
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 103D, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 "§103D- Procurement statistics. The state procurement
5 office shall keep statistics on solicitations and awards
6 protested under section 103D-701 for the purpose of improving
7 procurement procedures. The statistics shall include
8 information on protests involving inadvertent errors and amounts
9 forfeited from procurement protests."

10 SECTION 2. Section 103D-701, Hawaii Revised Statutes, is
11 amended by amending subsections (b) and (c) to read as follows:

12 "(b) The chief procurement officer or a designee, prior to
13 the commencement of an administrative proceeding under section
14 103D-709 or an action in court pursuant to section 103D-710, may
15 settle and resolve a protest concerning the solicitation or
16 award of a contract[-] within ten business days after the
17 receipt of the protest. This authority shall be exercised in
18 accordance with rules adopted by the policy board.

1 (c) If the protest is not resolved by mutual agreement,
2 the chief procurement officer or a designee shall [~~promptly~~]
3 issue a decision in writing to uphold or deny the protest[~~-~~] no
4 later than twenty business days after receipt of the protest.

5 The decision shall:

- 6 (1) State the reasons for the action taken; and
7 (2) Inform the protestor of the protestor's right to an
8 administrative proceeding as provided in this part, if
9 applicable."

10 SECTION 3. Section 103D-709, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**§103D-709 Administrative proceedings for review.** (a)
13 The several hearings officers appointed by the director of the
14 department of commerce and consumer affairs pursuant to section
15 26-9(f) shall have jurisdiction to review and determine de novo,
16 any request from any bidder, offeror, contractor, or person
17 aggrieved under section 103D-106, or governmental body aggrieved
18 by a determination of the chief procurement officer, head of a
19 purchasing agency, or a designee of either officer under section
20 103D-310, 103D-701, or 103D-702.

21 (b) Hearings to review and determine any request made
22 pursuant to subsection (a) shall commence within twenty-one

1 calendar days of receipt of the request. The hearings officers
2 shall have power to issue subpoenas, administer oaths, hear
3 testimony, find facts, make conclusions of law, and issue a
4 written decision which shall be final and conclusive unless a
5 person or governmental body adversely affected by the decision
6 commences an appeal in the circuit court of the circuit where
7 the case or controversy arises under section 103D-710. Hearings
8 officers shall issue written decisions not later than forty-five
9 days from the receipt of the request under subsection (a).

10 (c) Only parties to the protest made and decided pursuant
11 to sections 103D-701, 103D-709(a), 103D-310(b), and [+]103D-
12 702(g) [+] may initiate a proceeding under this section. The
13 party initiating the proceeding shall have the burden of proof,
14 including the burden of producing evidence as well as the burden
15 of persuasion. The degree or quantum of proof shall be [~~a~~
16 ~~preponderance of the~~] clear and convincing evidence. All
17 parties to the proceeding shall be afforded an opportunity to
18 present oral or documentary evidence, conduct cross-examination
19 as may be required, and argument on all issues involved. [~~The~~
20 ~~rules of evidence shall apply.~~] Fact finding under section 91-10
21 shall apply.

1 (d) Any bidder, offeror, contractor, or person that is a
2 party to a protest of a solicitation or award of a contract
3 under section 103D-302 or 103D-303 that is decided pursuant to
4 section 103D-701 may initiate a proceeding under this section;
5 provided that:

6 (1) For contracts with an estimated value of less than
7 \$1,000,000, the protest shall concern a matter that is
8 greater than \$10,000; and

9 (2) For contracts with an estimated value of \$1,000,000 or
10 more, the protest shall concern a matter that is equal
11 to no less than ten per cent of the estimated value of
12 the contract.

13 (e) The party initiating a proceeding under subsection (d)
14 shall pay to the department of commerce and consumer affairs a
15 cash or protest bond in the amount of:

16 (1) \$1,000 for a contract with an estimated value of less
17 than \$500,000;

18 (2) \$2,000 for a contract with an estimated value of at
19 least \$500,000, but less than \$1,000,000; or

20 (3) One-half per cent of the estimated value of the
21 contract or not more than \$10,000, whichever is less,

1 if the estimated value of the contract is \$1,000,000
2 or more.

3 If the initiating party prevails in the proceeding
4 initiated under subsection (d), the cash or protest bond shall
5 be returned to that party. If the initiating party does not
6 prevail in the proceeding initiated under subsection (d), the
7 cash or protest bond shall be deposited into the general fund.

8 ~~(d)~~ (f) The hearings officers shall ensure that a record
9 of each proceeding which includes the following is compiled:

- 10 (1) All pleadings, motions, intermediate rulings;
11 (2) Evidence received or considered, including oral
12 testimony, exhibits, and a statement of matters
13 officially noticed;
14 (3) Offers of proof and rulings thereon;
15 (4) Proposed findings of fact;
16 (5) A recording of the proceeding which may be transcribed
17 if judicial review of the written decision is sought
18 under section 103D-710.

19 ~~(e)~~ (g) No action shall be taken on a solicitation or an
20 award of a contract while a proceeding is pending, if the
21 procurement was previously stayed under section 103D-701(f).

1 ~~(f)~~ (h) The hearings officer shall decide whether the
2 determinations of the chief procurement officer or the chief
3 procurement officer's designee were in accordance with the
4 Constitution, statutes, rules, and the terms and conditions of
5 the solicitation or contract, and shall order such relief as may
6 be appropriate in accordance with this chapter.

7 ~~(g)~~ (i) The policy board shall adopt such other rules as
8 may be necessary to ensure that the proceedings conducted
9 pursuant to this section afford all parties an opportunity to be
10 heard.

11 (j) As used in this section, "estimated value of the
12 contract" or "estimated value", with respect to a contract,
13 means either the amount of the lowest responsible and responsive
14 bid under section 103D-302 or the bid amount of the responsible
15 offeror whose proposal is determined in writing to be the most
16 advantageous under section 103D-303, as applicable."

17 SECTION 4. Section 103D-710, Hawaii Revised Statutes, is
18 amended as follows:

19 1. By amending subsection (c) to read:

20 "(c) Within ~~twenty~~ ten calendar days of the filing of an
21 application for judicial review, the hearings officer shall
22 transmit the record of the administrative proceedings to the

1 circuit court of the circuit where the case or controversy
2 arises."

3 2. By amending subsection (e) to read:

4 "(e) [~~Upon~~] No later than thirty days from the filing of
5 the application for judicial review, based upon review of the
6 record the circuit court may affirm the decision of the hearings
7 officer issued pursuant to section 103D-709 or remand the case
8 with instructions for further proceedings; or it may reverse or
9 modify the decision and order if substantial rights may have
10 been prejudiced because the administrative findings,
11 conclusions, decisions, or orders are:

12 (1) In violation of constitutional or statutory
13 provisions;

14 (2) In excess of the statutory authority or jurisdiction
15 of the chief procurement officer or head of the
16 purchasing agency;

17 (3) Made upon unlawful procedure;

18 (4) Affected by other error of law;

19 (5) Clearly erroneous in view of the reliable, probative,
20 and substantial evidence on the whole record; or

1 (6) Arbitrary, or capricious, or characterized by abuse of
2 discretion or clearly unwarranted exercise of
3 discretion[-];

4 provided that if an application for judicial review is not
5 resolved on or before the thirtieth day from the filing of the
6 application, the circuit court shall lose jurisdiction and the
7 decision of the hearings officer shall not be disturbed. All
8 time limitations on actions, as provided for in section
9 103D-712, shall remain in effect."

10 SECTION 5. This Act does not affect rights and duties that
11 matured, penalties that were incurred, and proceedings that were
12 begun, before its effective date.

13 SECTION 6. Statutory material to be repealed is bracketed
14 and stricken. New statutory material is underscored.

15 SECTION 7. This Act shall take effect on July 1, 2112.

Report Title:

Procurement Code; Protest; Administrative Proceedings

Description:

Imposes time limits on rendering administrative and judicial review decisions; limits protests to those that are a minimum percentage of the contract value; requires posting of a protest bond, to be forfeited if the protesting party does not prevail. Effective July 1, 2112. (HB1671 HD2 PROPOSED)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dcca

KEALI'I S. LOPEZ
DIRECTOR

PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
OFFICE OF ADMINISTRATIVE HEARINGS

TO THE HOUSE COMMITTEE ON
FINANCE

TWENTY-SIXTH STATE LEGISLATURE
REGULAR SESSION, 2012

Date: Monday, February 27, 2012
Time: 11:30 a.m.
Conference Room: 308

**TESTIMONY FOR HEARING ON HB 1671, HD2 PROPOSED
RELATING TO PROCUREMENT**

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR, & THE HONORABLE
MARILYN B. LEE, VICE CHAIR, AND MEMBERS OF THE COMMITTEE:

The Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to offer comments for the Committee's Hearing on the proposed HD 2 to HB 1671,, Relating to Procurement. My name is David Karlen, and I am the Senior Hearings Officer of the OAH. OAH and DCCA support the proposed HD 1671, HD 2, with one exception. OAH and DCCA oppose the change in the burden of proof in Section 3 of the proposed legislation.

The OAH has administered the hearings on procurement protests since the Legislature established the Procurement Code, Chapter 103D of the Hawaii Revised Statutes, in 1993.

1. The proposed legislation in its original version revives the law in existence from 2009 to 2011 that proved to be workable and efficient.

HB 1671, Proposed HD 2, revives Act 175 of the 2009 Legislature which sunsetted as of June 30, 2011. HB 1671 was proposed by the State Procurement Office (SPO). The SPO surveyed a large group of stakeholders involved in procurement and circulated two drafts before making its final proposal through HB 1671. The OAH was consulted during this process and supported the SPO's comprehensive efforts that culminated in HB 1671.

Except for one section in the proposed HD2 which OAH opposes, the bill responsibly streamlines the procurement protest process by setting up a 45 day time limit that has proved to be workable in practice from July of 2009 to June of 2011. It creates minimum threshold amounts for protests in order to discourage minor complaints. It also requires protestors to file a bond, thus eliminating protests meant merely to delay matters without any hope of success.

The proposed HB 1671 HD 2 supplements the original measure in a significant way by imposing time limits on the initial decision by an agency on a protest. OAH has no comment on the specific proposed limit of twenty business days, but it supports the concept set forth by this modification. In the experience of OAH under Act 175, many agency decisions were timely, but the lack of a time limitation on that process did lead to substantial delays in some cases. One example would be a case where the agency

took five months to decide the initial protest whereas the protest of that agency decision was decided by the OAH in 45 days.

2. The burden of proof should not be elevated to an exceedingly high level

OAH does object to that portion of Section 3 of HB 1671, HD 2 Proposed, that changes the burden of proof on a party protesting a procurement in HRS Section 103D-709 (c) from the "preponderance of the evidence" standard common to virtually all civil litigation. HB 1671, HD 2 Proposed, would change that standard to one of "clear and convincing evidence."

The "clear and convincing evidence" standard is found in civil litigation primarily when there are allegations of fraud. It is a standard that is rarely used. It imposes a higher burden of proof, and there has been no study or evidence presented to the OAH concerning the history of procurement protests since 1993 that impels adoption of such a higher burden of proof. In addition, the association of this burden of proof with cases of fraud would potentially taint procurement protests with connotations of allegations of fraudulent activity on the part of procurement officials. The OAH believes that injecting that type of connotation would not be helpful to anyone concerned.

Thank you for the opportunity for OAH to provide its comments on this proposed legislation.

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcawhawaii.org
Website: www.gcawhawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 27, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR, MARILYN B. LEE, VICE CHAIR AND MEMBERS OF THE COMMITTEE ON FINANCE

SUBJECT: **SUPPORT OF H.B. 1671, PROPOSED HD2 AND RECOMMENDATION, RELATING TO PROCUREMENT.** Imposes time limits on rendering administrative and judicial review decisions; limits protests to those that are a minimum percentage of the contract value; requires posting of a protest bond, to be forfeited if the protesting party does not prevail. Effective July 1, 2112. (HB1671 HD2 PROPOSED)

HEARING

DATE: Monday, February 27, 2012
TIME: 11:30 AM
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

The General Contractors Association (GCA) is an organization comprised of over six hundred (600) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is celebrating its 80th anniversary this year; GCA remains the largest construction association in the State of Hawaii. GCA is submitting testimony **in support** of H.B. 1671, PROPOSED HD2, Relating to Contracts and respectfully requests this Committee to adopt the attached amendment.

The attached amendment incorporates GCA's proposed language into the PROPOSED HD2 and is delineated by the sections highlighted. GCA's language proposes to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process, while preserving the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA). GCA's language also proposes to amend a hearing officer's review of the procuring agency's decision in a bid protest under section 103D-701, HRS, by removing *de novo* review.

GCA believes its language coupled with the latest Proposed HD2 will address the main concerns with the bid protests which have been problematic and have stalled the startup and completion of public works projects meant to help stimulate the economy.

The Proposed HD2 essentially revives Act 175 (2009), introduced to strategically implement projects that were funded by the American Reinvestment and Recovery Act, which sunset on July 1, 2011. The following is being implemented in the Proposed HD2: (1) requiring the State Procurement Office to keep statistics on the request on all bids and awards and all protests filed as well as any additional cost to the state resulting from said protests; (2) provides for time limits on the rendering of decisions by hearing officers; and (3) requires the posting of bonds to initiate protests for contracts tied to the total value of the contract awarded.

The GCA agrees with the need to keep statistics on protests lodged and the cost of such protests as well as delays in construction resulting from such protest. Such statistics will help the state to determine the total cost of construction contract protest and the delays caused by these protests and develop procedures to eliminate the cause of bid protests. The GCA also supports the provision that would require the posting of a protest bond to initiate a protest proceeding to insure that only serious protests are lodged to reduce the number of protests. The provision to set time limits on the filing for judicial review of a hearing officer's decision should also help to speed up the final award of contracts.

The legislature's numerous proposals to increase funding for construction projects to aid in the recovery of Hawaii's economy will require swift and efficient contracts by the state. GCA's proposed language coupled with the Proposed HD2 will help to insure that the procurement process is as efficient as possible.

The GCA supports the passage of H.B. 1671, Proposed HD2 and its inclusion of the proposed amendment attached, and recommends that the committee pass this measure.

Thank you for the opportunity to provide our views on this measure.

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 103D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§103D- Procurement statistics. The state procurement office shall keep statistics on solicitations and awards protested under section 103D-701 for the purpose of improving procurement procedures. The statistics shall include information on protests involving inadvertent errors and amounts forfeited from procurement protests."

SECTION 2. Section 103D-701, Hawaii Revised Statutes, is amended by amending subsections (b) and (c) to read as follows:

"(b) The chief procurement officer or a designee, prior to the commencement of an administrative proceeding under section 103D-709 or an action in court pursuant to section 103D-710, may settle and resolve a protest concerning the solicitation or award of a contract[-] within ten business days after the

receipt of the protest. This authority shall be exercised in accordance with rules adopted by the policy board.

(c) If the protest is not resolved by mutual agreement, the chief procurement officer or a designee shall [~~promptly~~] issue a decision in writing to uphold or deny the protest[~~[-]~~] no later than twenty business days after receipt of the protest.

The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the protestor of the protestor's right to an administrative proceeding as provided in this part, if applicable.

In addition, a record of the protest shall be compiled and shall include the following:

- (1) Evidence received or considered, including oral testimony, exhibits, and a statement of the matters officially noticed;
- (2) Proposed findings of fact.

SECTION 3. Section 103D-709, Hawaii Revised Statutes, is amended to read as follows:

"103D-709 Administrative proceedings for review. (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to [~~review~~].

- (1) Review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under

section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310 [~~1035D-701~~] or 103D-702[~~-~~]; and

(2) Review and determine any request from any bidder, offeror, contractor, person, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-701 as provided in subsection (c).

(b) Hearings to review and determine any request made pursuant to subsection (a) (1) shall ~~commence~~ be conducted as follows:

(1) Hearings shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710. Hearings officers shall issue written decisions not later than

forty-five days from the receipt of the request under subsection (a) (1);

(2) The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. Fact finding under section 91-10 shall apply.

(3) The hearings officers shall ensure that a record is compiled of each proceeding which shall include the following:

(i) All pleadings, motions, and intermediate rulings;

(ii) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(iii) Offers of proof and rulings thereon;

(iv) Proposed findings of fact; and

(v) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 1030-710; and

(4) The hearings officer shall decide whether the determinations of the chief procurement officer or the

the department of commerce and consumer affairs,
 103D-701 to the office of administrative hearings of
 the record of the protest proceedings under section
 agency, or a designee of either officer shall transmit
 the chief procurement officer, head of a purchasing
 application for review pursuant to subsection (a) (2).

(1) Within ten calendar days of the filing of an
 pursuant to subsection (a) (2) shall be conducted as follows

(c) Hearings to review and determine any request made
 apply

argument on all issues involved. The rules of evidence shall
 evidence, conduct cross examination as may be required, and
 shall be afforded an opportunity to present oral or documentary
 preponderance of the evidence. All parties to the proceeding
 of persuasion. The degree or quantum of proof shall be a
 including the burden of producing evidence as well as the burden
 initiating the proceeding shall have the burden of proof.
 may initiate a proceeding under this section. The party
 to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g)
 [(c) Only parties to the protest made and decided pursuant

appropriate in accordance with this chapter
 contract, and shall order such relief as may be
 and the terms and conditions of the solicitation or
 with the Hawaii State Constitution, statutes, rules
 chief procurement officer's designee are in accordance

(2) The review shall be scheduled as expeditiously as

practicable. The review shall be conducted based upon

the record of the protest proceedings under section

103D-701 and briefs and oral argument. No new

evidence or new issues not raised in the proceedings

before the procuring agency shall be introduced,

except that the hearings officer appointed to hear the

case, if evidence is offered that is clearly newly

discovered evidence and material to the just decision

on appeal, may admit new evidence, and

(3) No later than thirty days from the filing of the

application for administrative review, based upon

review of the record, the appointed hearings officer,

(A) Shall affirm the decision of the purchasing

agency;

(B) Remand the case with instructions for further

proceedings; or

(C) Reverse the decision, but only if substantial

rights may have been prejudiced because the

findings, conclusions, decisions, or orders of

the purchasing agency are found to be arbitrary,

capricious, fraudulent, or clearly erroneous in

view of the reliable, probative, and substantial

evidence on the whole record.

provided that if an application for review is not resolved by the thirtieth day from the filing of the application, the hearings officer shall lose jurisdiction and the decision of the purchasing agency shall not be disturbed.

(d) Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under subsection (c); provided that:

- (1) For contracts with an estimated value of less than \$1,000,000, the protest shall concern a matter that is greater than \$10,000; and
- (2) For contracts with an estimated value of \$1,000,000 or more, the protest shall concern a matter that is equal to no less than ten per cent of the estimated value of the contract.

(e) The party initiating a proceeding under subsection (d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:

- (1) \$1,000 for a contract with an estimated value of less than \$500,000;
- (2) \$2,000 for a contract with an estimated value of at least \$500,000, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract or not more than \$10,000, whichever is less,

if the estimated value of the contract is \$1,000,000 or more.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

~~(d) The hearing officers shall ensure that a record of each proceeding which includes the following is compiled:~~

~~(1) All pleadings, motions, intermediate rulings;~~

~~(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;~~

~~(3) Offers of proof and rulings thereon;~~

~~(4) Proposed findings of fact;~~

~~(5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710-1~~

~~(f) Only parties to proceedings under sections 103D-310, 103D-701, 103D-709, and 103D-702 may initiate a proceeding under this section. All time limitations on actions, as provided for in section 103D-712, shall remain in effect.~~

([e]g) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103D-701(f).

~~[(f) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.]~~

~~(g)(h)~~ The policy board shall adopt such other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard."

~~(i)~~ As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract, means either the amount of the lowest responsible and responsive bid under section 103D-302 or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable."

SECTION 4. Section 103D-710, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (c) to read:

"(c) Within ~~[twenty]~~ ten calendar days of the filing of an application for judicial review, the hearings officer shall transmit the record of the administrative proceedings to the circuit court of the circuit where the case or controversy arises."

2. By amending subsection (e) to read:

"(e) [~~Upon~~] No later than thirty days from the filing of the application for judicial review, based upon review of the record the circuit court may affirm the decision of the hearings officer issued pursuant to section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion[~~-~~];

provided that if an application for judicial review is not resolved on or before the thirtieth day from the filing of the application, the circuit court shall lose jurisdiction and the decision of the hearings officer shall not be disturbed. All

time limitations on actions, as provided for in section 103D-712, shall remain in effect."

SECTION 5. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 7. This Act shall take effect on July 1, 2112.

BULLET POINTS ON HB1671 GCA PROPOSED HD2 CHANGES

- HB1671 GCA Proposed HD2 incorporates a vastly simplified procurement appeal process for other than appeals concerning bidder responsibility and debarment/suspension determinations. Its intent is to expedite and improve the procurement protest process by recognizing the procuring agency's experience and expertise in procurement, while preserving an independent but limited review of a procuring agency's decision to the DCCA office of administrative hearings (OAH)
- Provisions of Act 175 (SLH 2009) have been retained, including all time limits imposed and cash/protest bond requirements. Circuit court appeal time limits from Act 175 have been used for the simplified OAH procurement appeal process since its proposed new scope of review is very similar.
- Identical language in existing statutes and/or model codes were used as much as practicable but words were added to limit OAH review to only those issues raised in the protest to the procuring agency, but still permits the OAH to consider clearly newly discovered evidence/material
- GCA's HD2 removes the power of *de novo* review from hearings officers of the OAH. Instead, the OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be **arbitrary, capricious, fraudulent, or clearly erroneous** (bold words taken from the ABA 2000 Model Procurement Code)

BIA-HAWAII
BUILDING INDUSTRY ASSOCIATION

Testimony to House Committee on Finance

Monday, February 27, 2012

11:30 a.m.

Capitol Room 308

RE: H.B. 1671 HD1, Relating to Procurement

Good morning Chair Oshiro, Vice-Chair Lee, and members of the Committee:

My name is Gladys Quinto Marrone, Government Relations Director for the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, BIA-Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii **supports** H.B. 1671 HD1, which imposes time limits on rendering administrative and judicial review decisions; limits protests to those that are a minimum percentage of the contract value; requires posting of a protest bond, to be forfeited if the protesting party does not prevail.

This bill will help ensure that the procurement process is as efficient as possible, resulting in the expeditious awarding of State contracts that will help Hawaii's economic recovery through construction of capital improvement projects.

Thank you for the opportunity to share with you our views.

NEIL ABERCROMBIE
GOVERNOR



DEAN H. SEKI
Acting Comptroller

JAN S. GOUVEIA
Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY
OF
DEAN H. SEKI, ACTING COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
FINANCE
ON
February 27, 2012

H.B. 1671, PROPOSED H.D. 2

RELATING TO PROCUREMENT

Chair Oshiro and members of the Committee, thank you for the opportunity to submit written testimony on H.B. 1671, Proposed H.D. 2.

The Department of Accounting and General Services (DAGS) supports H.B. 1671, Proposed H.D. 2 and offers the following amendments:

Amend subsection (b), page 3, line 9 by adding to the end of the sentence: “unless a longer period is deemed necessary due to the complexity of a protest for a specific administrative review by the respective hearings officer.”

Amend subsection (e), page 7, line 4 at the beginning of the sentence: “Unless a longer period is deemed necessary due to the complexity of a protest for a specific judicial review by the circuit court,” no later than thirty days

While DAGS anticipates that the forty-five (45) day time limit would be adequate for most protests, there may be times when the forty-five (45) day time limit on a protest that is complex or that may require many witnesses would not be adequate for the protestor and the government to adequately present its case for a fair decision by the hearings officer. The same reasoning could be applied to the thirty (30) day time limit relating to judicial review.

We also recommend the following amendment to define “estimated value of the contract” or “estimated value” when a protest is made on the solicitation prior to receiving any bids.

Accordingly, amend subsection (j), page 6, line 16 by adding to the end of the sentence: “when the protest is received after the bids or offers have been received and opened. When a protest is on the solicitation and received before the bids or offers have been received and opened, “estimated value of the contract” or “estimated value”, means the amount of the government’s estimate of the contract value.”

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