



Testimony of Maurice Morita
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1617 Palama Street
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HOUSE COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS
Thursday, March 15, 2012
8:30 a.m., Conference Room 312

SB 2457, SD2 - RELATING TO PROCUREMENT

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

My name is Maurice Morita and I am the assistant director of Hawaii LECET (Laborers-Employers Cooperation and Education Trust). Hawaii LECET is a partnership between the Hawaii Laborers' Union, Local 368 and our union contractors.

The Hawaii LECET **strongly supports** SB 2457, SD2, which imposes time limits on rendering administrative and judicial review decisions, limits protests to those that are a minimum percentage of the contract value and requires posting of a protest bond, to be forfeited if the protesting party does not prevail and we **strongly support SB 2457, proposed HD1.**

We would like to recommend that the sunset date do not interfere with the intent of the original SB 2457 which is incorporated in the proposed HD1.

Thank you for the opportunity to submit this testimony.

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LATE TESTIMONY

GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 15, 2012

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

SUBJECT: **REVISED TESTIMONY -- SUPPORT OF S.B. 2457, PROPOSED HD1 & PROPOSED AMENDMENTS. RELATING TO PROCUREMENT.** Imposes time limits on 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. Temporarily authorizes the governor or a county mayor to exempt a procurement from protest concerning the procurement and administrative review of a non responsible offeror determination. Requires, as a condition of the exemption, that bids and proposals, but not trade secrets or other proprietary data, be released for public inspection. Effective July 1, 2012.

HEARING

DATE: Thursday, March 15, 2012
TIME: 9:45 a.m.
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 80th 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 support of S.B. 2457, PROPOSED HD1, Relating to Procurement and would like to offer amendments.**

Although GCA prefers the SD2 version over the Proposed HD1 version, we understand the Committee's position. GCA respectfully recommends that this Committee only apply sunset dates to the added language, borrowed from H.B. 2122, HD2. In order to address some of the concerns, we are proposing amendments for consideration and respectfully request this Committee to reconsider the sunset provisions for particular sections as outlined on the attached.

S.B. 2457, Proposed HD1 addresses a number of procurement revisions and also introduces a new section allowing the Governor or County mayor to temporarily authorize temporary relief from bid protests, of which language was previously heard by this Committee and crossed over to the Senate in H.B. 2122, HD1.

Proposed HD1 Background

S.B. 2457, Proposed HD1, Sections 1, 5 and 7 revives Act 175 (2009) and was originally passed to strategically implement projects that were funded by the American Reinvestment and Recovery Act. Sections 2, 3 and 4 incorporates H.B. 2122, HD2, relating to temporarily authorizing the governor or a county mayor to exempt a procurement from protest concerning the procurement and administrative review of a non responsible offeror determination. Section 6 amends Section 103D-709, Hawaii Revised Statute and proposes to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process. Further, section 6 preserves the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH), while amending an officer's standard of review in a bid protest under section 103D-701, HRS, by removing *de novo* review.

GCA's Position

The GCA agrees with the need to keep statistics on protests lodged and the cost of such protests as well as delays in construction resulting from such protest. Such statistics will help the state to determine the total cost of construction contract protest and the delays caused by these protests and develop procedures to eliminate the cause of bid protests. The GCA also supports the provision that would require the posting to a protest bond to initiate a protest proceeding to insure that only serious protest are lodged to reduce the number of protest. The provision to set time limits on the filing for judicial review of a hearing officer's decision should also help to speed up the final award of contracts.

In regards to the temporary authorization by the Governor or County Mayor exempting bid protests is of particular concern in Section 2 and GCA would like to propose 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~~

Striking such language will ensure that no confidential or proprietary information is released or breached by unintended parties. GCA remains 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.

Overall, GCA believes this bill will address concerns with the bid protests which remain problematic and have stalled the startup and completion of public works projects meant to help stimulate the economy. This bill will benefit the procurement process and will make the process more efficient. This session the legislature introduced a number of measures to increase funding for construction projects to aid in the recovery of Hawaii's economy; however these projects will need efficient and timely procurement approvals. All in all, this bill will protect the procurement process; curb problematic decisions by the OAH; and most importantly save tax dollars.

The GCA is proposing the attached amendments to address some of the sunset provisions in the Proposed HD1. The GCA supports the passage of S.B. 2457, Proposed HD1 and respectfully recommends that the committee adopt GCA's recommended amendments.

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

Amendments to Proposed HD1 suggested by GCA

<u>Bill Section</u>	<u>GCA's Proposed HD1</u>	<u>Justification to GCA Change</u>
		GCA recognizes that ERB's Proposed HD1 version attempts to integrate HB 2122, HD2 into SB 2457, SD2. While GCA strongly supports SB 2457, SD2 and would prefer it remain as is, GCA understands this Committee's attempt to incorporate other procurement elements.
Section 1. Ch. 103D, Procurement Statistics	Keep as is <u>with NO Sunset</u> . Make Permanent	SB 2457, SD2 included this provision and GCA believes this should remain permanent. Gathering of statistics will help evaluate why bid protests being filed and any issues may be addressed based on results from statistics.
Section 2. Ch. 103D New section – Temporary Exemption for D/B procurements from protests	Okay, but delete section on page 2, Lines 16-21 with reference to release of trade secrets or other proprietary information. <u>Keep Sunset Date for this section.</u>	Similar to GCA's position on HB 2122, HD2 – GCA supports this section except for provision allowing release of trade secrets or proprietary information on Design-Build Proposals to the AG or Corporation Counsel upon request. Thus, GCA recommends striking language as detailed.
Section 3. Ch. 103D-105 Public access to procurement information.	Keep as is <u>with Sunset</u> .	This section is in original SB 2457, SD2.
Section 4. Ch. 103D-303 subsection (h) regarding Debriefing request.	Keep as is <u>with Sunset</u> .	This section is in original SB 2457, SD2.
Section 5 Ch. 103D-701 subsection (a) Authority to resolve protested solicitations.	GCA suggests breaking Section 5 into three separate parts – separated by subsections as follows: (a); (b) & (c); and (h) . Subsection (a) will remain as is <u>with Sunset Date</u> .	Subsection (a) will have sunset date because applicable to section in bill related to Gov/Mayor exempting certain D/B proposals from bid protests.

<u>Bill Section</u>	<u>GCA's Proposed HD1</u>	<u>Justification to GCA Change</u>
<u>NEW</u> Section 6. Ch 103D-701 subsections (b) & (c)	Section 103D-701(b) & (c) should remain permanent as suggested in S.B. 2457, SD2. Keep subsections (d) to (g) as is, with no changes. <u>NO Sunset.</u>	Section 103D-701(b) & (c) should remain permanent as suggested in S.B. 2457, SD2, which is applicable to the resolution of bid protests by the procuring agent and sets time limits. This section also requires a record of protest to be kept.
<u>NEW</u> Section 7. Ch 103D-701 subsection (h)	Section 103D-701(h) keep as is <u>With Sunset.</u>	Subsection (h) will remain as is <u>with Sunset Date</u> since only applicable to section in bill related to Gov/Mayor exempting certain D/B proposals from bid protests.
<u>NEW</u> Section 8. Ch103D-310 subsection (b)	NEW AMENDMENT TO SECTION PROPOSED. Last part of subsection (a)(1) should be deleted: "except that a determination of nonresponsibility . . .review pursuant to section 103D-A and . . ." – <i>This language inserted into newly amended Section 103D-310(b).</i> Keep <u>With Sunset</u>	Amendment is applicable to Gov/Mayor Exemption so okay to sunset this section. Better to move out of Ch. 103D-709.
<u>Renumbered</u> to Section 9. Ch. 103D-709 subsections(a) thru (i)	Last part of subsection (a)(1) must be deleted: "except that a determination of nonresponsibility . . .review pursuant to section 103D-A and . . ." – <i>This language inserted into newly amended Section 103D-310(b).</i> <u>NO Sunset.</u>	End of subsection (a)(1) must be deleted b/c relates to Gov/Mayor temporary exemption to bid protests for select D/B bids. Keep rest of Section as is.
<u>Renumbered</u> to Section 10. Ch. 103D-710	Keep as is <u>with NO Sunset.</u>	

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

"§103D-A Temporary exemption of certain construction and design-build procurements from protest and administrative review of nonresponsible offeror determination. (a) The governor or the mayor of a county, as applicable, may exempt a procurement for a construction or design-build contract under the governor's or mayor's jurisdiction from protest under section 103D-701 and administrative review of a nonresponsible offeror determination under section 103D-709 if the following conditions are met:

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

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

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

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

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

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

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

(c) The governor or mayor, as applicable, shall post on the state or appropriate county website, as applicable, a list of all price adjustments and change orders approved for a contract, for an exempt procurement. The list of price adjustments and change orders shall be posted on the state or county website within ten days of the end of the quarter in which the price adjustment or change order is made.

(d) For the purpose of this section, "nonresponsible offeror determination" means a determination of nonresponsibility of a prospective offeror under section 103D-310(b)."

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

"§103D-105 Public access to procurement information. Government records relating to procurement shall be available to the public as provided in chapter 92F[-] and, if applicable, section 103D-A. Part I of chapter 92 shall not apply to discussions, deliberations, or decisions required to be conducted or made confidentially under this chapter[-]; provided that if the governor or the mayor of a county exempts a procurement pursuant to section 103D-A, this confidentiality provision shall not be applied to make confidential any information required to be made public under section 103D-A."

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

"(h) In cases of awards made under this section, non-selected offerors may submit a written request for debriefing to the procurement officer within three working days after the posting of the award of the contract. Thereafter, the procurement officer shall provide the non-selected offeror a prompt debriefing. Any protest by the non-selected offeror pursuant to section 103D-701 following debriefing shall be filed in writing with the procurement officer within five working days after the date upon which the debriefing is completed[-]; provided that the protest provision shall not apply to a procurement exempt from protest under section 103D-A."

SECTION 5. Section 103D-701, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

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

SECTION ~~6~~⁵. Section 103D-701, Hawaii Revised Statutes, is amended by amending subsection (b) and (c) to read as follows:

(b) The chief procurement officer or a designee, prior to the commencement of an administrative proceeding under section 103D-709 or an action in court pursuant to section 103D-710, may settle and resolve a protest concerning the solicitation or award of a contract~~[-]~~ within ten business days after receipt of the protest. This authority shall be exercised in accordance with rules adopted by the policy board.

(c) If the protest is not resolved by mutual agreement, the chief procurement officer or a designee shall ~~[promptly]~~ issue a decision in writing to uphold or deny the protest~~[-]~~ no later than twenty business days after receipt of the protest. The decision shall:

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

In addition, a record of the protest shall be compiled and shall include evidence received or considered, including oral testimony, exhibits, and a statement of the matters officially noticed, and proposed findings of fact.

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

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

(f) In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written

determination that the award of the contract without delay is necessary to protect substantial interests of the State.

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

SECTION 7. Section 103D-701, Hawaii Revised Statutes, is amended by amending subsection (h) to read as follows:

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

SECTION 8. Section 103D-310, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

(b) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709 except that a determination of nonresponsibility of a prospective offeror under section 103D-310(b) shall not be subject to review under this section if the procurement is exempt from review pursuant to section 103D-A; and

SECTION ~~9~~[6]. 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]:

(1) 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[~~].~~ except that a determination of nonresponsibility of a prospective offeror under section 103D-310(b) shall not be subject to review under this section if the procurement is exempt from review pursuant to section 103D-A; and

(2) Review and determine, as provided in subsection (c), any protest submitted under section 103D-701 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.

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

(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 present argument on all issues involved. Fact finding under section 91-10 (1) through (4) shall apply;

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

(A) All pleadings, motions, and 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; and

(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 are in accordance with the state 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.~~

~~(d) 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.]~~

(c) 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 and be conducted based upon the record of protest proceedings under section 103D-701, including the briefs, and oral argument. New evidence or new issues that were not raised in the proceedings before the procuring agency shall not be introduced, except that the hearings officer appointed to hear the case, may admit new evidence if evidence offered is clearly newly discovered evidence and material to the decision on appeal; and

(3) No later than thirty days from the filing of the application for administrative review, based upon review of the record, the appointed hearings officer:

- (A) Shall affirm the decision of the purchasing agency;
- (B) Remand the case with instructions for further proceedings; or
- (C) Reverse the decision, 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.

(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 subsection (c); provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest shall concern a matter with estimated damage greater than \$10,000; and

(2) For contracts with an estimated value of \$1,000,000 or more, the protest shall concern a matter with estimated damage that are 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 of one 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.

(f) Only parties to proceedings under sections 103D-310, 103D-701, 103D-702, and 103D-709 may initiate a proceeding under this section. All time limitations on actions, as provided for in section 103D-712, shall remain in effect.

~~[(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) 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)]~~ (h) 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.

(i) 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 ~~10 [7]~~. 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 8. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 10. This Act shall take effect on July 1, 2012; provided that on June 30, 2014, this Act shall be repealed and sections 103D-105, 103D-303(h), ~~103D-310(b)~~, 103D-701(a), and 103D-701(h), ~~and 103D-709(a)~~, Hawaii Revised Statutes, shall be reenacted in the form in which they read on June 30, 2012.

Report Title:

Procurement Code; Protest; Administrative Proceedings; Temporary Exemption from Protest and Administrative Review

Description:

Imposes time limits on 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. Temporarily authorizes the governor or a county mayor to exempt a procurement from protest concerning the procurement and administrative review of a non responsible offeror determination. Requires, as a condition of the exemption, that bids and proposals, but not trade secrets or other proprietary data, be released for public inspection. Effective July 1, 2012.

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
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 15, 2012

LATE LATE TESTIMONY

**S.B. 2457, S.D. 2, proposed H.D. 1
RELATING TO PROCUREMENT**

HOUSE COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS

The Department of Transportation (DOT) is testifying only on section 103D-709, Administrative proceedings for review, section (d) and (e) of S.B. No. 2457, S.D. 2, proposed H.D. 1. We defer comment on other sections of the bill to the responsible agencies.

Protests under the procurement code have had a negative impact on the economy because the awarding of construction and design-build projects resulted in costly delays in the commencement and completion of projects. Protests have hindered the procurement process and slowed the normal course of progress of projects that would energize and rejuvenate the economy. This bill requires the party filing for an administrative hearing to post a cash or protest bond. This will discourage parties from filing for an administrative hearing with less than convincing evidence, thus minimizing unnecessary halts to the contract process. Therefore, this bill will ensure contracts to be executed in a timely manner.

Thank you for the opportunity to provide testimony.

