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DIRECTOR

**TO THE HOUSE COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS
TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012**

Date: Tuesday, February 7, 2012

Time: 8:30 a.m.

Conference Room: 312

**TESTIMONY FOR HEARING ON HB 2044
RELATING TO PROCUREMENT**

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR, & THE HONORABLE ISAAC W. CHOY, 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 HB 2044, relating to Procurement. My name is David Karlen, the Senior Hearings Officer of the OAH.

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. The Procurement Code was based on the American Bar Association's Model Procurement Code for State and Local Governments.

HB 2044 would enact two major procedural changes to the way procurement protests are conducted at the administrative level. The OAH does not believe that these changes would be of benefit to the administrative review process.

1. The existing de novo review process should not be changed

The 1993 Procurement Code established that procurement protests would be decided on a *de novo* basis. HB 2044 retains *de novo* review for determinations of bidder responsibility under Section 103D-310 and debarment and suspension proceedings under Section 103D-702. However, it eliminates *de novo* review for protests of solicitations and awards under Section 103D-701. OAH does not believe that this change is warranted.

De novo review means, in essence, that the procuring agency's decisions are based on the matters originally presented by the protester to the agency but without the influence of 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 does not have an inordinate influence on the protest.

In 2000, seven years after the passage of the Procurement Code, the American Bar Association published the last updated version of its Model Procurement Code for State and Local Governments. This latest version retains the provision for *de novo* administrative review that the Legislature originally adopted in 1993, and the OAH does not support any changes to that standard.

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

Under present law, the burden of proof on a party protesting a procurement is the “preponderance of the evidence” standard common to virtually all civil litigation. HB 2044 proposes to 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 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.

We would like to bring the Committee's attention to HB 1671 that this Committee has already recommended for approval and sent on to the Finance Committee and which streamlines the procurement protest process. This measure 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 as adopted in HB 1671. The OAH was consulted during this process and supported the SPO's comprehensive efforts that culminated in HB 1671. The present measure, in contrast, did not go through any such process. No evidence has been presented to the OAH concerning the need for such changes or the experience of other jurisdictions with similar provisions.

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

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 7, 2012

TO: THE HONORABLE REPRESENTATIVES ANGUS MCKELVEY, CHAIR,
ISAAC CHOY, VICE CHAIR AND MEMBERS OF THE HOUSE
COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS

SUBJECT: **STRONG SUPPORT AND PROPOSED AMENDMENT TO H.B. 2044,
RELATING TO PROCUREMENT.** Requires a hearing officer to affirm the
decision of a procurement officer in protests filed under section 103D-701, HRS,
unless the procurement officer's decision is shown by clear and convincing
evidence to be arbitrary, capricious, fraudulent, or clearly erroneous.

HEARING

DATE: Tuesday, February 7, 2012
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Dear Chair McKelvey, Vice Chair Choy 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 strong support and recommending an amendment to H.B. 2044, Relating to Procurement.**

H.B. 2044 proposes to limit 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. Instead, unless the procurement officer's decision is shown by clear and convincing evidence to be arbitrary, capricious, fraudulent, or clearly erroneous, the decision shall stand.

GCA supports H.B. 2044, but would like to propose language to further its intent of simplifying and expediting the procurement appeal process. GCA's proposed HD1 amendment, attached, 1) generally limits the hearings officer's review to the record of the procuring agency's protest proceedings and the issues raised therein for evidence of decisions that may be arbitrary capricious, fraudulent, or clearly erroneous (see American Bar Association 2000 Model Procurement Code); and 2) provides the same time limits for the hearings officer to make the decision as those that were included in Act 175 (SLH 2009) which sunset as of July 1, 2011. The bill, as amended, recognizes 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) Office of Administrative Hearings (OAH).

Honorable Angus McKelvey, Chair
Committee on Economic Revitalization and Business
February 7, 2012
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GCA's proposal balances the desire to expedite procurements delayed by constant protest appeals while preserving a right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, GCA is in **strong support** of H.B 2044 and respectfully requests that this Committee adopt the proposed HD1 amendment attached.

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

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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. Section 103D-709, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(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, 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, pursuant to subsection (b) below; 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; provided that the determination of the chief

procurement officer, head of a purchasing agency, or a designee of either officer shall be affirmed unless there is clear and convincing evidence that the decision was arbitrary, capricious, fraudulent, or clearly erroneous." pursuant to subsection (c) below;

2. By amending subsections (b), (c), and (d) to read:

"(b) Hearings to review and determine any request made pursuant to subsection (a) (1) shall 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 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-;

(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. The rules of evidence shall apply;

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

- (a) All pleadings, motions, intermediate rulings;
- (b) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (c) Offers of proof and rulings thereon;
- (d) Proposed findings of fact;
- (e) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710; and

(4) 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.

~~(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. Hearings to review and determine any request made pursuant to subsection (a) (2) shall be conducted as follows:~~

- (1) Within ten calendar days of the filing of an application for review pursuant to subsection (a) (2), the chief procurement officer, head of a purchasing agency, or a designee of either officer shall transmit the record of the protest proceedings under section 103D-701 to the office of administrative hearings of the department of commerce and consumer affairs;
- (2) The review shall be scheduled as expeditiously as practicable. It shall be conducted on the record of the protest proceedings under section 103D-701, and briefs and oral argument. No new evidence, nor new issues not raised in the proceedings before the procuring agency, shall be introduced, except that the hearings officer appointed to hear the case may, if evidence is offered which is clearly newly discovered evidence and material to the just decision on appeal, admit the same; and

(3) Open No later than thirty days from the filing of the application for administrative review, based upon review of the record, the appointed hearings officer shall affirm the decision of the purchasing agency, or it may either remand the case with instructions for further proceedings or 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. All time limitations on actions, as provided for in section 103D-712, shall remain in effect.

~~(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 facts;~~

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

3. By amending subsection (f) to read:

~~"(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 (deleted).~~

SECTION 2. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

Grace Pacific

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February 6, 2012

TO: THE HONORABLE REPRESENTATIVES ANGUS MCKELVEY,
CHAIR, ISAAC CHOY, VICE CHAIR AND MEMBERS OF THE
HOUSE COMMITTEE ON ECONOMIC REVITALIZATION &
BUSINESS

SUBJECT: **STRONG SUPPORT OF H.B. 2044, RELATING TO
PROCUREMENT.** Requires a hearing officer to affirm the decision
of a procurement officer in protests filed under section 103D-701,
HRS, unless the procurement officer's decision is shown by clear
and convincing evidence to be arbitrary, capricious, fraudulent, or
clearly erroneous.

HEARING

DATE: Tuesday, February 7, 2012
TIME: 8:30 AM
PLACE: Conference Room 312

Dear Chair McKelvey, Vice Chair Choy and Members of the Committee:

Grace Pacific Corporation **strongly supports** H.B. 2044, Relating to
Procurement.

H.B. 2044 proposes to limit 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. Instead, unless the procurement officer's decision is shown by clear and
convincing evidence to be arbitrary, capricious, fraudulent, or clearly erroneous,
the decision shall stand.

Grace Pacific Corporation supports H.B. 2044, and is also in support of any
amendments to the bill that the General Contractors Association of Hawaii may
propose. The intent of the bill is 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) Office of
Administrative Hearings (OAH).

Honorable Angus McKelvey, Chair
Committee on Economic Revitalization & Business
February 6, 2012
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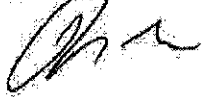
This bill retains a bid protester's right to a hearing before the OAH, but limits the hearing officer's review to the record of the procuring agencies decision below. Under this bill, the OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be arbitrary, capricious, fraudulent, or clearly erroneous.

This bill balances the desire to expedite procurements delayed by constant protest appeals while preserving a limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, Grace Pacific Corporation is in **strong support** of H.B 2044.

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

Grace Pacific Corporation



Raymond Nii
Manager, Eng, Admin, IDIQ



S & M SAKAMOTO, INC.
GENERAL CONTRACTORS

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February 7, 2012

TO: THE HONORABLE REPRESENTATIVES ANGUS MCKELVEY, CHAIR,
ISAAC CHOY, VICE CHAIR AND MEMBERS OF THE HOUSE
COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS

SUBJECT: **STRONG SUPPORT OF H.B. 2044, RELATING TO PROCUREMENT.**
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HEARING

DATE: Tuesday, February 7, 2012
TIME: 8:30 AM
PLACE: Conference Room 312

Dear Chair McKelvey, Vice Chair Choy and Members of the Committee:

S&M Sakamoto, Inc. strongly supports H.B. 2044, Relating to Procurement.

H.B. 2044 proposes to limit 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. Instead, unless the procurement officer's decision is shown by clear and convincing evidence to be arbitrary, capricious, fraudulent, or clearly erroneous, the decision shall stand.

S&M Sakamoto, Inc. supports H.B. 2044, and is also in support of any amendments to the bill that the General Contractors Association of Hawaii may propose. The intent of the bill is 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) Office of Administrative Hearings (OAH).

This bill retains a bid protester's right to a hearing before the OAH, but limits the hearing officer's review to the record of the procuring agencies decision below. Under this bill, 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.

This bill balances the desire to expedite procurements delayed by constant protest appeals while preserving a 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 2044.

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

Sincerely,

S&M Sakamoto, Inc.

A handwritten signature in black ink, appearing to read "Dennis M. Ideta". The signature is stylized and cursive.

Dennis M. Ideta
Senior Vice President



Hawaii Chapter

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RE: **Comments** of Associated Builders and Contractors of Hawaii
Re HB 2044.

Chair McKelvey, Vice Chair Choy & Members of the Committee.

Thank you for the opportunity to testify on this bill. My name is Malcolm Barcarse, Jr. I am the 2012 Board Chair and Legislative Committee Chair for Associated Builders and Contractors Hawaii Chapter. We are an association of over 150 members representing Merit Shop Contractors in the State of Hawaii.

We are concerned that this bill because while well intentioned misses the mark in making the contracting process more efficient while maintaining the integrity of the procurement system. Raising the standard of proof in the administrative hearings brings a significant unintended consequence in tolerating flawed decisions by the procurement officers of the contracting agencies.

The administrative hearings process serves as a valuable check and balance against the contracting agencies. In many cases the same contracting officer that handles a solicitation is the one that is deciding an initial protest of the solicitation. This bill may send the wrong message to the contracting agencies that unless they are being arbitrary, capricious, fraudulent, or clearly erroneous their decision is not going to be overturned. This might lead to less due diligences on the part of the contracting agencies in enforcing the procurement code.

This bill will also have the unintended consequence of allowing bids that may have significant errors in being sustained as the higher standard of proof sets a bar that is even higher than the bar required in civil court lawsuits. This bar may allow significant procurement code violations to fall through the cracks as the high standard of proof will be too difficult to overcome except in the most extreme cases.

Thank you for the opportunity to testify

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