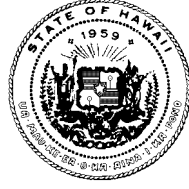


DAVID Y. IGE
GOVERNOR



CATHY BETTS
DIRECTOR

JOSEPH CAMPOS II
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

March 23, 2021

TO: The Honorable Representative Aaron Ling Johanson, Chair
House Committee on Consumer Protection & Commerce

FROM: Cathy Betts, Director

SUBJECT: **SB1329 SD2 HD1 – RELATING TO PROCUREMENT.**

Hearing: March 24, 2021, 2:00 p.m.
Via videoconference, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) understands the intent of the measure, opposes the measure, and provides comments.

The Senate Committee on Government Operations amended the measure by:

- (1) Removing language that would have set internal deadlines for the purchasing agency and any reviewing department or agency to complete the review of a protest concerning the solicitation or award of a contract;
- (2) Inserting language that requires the resolution of the bid protest within seventy-five calendar days of receipt of the protest;
- (3) Allowing for an extension of the seventy-five day resolution period under certain circumstances; and
- (4) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

The Senate Committees on the Judiciary and Ways and Means further amended the measure by defecting the effective date and making additional technical amendments.

The House Committee on Government reform amended the measure as follows:

- (1) Requiring the Chief Procurement Officer or a designee to address, rather than resolve, any protest as expeditiously as possible;

- (2) Removing language that would have provided an additional thirty calendar days if extenuating circumstances required additional time for the issuance of a written decision to uphold or deny the protest;
- (3) Specifying that if the protest is not resolved by mutual agreement and the Chief Procurement Officer or a designee does not issue a written decision to uphold or deny the protest, the protest shall prevail; and
- (4) Making technical, nonsubstantive amendments for the purposes of clarity, consistency, and style.

PURPOSE: The purposes of the bill requires the chief procurement officer or designee to address protests as expeditiously as possible. Creates time limits to resolve protests to the awards of competitive sealed proposal contracts and procurements of professional services, if the protest is not resolved by mutual agreement. Specifies that a protest shall prevail if the protest is not resolved by mutual agreement and within the established time limits. Effective 5/6/2137. (HD1)

DHS appreciates the efforts of the House Committee on Government Reform to clarify that resolution through mutual agreement is still available, and as noted in the committee report, to address the "ambiguity existed in the S.D. 2 version about what would happen to a protest after the time limit expires. To resolve this issue, your Committee amended the measure to allow said protest to prevail upon expiration of the time limit."¹

DHS opposes the measure as drafted as the "strict liability like" provision,

"If the protest is not resolved by mutual agreement and the chief procurement officer or a designee does not issue a written decision to uphold or deny the protest, the protest shall prevail[,]"

goes too far and may likely encourage protests, increase the number of fair hearings, and lengthen the time to final disposition. Further, this provision may act as a disincentive for smaller community based organizations from submitting a proposal consequently reducing

¹ See, Standing Committee Report, HCCR1083 at https://www.capitol.hawaii.gov/session2021/CommReports/SB1329_HD1_HSCR1083_.htm

competition and may likely increase the overall costs of procurement and services. Of greatest concern is this proposed language is a policy against making decisions on the merits.

Depending upon the breadth and complexity of the procurement, or if more than one protest is received, the proposed set time frame of 75 days, with extenuating circumstances, may not be enough time for the chief procurement officer or the designee to sufficiently review and respond to the protest. In the event that the decision of the chief procurement officer or designee is forced or rushed to decide within the mandated time frame, the decision will likely result in a fair hearing request as provided by sections 103D-701(e) and 103D-709, Hawaii Revised Statutes (HRS).

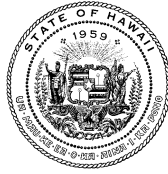
We also consider that section 103D-701(e), HRS, provides,

" In addition to any other relief, when a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not, then the protestor shall be entitled to the actual costs reasonably incurred in connection with the solicitation, including bid or proposal preparation costs but not attorney's fees."

The right to administrative review in section 103D-701(c), HRS, and the available remedy in section 103D-701(e), HRS, are the most likely reasons why certain decisions take as long as they do in protests that were not resolved by mutual agreement.

Thank you for the opportunity to provide comments on this measure.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

WEDNESDAY, MARCH 24, 2021, 2:00 P.M.
CONFERENCE ROOM 329 VIA VIDEOCONFERENCE, STATE CAPITOL

S.B. 1329, S.D. 2, H.D. 1

RELATING TO PROCUREMENT.

Chair Johanson, Vice Chair Kitagawa, and Members of the Committee, thank you for the opportunity to submit testimony on S.B. 1329, S.D. 2, H.D. 1. The Department of Accounting and General Services (DAGS) supports purposes (1) and (2) of the bill to address protests as expeditiously as possible and to place a time limit on the resolution of protests for contracts resulting from the competitive sealed proposal and professional services procurement methods. DAGS also appreciates the elimination of the cap on the number of time extensions as well as the second committee report which acknowledges the need for additional discussion on this matter, and offers the following comments.

- **We remain very concerned that the imposition of time limits on the resolution of protests may compromise fair and just resolutions in the best interest of the State. This is especially true for construction procurements.**

There are several factors, beyond the control of the State, which adversely impact an agency's ability to address a protest for a project within a specified deadline. For example:

- The number and complexity of issues involved in a single protest.

- The complexity of the procurement. Protests involving construction projects may involve contractor licensing issues, issues of interpretation of the plans and specifications, etc.
- The number of protests received for a project.
- The current overall caseload of protests.

For these reasons, we strongly advise against the imposition of time limits on the first phase of the protest process for construction procurements, which may compromise a fair and just resolution. Based on research of DAGS' own past protests, the current time limits proposed in this legislation are not reasonable for construction procurements.

We note that Standing Committee Report No. 554 took the forty-five day deadline for the administrative hearings phase into consideration in establishing the deadline for the first phase of the protest process contained in this legislation. We would like to point out that by the time a protest goes to administrative hearing, the Hearings Officer is presented with the end result of all of the research done during the first phase of the protest (i.e. in the development of the agency's response). This deadline may have been set to address issues of scheduling hearings and the attendant pre-hearing conferences, which is not the same as the need to perform the amount of research required to address the first phase of a protest.

We suggest that consideration be given to increasing the initial time period based on a study of the information collected by State agencies on the protest process to ensure fair and just consideration of protests. DAGS has already begun gathering information from other State agencies to add to our own protest tracking information in an effort to help guide this legislation.

- **The current wording of the bill does not confine the application of these time limits to the competitive sealed proposal and professional services methods of procurement in accordance with the stated intent of this legislation.**

Therefore, we suggest amending the wording on page 2, lines 8 through 13, to align with the stated intent of this bill:

“If the protest is not resolved by mutual agreement for section 103D-303 or 103D-304 procurements, the chief procurement officer or a designee shall [~~promptly~~] issue a written decision [in writing] to uphold or deny the protest [-] within seventy-five calendar days of receipt of the protest, unless extenuating circumstances require additional time.”

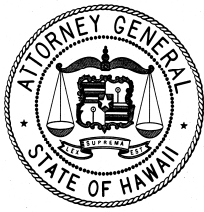
- **DAGS does not support purpose (3), and we suggest elimination of the wording on page 2, line 19, through page 3, line 2, of this legislation: “If the protest is not resolved by mutual agreement and the chief procurement officer or a designee does not issue a written decision to uphold or deny the protest, the protest shall prevail.”**

If this wording was added to specify what happens when the 75-day deadline is not met, it contradicts the State’s ability to exceed the 75 day deadline based on extenuating circumstances, as stated on page 2, line 13.

In addition, as detailed above, there are several reasons beyond the control of the State which may prevent it from responding within the 75-day deadline. Therefore, it is not in the State’s best interest to specify that the protestor prevails in instances where the 75-calendar day deadline is not met. This may have the unintended consequence of encouraging protestors to take actions which would prevent the State from addressing the protest in a timely manner (such as filing very complex protests with many issues, supplementing the protest with additional

claims and information after the initial submittal, etc.) in order to increase their chances of prevailing.

Thank you for the opportunity to submit testimony on this matter.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 1329, S.D. 2, H.D. 1, RELATING TO PROCUREMENT.

BEFORE THE:

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Wednesday, March 24, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 329, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
Yvonne R. Shinmura, Deputy Attorney General

Chair Johanson and Members of the Committee:

The Department of the Attorney General has the following comments on this bill.

The intent of this measure is to create time limits to resolve protests of awarded competitive sealed proposal contracts and procurement of professional services if the protest is not resolved by mutual agreement. The bill amends subsection (c) of section 103D-701, Hawaii Revised Statutes, to require the Chief Procurement Officer or a designee to issue a written decision to uphold or deny the protest within seventy-five calendar days of receipt of the protest unless extenuating circumstances require additional time.

The current version of this bill deletes a thirty-day period to extend the time to issue a decision to uphold or deny the protest due to extenuating circumstances. However, the wording in the bill still allows an extension of time due to extenuating circumstances but does not specify: (1) the length of the extension, (2) who makes the determination, and (3) what constitutes extenuating circumstances. The inclusion in the statute of additional provisions regarding the possible extension of time may avoid or reduce future litigation about any extension of time.

We respectfully ask the Committee to consider and address these ambiguities before passing this bill.

DAVID Y. IGE
GOVERNOR



BONNIE KAHAKUI
ACTING ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 586-0554
email: state.procurement.office@hawaii.gov
<http://spo.hawaii.gov>

TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON

CONSUMER PROTECTION & COMMERCE
March 24, 2021, 2:00 PM

SENATE BILL 1329 SD2 HD1
RELATING TO PROCUREMENT

Chair Johanson and Vice-Chair Kitagawa, and members of the committee, thank you for the opportunity to submit testimony on SB1329 SD2 HD1. The State Procurement Office (SPO) appreciates the intent of the bill to address protests expeditiously and acknowledges departments' concerns about setting time limits particularly as it relates to very complex solicitations and protests.

SB1329 SD H1 removed the 30-day time limit to respond due to extenuating circumstances, resulting in ambiguity about the extension. What constitutes extenuating circumstances and how long can the extension be?

Thank you.

Written Only

DAVID Y. IGE
GOVERNOR



DR. CHRISTINA M. KISHIMOTO
SUPERINTENDENT

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

Date: 03/24/2021

Time: 02:00 PM

Location: 329 Via Videoconference

Committee: House Consumer Protection
& Commerce

Department: Education

Person Testifying: Dr. Christina M. Kishimoto, Superintendent of Education

Title of Bill: SB 1329, SD2, HD1 RELATING TO PROCUREMENT.

Purpose of Bill: Requires the chief procurement officer or designee to address protests as expeditiously as possible. Creates time limits to resolve protests to the awards of competitive sealed proposal contracts and procurements of professional services, if the protest is not resolved by mutual agreement. Specifies that a protest shall prevail if the protest is not resolved by mutual agreement and within the established time limits. Effective 5/6/2137. (HD1)

Department's Position:

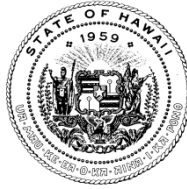
The Hawaii Department of Education (Department) supports the intent of the SB1329, SD2, HD1 to resolve procurement protests in a timely manner and notes that comments submitted in our testimony on the previous draft of this measure were specific and not intended to speak on behalf of all state agencies. Clearly, this is an important and complex issue for which a collaborative and collective conversation is needed to define what constitutes "timely" and the disposition of the protest after the passage of the allotted amount of time.

Thank you for the opportunity to provide testimony on this measure.

The Hawai'i State Department of Education is committed to delivering on our promises to students, providing an equitable, excellent, and innovative learning environment in every school to engage and elevate our communities. This is achieved through targeted work around three impact strategies: school design, student voice, and teacher

collaboration. Detailed information is available at www.hawaiipublicschools.org.

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

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

March 24, 2021
2:00 P.M.
State Capitol
Conference Room 329
VIA VIDEOCONFERENCE

S.B. 1329, S.D. 2, H.D. 1
RELATING TO PROCUREMENT

House Committee on Consumer Protection & Commerce

The Department of Transportation (DOT) **supports the intent with comments** of the bill which requires the chief procurement officer or designee to address protests as expeditiously as possible; creates time limits to resolve protests to the awards of competitive sealed proposal contracts and procurements of professional services, if the protest is not resolved by mutual agreement; specifies that a protest shall prevail if the protest is not resolved by mutual agreement within the established time limits; and takes effect 5/6/2137.

The current bill states the purpose of this Act is to require the chief procurement officer or designee to address protests as expeditiously as possible; create time limits to resolve protests to the awards of competitive sealed proposal contracts and procurements of professional services, if the protest is not resolved by mutual agreement; and specify that a protest shall prevail if the protest is not resolved within the established time limits. However, the proposed amendment to the statute, HRS § 103D-701, does not confine the application of the time limit solely to competitive sealed proposals and procurement of professional services. The proposed time limits would also impact competitive sealed bidding for goods, services, and construction. More so specifically for construction protests, the proposed time limits may not be adequate or realistic for the State to conduct sufficient and appropriate due diligence to thoroughly research and formulate a defensible response to support the State's position and ensure a fair and just resolution, primarily due to meeting an established across-the-board time limit.

To address the proposed amended content stating the protest shall prevail in the event the protest is not resolved by mutual agreement or within the established time limits, there are situations in which the State receives multiple protests on the same project, either by the same protestor throughout the course of resolving the protest or by different bidders. The protests by the different bidders may share common issues,

however, there may be additional protest issues that are specific to a particular bidder. In any case, the State will address each issue responsibly, diligently, and appropriately to ensure the highest possibility of a fair and just resolution.

Procurement protests can be lengthy and may adversely impact project timelines in varying degrees. However, in order for the State to responsibly, diligently, and appropriately support their respective position in response to the protest, each protest needs to be assessed and addressed on a case-by-case basis with consideration and attention to the specific nature of the protest and its issues as it relates to the scope of the project and integrity of the procurement.

In construction protests, the protest issues are not always straightforward. In fact, majority of the protests often times require collaboration by all respective stakeholders to identify the actual protest issues before any action can commence to research and respond to the issue. The issues, again often times, may be stated by the protestor or respective legal counsel in a manner that is convoluted, complex, vague, and virtually impossible to identify at first pass. The requirement of protestors to submit timely, clear, and concisely stated protest, with statements of facts and law to support the protest issues, to the State would be ideal, however, are beyond the State's control. The efforts by the State to decode and clarify the specific protest issues, in itself, may be time-consuming and this is before even starting the investigative vetting process to address each issue in order to formulate a defensible and responsible formal response.

The quality and thoroughness of the State's response should adequately and sufficiently address the protest issues to the extent, and with a committed intent, of resolution at the response stage. Further escalation of the protest is not in the best interest of all parties. The respective stakeholders, from all key areas of expertise, to include technical and operational, procurement, and legal, at a minimum, need to ensure and appreciate the weight of a well-vetted response and remain mindful that expediting the resolution should not be at the expense of a fair and just decision. In the best interest of the State, fair procurement, to include resolution of protests, and ultimately taxpayers, time limits should be carefully considered as a component of protest resolution and not the driving factor in the resolution.

Thank you for the opportunity to provide testimony.



Malcolm Barcarse, Jr.
A&B Electric Co., Inc.
Chairman

Kathryn Mashima
Mashima Electric
Chairman Elect

Ross Kawano
ECA, LLP
Treasurer/Secretary

Jarrett Walters
Hawaiian Building
Maintenance

Canaan Shon
Hawaii Geophysical Services

Ralph Sakauye
Bora, Inc.

Kevin Schmid
Oceanic Companies, Inc.



Geoffrey Chu
Oceanic Companies, Inc.
Chairman

Kimo Pierce
Hawaii Plumbing Group, LLC
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David Tsuda
First Hawaiian Bank
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Ross Kawano
ECA, LLP
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Scott Massner
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Maurice Torigoe
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March 24, 2021

To: Committee on Consumer Protection and Commerce
Rep. Aaron Ling Johanson, Chair
Rep. Lisa Kitagawa, Vice Chair

From: Malcolm Barcarse, Jr. ABC Hawaii Board Chair.

Associated Builders and Contractors Hawaii Chapter testimony **Supporting the Intent of SB 1329, SD2, HD1.**

Chair Johanson, Vice Chair Kitagawa and members of the Committee:

Thank you for the opportunity to testify, my name is Malcolm Barcarse, Jr. I am currently the Chair of Associated Builders and Contractors, Hawaii Chapter which represents over 170 member companies in the Construction Industry. We also have a State Approved Trade Apprenticeship Program in the trades of Carpentry, Electrical, Painting, Plumbing and Roofing.

Our membership regularly submits bids on public works projects for State and County agencies. We have also seen over the years how the laws regarding bid protests have evolved where strict deadlines have been placed on the Office of Administrative Hearings and the Circuit Court to dispose of cases, along with the requirement of contractors to put up protest bonds before initiating an appeal to the Office of Administrative Hearings. These provisions appear to have done a good job of filtering out cases that get appealed to OAH unnecessarily.

Despite these efforts the one missing piece to the bid protest puzzle is the unlimited time that the agencies have to make a decision on whether to sustain or deny a protest. Therefore, we believe that SB 1329 is a step in the right direction and **supports the intent** of this bill to set deadlines on the agencies to move these protests along in a timely manner.

However, we prefer the language of the SD2 version that was passed out by the Senate as opposed to the current SD 2, HD 1 version. Our concern with the HD1 are the two amendments substituting resolve to address in line 8 of page 2 and allowing the broad extenuating circumstances language in line 13 of page 2 significantly waters down this bill. The word address does not appear to be defined in the statute so our concern is this would allow the agencies to start reviewing the protest within 75 calendar days without a decision and then assert that they are complying with this bill. Regarding extenuating circumstances there is no definition of what that is and furthermore there is no procedure in the HD1 to require the agencies to timely resolve the protest once extenuating circumstances are asserted. ABC Hawaii looks forward to working with the Legislature and the relevant stakeholders to improve the public works procurement system.

Thank you for the opportunity to testify