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# A BILL FOR AN ACT

RELATING TO THE PROCUREMENT CODE.

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

1           SECTION 1. The legislature finds that protests under the  
2 procurement code have delayed the awarding of construction and  
3 design-build projects. The legislature further finds that both  
4 types of projects have high economic multipliers. Thus, the  
5 governor or a county mayor, as applicable, should have the  
6 authority for two years to exempt the procurement of these  
7 contracts from protests and administrative review of  
8 nonresponsible offeror determinations. The legislature intends  
9 this Act to authorize the temporary exemption of a procurement  
10 from procurement code provisions pertaining only to protests and  
11 administrative review of nonresponsible offeror determinations.

12           Because the exemption provided by this Act is so  
13 extraordinary, the legislature finds that the public must be  
14 ensured of the integrity of the process and actions under an  
15 exempt procurement. The legislature further finds that public  
16 confidence may be achieved by ensuring that the public has  
17 access to all information concerning the procurement, except  
18 trade secrets and other proprietary data.



1           The purpose of this Act is to promote economic  
2 revitalization by temporarily authorizing the governor or a  
3 county mayor to exempt construction or design-build procurements  
4 from protests concerning the procurement and the administrative  
5 review of a nonresponsible offeror determination. The governor  
6 or a county mayor, as applicable, may exempt a procurement only  
7 if all information concerning the procurement, except trade  
8 secrets and other proprietary data, is released for public  
9 inspection.

10           SECTION 2. Chapter 103D, Hawaii Revised Statutes, is  
11 amended by adding a new section to part III to be appropriately  
12 designated and to read as follows:

13           "§103D-A Temporary exemption of certain construction and  
14 design-build procurements from protest and administrative review  
15 of nonresponsible offeror determination. (a) For the purpose  
16 of this section, "nonresponsible offeror determination" means a  
17 determination of nonresponsibility of a prospective offeror  
18 under section 103D-310(b).

19           (b) The governor or the mayor of a county, as applicable,  
20 may exempt a procurement for a construction or design-build  
21 contract under the governor's or mayor's jurisdiction from  
22 protest under section 103D-701 and administrative review of a



1 nonresponsible offeror determination under section 103D-709 if  
2 the following conditions are met:

3 (1) The invitation for bids or request for proposals is  
4 issued by the head of the purchasing agency between  
5 July 1, 2012, and June 30, 2014;

6 (2) The governor or mayor requires all bidders or  
7 offerors, as a condition for submitting bids or  
8 proposals, to agree that all bids or offers, including  
9 amendments or revisions, but not trade secrets or  
10 other proprietary data designated by the bidders or  
11 offerors, shall be released for public inspection upon  
12 award of the contract; provided that:

13 (A) A bidder or offeror who does not agree to the  
14 requirements of this paragraph shall be deemed  
15 nonresponsible for the procurement; and

16 (B) After award of the contract, information  
17 designated as trade secrets or other proprietary  
18 data may be disclosed if required by the state  
19 attorney general or county corporation counsel,  
20 as applicable, in accordance with rules of the  
21 state procurement office; and



1       (3) The governor or mayor agrees to release for public  
2       inspection, upon award of the contract, all written  
3       evaluations and ratings of bids or offerors by the  
4       purchasing agency or evaluation committee for the  
5       procurement, if any.

6       The governor or mayor shall establish that a procurement is  
7       exempt from protest and administrative review of a  
8       nonresponsible offeror determination by issuing a proclamation  
9       simultaneously with the issuance of the invitation for bids or  
10      request for proposals for the procurement. The proclamation  
11      shall be a public record.

12      (c) Simultaneously with the award of a contract for an  
13      exempt procurement, the governor or mayor, as applicable, shall  
14      release for public inspection the information specified under  
15      subsection (b) (2) and (3).

16      (d) The governor or mayor, as applicable, shall post on  
17      the governor's or mayor's state or county website, as  
18      applicable, a list of all price adjustments and change orders  
19      approved for a contract, for an exempt procurement. The list of  
20      price adjustments and change orders shall be posted on the state  
21      or county website within ten days of the end of the quarter."



1 SECTION 3. Section 103D-105, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "§103D-105 Public access to procurement information.

4 Government records relating to procurement shall be available to  
5 the public as provided in chapter 92F[-] and, if applicable,  
6 section 103D-A. Part I of chapter 92 shall not apply to  
7 discussions, deliberations, or decisions required to be  
8 conducted or made confidentially under this chapter[-]; provided  
9 that if the governor or the mayor of a county exempts a  
10 procurement pursuant to section 103D-A, this confidentiality  
11 provision shall not be applied to make confidential any  
12 information required to be made public under section 103D-A."

13 SECTION 4. Section 103D-303, Hawaii Revised Statutes, is  
14 amended by amending subsection (h) to read as follows:

15 "(h) In cases of awards made under this section, non-  
16 selected offerors may submit a written request for debriefing to  
17 the procurement officer within three working days after the  
18 posting of the award of the contract. Thereafter, the  
19 procurement officer shall provide the non-selected offeror a  
20 prompt debriefing. Any protest by the non-selected offeror  
21 pursuant to section 103D-701 following debriefing shall be filed  
22 in writing with the procurement officer within five working days



1 after the date upon which the debriefing is completed[-];  
2 provided that the protest provision shall not apply to a  
3 procurement exempt from protest under section 103D-A."

4 SECTION 5. Section 103D-701, Hawaii Revised Statutes, is  
5 amended to read as follows:

6 "**§103D-701 Authority to resolve protested solicitations**  
7 **and awards.** (a) [Any] Except as provided in subsection (h),  
8 any actual or prospective bidder, offeror, or contractor who is  
9 aggrieved in connection with the solicitation or award of a  
10 contract may protest to the chief procurement officer or a  
11 designee as specified in the solicitation. Except as provided  
12 in sections 103D-303 and 103D-304, a protest shall be submitted  
13 in writing within five working days after the aggrieved person  
14 knows or should have known of the facts giving rise thereto;  
15 provided that a protest of an award or proposed award shall in  
16 any event be submitted in writing within five working days after  
17 the posting of award of the contract under section 103D-302 or  
18 103D-303, if no request for debriefing has been made, as  
19 applicable; provided further that no protest based upon the  
20 content of the solicitation shall be considered unless it is  
21 submitted in writing prior to the date set for the receipt of  
22 offers.



1 (b) The chief procurement officer or a designee, prior to  
2 the commencement of an administrative proceeding under section  
3 103D-709 or an action in court pursuant to section 103D-710, may  
4 settle and resolve a protest concerning the solicitation or  
5 award of a contract. This authority shall be exercised in  
6 accordance with rules adopted by the policy board.

7 (c) If the protest is not resolved by mutual agreement,  
8 the chief procurement officer or a designee shall promptly issue  
9 a decision in writing to uphold or deny the protest. The  
10 decision shall:

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

15 (d) A copy of the decision under subsection (c) shall be  
16 mailed or otherwise furnished immediately to the protestor and  
17 any other party intervening.

18 (e) A decision under subsection (c) shall be final and  
19 conclusive, unless any person adversely affected by the decision  
20 commences an administrative proceeding under section 103D-709.

21 (f) In the event of a timely protest under subsection (a),  
22 no further action shall be taken on the solicitation or the



1 award of the contract until the chief procurement officer makes  
2 a written determination that the award of the contract without  
3 delay is necessary to protect substantial interests of the  
4 State.

5 (g) In addition to any other relief, when a protest is  
6 sustained and the protestor should have been awarded the  
7 contract under the solicitation but is not, then the protestor  
8 shall be entitled to the actual costs reasonably incurred in  
9 connection with the solicitation, including bid or proposal  
10 preparation costs but not attorney's fees.

11 (h) This section shall not apply when a procurement for a  
12 construction or design-build contract is exempt from protest  
13 under section 103D-A."

14 SECTION 6. Section 103D-709, Hawaii Revised Statutes, is  
15 amended by amending subsection (a) to read as follows:

16 "(a) The several hearings officers appointed by the  
17 director of the department of commerce and consumer affairs  
18 pursuant to section 26-9(f) shall have jurisdiction to review  
19 and determine de novo, any request from any bidder, offeror,  
20 contractor, person aggrieved under section 103D-106, or  
21 governmental body aggrieved by a determination of the chief  
22 procurement officer, head of a purchasing agency, or a designee





1 of either officer under section 103D-310, 103D-701, or 103D-  
2 702[-]; except that a determination of nonresponsibility of a  
3 prospective offeror under section 103D-310(b) shall not be  
4 subject to review under this section if the procurement is  
5 exempt from review pursuant to section 103D-A."

6 SECTION 7. Statutory material to be repealed is bracketed  
7 and stricken. New statutory material is underscored.

8 SECTION 8. This Act shall take effect on July 1, 2012;  
9 provided that on June 30, 2014, this Act shall be repealed and  
10 sections 103D-105, 103D-303(h), 103D-701, and 103D-709(a),  
11 Hawaii Revised Statutes, shall be reenacted in the form in which  
12 they read on June 30, 2012.



**Report Title:**

Procurement; Temporary Exemption From Protest, Administrative Review Of Nonresponsible Offeror Determination

**Description:**

Temporarily authorizes the governor or a county mayor to exempt a construction or design-build procurement from protest concerning the procurement and administrative review of a nonresponsible offeror determination. Requires, as a condition of the exemption, that all bids and proposals, including amendments or revisions, evaluations, and ratings, but not trade secrets or other proprietary data, be released for public inspection. Requires the posting of the information on the state or county website. (PROPOSED HD2)

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



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**GCA of Hawaii**

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

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February 27, 2012

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

SUBJECT: **CONDITIONAL SUPPORT OF H.B. 2122, PROPOSED HD2 WITH  
RECOMMENDATION, RELATING TO THE PROCUREMENT CODE.**  
Temporarily authorizes the governor or a county mayor to exempt a construction or design-build procurement from protest concerning the procurement and administrative review of a nonresponsible offeror determination. Requires, as a condition of the exemption, that all bids and proposals, including amendments or revisions, evaluations, and ratings, but not trade secrets or other proprietary data, be released for public inspection. Requires the posting of the information on the state or county website. (PROPOSED HD2)

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 80<sup>th</sup> anniversary; GCA remains the largest construction association in the State of Hawaii. **GCA offers conditional SUPPORT regarding H.B. 2122, PROPOSED HD2, Relating to the Procurement Code and recommends an amendment.**

**While GCA is in support of the current HD1 version because it aims to simplify and expedite the procurement appeal process, a bill with similar language is also being considered by this Committee, H.B. 2044, HD1. Therefore, GCA respectfully requests this Committee's favorable consideration of H.B. 2044, HD1 to ensure that the concerns it addresses remains alive.**

GCA supports the intent of H.B. 2122, PROPOSED HD2, but recommends an amendment to ensure that no confidential or proprietary information is released or breached by unintended parties. GCA would propose the striking the following:

~~(B) After award of the contract, information designated as trade secrets or other proprietary data may be disclosed if required by the state attorney general or county corporation counsel, as applicable, in accordance with rules of the state procurement office; and~~

The PROPOSED HD2 version is similar to H.B. 1894, but makes an exception to the provision requiring the release of all bids and proposals by not requiring the release of any trade secrets or proprietary data unless required by the state attorney general or corporation counsel. GCA is still concerned about the limited release of such trade secrets or other proprietary information because of the possibility of a breach in information. For example, Design-Build proposals may contain proprietary design information that competitors may use to their advantage. Therefore, although we commend the Committee in attempting to address some of our initial concerns about the release of such information, problems may still exist.

We understand the intended purpose of H.B. 2122, PROPOSED HD2, which is to promote economic revitalization by authorizing the governor or county mayor to exempt construction or design-build procurement from protests for two years, while also implementing procedural measures to ensure transparency in the process.

For the abovementioned reasons, **GCA recommends the amendment, and if adopted would support the PROPOSED HD2.**

Thank you for the opportunity to testify on this matter.



**Hawaii Chapter**

February 27, 2012

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Rep. Marilyn B. Lee, Vice Chair

Testimony of Associated Builders and Contractors Hawaii Chapter in  
**opposition** to HB 2122 Proposed HD 2

Chair Oshiro, Vice Chair Lee, and members of the Committee; thank you for the opportunity to testify on this matter. My name is Malcolm Barcarse, Jr. I am the 2012 Board Chair and the Legislative Committee Chair of Associated Builders and Contractors Hawaii Chapter. We are an association of over 150 members representing the merit shop contracting industry in Hawaii.

We recognize the need to jump start the construction industry in Hawaii and appreciate the House's efforts to streamline procurement for Capital Improvement Projects. However we should not undermine the integrity of the procurement process in the name of streamlining and we believe that HB 2122 Proposed HD 2 does so and that is why we **oppose** it.

The bid protest system exists to ensure that the State and Counties are getting a responsible contractor for its projects. Many protestable flaws that occur in the bidding process are discovered by contractors that are knowledgeable of the marketplace. Eliminating protests on a project will deprive the State and the Counties of the checks and balances necessary between the government and the Contracting Community to ensure that the procurement process is fair and provides a good value to the Government.

We believe that there are other ways to reform the procurement process some of these bills are being heard at this very hearing. The ability to exempt a project from bid protests while potentially expediting the procurement may cost the State and the Counties in the long run if a non responsible bidder is awarded a contract when the problem with its bid could have been discovered during the protest process.

Thank you for the opportunity to testify.

**America's Best Contractors**