



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

February 13, 2013  
2:00 p.m.  
State Capitol, Room 308

**LATE TESTIMONY**

**H.B. 192  
RELATING TO TRANSPORTATION**

Committee on Finance

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The Department of Transportation (DOT) **opposes** this bill.

The Bill provides for repealing the de novo standard of review currently in use by the Department of Commerce and Consumer Affairs (DCCA) hearings officers to review procurement protests in an administrative hearing.

There is no need for this proposed revision, as a similar bill was vetoed last session in favor of Act 173 which significantly streamlined the procurement protest process.

The present proposal is a repeat of HB 1671 HD2 SD2 that was vetoed by the Governor at the end of the last legislative session. The Governor stated that the bill would be counterproductive to the goal of streamlining the procurement protest process because it would place operational burdens on the procuring agencies that they would not be able to meet and would prolong, rather than shorten, the protest process.

This bill would place the responsibility for conducting a full review of the procurement protest on the agencies' procurement officer rather than on the hearings officer.

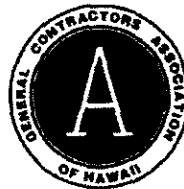
Procuring agencies are not equipped in terms of experienced staff to carry out evidence gathering in producing a comprehensive record. The agencies would in effect be conducting contested case proceedings and would slow down the decision making process.

The second portion of the proposed legislation is unnecessary because it duplicates present law. The bill prohibits DCCA hearings officers from reviewing and determining matters not already raised and initially decided by the procuring agency. There is current law under which the DCCA hearings officers proceed.

Thank you for the opportunity to provide testimony.



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# LATE TESTIMONY

## GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 13, 2013

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

SUBJECT: **COMMENTS AND SUGGESTED AMENDMENTS TO H.B. 192, RELATING TO PROCUREMENT.** Repeal the *de novo* standard of review for administrative review of hearing officer's decisions of protests.

### 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:

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 the largest construction association in the State of Hawaii. The 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.

H.B. 192, Relating to Procurement proposes to amend Sections 103D-709 and 103D-710, Hawaii Revised Statutes and repeal the *de novo* standard of review for hearing decisions by the Office of Administrative Hearings for appeals of protests.

GCA is in **support of the intent** of this bill, **but would like to propose the attached amendments as a Proposed H.D. 1 for the Committee's consideration.** GCA's proposed amendments are similar to Section three of H.B. 1671 (2012), which was passed by this body last session, but was unfortunately vetoed by the Governor. GCA's amendments propose to remove the *de novo* standard of review for the Department of Commerce and Consumer Affairs, Office of Administrative Hearing's (OAH) for bid protests involving 103D-302, known as Competitive Sealed Bidding or the low bid system. GCA's proposed amendments would provide procurement procedure solutions to: (1) avoid frivolous bid protests (2) allow projects to get out faster; (3) potentially eliminate awards to second low bidders, saving the state and tax payers thousands of dollars; and (4) avoid troublesome decisions by the DCCA OAH, which set bad precedence.

The removal of the *de novo* standard of review for low-bid protests would require OAH to determine the merits of the case based on the facts raised before the procuring agency and not

allow any new information not originally raised by the protester at the agency level. The attached amendments would allow the procuring agency, who has the most knowledge of the project and bid specifications, to make the initial determination. The proposed H.D. 1 would ensure efficiency in the bid protest appeal process by recognizing the procuring agency's experience and expertise in the procurement process. Therefore, GCA's proposed changes are less restrictive than the current draft of the bill and only removes the ability of OAH to use the *de novo* standard of review under 103D-302, HRS, Competitive Sealed Bidding, also known as the low-bid system.

The effects of this bill will likely improve the overall procurement process and require the OAH to limit its review to the facts presented to the procuring agency in the original bid protest. It is important to note that proposals to increase funding for construction projects to aid in the recovery of Hawaii's economy will require swift and efficient contracts by the state. GCA's proposed language will help to insure that the procurement process is more efficient and narrows the bill's reach to low-bid procurement contracts.

The GCA respectfully requests adoption of its proposed amendments and the passage of H.B. 192 by this Committee. GCA appreciates the opportunity to provide comments and requested amendments to H.B. 192

STATE OF HAWAII

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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 to read as follows:

**"§103D-709 Administrative proceedings for review.** (a) The several hearings officer's 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, with the exception of a protest of an award or proposed award under Section 103D-302 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[-]; and

(2) Review and determine, as provided in subsection (d), any protest submitted under section 103D-302, pursuant to 103D-701 from any bidder, offeror, contractor, person, or governmental body aggrieved by a determination of the procurement officer.

(b) Hearings to review and determine any request made pursuant to subsection ~~[(a)]~~ (a)(1) 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, not later than forty-five days from the receipt of the request under subsection ~~[(a)]~~ (a)(1), that 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.

(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 present argument on all issues involved. Fact finding under section 91-10 shall apply.

(d) 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 procurement officer shall transmit the written decision and all documents related to the protest, including, but not limited to, all written and electronic communications and materials considered by the procurement officer, 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 procurement officer's written decision and all documents related to the protest, including, but not limited to, all written and electronic communications and materials considered by the procurement officer, under section 103D-701. New evidence or new issues that were not raised by the parties 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;

(3) No later than forty-five 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; and

(4) If an application for review is not resolved by the forty-fifth 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] (e) 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 this section; provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or

(2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

~~[(e)]~~ (f) The party initiating a proceeding falling within subsection ~~[(d)]~~ (e) 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 \$500,000 or more, but less than \$1,000,000; or
- (3) One-half per cent of the estimated value of the contract if the estimated value of the contract is \$1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than \$10,000.

If the initiating party prevails in the administrative proceeding, the cash or protest bond shall be returned to that party. If the initiating party does not prevail in the administrative proceeding, the cash or protest bond shall be deposited into the general fund.

~~[(f)]~~ (g) 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.

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

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

~~[(i)]~~ (j) The policy board shall adopt other rules as may be necessary to ensure that the proceedings conducted pursuant to this section afford all parties an opportunity to be heard.

~~[(j)]~~ (k) As used in this section, "estimated value of the contract" or "estimated value", with respect to a contract, means 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 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on December 31, 2013.

~~SECTION 6. This Act shall take effect on December 31, 2013.~~

**Report Title:**

Procurement Code; Protest; Administrative Proceedings

**Description:**

Amends standard of review for administrative decisions under Chapter 103D-709 for Competitive Sealed Bidding.

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