

**SB2457,SD1**



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  
TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2012

Date: Friday, February 24, 2012  
Time: 9:30 a.m.  
Conference Room: 016

**TESTIMONY FOR HEARING ON SB 2457, SD1  
RELATING TO PROCUREMENT**

TO THE HONORABLE CLAYTON HEE, CHAIR, & THE HONORABLE  
MAILE S.L. SHIMABUKURO, 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 SB 2457, SD 1, relating to Procurement. My name is David Karlen, and I am 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. OAH and DCCA oppose SB 2457, SD 1.

Hawaii's Procurement Code was based on the American Bar Association's Model Procurement Code for State and Local Governments. SB 2457, SD 1, 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. Accordingly,

**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. SB 2457, SD 1, retains *de novo* review for determinations of bidder responsibility under Section 103D-310 and debarment and suspension proceedings under Section 103D-702. There are hardly ever any protests filed under these statutes. However, it eliminates *de novo* review for protests of solicitations and awards under Section 103D-701. OAH strongly believes this change is not warranted because: (a) it will undermine public confidence in the procurement process; and (b) it will be counterproductive and lead to greater complexity and delay in the procurement protest process.

**a. De Novo Review Enhances the Integrity of the Procurement Process and Public Confidence in that Process**

*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 as to the choice of contractors 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.

Testimony previously submitted by a lobbying group to the Senate with respect to SD 2457, and to the House in favor of a companion bill, HB 2044, mistakenly claimed that the American Bar Association had changed its Model Procurement Code in the year 2000 to eliminate *de novo* review. That was not, in fact, the case.

**2. SB 2457, SB1, mandates an unworkable procedure that will lead to substantial delays at the agency level before a procurement protest is ever filed and inadequate time to review an agency decision.**

The bill requires the procuring agency to prepare “a record of the protest proceedings” but provides no guidance as to what constitutes a “record.” If, administratively, the agency decides a protest based solely on letters and other documents, the agency is not obtaining “live” evidence that is often relevant to deciding what happened and why. As noted above, there will be no confidence that such an in-house review of documents creates an accountable, transparent procurement process.

On the other hand, if the agency, as it should in at least some protests, goes beyond the paperwork, the agencies are not equipped to take and preserve oral testimony as well as to prepare an investigative report that puts its own employees to the test by going beyond the surface of documents or self-serving documents.

In order to do a proper job without the benefit of the adversarial process conducted by a professional hearings officer, the agency will end up taking more time than normally involved in resolving procurement protests. Presently, the real delay in bid protests stems from agency delay in resolving the initial protest because there are no time limits on that activity. (In 2011 case, the agency took 5 months while OAH resolved the protest, including a full evidentiary hearing, in 45 days). SB 2457, SD 1, will only make matters worse.

To make matters worse, the current proposed legislation has an absolute time limit of thirty (30) days. Yet it gives the agency ten (10) days to file the administrative record, with no stated penalties for noncompliance. It is thus in the agency's interest to be late and use up more than ten days of the thirty day total because failure to conclude the proceeding in thirty days automatically means the agency's decision is upheld.

In the remaining twenty days, even assuming the agency timely files the record, the OAH hearings officer is supposed to receive briefs, hear oral argument, take new evidence where appropriate, and issue a written decision that explains the basis for a decision no matter which party prevails. This is totally unrealistic if the case is at all complicated and will lead to further erosion in public confidence in the viability of the procurement protest process.

Supporters of HB 2044, the companion bill to SB 2457, previously submitted testimony to the House in favor of adding time limits on the protest hearing that were supposedly consistent with Act 175 (SLH 2009) which sunset on June 30, 2011. The proposed time limits, however, were not consistent with the forty-five days for de novo review provided in Act 175.

We respectfully direct the Committee's attention to HB 1671 which revives Act 175. It has been approved by the House Committee on Economic Revitalization & Business and is now pending before the House Finance Committee. It responsibly streamlines the procurement protest process by setting up 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. 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 through 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. It is only a creation of one lobbying group. No actual evidence has been presented to the Legislature or OAH concerning the need for the proposed changes or the identification of other jurisdictions with similar provisions so that their experience with this system could be investigated.

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



## Testimony to Senate Committee Judiciary & Labor

Friday, February 24, 2012

9:30 a.m.

Capitol Room 016

### RE: S.B. 2457 SD1, Relating to Procurement

Good morning Chair Hee, Vice-Chair Shimabukuro, 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** S.B. 2457 SD1, which 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.

BIA-Hawaii is also in support of amendments to the bill that the General Contractors Association of Hawaii (GCA) proposed. 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 foregoing reasons, BIA-Hawaii **supports** S.B. 2457 SD1.

Thank you for the opportunity to testify.



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

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

February 24, 2012

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

SUBJECT: **STRONG SUPPORT OF S.B. 2457, SD1.** Amends administrative review  
proceedings under Hawaii public procurement code. (SD1)

HEARING

DATE: Friday, February 24, 2012  
TIME: 9:00 A.M.  
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee:

**S&M Sakamoto, Inc. strongly supports S.B 2457, SD1 Relating to Procurement.**

S.B. 2457, SD1 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 S.B. 2457, SD1. 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).

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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 S.B. 2457, SD1 and respectfully requests this Committee to pass this measure.



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

A handwritten signature in black ink, appearing to read "Dennis M. Ideta", with a stylized flourish extending to the right.

Sincerely,

S&M Sakamoto, Inc.

Dennis M. Ideta  
Senior Vice President

February 24, 2012

TO: HONORABLE SENATORS CLAYTON HEE, CHAIR, MAILE SHIMABUKURO  
VICE CHAIR AND MEMBERS OF THE COMMITTEE ON JUDICIARY AND  
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Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee:

**Royal Contracting Co., Ltd. strongly supports S.B 2457, SD1 Relating to Procurement.**

S.B. 2457, SD1 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.

**Royal Contracting Co., Ltd.** supports S.B. 2457, SD1. 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).

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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, **Royal Contracting Co., Ltd.** is in **strong support** of S.B. 2457, SD1 and respectfully requests this Committee to pass this measure.

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



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February 24, 2012

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VICE CHAIR AND MEMBERS OF THE COMMITTEE ON JUDICIARY AND  
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DATE: Friday, February 24, 2012  
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Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee:

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** S.B 2457, SD1 Relating to Procurement.

S.B. 2457, SD1 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 found to be arbitrary, capricious, fraudulent, or clearly erroneous, the decision shall stand.

RSI supports S.B. 2457, SD1. 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).

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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, RSI is in **strong support** of S.B. 2457, SD1 and respectfully requests this Committee to pass this measure.

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

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# GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 24, 2012

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

SUBJECT: **STRONG SUPPORT OF S.B. 2457, SD1, RELATING TO PROCUREMENT.** Amends administrative review proceedings under Hawaii public procurement code. (SD1)

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Dear Chair Hee, Vice Chair Shimabukuro 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 testimony **in strong support** of S.B. 2457, SD1 Relating to Procurement.

S.B. 2457, SD1 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). This bill 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 supports S.B. 2457, SD1 and its intent of simplifying and expediting the procurement appeal process. This bill 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 for the Circuit Court in Act 175 (SLH 2009) which sunset as of July 1, 2011.

This bill is necessary to allow public works projects to move forward by avoiding unscrupulous bid protests and bad precedence for construction related cases. The *de novo* process means a new trial by a different tribunal. Under the current law, the protestor has two chances to appeal on totally different basis (i.e. an appeal at procuring agency and a second opportunity "anew" at the

OAH level). The current process results in stalled projects, prolonged evidentiary hearings, and bad precedence for the construction industry.

Any concern raised in regards to possible undue influence by the procuring agency is minimal, if not, non-existent because the procuring agencies are held at a very high standard and in most cases award projects to the lowest bidder. For example through the Competitive Bid Process and others, there is little room for undue influence between the bidder and the procuring agency because departments are required to be very transparent in the procurement process.

Additionally, the following factors should also be considered:

- **Increase cost** – A bid protest based solely on a technical error or subcontractor listing could end up costing the states thousands if awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> lowest bidder. For example, in the Bolton case involving improvements to Honokohou Small boat Harbor, taxpayers paid 44% more because the contract was awarded to the second lowest bidder.
- **Prolongs process and stalls projects** - Current OAH review delays decisions and delays start of project;
- **De Novo process would require more experts and the evidentiary hearing would draw out the process.** The OAH is considering issues that were not initially raised before the procuring agency, allowing the protestor an opportunity to make additional claims not originally considered.

For the above mentioned reasons, GCA is in **strong support** of S.B. 2457, SD1 and respectfully requests that this Committee pass this measure.

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