NEIL ABERCROMBIE
GOVERNOR

SARAH ALLEN
ACTING ADMINISTRATOR

STATE OF HAWAII
STATE PROCUREMENT OFFICE
P.O. Box 119
Honolulu, Hawaii 96810-0119
Telephone: (808) 587-4700
e-mail: state.procurement.office@hawaii.gov
http://hawaii.gov/spo

TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
CONSUMER PROTECTION & COMMERCE

March 10, 2014, 2:00 p.m.

SB 2463, SD2

RELATING TO PROCUREMENT

Chair McKelvey, Vice-Chair Kawakami, and members of the committee, thank you for the opportunity to submit testimony on SB2463, SD2.

The State Procurement Office supports this bill.

Thank you.

ASCE
AMERICAN SOCIETY OF CIVIL ENGINEERS
Hawai'i Section | PO Box 917 | Honolulu, HI 96808-0917

2014 Hawai'i Section Officers

PRESIDENT
Brian Enomoto, P.E.
Moffatt & Nichol
733 Bishop Street, Suite 1740
Honolulu, HI 96813
(808) 388-5559
e-mail: benomoto@asceHawaii.org

PRESIDENT-ELECT
Glenn Miyasato, P.E.
MKE Associates, LLC
99-205 Moanalua Road, Suite 205
Aiea, Hawai'i 96701
(808) 488-7579
e-mail: glenn@mkellc.com

VICE PRESIDENT
Benjamin J. Rasa, P.E.
Tapestry Partners Ltd
(808) 497-6209
email: ben@tapestrypartners.net

SECRETARY
Tim Goshi, P.E.
KAI Hawaii, Inc.
31 N. Pauahi Street, 2nd Floor
Honolulu, HI 96817
(808) 791-3966
e-mail: tim.goshi@ymail.com

TREASURER
Lara Karamatsu, P.E.
Parsons Brinckerhoff
1003 Bishop Street, Suite 1000
Honolulu, Hawaii 96813
(808) 694-3213
e-mail: karamalsu@pbworld.com

IMMEDIATE PAST-PRESIDENT
Ian Arakaki, P.E.
The Limtiaco Consulting Group
680 Iwilei Road, Suite 430
Honolulu, Hawai'i 96817
(808) 596-7790 Fax: (808) 596-7361
e-mail: ian@tlcghawaii.com

YOUNGER MEMBER FORUM PRESIDENT
Jason Sugibayashi, P.E.
Sam O. Hirota, Inc.
864 South Beretania Street
Honolulu, Hawai'i 96813
(808) 537-9971
e-mail: jsugibayashi@ascehawaiiymf.org

March 7, 2014

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

I am testifying **in support of Senate Bill 2463 SD2** Relating to Procurement on behalf of the Hawaii Section of the American Society of Civil Engineers.

The American Society of Civil Engineers was established in 1852 and is the oldest professional engineering organization in the United States. The Hawaii Section of ASCE was established in 1937 and is comprised of more than 1,000 civil engineers from both the public and private sectors of our state. Many of our members own or are employed by companies in both the design and construction industry.

Members with professional licensure authority regularly seal construction drawings for state agencies certifying that the plans were prepared under their direction. A substantial part of their work involves projects for state and county facilities. Design and construction contracts with the state require the designer or the contractor to defend the government against any and all suits for injury that may occur throughout the life of the project. The potential liability for these plans may be substantial and engineers can be held personally liable for their actions well beyond the period of their involvement with the project.

We concur with the position taken by the American Council of Engineering Companies of Hawaii and the General Contractors Association of Hawaii supporting Senate Bill 2462 SD2.

We recommend your passage of Senate Bill 2463 SD2. Thank you for your consideration.

Sincerely yours,

Owen Miyamoto, PE, FASCE
Local Legislative Affairs Liaison
3209 Paty Drive
Honolulu, HI 96822-1439
Email: owen@hawaii.edu

ACEC

American Council of Engineering Companies of Hawaii

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

President-Elect
William H.Q. Bow, P.E.
Bow Engineering
Ph: (808)941-8853

Treasurer
Robin Lim, P.E.
Geolabs
Ph: (808) 841-5064

Secretary
Corey Matsuoka, P.E.
SSFM International, Inc.
Ph: (808) 531-1308

Past President
Terrance Arashiro, P.E.
Austin, Tsutsumi & Assoc.
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

March 8, 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 SB 2463, SD2 Relating to Procurement
Hearing: Monday, March 10, 2:00 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 currently are required to sign contract terms and conditions requiring the design professional to defend the state in any lawsuit related to the project, regardless of whether the professional 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 the professional to pay damages, including attorney's fees, if found to be at fault.

The Federal Government and many states do not require design professionals to sign indemnification clauses, and a number of states 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. In the years since the relief provided by that bill, we have seen continuing issues:

- The unfair contract terms do not favor teams of local small firms that may band together to pursue larger projects, and are each individually subject to the onerous contract terms. This favors larger, out-of-state firms that can afford to "self-insure".

ACEC
American Council of Engineering Companies
of Hawaii

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

President-Elect
William H.Q. Bow, P.E.
Bow Engineering
Ph: (808)941-8853

Treasurer
Robin Lim, P.E.
Geolabs
Ph: (808) 841-5064

Secretary
Corey Matsuoka, P.E.
SSFM International, Inc.
Ph: (808) 531-1308

Past President
Terrance Arashiro, P.E.
Austin, Tsutsumi & Assoc.
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

- 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.
- If firms decline to do work for the State under the unfair contract terms, the procurement process is negatively impacted, and costs to the State increased, as fewer 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 with 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. Design professionals receive a limited short-term financial benefit (often profits less than $10,000), 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. It is simply unreasonable to require design professionals to take on such high risk relative to their reward. Risk exists for all projects. All parties, including the project owners, should assume their fair share of the risk.

This bill will encourage more of our local firms 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 committee and the members of the House to encourage a fair and reasonable business climate in Hawaii, and respectfully urge you pass this bill. 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

SAH - Subcontractors Association of Hawaii

*Century Square 1188 Bishop Street, Ste. 1003***
Honolulu, Hawaii 96813-3304
Phone: (808) 537-5619 ✦ Fax: (808) 533-2739

TO:	House Clerk	**FAX#:**	808-586-8437
ATTN:		**DATE:**	3/7/14
FROM:	Tim Lyons/ SAH	**RE:**	S.B. 2463, SD 2

TOTAL PAGES (Including cover sheet): 3

CPC Hearing 3/10/14 2:00 pm

If you would like to stop receiving future faxes from the association advertising products and services fax (808) 533-2739 to inform us of the specific fax number(s) you would like removed from our database. This

Mar. 7. 2014 4:37PM No. 3616 P. 1

MAR-07-2014 04:50PM FAX: ID:REP KAWAKAMI PAGE:001 R=100%

No. 5016 P. 2
Mar. 7. 2014 4:37PM
MAR-07-2014 04:51PM FAX: ID:REP KAWAKAMI PAGE:002 R=100%

SAH - Subcontractors Association of Hawaii

Century Square 1188 Bishop Street, Ste. 1003
Honolulu, Hawaii 96813-3304
Phone: (808) 537-5619 ✦ Fax: (808) 533-2739

March 10, 2014

Testimony To: House Committee on Consumer Protection & Commerce

Representative Angus L.K. McKelvey, Chair

Presented By: Tim Lyons, President

Subcontractors Association Hawaii

Subject: S.B. 2463, SD 2 – RELATING TO PROCUREMENT

Chair McKelvey and Members of Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii and we support this Bill. The SAH represents the following nine separate and distinct subcontracting organizations which include:

Mar. 7. 2014 4:37PM No. 3015 P. 3

MAR-07-2014 04:51PM FAX: ID:REP KAWAKAMI PAGE:003 R=100%

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

We have no objection to the amendment offered by GCA.

Thank you.

HAWAII INSURERS COUNCIL
A trade association of property and casualty insurance companies

Pauahi Tower, Suite 2010
1003 Bishop Street
Honolulu, Hawaii 96813
Telephone (808) 525-5877

Alison Powers
Executive Director

TESTIMONY OF MICHAEL TANOUE

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Representative Angus McKelvey, Chair
Representative Derek Kawakami, Vice Chair

Monday, March 10, 2014
2:00 p.m.

SB 2463, SD2

Chair McKelvey, Vice Chair Kawakami, and members of the Committee, my name is Michael Tanoue, counsel for the Hawaii Insurers Council, a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately one third of all property and casualty insurance premiums in the state.

HIC **supports** this measure with one technical amendment. SB 2463, SD2 eliminates the duty to defend for design professionals and limits exposure to contractors and subcontractors required to defend the government if they have no liability in a government contract for a period of one year from final acceptance. We believe that the intent of the bill is good and suggest the following amendment which we believe was a drafting error:

"(b) Beginning July 1, 2014, the requirement for a person licensed under chapter 444 to defend the governmental body, or its officers, employees, or agents, from any liability, damage, loss, or claim, action, or proceeding arising out of the contractor's performance under, or any subcontractor's performance pursuant to, the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a [~~minimum~~] maximum of one year after final acceptance."

Thank you for the opportunity to testify.

The Pacific Resource
PARTNERSHIP

Testimony of Cindy McMillan
The Pacific Resource Partnership

House Committee on Consumer Protection & Commerce
Representative Angus L.K. McKelvey, Chair
Representative Derek S.K. Kawakami, Vice Chair

SB 2463, SD2 - Procurement
Monday, March 10, 2014
2:00 PM
Conference Room 325

Aloha Chair McKelvey, Vice Chair Kawakami 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 supports SB 2463, SD2, which prohibits any contract that is entered into by any governmental body with a person licensed under chapter 464, Hawaii Revised Statutes, from requiring the contractor to defend the governmental body from claims arising out of the contractor's performance under the contract. This measure provides that the requirement for persons licensed under chapter 444, Hawaii Revised Statutes, to defend a governmental body from claims arising out of the contractor's performance under, or any subcontractor's performance pursuant to, the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a minimum of one year after final acceptance.

Contracts for public works often include a duty to defend clause, requiring the contractor to defend governmental entities before the contractor's negligence or fault is determined. Public works often involve large risks due to site circumstances, public environmental concerns, and high public usage.

The duty-to-defend clauses in public works contracts are detrimental to design professionals and construction contractors in the long-term because such clauses negatively affect competition for contracts and innovation. While some state and county agencies recognize the negative implications and have removed the duty-to-defend clauses from contracts for public works, inconsistencies between agencies and departments exist. Therefore, this measure standardizes different contract conditions regarding the duty-to-defend clause.

We ask for your support of SB 2463, SD2. Thank you for the opportunity to share our views with you.

1100 Alakea Street • Alakea Corporate Tower, 4th Floor • Honolulu, HI 96813
Tel (808) 528-5557 • Fax (808) 528-0421 • www.prp-hawaii.com

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

LATE

GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 10, 2014

TO: HONORABLE ANGUS MCKELVEY, CHAIR, HONORABLE DEREK KAWAKAI, VICE CHAIR AND HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

SUBJECT: **SUPPORT & PROPOSED AMENDMENTS TO S.B. 2463, S.D.2, RELATING TO PROCUREMENT.** Prohibits any contract that is entered into by any governmental body with a person licensed under chapter 464, Hawaii Revised Statutes, from requiring the contractor to defend the governmental body from claims arising out of the contractor's performance under the contract. Provides that the requirement for persons licensed under chapter 444, Hawaii Revised Statutes, to defend a governmental body from claims arising out of the contractor's performance under, or any subcontractor's performance pursuant to, the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a minimum of one year after final acceptance. (SD2)

HEARING

DATE: Monday, March 10, 2014
TIME: 2:00 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 approximately 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 S.B. 2463, SD2, but would request the Committee's consideration of an amendment to correct an inadvertent drafting error to the bill when it moved out of the Senate Judiciary and Labor Committee which was originally supported by interested stakeholders.

GCA's proposed amendment on page 4, Lines 5 - 6 would read as follows: "warranty period up to a [~~minimum~~] maximum of one year after final acceptance."

The change from "minimum" to "maximum" would provide the general contractor assurance that its requirement to defend the state would expire one year after final acceptance of the project. This proposal was discussed among interested stakeholders and agreed upon by parties. However due to an inadvertent drafting error when it moved out of the Senate Committee on Judiciary and Labor the reference to maximum was changed to minimum. The proposed amendment would fix

the inadvertent error. Upon review of previously submitted testimony to the Senate Committee on Judiciary and Labor, it will reveal that the language agreed upon by the stakeholders references "maximum" rather than "minimum."

Support of S.D. 2 version of bill

Notwithstanding the abovementioned amendment, GCA is in support of the current S.D. 2 version. The current 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 measure is to address the ongoing uneven application of the duty to defend clause in government contracts among both design professionals and construction contractors. The current bill includes two separate provisions to apply to design professionals and construction contractors with regard to the duty to defend. First, the provision applicable to design professionals would prohibit governmental procurement contracts of any amount that are exclusively for the services of 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. Second, the provision applicable to construction contractors, which is meant to include both prime contractors and subcontractors, would limit a construction contractor's requirement to defend the governmental body for the warranty period up to a **maximum** of one year after final acceptance. The limit of the duty to defend clause for those licensed under Chapter 444, HRS recognizes that to require defense of the state beyond the owner's acceptance of the project and a reasonable contractor's warranty period would be overly burdensome.

The GCA believes that a construction contractor for a state project should be limited in its defense requirements of the state prior to negligence being established. The duty to defend is executed by contract between the contractor and the government agency. A contractor's duty to defend the state has been unevenly applied absent a clear statute indicating whether it was required or not. Some agencies may require the duty to defend as part of their General Conditions in a contract, and others may not. Due to the absence of the duty to defend obligations in current law, state and county agencies may apply it inconsistently, which provides uncertainty for contractors doing public works projects.

In an effort to ensure fairness, GCA believes this measure, after adoption of abovementioned requested amendment will provide clarification for all state and county agencies to follow regarding the contractual language of duty to defend clauses.

GCA **respectfully requests the abovementioned amendment and strongly supports** S.B. 2463, SD2 and we request that this Committee pass the measure as requested.

LATE

BIA-HAWAII
BUILDING INDUSTRY ASSOCIATION
THE VOICE OF THE CONSTRUCTION INDUSTRY

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

Treasurer
Guy J. Shindo
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 Thielen
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 AND COMMERCE
Monday, March 10, 2014
2:00 p.m.
Hawaii State Capitol - Room 325

RE: S.B. 2463 S.D. 2- 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** S.B. 2463 S.D. 2, which prohibits any contract that is entered into by any governmental body with a person licensed under chapter 464, Hawaii Revised Statutes, from requiring the contractor to defend the governmental body from claims arising out of the contractor's performance under the contract. **We recommend this Committee accept the proposed changes as outlined by the GCA:** page 4, Lines 5 - 6 would read as follows: "warranty period up to a [~~minimum~~] maximum of one year after final acceptance."

The costs involved in defending the state prior to a contractor's fault being determined can be costly. The proposed language, agreed to by industry stakeholders, would no longer require government contractors, licensed under Chapter 464, Hawaii Revised Statutes, to *defend* the state prior to negligence being established.

For contractors licensed under Chapter 444, HRS, however, proposed is a one-year limit, after the owner's final acceptance of the project, on their duty to defend.

The proposed language would not preclude the contractor's obligation to *indemnify* the state in the event that there is a judgment finding fault against the contractor. S.B. 2463, S.D. 1, as well as the proposed draft, 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. The draft proposal 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.

We appreciate the opportunity to share with your our views.

Mailing address: P.O. Box 970967, Waipahu, HI 96797 Street address: 94-487 Akoki St., Waipahu, HI 96797-0967;
Telephone: (808) 847-4666 Fax: (808) 440-1198 E-mail: info@biahawaii.org; www.biahawaii.org

LATE

AMERICAN INSTITUTE OF ARCHITECTS

CPC
2:00 pm

March 10, 2014

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

Re: **Senate Bill 2463 SD2**
Relating to Procurement

Dear Chair McKelvey and Members of the Committee,

My name is Daniel Chun, Government Affairs Chair of the American Institute of Architects (AIA) Hawaii State Council., in **SUPPORT** of SB 2463 SD2 because it mitigates problems unique to construction industry business. The bill also promotes competition and consumer choice – in the long term.

The "defense clause " survives the life of the contract.

The "defense clause" may be acceptable as a contract condition on other state procurements where a product, such as soap or toilet paper, is bought and consumed relatively quickly. For public works projects, such as highways and buildings, service life is measured in decades. Public works also have high public usage, thus increasing benefit to the taxpayers while increasing risk to the design professional and to the constructor.

We recently see trends where lawsuits are brought, sometimes before construction begins and during the process, relating to environmental issues. We are willing to defend ourselves, but we lack the resources to defend public agencies against these claims.

Passage of SB 2463 SD2 will promote small businesses and all consumers

AIA members operate some 180 Hawaii businesses, all of which are small businesses because no one business dominates the market for design services. Our members operate small businesses in every county, whether large or small in population.

If defense costs must be absorbed by architects this can lead to only larger nationally-based businesses being able to afford the financial risk. The preponderance of local small businesses is also true of Hawaii's whole construction industry. Thus passage of SB 2463 SD2 will in the long-term be more helpful to the state, counties and consumers than to businesses individually. Thank you for this opportunity to **SUPPORT** Senate Bill 2463 SD2.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014

ON THE FOLLOWING MEASURE:
S.B. NO. 2463, S.D. 2, RELATING TO PROCUREMENT.

BEFORE THE:
HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

LATE

DATE: Monday, March 10, 2014 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Stella M.L. Kam, Deputy Attorney General

Chair McKelvey and Members of the Committee:

The Department of the Attorney General opposes this bill.

This bill prohibits the government from requiring design professionals licensed under chapter 464, Hawaii Revised Statutes (HRS), to defend the government in design contracts. This bill also limits the government from requiring contractors licensed under chapter 444, HRS, to defend the government in construction contracts beyond the government's final acceptance of the project and the contractor's warranty period up to a minimum of one year after final acceptance.

Design professionals and contractors are required by law to carry different types of insurance and the type of insurance each group carries impacts its ability to defend the government. With contractors, regardless of whether the construction project is for the private sector or for the government, damages caused by the negligence of the contractor are generally covered by the contractor's commercial general liability insurance, which the contractor obtains prior to any commencement of work, and under this policy, the owner, whether private or public, may be, and usually is, added as an additional insured.

To treat the public owner differently than the private owner, by denying the government the protection of a contractor's duty to defend that is normally provided to the private sector, is a tremendous disservice to the government. This bill would allow the contractor and possibly, its insurer, to unfairly escape having to defend the government for the contractor's own act or failure to act that results in injury or damages. The contractor has control over the job site and, to take a very common example, if the contractor is negligent and, as a result of that negligence,

a third party or the contractor's own employee, subcontractor, supplier, etc., is injured, then the government should not be forced to defend itself when it had nothing to do with the injury.

We respectfully disagree with section 1 of the bill and its argument that requiring the contractor to defend the government is overly burdensome. As stated earlier, contractors' commercial general liability insurance policies cover the duty to defend the owner. Moreover, it is highly unlikely that the insurance companies will reduce the contractors' insurance premiums for government contracts even if the contractors' duty to defend is limited as set forth in this bill. Contractors' commercial general liability insurance premiums are based upon the cost of the project. Therefore, the entities that will primarily benefit from limiting or eliminating the contractors' duty to defend the government for government projects are the insurance companies. It is outrageous that the government could be paying for the contractors' insurance, which is built into the project costs, and yet might have no recourse against the contractors and might not be covered by the insurance policy for defense of claims that would normally be covered under the policy for private owners. Construction contracting involves many different interwoven areas and it is inappropriate to selectively attempt to eliminate one contractual protection without taking into account the larger picture.

Finally, we note that the wording of the proposed amendment to section 103D-713(b), HRS, is ambiguous as to the length of time that a contractor has the duty to defend the government.

We respectfully ask the Committee to hold this bill, or in the alternative, to delete the proposed new subsection (b) in the amendment to section 103D-713, HRS.