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ADMINISTRATOR



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TESTIMONY
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE
HOUSE COMMITTEE
ON
LEGISLATIVE MANAGEMENT

February 12, 2008

HB 2267, HD1

RELATING TO PROCUREMENT.

Chair Magaoay, Vice Chair Tokioka, and committee members, thank you for the opportunity to testify on HB 2267, HD1. 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.

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

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**TESTIMONY OF ROBIN K. MATSUNAGA, OMBUDSMAN,
ON H.B. NO. 2267, H.D. 1, A BILL FOR AN ACT
RELATING TO PROCUREMENT**

**HOUSE COMMITTEE ON LEGISLATIVE MANAGEMENT
FEBRUARY 12, 2008**

Chair Magaoay and Members of the Committee:

Thank you for the opportunity to present testimony on H.B. No. 2267, H.D. 1. 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. However, we note that chief procurement officers 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.

As you know, 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, as proposed in this bill.

In addition to these general issues, 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.

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 that conflicts with Chapter 96, HRS, 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 would conflict with Section 96-17, HRS, which prevents the proceedings and decisions of the Ombudsman from being reviewed in any court.

In addition, authorizing the Ombudsman to review decisions of the chief procurement officers in the state legislative and judicial branches and each county council would conflict with Section 96-1, HRS, which specifically excludes the legislature, the judiciary and the county councils from the Ombudsman's jurisdiction.

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, 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. Therefore, if H.B. No. 2267, H.D. 1, will be passed by this committee, we respectfully request that the bill be amended to delete the proposed transfer of the review of procurement determinations to our office.

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

LINDA LINGLE
GOVERNOR



RUSS K. SAITO
Comptroller

Barbara A. Annis
Deputy Comptroller

**STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES**
P.O. BOX 119
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TESTIMONY
OF
RUSS K. SAITO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
LEGISLATIVE MANAGEMENT
ON
February 12, 2008

H.B. 2267, H.D. 1

RELATING TO PROCUREMENT

Chair Magaoay and members of the Committee, thank you for the opportunity to testify on H.B. 2267, H.D. 1.

The Department of Accounting and General Services (DAGS) appreciates the bill's attempt to make the procurement code's protest procedure fairer and believes that what the bill proposes is reasonable. DAGS' concern is that the State's 20 Chief Procurement Officers may not have adequate staff support or resources to take back the authority to settle protests from all procurement officers to whom the protest settlement responsibility has been delegated. DAGS recommends that these staffing and resource requirements be determined and that if provided for, they do not take away from any programs or projects in the administration's budget submittal.

DAGS recognizes that reimbursing protestors for reasonable attorney's fees would appeal to protestors. DAGS' concern is that what is "reasonable" needs to be clearly defined to avoid frivolous costs or protests. DAGS further recommends that the drafters

of the bill establish a means for the State to pay the reasonable attorney's fees and to do so without adversely affecting any programs or projects in the administration's budget submittal.

DAGS believes that the administrative review of determinations made by the Chief Procurement Officers by the Department of Commerce and Consumer Affairs (DCCA) is acceptable. The potential conflict the bill mentions will exist no matter where the review is handled, as the 20 Chief Procurement Officers have jurisdiction in all branches of government. Of the 20 Chief Procurement Officers, 4 are in the State Executive Branch (1 - Cabinet Departments, 1 - UH, 1 - DOE, 1 - Hawaii Health Systems Corp), 1 is in the State House, 1 is in the State Senate, 1 is in the Judiciary, 1 is in OHA, 4 are in the mayors' cabinets, 4 are in the county councils, and 4 are in the boards of water supply.

In summary, DAGS supports the intent of the bill and recommends that the resource requirements of the protest settlement and definition of reasonable attorney's fees for reimbursement be addressed in the bill's language. DAGS does not believe it is necessary to reassign the administrative review of determinations made by the Chief Procurement Officers from the DCCA to the Office of the Ombudsman.

Thank you for the opportunity to testify on this matter.

Harry Kim
Mayor



Lincoln S.T. Ashida
Corporation Counsel

Gerald Takase
Assistant Corporation Counsel

COUNTY OF HAWAII

OFFICE OF THE CORPORATION COUNSEL

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February 11, 2008

The Honorable Representative Michael Y. Magaoay, Chair
and Members of the Committee on Legislative Management
Hawai'i State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Representative Magaoay and Representatives:

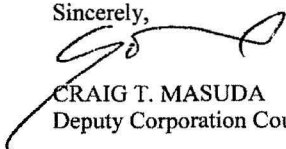
Re: Testimony in Opposition to HB 2267 HD1 Relating to Procurement
Hearing Scheduled for Tuesday, February 12, 2008, 2:00 p.m., Conf Room 423

Thank you for this opportunity to again speak against HB 2267, HD1. I am Craig Masuda, Deputy Corporation Counsel, representing the Hawai'i County Department of Finance.

Please note that HB 226, HD1, is essentially the same bill heard before the Economic Development & Business Concerns Committee where there was unanimous opposition to this bill. Please further note that the unanimous opposition was from agencies and people who work directly in this area. The fact that the opposition was unanimous is impressive enough but when this committee considers that the opposition came from the Ombudsman, Department of Accounting and General Services, and the State Procurement Office, there is no reason for this committee to allow this measure to continue.

On behalf of the County of Hawai'i Department of Finance, I again request that HB 226, HD1, be held in committee for the reasons stated above and my prior testimony in opposition. Thank you for your time and consideration.

Sincerely,



CRAIG T. MASUDA
Deputy Corporation Counsel

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Testimony by Hawaii Procurement Institute
Before the House Committee on Legislative Management

February 12, 2008
2:00 p.m.
Room 423

HB 2267 Relating to Procurement

Chair Magaoay, Vice Chair Tokioka and Members of the Committee:

The Hawaii Procurement Institute (HPI) submits this testimony in support of HB 2267.

I am Jessica Horiuchi, Executive Director of HPI. HPI supports HB 2267 because it will promote the legislature's intent of full competition by ensuring contractors are treated fairly in the award of government contracts. It will also force agencies to obey the Procurement Code and comply with rules intended to protect against the waste and abuse of public funds. Finally, it will reestablish the legislature's role in the oversight of the expenditure of public funds.

We urge passage for the following reasons:

A. Prohibition Against Delegation of Protest Resolution Authority.

As a matter of practice, the administrator of the state procurement office and some other chief procurement officers routinely delegate to procurement officers their authority to resolve protests under HRS 103D-701. Most often, procurement officers are the officials who took the actions that are the subject of the protest. Consequently, such delegations require contractors to voice their protests to very official whose actions the contractors found objectionable. As a result, the practice of delegating protest resolution authority converts the contractor's protest into a request for reconsideration and not a true protest.

The legislature structured the protest procedure to afford contractors an appeal of the procurement officer's actions to a higher and independent authority. By delegating protest resolution authority to the procurement officer, Chief Procurement Officers are thwarting the legislature's intent and depriving contractors of an independent review of their protests.

To ensure fairness to contractors and to preserve the effectiveness of protest procedures, the legislature should pass this bill's prohibition against delegation of protest resolution authority.

B. Reimbursement of Attorney Fees For Prevailing Protestors.

At its core, the Procurement Code embodies the legislature's instructions to all branches of the government as to the procedures they must follow whenever they spend public funds for construction, goods and services. The legislature's instructions are formulated to prevent waste, fraud and abuse in the expenditure of public funds. Protests are merely mechanisms to enforce the legislature's instructions. They empower contractors to point out instances where the contractors believe procurement officers violated the Procurement Code procedures.

Recent news reports have identified numerous and repeated instances where government agencies have violated fundamental procurement rules. All of these violations could have been corrected through protests. However, protests were not filed, and in most cases the government agencies have not taken corrective action.

The federal government avoids this circumstance by providing reimbursement of attorney fees when a contractor raises a meritorious protest and the government fails to take prompt corrective action. Reimbursing attorney fees creates "private attorneys general" to protect the public interest and force government agencies to obey the Procurement Code. It also encourages agencies to be responsive to meritorious protests. By correcting their errors, agencies can avoid payment of fees.

We specifically note here that the legislature should expand HB 2267 to direct agencies to pay attorney fees from the agency's operating budget. Agencies should not be allowed to ignore meritorious protests and treat the payment of fees as a judgment payable from judgment funds separately appropriated by the legislature. To be effective in forcing agencies to respond to meritorious protests, agencies should be obligated to pay for their errors themselves and not pass the costs of their errors to the taxpayer in a separate appropriation.

To enhance the effectiveness of the protest procedures and to force agencies to obey procurement rules we urge the legislature to do as the federal government has. The legislature should pass this provision of HB 2267 and provide for (1) the payment of attorney fees when agencies fail to take corrective action in a meritorious protest and (2) require agencies to pay for that failure by making payment from their own operating budget.

C. Transfer the Administrative Review of Government Protests To The Office of the Ombudsman.

Currently the administrative law judges of the Department of Commerce and Consumer Affairs (DCCA) conduct the administrative review of agency protest decisions. Unfortunately, the DCCA judges have not seen their role as

enforcing the intent of the Procurement Code in areas such as promoting open competition and assuring fairness to contractors. Too often, the DCCA judges have deferred to the agency and relied on the agency's narrow and technical readings of the procurement rules. The judges use this approach in denying protests even where the government's actions discouraged competition and deprived the taxpayers of the safeguards competition provides against waste of public funds.

The legislature's reliance on DCCA judges to review agency protest decisions also removes overall procurement oversight from the legislature. The federal Congress assures its continued oversight of procurement practices by assigning the authority to review protests to a Congressional office, the Government Accountability Office ("GAO"). Although constitutional separation of powers requires that the GAO only "recommend" corrective action on protests in other branches, the reality is that the other branches' procurement errors are directly reviewed by a legislative arm and the other branches are compelled to explain to the legislature if they decline to follow GAO recommendations when errors are identified.

The federal model preserves for the legislature its role as the body defining how public funds are to be expended. It also eliminates the tendency of officials, such as DCCA judges, to defer to agencies and allow agencies to define the procedures they must follow when conducting procurements.

To reassert its role as the definer of procurement policy, the legislature should adopt this bill's transfer to the Office of the Ombudsman the power to conduct administrative reviews of agency protest decisions.

We note that HB 2267 allows the Ombudsman to contract for qualified support in the review of protests and thereby overcomes potential concerns that the Ombudsman lacks expertise or staffing to perform the function of legislative oversight in procurement.

Thank you for affording the Hawaii Procurement Institute this opportunity to testify in support of HB 2267.