



## COMMENTS

NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
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KEALI' I S. LOPEZ  
DIRECTOR

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR,  
AND TO THE SENATE COMMITTEE ON WAYS AND MEANS  
TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2012

Date: Tuesday, April 3, 2012

Time: 10:30 a.m.

Conference Room: 016

### COMMENTS FOR DECISION MAKING ON HB 1671, HD2, SD 1, RELATING TO PROCUREMENT

TO THE HONORABLE CLAYTON HEE, CHAIR, AND THE HONORABLE MAILE S.L. SHIMABUKURO, VICE-CHAIR, AND MEMBERS OF THE COMMITTEE ON JUDICIARY AND LABOR

AND TO THE HONORABLE DAVID Y. IGE, CHAIR, AND THE HONORABLE MICHELLE N. KIDANI, VICE-CHAIR, AND MEMBERS OF THE COMMITTEE ON WAYS AND MEANS

The Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to offer comments for the Committees' decision making on HB 1671, HD 2, SD 1, relating to Procurement.

**1. OAH urges this committee to consider the proposed H.D.1 to H.B. 1671.**

In comparing the various forms of this measure and a companion Senate bill, OAH strongly prefers proposed House Draft 1 of House Bill 1671 to HB 1671, HD 2, SD 1 and urges these two committees to favorably consider the language of House Draft 1 in lieu of the current language of this bill. A copy of the House Draft 1 is attached for the Committee's consideration.

**2. The Existing De Novo Review Process Should Not Be Changed - De Novo Review Enhances the Integrity of the Procurement Process and Public Confidence in that Process**

*De novo* review means, in essence, that the hearings officer's decision is based on the matters originally presented by the protester to the agency, without being subject to the decision of the agency official who made the initial evaluation of the protest. It enhances public confidence in the procurement system by eliminating any perception that an agency official with a presumably vested interest in upholding the decisions of his or her agency as to the choice of contractors does not have an inordinate influence on the protest. **It does not mean new issues can be raised before the OAH.**

HB 1671, HD 2, SD 1, mandates an unworkable procedure that will lead to substantial delays at the agency level before a procurement protest is ever filed with OAH and inadequate time to review an agency decision. There will be no confidence that an agency in-house review creates an accountable, transparent procurement process free of bias or undue favoritism. In addition, agencies are not equipped to take and preserve oral testimony as well as to prepare a comprehensive procurement investigative report.

**3. Revival of Act 175 is a Positive Step to Streamline Procurement Protests**

Act 175 responsibly streamlined the procurement protest process that proved to be workable in practice from July of 2009 to June of 2011. Its revival 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. Revival of Act 175 was proposed by the State Procurement Office (SPO). Its revival is effectuated in the form of HB 1671, HD1, that is attached.

OAH strongly urges these committees to favorably consider the attached draft in lieu of the bill in its current form.

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

HOUSE OF REPRESENTATIVES  
TWENTY-SIXTH LEGISLATURE, 2012  
STATE OF HAWAII

H.B. NO. 1671  
H.D. 1

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## 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-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 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, 103D-701, or 103D-702.

(b) Hearings to review and determine any request made pursuant

to subsection (a) 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).

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and [†]103D-702(g)[†] may initiate a proceeding under this section. 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. [~~The rules of evidence shall apply.~~] Fact finding under section 91-10 shall apply.

(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 this section; 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 proceeding initiated under subsection (d), the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the proceeding initiated under subsection (d), the cash or protest bond shall be deposited into the general fund.

~~(d)~~ (f) The hearings 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.

~~(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)~~ (h) 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)~~ (i) 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.

(j) 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 3. 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 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. 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 HD1)

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



**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

P.O. Box 119  
Honolulu, Hawaii 96810-0119  
Tel: (808) 587-4700 Fax: (808) 587-4703  
<http://hawaii.gov/spo>

**COMMENTS  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE**

**TO THE  
SENATE COMMITTEES  
ON  
JUDICIARY AND LABOR  
AND  
WAYS AND MEANS**

April 3, 2012

10:30 a.m.

**HB 1671, HD2, SD1**

RELATING TO PROCUREMENT.

Chairs Hee and Ige, Vice-Chairs Shimabukuro and Kidani and members of the committees, thank you for the opportunity to comment on HB1671, HD2, SD1. SECTION 1 requires the State Procurement Office (SPO) to maintain protest statistics.

The SPO opposes SECTIONS 2 and 7. SECTION 2 adds definitions for "Chief procurement officer" (CPO) and "Procurement officer" and SECTION 7 proposes overall changes for procurement officer to replace chief procurement officer. The added definitions in SECTION 2 and the overall changes proposed in SECTION 7 do not provide proper clarification of responsibility, as various sections throughout HRS chapter 103D requires the designation of CPO. The SPO had earlier provided to the prior Senate committee, proposed amendments specific to one section, however, switching the CPO to Procurement Officer (PO) was not intended to be applied to all chapter 103D sections. SECTIONS 2 and 7 should be deleted in its entirety.

The SPO supports the SECTION 3 amendments for section 103D-701 on protest processes requiring the procurement officer to resolve a protest within 10-business days, and issuance of a decision within 20-business days, except for the following:

Page 6, line 12, subsection (f), retain the chief procurement officer authority to determine lift of stay is necessary and should read as follows:

"...award of the contract until the chief procurement officer ..."

Thank you.



*A Minority Woman Owned & Operated Small Business*

500 ALAKAWA STREET, #119 • HONOLULU, HAWAII 96817 • PH: (808) 842-7955 • FAX: (808) 842-3985 • LIC #BC-14014

Via E-mail: [JDLEstimony@capitol.hawaii.gov](mailto:JDLEstimony@capitol.hawaii.gov)

Via Fax: (808) 586-7334

April 2, 2012

TO: HONORABLE SENATORS CLAYTON HEE, CHAIR, MAILE SHIMABUKURO, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY AND LABOR

HONORABLE SENATORS DAVID IGE, CHAIR, MICHELLE KIDANI, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ONN WAYS AND MEANS

SUBJECT: STRONG SUPPORT OF H.B. 1671, HD2, SD1 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. Clarifies use of the terms "chief procurement officer" and "procurement officer" in the procurement code. Effective July 1, 2050. (SD1)

DATE: Tuesday, April 3, 2012

TIME: 10:30 a.m.

PLACE: Conference Room 016

PUBLIC DECISION-MAKING

Dear Chairs Hee and Ige, Vice Chairs Shimabukuro and Kidani and Members of the Committees:

Waltz Engineering, Inc. strongly supports H.B. 1671, HD2, SD1 Relating to Procurement.

H.B. 1671, HD2, SD1 revives elements of Act 175 (2009) that were intended to expedite the procurement process for construction projects funded by the American Reinvestment and Recovery Act, but sunset on July 1, 2011. In addition, the bill greatly simplifies the current bid protest appeal process. It eliminates the extensive de novo review done currently for bid protest appeals heard by hearings officers from the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH). In its place, is a process that limits the OAH review to the evidence and issues raised in the proceedings before the procuring agency and the record of procuring agency's decision on a bid protest.

The intent of the bill is to discourage de minimus and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, Waltz Engineering, Inc. is in strong support of H.B. 1671, HD2, SD1 and respectfully requests this Committee to pass this measure.

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

1065 Ahua Street  
Honolulu, HI 96819  
Phone: 808-833-1681 FAX: 839-4167  
Email: [info@gcahawaii.org](mailto:info@gcahawaii.org)  
Website: [www.gcahawaii.org](http://www.gcahawaii.org)



# GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

April 3, 2012

TO: HONORABLE SENATORS CLAYTON HEE, CHAIR, MAILE SHIMABUKURO, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY AND LABOR

HONORABLE SENATORS DAVID IGE, CHAIR, MICHELLE KIDANI, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ONN WAYS AND MEANS

SUBJECT: **STRONG SUPPORT OF H.B. 1671, HD2, SD1 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. Clarifies use of the terms "chief procurement officer" and "procurement officer" in the procurement code. Effective July 1, 2050. (SD1)

#### PUBLIC DECISION-MAKING

DATE: April 3, 2012  
TIME: 10:30 a.m.  
PLACE: Conference Room 016

Dear Chairs Hee and Ige, Vice Chairs Shimabukuro and Kidani and Members of the Committees:

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 80<sup>th</sup> anniversary this year; GCA remains the largest construction association in the State of Hawaii whose mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest. GCA is submitting testimony in **strong support** of H.B. 1671, HD2, SD1, Relating to Procurement. However, GCA respectfully recommends the following amendments:

- Section 3, Page 5, Line 15 and again in Line 21 - suggest adding the words "for cause" – to read determined necessary for cause. *The hope is this will ensure time extensions are used only when necessary for a reasonable cause.*
- Section 3, Page 6, Line 12 requests not deleting the word chief. *The thought is the chief procurement officer should make the final call to lift a stay especially because there is no appeal from this decision.*

H.B. 1671, HD2, SD1 revives Act 175 (2009), which was originally passed to strategically implement projects that were funded by the American Reinvestment and Recovery Act, and sunset on July 1, 2011. This bill will revive many of the elements of Act 175 (2009) that make the procurement process more efficient.



**S & M SAKAMOTO, INC.**  
GENERAL CONTRACTORS

Via E-mail: [JDCTestimony@capitol.hawaii.gov](mailto:JDCTestimony@capitol.hawaii.gov)  
Via Fax: (808) 586-7334

April 3, 2012

TO: HONORABLE SENATORS CLAYTON HEE, CHAIR, MAILE SHIMABUKURO,  
VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY  
AND LABOR

HONORABLE SENATORS DAVID IGE, CHAIR, MICHELLE KIDANI, VICE  
CHAIR AND MEMBERS OF THE SENATE COMMITTEE ONN WAYS AND  
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SUBJECT: **STRONG SUPPORT OF H.B. 1671, HD2, SD1** Imposes time limits on  
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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. Clarifies use  
of the terms "chief procurement officer" and "procurement officer" in the  
procurement code. Effective July 1, 2050. (SD1)

PUBLIC DECISION-MAKING

DATE: Tuesday, April 3, 2012  
TIME: 10:30 a.m.  
PLACE: Conference Room 016

Dear Chairs Hee and Ige, Vice Chairs Shimabukuro and Kidani and Members of the  
Committees:

**S&M Sakamoto, Inc. strongly supports** H.B. 1671, HD2, SD1 Relating to Procurement.

H.B. 1671, HD2, SD1 revives elements of Act 175 (2009) that were intended to expedite the procurement process for construction projects funded by the American Reinvestment and Recovery Act, but sunset on July 1, 2011. In addition, the bill greatly simplifies the current bid protest appeal process. It eliminates the extensive *de novo* review done currently for bid protest appeals heard by hearings officers from the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH). In its place, is a process that limits the OAH review to the evidence and issues raised in the proceedings before the procuring agency and the record of procuring agency's decision on a bid protest.

The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, S&M Sakamoto, Inc. is in **strong support** of H.B. 1671, HD2, SD1 and respectfully requests this Committee to pass this measure.

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



VIA E-MAIL: [JDLTESTIMONY@CAPITOL.HAWAII.GOV](mailto:JDLTESTIMONY@CAPITOL.HAWAII.GOV)

Via Fax: (808) 586-7334

April 3, 2012

TO: HONORABLE SENATORS CLAYTON HEE, CHAIR, MAILE SHIMABUKURO, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY AND LABOR

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PUBLIC DECISION-MAKING

DATE: Tuesday, April 3, 2012

TIME: 10:30 a.m.

PLACE: Conference Room 016

Dear Chairs Hee and Ige, Vice Chairs Shimabukuro and Kidani and Members of the Committees:

LYZ, Inc. **strongly supports** H.B. 1671, HD2, SD1 Relating to Procurement.

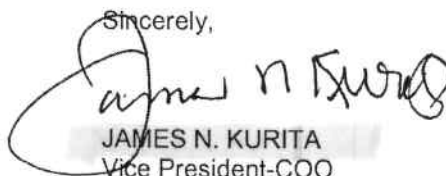
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The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and expedite the procurement appeal process. The bill recognizes the procuring agency's experience and expertise in the procurement process, while preserving the limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, LYZ, Inc. is in **strong support** of H.B. 1671, HD2, SD1 and respectfully requests this Committee to pass this measure.

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

Sincerely,



JAMES N. KURITA  
Vice President-COO





**RALPH S. INOUE CO LTD**  
**GENERAL CONTRACTOR**

2831 Awaawaloa Street  
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Via E-mail: [JDLTestimony@capitol.hawaii.gov](mailto:JDLTestimony@capitol.hawaii.gov)  
Via Fax: (808) 586-7334

April 3, 2012

TO: HONORABLE SENATORS CLAYTON HEE, CHAIR, MAILE SHIMABUKURO,  
VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY  
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PUBLIC DECISION-MAKING

DATE: Tuesday, April 3, 2012  
TIME: 10:30 a.m.  
PLACE: Conference Room 016

Dear Chairs Hee and Ige, Vice Chairs Shimabukuro and Kidani and Members of the  
Committees:

My name is Lance Inouye and I am President of Ralph S. Inouye Co., Ltd. (RSI), General  
Contractor and a member of the General Contractors Association of Hawaii (GCA). RSI  
**strongly supports** H.B. 1671, HD2, SD1 Relating to Procurement.

H.B. 1671, HD2, SD1 revives elements of Act 175 (2009) that were intended to expedite the  
procurement process for construction projects funded by the American Reinvestment and  
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The intent of the bill is to discourage *de minimus* and frivolous bid protests and simplify and  
expedite the procurement appeal process. The bill recognizes the procuring agency's  
experience and expertise in the procurement process, while preserving the limited right of  
review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, RSI is in **strong support** of H.B. 1671, HD2, SD1 and  
respectfully requests this Committee to pass this measure.

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