

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

LATE TESTIMONY

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February 13, 2013

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling Johanson, Vice Chairs; and Members of the House Committee on Finance

Subject: TESTIMONY IN SUPPORT of HB 137, Relating to Procurement

Dear Chair Luke and Members of the Committee:

The American Council of Engineering Companies of Hawaii (ACECH) represents almost 70 member firms with over 1,300 employees throughout Hawaii. ACECH's member firms are comprised of engineers who are at the forefront of their particular disciplines, and who have specialized experience in the geography, resources, and design requirements of Hawaii and the Pacific region. Projects designed by design professionals directly affect the quality of the water we drink and the food we eat; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play. Most projects start as problems or opportunities in need of solutions. Design professionals have the expertise to develop viable solutions to society's problems.

Design professionals who conduct work for the State do so under contract using the State's "General Conditions" (Document AG-008, revised 4/15/2009). A set of contract terms and conditions primarily developed for use in contracts with construction contractors make up the State's General Conditions. However, the legal rights and responsibilities are very different for design professionals. **Many of the terms in the current General Conditions are not applicable to or appropriate for the services provided by design professionals, and are not covered by professional liability insurance policies.** The situation is completely different for contractors, whose insurance provides broader coverage. And, unlike contractors, design professionals may be held personally liable because they hold professional licenses.

The State requires design professionals to obtain professional liability insurance (PLI) for our work. However, inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement. In situations not covered by PLI, design professionals must cover claims from their own pockets, severely limiting the recovery available to the State. It is in the best interest of the State to utilize reasonably insurable contract terms so that PLI coverage applies.

We want to emphasize that this bill does not contain any new concepts, but simply suggests changes to a bill previously passed by the State Legislature in 2007. ACECH worked with the Legislature to pass a bill that became law (HRS §103D-713), prohibiting governmental bodies from requiring design professionals to defend the government, and that also linked our liability to our negligence. The bill covered only contracts less than \$1 million. In the years since the relief provided by that bill, we have seen continuing issues:

- Many of our small local firms are still subject to the unfair contract language when they serve as sub-consultants on projects with contracts greater than \$1 million.
- The unfair contract terms do not favor teams of local small firms that often band together to pursue larger projects, but would each individually be subject to the onerous contract terms. This favors larger, out-of-state firms that can afford to "self-insure".

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Page 2 of 2

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- Many of our best firms decline to do work for the State under the unfair contract terms, negatively impacting the procurement process, and potentially increasing costs to the State as less firms are "in the pool" of qualified consultants.
- Many agencies are unsure if HRS §103D-713 applies to them, and firms frequently struggle to have the applicable language used in contracts, slowing down the procurement process.
- An unreasonable risk climate serves to limit innovative design, since engineers are more likely to stick to "tried-and-true" solutions to avoid potential risk. Since the State has clearly seen the link between economic growth and commercial technological advances and innovation, as evidenced by various innovation programs, the stifling of local engineering firms through such onerous contract terms is counterproductive.

Most states do not have such unfair contract requirements for design professionals, and other states, including Florida and Michigan, recently revised their contract language to bring fairness to their public contracts. The City and County of Honolulu recently revised their indemnification clause for design professionals, in line with what we are requesting in this bill, citing a desire to have the largest pool of design consultants willing to do work for City departments.

We note that a companion bill in the Senate, SB 504, was heard last week in a joint hearing of the Senate Committees on Economic Development, Government Operations and Housing and Commerce and Consumer Protection. We support the revisions to the bill proposed by SB 504 SD1. The revisions resolved a concern expressed in the hearing by the State Procurement Office regarding the definition of "governmental body", and also clarifies Section 1 to clarify that the measure pertains to defense, rather than indemnification clauses in government procurement contracts. We urge your committee to adopt the same revisions.

In conclusion, requiring design professionals to sign contracts containing uninsurable terms that shift an unreasonable degree of risk to the design professional is poor public policy and has no public benefit. For State and County public works projects, the main beneficiary of design professional services is the public. Design professionals receive a limited short-term financial benefit, compared to the very long-lasting benefit to the State and its citizens. In many cases, the owner's maintenance activities and upgrades affect the project's risk profile far more than does the initial design. Risk exists for all projects. All parties, including the public owners, should assume their fair share of the risk.

We appreciate the continuing efforts of your committees and the members of the House of Representatives to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII



Terrance Arashiro, P.E.
President

MOSS Engineering, Inc. Electrical / Lighting Engineers
1357 Kapiolani Blvd., Suite 830 Honolulu, Hawaii 96814

Richard M. Moss P.E., LEED® AP

February 11, 2013

LATE TESTIMONY

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling Johanson, Vice Chairs; and Members of the House Committee on Finance

Subject: TESTIMONY IN SUPPORT of HB137, Relating to Procurement

Dear Chair Luke and Members of the Committee:

I am a practicing engineer in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

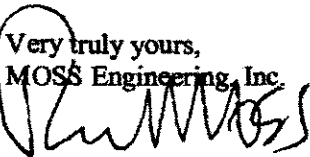
A design professional's PLI only covers harm caused by the design professional's negligence; it will not advance the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to the contract.

We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

If you have any questions, please don't hesitate to call.

Very truly yours,
MOSS Engineering, Inc.


Richard M. Moss, P.E.
President

TEL: (808) 951-6632

Supporting AutoCAD and Revit Platforms
mail@moss-engineering.net

FAX: (808) 941-0917



12 February 2013

MEMORANDUM

LATE TESTIMONY

TO: House Committee on Finance
Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling Johanson,
Vice Chairs; and Members of the House Committee on Finance

SUBJECT: TESTIMONY IN SUPPORT of HB137, Relating to Procurement
House Hearing: Wednesday, February 13, 2:00 p.m., Conference Room 308

I am writing in strong SUPPORT of the passage of HB137.

I am a practicing architect in the State of Hawaii, and have provided design services for a number of Hawaii State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

A design professional's PLI only covers harm caused by the design professional's negligence; it will not advance the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and some states that did have recently revised their contract language to bring fairness to the contract.

We appreciate the continuing efforts of your committees and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,

Design Partners Incorporated

Principal
Duane T. Hamada
AIA, CSI, LEED AP

cc: Janice Marsters, Kennedy Jenks Consultants



RALPH S. INOUE CO LTD
GENERAL CONTRACTOR

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Via E-mail: FINTestimony@capitol.hawaii.gov
Via Fax: 1-800-535-3859

February 12, 2013

LATE TESTIMONY

TO: HONORABLE SYLVIA LUKE, CHAIR, HONORABLE SCOTT NISHIMOTO, VICE CHAIR, HONORABLE AARON JOHANSON, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON FINANCE

SUBJECT: **STRONG OPPOSITION TO H.B. 137 & AMENDMENTS PROPOSED, RELATING TO PROCUREMENT AS CURRENTLY DRAFTED.** Prohibits governmental procurement contracts of any amount that are exclusively for the services of engineers, architects, surveyors, or landscape architects, from requiring the contractor to indemnify the governmental body against liability not arising from the contractor's own negligence or fault.

HEARING

DATE: Wednesday, February 13, 2013
TIME: 2:00 p.m.
PLACE: Conference Room 308

Dear Chair Luke, Vice Chairs Nishimoto and Johanson and Members of the Committee:

Ralph S. Inouye Co., Ltd. (RSI), General Contractor and member of the General Contractors Association of Hawaii (GCA), **strongly opposes** the passage of H.B. 137, Relating to Procurement, as currently drafted, **and requests that the amendments proposed by the General Contractors Association of Hawaii (GCA) be adopted to ensure fairness.** This bill proposes to shift the indemnification liability solely to the contractor, while exempting all engineers, architects, surveyors and landscape architects, unless the liability results from their own negligence or fault. This bill will leave the contractor alone to bear the burden of defending governmental entities when the contractor is not negligent or at fault.

H.B. 137 would unfairly allow special treatment for engineers, architects, surveyors, or landscape architects by not requiring them to sign indemnity clauses in governmental procurement contracts, whereby liability would only arise from their own fault or negligence.

Enactment of this amendment would leave construction contractors, as the only major party still required by contract to indemnify the state. The result would be increased insurance costs for the contractor and the state. It may also result in some contractors no longer being able to obtain liability insurance coverage and thus unable to bid on state public works contracts.

Accordingly, RSI strongly opposes H.B. 137 as currently drafted and requests that GCA's amendments be adopted.

Thank you for the opportunity to offer our comments on this matter.



MKE ASSOCIATES LLC
Structural Engineers

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Aiea, HI 96701

Phone: (808) 488-7579
Fax: (808) 488-7818
E-Mail: mke@mkellc.com

February 12, 2013

LATE TESTIMONY

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling
Johanson, Vice Chairs; and Members of the House Committee on Finance

Subject: TESTIMONY IN SUPPORT of HB 137, Relating to Procurement

Dear Chair Luke and Members of the Committee:

I am a practicing engineer in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

A design professional's PLI only covers harm caused by the design professional's negligence; it will not advance the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we as design professionals are personally liable, and that this liability follows us into retirement.

Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to the contract.

We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,
MKE Associates LLC

Susan Kuniyoshi, P.E.
Its Member

Dear Chair Luke and Members of the Committee:

I am a practicing architect in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

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Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to the contract.

We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully Submitted,

John M. Toguchi, AIA | LEED AP
J-CUBED, LLC
808|258|7368



Testimony of
The Pacific Resource Partnership

House Committee on Finance
Representative Sylvia Luke, Chair
Representative Scott Nishimoto, Vice Chair
Representative Aaron Ling Johanson, Vice Chair

HB 137 – Relating to Procurement
Wednesday, February 13, 2013
2:00 pm
Conference Room 308

Aloha Chair Luke, Vice Chairs Nishimoto and Johanson, and Members of the Committee:

The Pacific Resource Partnership (PRP) is a labor-management consortium representing over 240 signatory contractors and the Hawaii Regional Council of Carpenters.

PRP **opposes** HB 137 – Relating to Procurement as written **unless** the inclusion of **contractors** as defined in Chapter 444-1 were adopted into this measure.

H.B. 137 proposes to prohibit governmental procurement of contracts of any amount that are exclusively for the services of engineers, architects, surveyors, or landscape architects, from requiring the contractor to indemnify the governmental body against liability not arising from the contractor's own negligence or fault.

Under Hawaii law, a party that owes a duty to defend must provide that defense even if there is only the **potential** for that party to be held liable. Whether the indemnifying party is ultimately liable is irrelevant to the determination of whether the duty is owed.

Therefore, H.B. 137 unfairly shifts the financial burden of defending the State to local contractors because design professionals view the financial burden of potentially having to defend the State as too great. In the interest of fairness, the obligation to defend the State should either apply to all the parties involved in a project, or none.

For these reasons, we respectfully request that this committee hold this bill **as written**, and requests that the committee include construction contractors (as defined in Chapter 444-1) into this measure.

LATE TESTIMONY

February 11, 2013

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Honorable Representatives Sylvia Luke, Chair;
Scott Y. Nishimoto and Aaron Ling Johanson, Vice Chairs;
and Members of the House Committee on Finance

Subject: **TESTIMONY IN SUPPORT of HB 137, Relating to Procurement**



Hirata & Associates

Geotechnical
Engineering

Hirata & Associates, Inc.

99-1433 Koaha Pl
Aiea, HI 96701
tel 808.486.0787
fax 808.486.0870

Dear Chair Luke and Members of the Committee:

I am a practicing engineer in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

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We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,

HIRATA & ASSOCIATES, INC.



Paul S. Morimoto President



LATE TESTIMONY

FUNG ASSOCIATES

architecture ■ planning ■ interiors

February 11, 2013

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling Johanson, Vice Chairs; and Members of the House Committee on Finance

Subject: TESTIMONY IN SUPPORT of HB 137, Relating to Procurement

Dear Chair Luke and Members of the Committee:

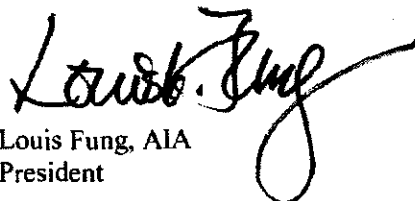
I am Louis Fung, AIA, principal of Fung Associates, Inc., a 15-person architectural firm based in Hawaii. I am a practicing architect in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

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Respectfully submitted,
FUNG ASSOCIATES, INC.



Louis Fung, AIA
President



CONTROLPOINT
Surveying, Inc.

February 13, 2013

LATE TESTIMONY

House of Representatives
The Twenty-Seventh Legislature
Regular Session of 2013
Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Subject: TESTIMONY IN SUPPORT of H.B. 137, RELATING TO PROCUREMENT

DATE: Wednesday, February 13, 2013

TIME: 2:00 p.m.

PLACE: Conference Room 308

Dear Chair Luke and Members of the Committee:

I am Ed Yeh, owner of ControlPoint Surveying, Inc. ControlPoint Surveying, Inc. is a professional land surveying company founded in 1984, and a member of the Hawaii Land Surveyors Association. ControlPoint Surveying, Inc. has provided survey support for design services for a number of State and County projects. I respectfully submit my support of H.B. 137.

In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

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We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for this opportunity to submit my testimony in support of H.B. 137.

Respectfully submitted,

Yue-Hong "Ed" Yeh

PRESIDENT, Tel: 808.591.2022, Ext 110



February 11, 2013

LATE TESTIMONY

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling Johanson, Vice Chairs; and Members of the House Committee on Finance

PRINCIPALS

Francis S. Oda, Arch.D.
FAIA, AICP, LEED AP

Norman G.Y. Hong
AIA

Sheryl B. Seaman
AIA, ASID, LEED AP

Hitoshi Hida
AIA

Roy H. Nihei
AIA, CSI, LEED AP

James I. Nishimoto
AIA

Stephen Yuen
AIA

Linda C. Miki
AIA

George I. Atta
FAICP, LEED AP

Charles Y. Kaneshiro
AIA, LEED AP

Jeffrey H. Overton
AICP, LEED AP

Christine Mendes Ruotola
AICP, LEED AP

James L. Stone, Arch.D.
AIA, LEED AP

Katherine M. MacNeil
AIA, LEED AP

Tom Young, MBA
AIA

Paul T. Matsuda
PE, LEED AP

OF COUNSEL

Ralph E. Portmore
FAICP

Subject: **TESTIMONY IN SUPPORT of HB 137, Relating to Procurement**

Dear Chair Luke and Members of the Committee:

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We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,

GROUP 70 INTERNATIONAL, INC.

NORMAN G.Y. HONG, AIA
Vice Chairman and CEO



February 11, 2013

LATE TESTIMONY

House Committee on Finance

Hearing Date: Wednesday, February 13, 2:00 p.m., Conference Room 308

PRINCIPALS

Francis S. Oda, Arch.D.,
FAIA, AICP, LEED AP

Norman G.Y. Hong
AIA

Sheryl B. Seaman
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Hitoshi Hida
AIA

Roy H. Nihei
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AIA

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AIA

George I. Atta
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Jeffrey H. Overton
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Christine Mendes Ruotola
AICP, LEED AP

James L. Stone, Arch.D.,
AIA, LEED AP

Katherine M. MacNeil
AIA, LEED AP

Tom Young, MBA
AIA

Paul T. Matsuda
PE, LEED AP

OF COUNSEL

Ralph E. Portmore
FAICP

Honorable Representatives Sylvia Luke, Chair; Scott Y. Nishimoto and Aaron Ling Johanson, Vice Chairs; and Members of the House Committee on Finance

Subject: **TESTIMONY IN SUPPORT of HB 137, Relating to Procurement**

Dear Chair Luke and Members of the Committee:

I am a practicing engineer in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

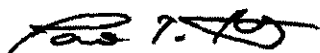
A design professional's PLI only covers harm caused by the design professional's negligence; it will not advance the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to the contract.

We appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you restore fairness to State contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,

Group 70 International, Inc.


Paul T. Matsuda, P.E., LEED AP
Principal