



AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

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Beverly Ishii-Nakayama, P.E.
Shigemura, Lau, Sakanashi,
Higuchi & Assoc.
Ph: (808) 942-9100

President-Elect

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Bow Engineering
Ph: (808)941-8853

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Geolabs
Ph: (808) 841-5064

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SSFM International, Inc.
Ph: (808) 531-1308

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Ph: (808) 533-3646

National Director

Sheryl E. Nojima, P.E., PhD
Gray, Hong, Nojima & Assoc.
Ph: (808) 521-0306

Directors

Jeffrey K. Kalani, P.E.
Yogi Kwong Engineers, LLC
Ph: (808) 942-0001

Paul Morimoto, P.E.
Hirata & Assoc.
Ph: (808) 486-0787

Sachin Shah, P.E.
Notkin Hawaii Inc.
Ph: (808) 941-6600

Ginny M. Wright
Executive Director
P.O. Box 88840
Honolulu, HI 96830
Ph: (808) 234-0821
Cell: (808) 741-4772
Fx: (808) 234-1721
Email: gwright@acechawaii.org
Website: www.acechawaii.org

January 23, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

**Subject: TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement
Hearing: Monday, January 27, 2:10 p.m., Conference Room 325**

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

The American Council of Engineering Companies of Hawaii (ACECH) represents about 70 member firms with over 1,300 employees throughout Hawaii. Projects designed by ACECH's member firms 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 and construction contractors (contracting entity) conducting work for government entities do so under contract terms and conditions requiring the entity to defend the state in any lawsuit related to the project, regardless of whether the contracting entity has any fault related to the project. This requirement to defend the state before negligence or fault is shown is an inappropriate attempt to shift the government's liability to Hawaii's hardworking businesses. The contract contains an indemnification clause that requires contracting entities to pay damages, including attorney's fees, if found to be at fault.

The Federal Government and many states do not require contracting entities to sign indemnification clauses, and, of the States that do, a number have recently revised their contract language to remove the "defend" term and to link liability to negligence or fault. These States have recognized that the State and its citizens derive much more benefit from public works projects than designers and contractors, and that requiring companies to defend the State in absence of fault is not fair.

In 2007, ACECH worked with the State 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, and did not include construction contractors. In the years since the relief provided by that bill, we have seen continuing issues:

- Our small local firms are still subject to the unfair contract language when they serve as subcontractors on projects with contracts greater than \$1 million.



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Ph: (808) 234-0821
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Email: gwright@acechawaii.org
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- The unfair contract terms do not favor teams of local small firms that may 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”.
- 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 and contractors are more likely to stick to “tried-and-true” solutions to avoid potential risk situations. Since the State administration has clearly seen the link between economic growth and commercial technological advances and innovation, as evidenced by various innovation programs, the stifling of local innovation because of such unfair contract terms is counterproductive.

In conclusion, requiring contracting entities to sign contracts containing unfair terms that cause them to assume an unreasonable degree of risk is poor public policy and has no public benefit. For State and County public works projects, the main beneficiary of these projects is the public. Contracting entities 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 lack of maintenance or subsequent 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.

This bill will encourage more of our small businesses to work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms and contractors. 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 improve fairness in State contracts. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

Beverly Ishii-Nakayama, P.E.
President

AMERICAN INSTITUTE OF ARCHITECTS

CPC
2:10 pm

January 27, 2014

Honorable Angus McKelvey, Chair
House Committee on Consumer Protection and Commerce

Re: **House Bill 2047**
Relating to Procurement

Dear Chair McKelvey and Members of the Committee,

My name is Daniel Chun, President of the American Institute of Architects (AIA) Hawaii State Council, speaking in **SUPPORT** of HB 2047.

The “defend clause” survives the life of the contract

The “defend clause” may be acceptable as a contract condition on other state contracts where a product, such as soap or toilet paper, is bought and consumed rather quickly. For public works projects, service life is measured in decades. Public buildings also have high public usage, thus increasing benefit to the taxpayer while increasing risk to the architect and contractor.

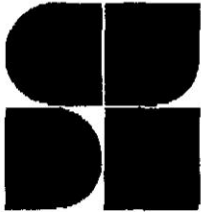
We recently see trends where lawsuits are brought, even before construction begins, relating to permit disputes over historic preservation and/or environmental issues. We are willing to defend ourselves, but we lack the resources to defend state and other public agencies against these claims.

Passage of HB 2047 will encourage small businesses across the state

AIA members operate some 180 Hawaii businesses, all of which are small businesses because no one business dominates the market for architectural services. If defense costs must be absorbed by architects this can lead to only larger nationally-based businesses being able to afford the financial risk. AIA contends that it is in the public interest to encourage competition among businesses selling architectural and other construction services in Hawaii.

AIA represents small architect businesses all over the state of Hawaii. Our members operate in every county seat to be close to their customers, county agencies and building projects. Our businesses are also a source of professional jobs that can be too scarce in some counties. Thus passage of HB 2047 will in the long-term be more helpful to the state, counties and consumers than to architects individually. Thank you for the opportunity to **SUPPORT** House Bill 2047.

1916 Young Street, 2nd Floor
 Honolulu, HI 96826
 PH (808) 942-9100
 FAX (808) 942-1899
 E-mail: slsh1@lava.net



SHIGEMURA, LAU, SAKANASHI, HIGUCHI AND ASSOCIATES, INC.

January 23, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

Howard K.C. Lau
 Craig H. Sakanashi
 Wayne K. Higuchi
 Beverly Ishii-Nakayama

**Subject: TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement
 Hearing: Monday, January 27, 2:10 p.m., Conference Room 325**

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committees:

I am a practicing structural 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 contract terms and conditions for design professionals that include the word "defend" in an indemnity clause. This requirement to defend the state before negligence or fault is shown is an inappropriate attempt to shift the government's liability to Hawaii's hardworking businesses. An indemnification clause that does not include "defend" and requires contracting entities to pay damages, including attorney's fees, if found to be at fault, more appropriately shares the risk.

The Federal Government and many states do not require contracting entities to sign indemnification clauses and, of the States that do, a number have recently revised their contract language to remove the "defend" term. These States have recognized that the State and its citizens derive much more benefit from public works projects than designers and contractors, and that requiring companies to defend the State in absence of fault is not fair.

Contracting entities, such as our small business, 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 lack of maintenance and subsequent upgrades affect the project's risk profile far more than our initial design. Risk exists for all projects, and in fairness 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 to improve the business climate in Hawaii, and respectfully urge that fairness be restored to State contracts. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,
 Shigemura, Lau, Sakanashi, Higuchi and Associates

Beverly Ishii-Nakayama, P.E.
 Principal

CONSULTING STRUCTURAL ENGINEERS

January 24, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

Subject: **TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement**
Hearing: Monday, January 27, 2:10 p.m., Conference Room 325

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

Fukunaga & Associates, Inc. is a locally owned and managed small business civil and environmental engineering firm operating in Hawaii since 1969. **We are in strong support of HB 2047, Relating to Procurement.**

I am a licensed Professional Civil 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. The State requires design professionals to obtain professional liability insurance (PLI) for our work which I believe is a good thing, 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. We believe it is unfair 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 public contracts.

This bill will encourage us to seek more work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms. We appreciate the continuing efforts of your committee and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to government contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Very truly yours,
Fukunaga & Associates, Inc.



Jon K. Nishimura, P.E.
President

FUKUNAGA & ASSOCIATES, INC.





THE LIMTIACO CONSULTING GROUP
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

January 24, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair;
and Members of the House Committee on Consumer Protection and Commerce

Subject: STRONG SUPPORT of HB 2047, Relating to Procurement

Hearing: Monday, January 27, 2:10 pm, Conference Room 325

Chair McKelvey, Vice Chair Kawakami, and Committee Members:

The Limtiaco Consulting Group (TLCG) is a local civil and environmental engineering firm and is proud to be voted one of Hawaii's Best Places to Work. TLCG is an active member of the American Council of Engineering Companies of Hawaii (ACECH) as well as other professional engineering organizations. TLCG principals believe it is important to give back to the communities we serve through meaningful volunteerism.

As a small business in Hawaii, we face numerous business challenges. One such challenge is being addressed in HB2047, Relating to Procurement.

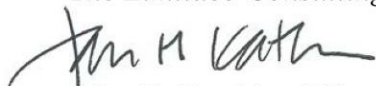
As licensed professional engineers, we understand it is our duty to take responsibility for our error; however, the current State contract language requires us to pay for defense costs even if we are not negligent. In addition to being unfair this clause is uninsurable, meaning defense costs would need to be paid out of pocket and our engineers could be held personally liable for damages unrelated to our engineering services. (Professional liability insurance only applies when an engineer is negligent.) This defend clause jeopardizes the livelihood of our company, our employees, and our families.

Our company is so bothered with this contract provision that we declined a significant project with the Department of Transportation after being selected as the most qualified design professional. This project would have fueled growth of our company and we were prepared to hire engineers and reverse Hawaii's proverbial "brain drain." This did not happen because of the onerous defend clause.

We deeply appreciate your unwavering effort to improve Hawaii's business climate and I personally applaud your commitment to making our beautiful State a better one. Thank you for an opportunity to express my concerns and mahalo for your favorable consideration of this bill.

With aloha,

The Limtiaco Consulting Group, Inc.


John H. Katahira, P.E.
President

Kennedy/Jenks Consultants
Engineers & Scientists

AIPA Building
3375 Koapaka Street, Suite F227
Honolulu, Hawaii 96819
808-218-6030
FAX: 808-488-3776

January 25, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and
Members of the House Committee on Consumer Protection and Commerce

Subject: **TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement**
Hearing: Monday, January 27, 2:10 p.m., Conference Room 325

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

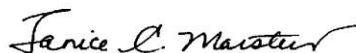
I am a practicing environmental engineer in the State of Hawaii, and have provided engineering consultation services for a number of State and County projects. The situation of government contracts for design professionals is out of control. Attorneys General and County Corporation Counsels have put into place incredibly unfair contract language without understanding the impact on our firms. I have been told by a County Corporation Counsel that they don't care that the contract would force design professionals to pay even if they weren't at fault. They want to be able to tap into our insurance policies so the government doesn't have to pay for lawsuits. The problem is that these terms create liability that is not covered by our professional liability 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. Recently, when yet another county changed from previously reasonable terms and conditions to the same conditions used by the State, I wondered why I stay in this business when I could lose everything because of something that is not my fault.

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 public contracts.

This bill will encourage our firm to seek more work with governmental agencies, and benefits the State and its citizens by encouraging greater participation by qualified firms. We appreciate the continuing efforts of your committee and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to government contracts. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,



Janice Marsters, Senior Environmental Engineer



LATE

January 24, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and
Members of the House Committee on Consumer Protection and Commerce

**Subject: TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement
Hearing: Monday, January 27, 2:10 p.m., Conference Room 325**

Dear Chair McKelvey, Vice Chair Kawakami, 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. 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 public contracts.

This bill will encourage us to seek more work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms. We appreciate the continuing efforts of your committee and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to government contracts with design professionals.

Thank you for an opportunity to express our views in **SUPPORT of this bill.**

Respectfully submitted,

Pacific Geotechnical Engineers, Inc.

Glen Y.F. Lau, P.E.
President

LATE

Sam O. Hirota, Inc.

January 25, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

Subject: **TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement**

Hearing: Monday, January 27, 2:10 p.m., Conference Room 325

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

I am a practicing licensed engineer, licensed surveyor, and Land Court surveyor in the State of Hawaii, and have provided design services for over 40 years for projects in the State and the Pacific Rim.

About 40 years ago, our firm completed the design for Piilani Highway on Maui. My father, Sam Hirota, at that time, signed the State of Hawaii DOT contract which contained the defend clause, which required our firm to defend the State to the limit of our Professional Liability Insurance (PLI) policy although we had no role in the construction, a State responsibility. **Currently, our PLI policy no longer provides that coverage, and therefore our firm no longer accepts any work with a "defend clause" as part of the contract.**

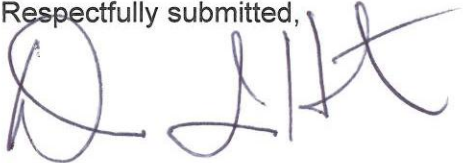
As a University of Hawaii Regent (2008-2012), I worked to remove such clauses from design contracts at UH during that time since it was my belief that design professionals were supposed to provide design services and not be a source of liability insurance for the institution, which is self insured. I was also concerned that if the institution was depending on individuals to defend it, without significant assets to defend it.

As you may know, 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.

Our firm recently received the ACEC Hawaii Engineering Design Excellence 2014 Award for Pavement Management System and Street Condition Survey with the City and County of Honolulu. The original contract contained the standard "defend clause"., which was finally removed during contract negotiations. If it was not removed, we would not have done the work, and the pot holes would have continued since our firm was the only qualified respondent.

This bill will encourage us to seek more work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms. We appreciate the continuing efforts of your committee and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to government contracts with design professionals. Thank you for an opportunity to express our views in **SUPPORT** of this bill.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "D. Hirota", written over the text "Respectfully submitted,".

Dennis I. Hirota, PhD, PE, LPLS

President

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcahawaii.org
Website: www.gcahawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

LATE

Uploaded via Capitol Website

January 27, 2014

TO: HONORABLE ANGUS MCKELVEY, CHAIR, HONORABLE DEREK KAWAKAMI,
VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON CONSUMER
PROTECTION AND COMMERCE

SUBJECT: **SUPPORT OF H.B. 2047. RELATING TO PROCUREMENT.** Prohibits
governmental procurement contracts of any amount that are exclusively for the
services of contractors, engineers, architects, surveyors, or landscape architects,
from requiring the person to defend the governmental body against liability not
arising from the contractor's own negligence or fault. Provides that the contractor
may still be required to indemnify and hold harmless the governmental body from
claims arising out of or resulting from the negligent, reckless, or wrongful acts,
errors, or omissions of the contractor.

HEARING

DATE: Monday, January 27, 2014
TIME: 2:10 p.m.
PLACE: Conference Room 325

Dear Chair McKelvey, Vice Chair Kawakami and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over six hundred 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 GCA's 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.

The GCA is **in support** of H.B. 2047, which would no longer allow government contracts to require government contractors to defend the state prior to negligence being established. This bill does not preclude the contractor's obligation to indemnify the state in the event that there is a judgment finding fault on part of the contractor. The purpose of this bill is to prohibit governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault.

The GCA believes that an awardee of a state contract should not be required to defend the state prior to negligence being established. This bill would make it the responsibility of each party named in a suit, which would include the state as a party, to cover defense costs prior to negligence being established. Historically, a contractor's duty to defend the state has been unevenly applied.

In an effort to ensure fairness, GCA believes this bill provides a consistent clarification for all state and county agencies to follow.

GCA **supports** H.B. 2047 and we respectfully request that this Committee pass this bill.

1099 Alakea Street, Suite 2400
Honolulu, Hawaii 96813
Tel: 808-523-8499
Fax: 808-533-0226
www.browncaldwell.com

LATE

January 26, 2014



**House Committee on Consumer Protection and Commerce
Hearing Date: Monday, January 27, 2:10 p.m., Conference Room 325**

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

Subject: TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

I am a licensed civil engineer in the State of Hawaii, and have provided design services for many State and County projects for over 30 years. 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 my company's insurance.

A design professional's PLI only covers harm caused by the design professional's negligence; it will not cover 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 are not negligent or at fault. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to their contracts.

This bill will encourage us to seek more work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms. I appreciate the continuing efforts of your committee and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to government contracts with design professionals. Thank you for the opportunity to express my view in SUPPORT of this bill.

Respectfully submitted,
Brown and Caldwell

A handwritten signature in black ink, appearing to read "Douglas B. Lee".

Douglas B. Lee, P.E.
Vice President



2014 Officers

President

Brian K. Adachi
 BKA Builders, Inc.

President-Elect

Richard Hobson, Jr.
 Gentry Homes, Ltd.

Vice President

Craig Washofsky
 Servco Home & Appliance Distribution

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 First Hawaiian Bank

Secretary

Evan Fujimoto
 Graham Builders, Inc.

Special Appointee-Builder

Paul D. Silen
 Hawaiian Dredging Construction Co., Inc.

Special Appointee-Builder

Mark Kennedy
 HASEKO Construction Management Group, Inc.

Special Appointee-Associate

Dean Uchida
 SSFM International, Inc.

Immediate Past President

Greg Thielens
 Complete Construction Services Corp.

Chief Executive Officer

Karen T. Nakamura
 BIA-Hawaii

2014 Directors

Anthony Borge

RMA Sales

Carleton Ching

Castle & Cooke Hawaii, Inc.

Chris Cheung

CC Engineering & Construction, Inc.

Clifton Crawford

C&J Contracting, Inc.

Eric Bass

D.R. Horton, Schuler Division

Gary T. Okimoto

Honolulu Wood Treating

Lili Shintani

Alan Shintani, Inc.

Mark Hertel

Inter-Island Solar Supply, Oahu-Maui-Hawaii-Kauai

Marshall Hickox

Homeworks Construction, Inc.

Michael Watanabe

JW, Inc.

Ryan Engle

Bays Lung Rose & Holma

Stephen Hanson

simplicityHR by ALTRES

TESTIMONY TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

MONDAY, JANUARY 28, 2014

2:10 P.M.

HAWAII STATE CAPITOL - ROOM 325

SUBJECT: H.B. 2047 - RELATING TO PROCUREMENT

Dear Chair McKelvey, Vice-Chair Kawakami, and members of the Committee:

My name is Gladys Marrone, Government Relations Director for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii **supports** H.B. 2047, which prohibits governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault. The bill further provides that the contractor may still be required to indemnify and hold harmless the governmental body from claims arising out of or resulting from the negligent, reckless, or wrongful acts, errors, or omissions of the contractor.

The costs involved in defending the state prior to a contractor's fault being determined can be costly. H.B. 2047 would no longer require government contractors to defend the state prior to negligence being established. However, this bill would not preclude the contractor's obligation to indemnify the state in the event that there is a judgment finding fault against the contractor. H.B. 2047 would make it the responsibility of each party named in a suit, which would include the state as a party, to cover the initial defense costs prior to negligence being established.

Some state and county agencies recognize the duty to defend clause as detrimental and have removed it from their contracts. H.B. 2047 would bring government contracts into uniformity by prohibiting defense clauses in contracts that are entered into by persons licensed under Chapters 444 and 464, Hawaii Revised Statutes.

Based on the foregoing reasons, BIA-Hawaii **supports** H.B. 2047.

We appreciate the opportunity to share with you our views.



Gray • Hong • Nojima & Associates, Inc.
CONSULTING ENGINEERS

LATE

*Daniel S.C. Hong, PE
Sheryl E. Nojima, PhD, PE
Michael H. Nojima, PE, LEED AP
Audrey Y.T. Yokota, PE
Toby T. Hanzawa, PE, LEED AP
Gavin Y. Masaki, PE, LEED AP
Winston M. Taniguchi, PE*

**201 Merchant Street, Suite 1900
Honolulu, Hawaii 96813-2926
Telephone: (808) 521-0306
Fax: (808) 531-8018
email@grayhongnojima.com
www.grayhongnojima.com**

January 27, 2014

House Committee on Consumer Protection and Commerce

Honorable Representatives Angus L.K. McKelvey, Chair; Derek S.K. Kawakami, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

Subject: **TESTIMONY IN SUPPORT of HB 2047, Relating to Procurement
Hearing: Monday, January 27, 2:10 p.m., Conference Room 325**

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

I am a practicing engineer and owner of a small business 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. 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 public contracts.

This bill will encourage us to seek more work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms. We appreciate the continuing efforts of your committee and the members of the House to improve the business climate in Hawaii, and respectfully urge you restore fairness to government contracts with design professionals. Thank you for an opportunity to express our views in SUPPORT of this bill.

Respectfully submitted,
Gray, Hong, Nojima & Associates, Inc.

Sheryl E. Nojima, PhD, PE
President

LATE

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcahawaii.org
Website: www.gcahawaii.org

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GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

Uploaded via Capitol Website

January 27, 2014

TO: HONORABLE ANGUS MCKELVEY, CHAIR, HONORABLE DEREK KAWAKAMI,
VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON CONSUMER
PROTECTION AND COMMERCE

SUBJECT: **SUPPORT OF H.B. 2047. RELATING TO PROCUREMENT.** Prohibits
governmental procurement contracts of any amount that are exclusively for the
services of contractors, engineers, architects, surveyors, or landscape architects,
from requiring the person to defend the governmental body against liability not
arising from the contractor's own negligence or fault. Provides that the contractor
may still be required to indemnify and hold harmless the governmental body from
claims arising out of or resulting from the negligent, reckless, or wrongful acts,
errors, or omissions of the contractor.

HEARING

DATE: Monday, January 27, 2014
TIME: 2:10 p.m.
PLACE: Conference Room 325

Dear Chair McKelvey, Vice Chair Kawakami and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over six hundred 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 GCA's 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.

The GCA is **in support** of H.B. 2047, which would no longer allow government contracts to require government contractors to defend the state prior to negligence being established. This bill does not preclude the contractor's obligation to indemnify the state in the event that there is a judgment finding fault on part of the contractor. The purpose of this bill is to prohibit governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault.

The GCA believes that an awardee of a state contract should not be required to defend the state prior to negligence being established. This bill would make it the responsibility of each party named in a suit, which would include the state as a party, to cover defense costs prior to negligence being established. Historically, a contractor's duty to defend the state has been unevenly applied.

In an effort to ensure fairness, GCA believes this bill provides a consistent clarification for all state and county agencies to follow.

GCA supports H.B. 2047 and we respectfully request that this Committee pass this bill.