOUNT IS AN INEFFECTIVE REVENUE GENERATOR.** If the idea of increasing the bond amount is to generate revenue for the State, this is short sighted, because half of the bid protests and appeals are made by **low** bidders whose bids have been rejected for reasons the bidder disputes. For 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.



February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: February 1, 2024

TIME: 9:00 a.m.

PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

Ralph S Inouye Co, Ltd (RSI), a Hawaii general contractor for over 60 years, **supports H.B. 2070 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, 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 maximizing the use of public funds.

Three 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, **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>

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

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

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



**LATE**

▶ TOGETHER WE BUILD SUCCESS

February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

Nordic PCL Construction, Inc. is a kama'aina company founded in Honolulu in 1938 with a portfolio of projects that include commercial, healthcare, hospitality, high-rise condominiums, education, airports, and institutional projects on all the major islands.

Nordic PCL **supports H.B. 2070 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

Nordic PCL 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.

Three 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.

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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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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 if 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.

Yours truly,

NORDIC PCL CONSTRUCTION, INC.

A handwritten signature in blue ink, appearing to read "Glen Kaneshige", written in a cursive style.

Glen Kaneshige  
President



HAWAIIAN DREDGING  
CONSTRUCTION COMPANY, INC.

**LATE**

January 31, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

**HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.** is a general contractor with a 122-year history in Hawaii that is active in the construction of buildings, infrastructure, housing, power & industrial and waterfront & foundation work.

**HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC. supports H.B. 2070 Relating to Procurement**, which requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

**HAWAIIAN DREDGING CONSTRUCTION COMPANY, 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 maximizing the use of public funds.

Three 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).

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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>



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:



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 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.	
	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.





**HENSEL PHELPS**

Plan. Build. Manage.

841 Bishop Street  
Suite 2001  
Honolulu, Hawaii 96813  
808.535.9500

**LATE**

February 1, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

Hensel Phelps Construction Co. (Hensel Phelps) is a national general contractor with a Pacific Region office in Honolulu, Hawaii. In the Pacific Region, Hensel Phelps has completed over \$2.7 billion of work in Hawaii and Guam and currently has over 250 full-time salaried staff and an average of 250 skilled craftworkers.

**HENSEL PHELPS supports H.B. 2070 Relating to Procurement**, which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

**HENSEL PHELPS** 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.

Three 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.

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**OUR VALUES**

OWNERSHIP | INTEGRITY | BUILDER | DIVERSITY | COMMUNITY

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:

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

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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>

[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, **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:



<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.	
	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.

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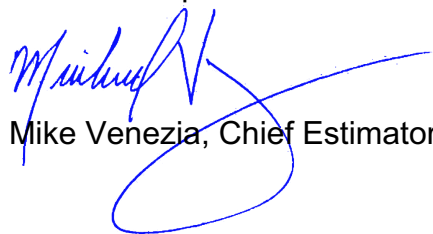
to be listed in bids. The prospect of having to list unlicensed noncontractor entities as subcontractors in a bid would have totally changed and disrupted procurement, bogged down jobs in protests, and cost the State millions and millions of dollars. The substantive merits of the case would not have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

Hensel Phelps



Mike Venezia, Chief Estimator

**LATE**

January 31, 2024

TO: HONORABLE SCOT Z. MATAYOSHI, CHAIR, HONORABLE ANDREW TAKUYA GARRETT, VICE CHAIR, AND MEMBERS OF THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT FOR H.B. 2070, RELATING TO PROCUREMENT.** Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

HEARING

DATE: February 1, 2024  
TIME: 9:00 a.m.  
PLACE: Conference Room 309

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee,

**King & Neel Pacific, Inc., a local insurance and bonding agency serving the building industry in Hawaii since 1967, supports H.B. 2070 Relating to Procurement,** which Requires cash or protest bonds to be returned to the initiating parties, minus administrative costs as determined by the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs, except in cases where the appeal was frivolous or made in bad faith.

King & Neel Pacific, 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.

Three 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.

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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>

**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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	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.