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TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE
HOUSE COMMITTEE
ON
ECONOMIC DEVELOPMENT & BUSINESS CONCERNS

January 29, 2008

HB 2267

RELATING TO PROCUREMENT.

Chair Yamashita, Vice Chair Wakai, and committee members, thank you for the opportunity to testify on HB 2267. This bill proposes to transfer the review function for procurement determinations to the office of the ombudsman to ensure a fair and impartial rendering; and prohibits the chief procurement officer (CPO) from delegating its authority to resolve protests. The following comments are for your consideration.

The Department of Commerce and Consumer Affairs (DCCA) currently has the responsibility to conduct administrative proceedings to adjudicate procurement determinations made by a chief procurement officer under the Hawaii Public Procurement Code. The twenty Chief Procurement Officers for their respective jurisdictions include the Judiciary, Senate, House of Representatives, Office of Hawaiian Affairs, University of Hawaii, Department of Education, Hawaii Health Systems Corporation, Executive State Departments, County councils, boards of water and County executive departments. This being the case, the use of any government agency to adjudicate procurement administrative hearings would result in a similar appearance of a conflict of interest situation.

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In response to SECTION 5 to prohibit CPO delegation of authority to resolve protests, operationally, the SPO has given each department head procurement delegation for resolution of protest to expedite this process, as the purchasing agency has the knowledge and background for each solicitation. To prohibit the delegation of this authority would considerably delay the resolution of a protest. The CPO would need additional time to become knowledgeable with the procurement. If a protest is filed, and resolution is not satisfactory at the purchasing agency level, a protestor may request for a review by the DCCA Administrative Hearings office. This process ensures fairness in the review of the procurement issue. SPO believes that DCCA's decisions in our past administrative proceedings have been fair. We recommend this bill be held.



Robin K. Matsunaga
Ombudsman

David T. Tomatani
First Assistant

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**TESTIMONY OF ROBIN K. MATSUNAGA, OMBUDSMAN,
ON H.B. NO. 2267, A BILL FOR AN ACT
RELATING TO PROCUREMENT**

**HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS CONCERNS
JANUARY 29, 2008**

Chair Yamashita and Members of the Committee:

Thank you for the opportunity to present testimony on H.B. No. 2267. This testimony pertains only to the proposed transfer of the review of procurement determinations from the Department of Commerce and Consumer Affairs to the Office of the Ombudsman.

Section 103D-709, HRS, authorizes hearings officers appointed by the Director of Commerce and Consumer Affairs to review and determine de novo a determination of the chief procurement officer, a head of a purchasing agency, or the designee of either officer. We concur that the review of a determination by an executive branch officer by another executive branch agency could raise questions of partiality and potential conflict of interest. We note, however, that heads of purchasing agencies also exist in the legislative and judicial branches and thus a perfect remedy to the issue of potential conflict of interest may not be possible, no matter in which branch the hearings officers are placed.

The Ombudsman is authorized under Chapter 96, HRS, to investigate complaints about the administrative acts of executive branch agencies in the state and county governments, including procurement-related decisions of the heads of executive branch purchasing agencies, the chief procurement officer, and even the hearings officers authorized by Section 103D-709, HRS, to review procurement determinations. Therefore, the Ombudsman is already authorized to review procurement actions and decisions. This additional avenue of review for a person who disagrees with a procurement determination would be lost if the hearings officers are appointed by the Ombudsman.

While we understand and support the intent to provide a more impartial review of procurement determinations, we are concerned that the administrative functions and authority provided the

hearings officer in Section 103D-709, HRS, are inconsistent with the existing statutory provisions of Chapter 96, HRS. In addition, the administrative review function that is prescribed in Part VII of Chapter 103D may be inappropriate for a legislative branch agency.

As you know, Chapter 96, HRS, authorizes the Ombudsman to make recommendations for corrective action but does not authorize the Ombudsman to make binding decisions, compel corrective action, or reverse administrative decisions. This limitation of authority serves as a balance against the other powers and protections that are given to the Ombudsman, such as the barring of judicial review of the Ombudsman's decisions and the granting to the Ombudsman of the same immunities from civil and criminal liability as a judge of this State, and is consistent with models and standards for ombudsman offices that have been adopted by the American Bar Association and the United States Ombudsman Association.

However, in contrast, subsection (b) of Section 103D-709, HRS, provides the hearings officer the power to make conclusions of law and to issue written decisions which shall be final and conclusive. In addition, subsection (f) of Section 103D-709, HRS, requires the hearings officer to order relief if the hearings officer finds the determination of the chief procurement officer to be in error. Relief includes the cancellation or revision of a solicitation or proposed award of a contract, or the modification or termination of a contract that has been awarded prior to the hearings officer's determination.

The authority of the hearings officer to make conclusions of law, issue written decisions which are final and conclusive, and order relief is characteristic of an enforcement function and exceeds the authority that is currently provided the Ombudsman and conflicts with existing ombudsman models and standards. Also, as noted in Section 1 of H.B. No. 2267, even the General Accountability Office lacks the authority to order relief, and like the Ombudsman is limited to making recommendations for corrective action when it determines that a bid protest is substantiated.

Another provision of concern is subsection (b) of Section 103D-709, HRS, which allows a decision of the hearings officer to be appealed in the circuit court. This provision appears to conflict with Section 96-17, HRS, which prevents the proceedings and decisions of the Ombudsman from being reviewed in any court.

It also appears that it may be more appropriate to leave the administrative review process prescribed in Part VII of Chapter 103D in the executive branch than to transfer it to an agency in

the legislative branch. As previously mentioned, the authority of the hearings officer to order relief is an administrative enforcement function and uncharacteristic of a legislative branch officer.

Finally, subsection (e) of Section 103D-701, HRS, provides that the decision of the chief procurement officer or designee on a protest shall be final and conclusive, unless any person adversely affected by the decision commences an administrative proceeding under Section 103D-709, HRS. According to subsection (e) of Section 103D-709, HRS, no action shall be taken on a solicitation or an award of a contract while the administrative proceeding is pending, if the procurement was previously stayed under Section 103D-701(f). Under existing law, the commencement of an investigation by the Ombudsman of a complaint regarding an administrative act or decision of an executive branch officer or employee does not cause the administrative act or decision to be placed on hold pending the determination by the Ombudsman whether the complaint is substantiated or not substantiated. This is consistent with the role and function of the Ombudsman and consistent with the doctrine of separation of powers between the three branches of government.

Based on the issues discussed above, we are unable to support the proposed transfer of the review of procurement determinations to our office. Therefore, if H.B. No. 2267 will be passed by this committee, we respectfully request that the bill be amended to delete the proposed transfer.

If you have any questions, I would be happy to answer them.

January 28, 2008

The Honorable Representative Kyle T. Yamashita, Chair
and Members of the Committee on Economic Development
& Business Concerns

Hawai'i State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Chairman Yamashita and Representatives:

Re: Testimony in Opposition to HB 2267 Relating to Procurement
Hearing Scheduled for Tuesday, January 29, 2008, 8:30 a.m., Room 325

The Honorable Chair Kyle T. Yamashita, Vice-Chair Glenn Wakai, and members of the Economic Development & Business Concerns Committee, my name is Craig Masuda, Deputy Corporation Counsel for the County of Hawai'i Department of Finance, and submitting testimony in opposition to HB 2267.

HB 2267 seeks to transfer the authority of administrative hearings on procurement hearings under Chapter 103D, Hawai'i Revised Statutes, and Hawai'i Administrative Rules, Title 16, Chapter 201, from the Office of the Administrative Hearing, Department of Commerce and Consumer Affairs, to a yet to be created division of the Office of Ombudsman. As a practicing attorney in the area of procurement hearings and the advisor to the Department of Finance in procurement matters, I can attest that procurement is a highly specialized area of law that requires experts in this area of law to sit as the adjudicatory body. Due to the statutorily required quick setting of contested cases, the hearings officers must be versed in the procurement laws, rules and case law, and this is not an area that can be "learned on the job" as a trier of fact. The present hearings officers possess this expertise and balance this specialized knowledge of the law with proper judicial decorum gained from also sitting as hearings officers in other types of contested cases. The Office of Administrative Hearings not only adjudicates procurement issues but also adjudicates many varied issues such as licensing disputes for contractors to hairdressers; from insurance disputes to condominium disputes; and from trade name disputes to medical claims conciliation. This unique blend of expertise and experience is gained through the unique positioning and function of the Office of Administrative Hearings under the Department of Commerce and Consumer Affairs. In order to preserve this resource all the

functions and duties of the Office of Administrative Hearings would have to be transferred to the Office of Ombudsman. Although such a whole sale transfer would not make sense for other reasons, the County of Hawai'i would not oppose such an action from the standpoint of procurement contested case hearing.

As to HB 2267's requirement that the Chief Procurement Officer not delegate its authority under Section 103D-208, Hawai'i Revise Statutes, as amended, the County of Hawai'i takes no position.

Thank you for allowing me to present this testimony in opposition to HB 2267 for the reasons stated above.

Sincerely,

CRAIG T. MASUDA
Deputy Corporation Counsel
Representing the County of Hawai'i
Department of Finance

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