

NEIL ABERCROMBIE  
GOVERNOR



## LATE TESTIMONY

AARON S. FUJIOKA  
ADMINISTRATOR

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TESTIMONY  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE  
HOUSE COMMITTEE  
ON  
ECONOMIC REVITALIZATION & BUSINESS

February 02, 2012

8:30 AM

HB 2122

RELATING TO THE PROCUREMENT CODE.

Chair McKelvey, Vice Chair Choy, and committee members, thank you for the opportunity to testify on HB 2122. This bill temporarily suspends the protest process.

This bill would adversely impact vendors, contractors and service providers by eliminating due process to protest the outcome of award which may be due to faulty specifications and other requirements that may be biased, restrictive or preferential in nature. Protests also allow mistakes on the part of the governmental agency to be corrected.

The bill eliminates checks and balances, limits the ability of the chief procurement officers to take corrective action, and lead to misuse and abuse.

The State Procurement Office opposes this bill.

**BIA-HAWAII**  
BUILDING INDUSTRY ASSOCIATION

**LATE TESTIMONY**

*"Building Better Communities"*

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**Testimony to the House Committee on Economic Revitalization & Business**  
Thursday, February 2, 2012  
8:30 a.m.  
State Capitol, Room 312

**RE: H.B. 2122, Relating to the Procurement Code**

Good morning Chair McKelvey, Vice Chair Choy, and members of the committee:

My name is Karen Nakamura, Chief Executive Officer of 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 the intent behind H.B. 2122**, which suspends the ability of a contractor to protest the awarding of a contract under the State Procurement Code for five years.

The State Procurement Code, since its inception in 1993, has gone through many revisions and additions that give rise to the many problems it currently has.

BIA-Hawaii recommends a less-harsh remedy process through an amended version of HB2044/2457, which 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's Office of Administrative Hearings.

BIA-Hawaii applauds and supports the Legislature's effort to get construction projects moving so that our economy can bounce back and the people of Hawaii can get back to work. Part of this effort includes expediting construction procurement awards.

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

*Karen T. Nakamura*

EVP/CEO  
BIA-Hawaii

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## LATE TESTIMONY GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 2, 2012

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

SUBJECT: **COMMENTS AND PROPOSED AMENDMENT TO H.B. 2122,  
RELATING TO THE PROCUREMENT CODE.** Suspends the ability of a  
contractor to protest the awarding of a contract under the State Procurement Code  
for five years. Effective July 1, 2012.

### NOTICE OF HEARING

DATE: Thursday, February 2, 2012  
TIME: 8:30 AM  
PLACE: Conference Room 312

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 80<sup>th</sup> anniversary this year; GCA remains the largest construction association in the State of Hawaii. GCA is submitting **comments and recommending an amendment to H.B. 2122, Relating to the Procurement Code.**

H.B. 2122 proposes to suspend the ability of a contractor to protest a contract award under the State Procurement Code for five years.

GCA applauds the legislature's effort to address some of the problems that the procurement code presents for construction projects. GCA is in favor of this bill's objective which is to expedite construction procurement awards. However, the removal of the protest process may raise some due process concerns.

As an alternative, GCA would like to propose language to replace H.B. 2122 as proposed in the attached proposed HD1 amendment. GCA's proposed language retains a bid protester's right to a hearing before the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH), but limits the hearing officer's review to the record of the procuring agencies decision below. 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. (See American Bar Association 2000 Model Procurement Code)

GCA's proposal 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. See attached proposed language replacing H.B. 2122.

The GCA understands the intent of H.B. 2122, but respectfully requests that the abovementioned amendment be considered and adopted as an HD1. Upon this Committee's adoption of the proposed language, GCA will be in support of this measure.

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) ~~Upon~~ 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.