



January 30, 2024

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

SUBJECT: **SUPPORT OF S.B. 2570, RELATING TO PROCUREMENT.** Requires a protest to be submitted within seven calendar days after the posting of award of the contract. Establishes that a party is not aggrieved until official action, adverse to that party, has been taken. Amends the minimum per cent value of a contract required for parties to a protest of an award to initiate proceedings from ten per cent to five per cent.

HEARING

DATE: Tuesday, January 30, 2024
TIME: 3:00 p.m.
PLACE: Capitol Room 225

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

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

GCA **supports** S.B. 2570, which requires a protest to be submitted within seven calendar days after the posting of award of the contract. Establishes that a party is not aggrieved until official action, adverse to that party, has been taken. Amends the minimum per cent value of a contract required for parties to a protest of an award to initiate proceedings from ten per cent to five per cent

The GCA notes that section 2 of the measure will clarify confusion amongst the industry regarding the filing of bid protests. The GCA supports this clarification.

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

SB-2570

Submitted on: 1/29/2024 2:04:31 PM

Testimony for GVO on 1/30/2024 3:00:00 PM

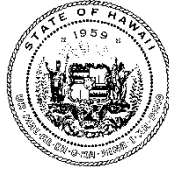
Submitted By	Organization	Testifier Position	Testify
Nan Shin	Individual	Support	Written Testimony Only

Comments:

Nan, Inc. (“Nan”) supports S.B. 2570 which simplifies the time requirements for protest in public procurement. Currently the language in HRS § 130D-701 is vague as to when “the aggrieved person knows or should have known of the facts giving rise” to its protest. There can be no confusion that S.B. 2570 requires that a protest of an award is due within seven calendar days after an award is made and a protest of the contents of the solicitation is due one day before the receipt of offers.

With respect to protest of solicitations that are due one day before the receipt of offers, solicitations are normally hundreds of pages long and require much longer than a mere five days to read and comprehend the scope of work and the requirements necessary to perform said work. HRS § 130D-701 as it is currently written affords a bidder only five days after which a solicitation has been issued to read and comprehend the solicitation, discovery any deficiencies or defects, and then draft its well-reasoned protest to the contents of the solicitation. The issuing agency should be able to hide behind the five-day limitation when a solicitation is clearly deficient, ambiguous, or unlawful.

Finally, S.B. 2570 defines aggrieved a official action, adverse to it, has been taken. Thus, agencies will not be able to claim that a protest is untimely until after award.



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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
January 30, 2024, 3:00 p.m.

SENATE BILL 2570
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Gabbard, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 2570. The State Procurement Office (SPO) appreciates the intent of the bill to clarify the language regarding when protests are required to be submitted and offers the following comments:

SB2570's language in Section 2, page 2, lines 7 to 9, and line 15, amends HRS section 103D-701(a) to clarify that the deadline for submitting written protests, that are based on the content of the solicitation, be changed from "**prior to the date set for receipt of offers**" to "**one day prior to the date set for the receipt of offers.**"

The SPO recommends revising the language to "**a minimum of one business day prior to the date set for receipt of offers.**" This will allow vendors the opportunity to file a protest on the content of the solicitation anytime up to one business day prior to the date of receipt of offers. Also give the agency the opportunity to make amendments to the solicitation early in the process if necessary.

SB2570 language in Section 2, page 4, lines 19 to 20, adds a new subsection to HRS section 103D-701 to clarify that "**a party is not aggrieved until official action, adverse to it, has been taken.**" The SPO comments that this additional language is not necessary as adequate definitions are supplied in Hawaii Revised Statutes, Hawaii Administrative Rules, and multiple decisions from the Office of Administrative Hearings.

HAR section 3-126-1 defines "protestor" to mean any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and while files a protest. Additionally, pursuant to HRS section 103D-701(a), in order to qualify as a party withstanding to file a request for an administrative hearing, the Petitioner must be an "actual or prospective bidder, offeror, or contractor." HAR section 3-120-2 defines a "bidder" as a business submitting a bid in response to an invitation for bids, while an offeror is a business

submitting a bid or proposal in response to an invitation for bids or a request for proposals, or an unpriced technical offer in response to an expression of interest. A contractor is defined in HRS section 103D-104 as any person having a contract with a governmental body.

SB2570's page 4, Section 3, line 13, amends HRS section 103D-709(d)'s estimated value of the contract percentage from "ten per cent" to "**five per cent**," which will result in more protests, allowing a bid protest over a minor matter to delay the procurement, and may result in the State having to pay more due to costly delays. This would lead to an unacceptable result at odds with the Legislature's intent of reducing protests.

HRS section 103D-709(d) requires a minimum amount in controversy before a Request for Administrative Hearing (RFAH) can be initiated or the RFAH may be dismissed for lack of jurisdiction. For example, in the case of ***Nan, Inc. v. Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2015-005 (July 14, 2015)***, individual claims can be aggregated in order to determine if a protest brings into question matters totaling the required jurisdictional amount (10% of the estimated value of the contract for contracts with an estimated value of \$1,000,000 or more). However, in this case, the aggregation of Nan's claims totaled well below the required jurisdictional amount, resulting in the RFAH being dismissed for lack of jurisdiction as OAH does not have jurisdiction over a protest concerning a contract valued at \$10,000.

Reference: https://cca.hawaii.gov/oah/oah_decisions/procurement/.

The SPO opposes the language lowering the percentage from 10% to 5%. This will raise questions and concerns, without any justification for the change.

Thank you.