



**STATE OF HAWAII  
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TESTIMONY  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE  
SENATE COMMITTEE  
ON  
JUDICIARY AND LABOR

February 26, 2013

10:00 a.m.

SB 504, SD 1

RELATING TO PROCUREMENT.

Chair Hee, Vice-Chair Shimabukuro, and committee members, thank you for the opportunity to submit testimony on SB 504, SD 1. The State Procurement Office's (SPO) comments are limited to SECTION 2 which adds a definition for "governmental body".

The bill creates another definition for "governmental body"; however chapter 103D has an existing definition of "governmental body". HRS §103D-104 reads, "*Governmental body means any department, commission, council, board, bureau, authority, committee, institution, legislative body, agency, government corporation, or other establishment or office of the executive, legislative, or judicial branch of the State, including the office of Hawaiian affairs, and the several counties of the State.*" Both definitions are similar, however to have two definitions within the same chapter will be confusing.

The SPO recommends the language on page 3, lines 18 to 22 and page 4, lines 1 to 3 be deleted, as it is duplicative.

Thank you.



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**YOUNGER MEMBER FORUM**

**PRESIDENT**

**Kurt Nagamine**

e-mail: [knagamine@ascehawaiymf.org](mailto:knagamine@ascehawaiymf.org)

February 25, 2013

Honorable Clayton Hee, Chair  
Honorable Maile S.L. Shimabukuro, Vice Chair  
Honorable Members of the Senate Committee on Judiciary and Labor,

**I am testifying in SUPPORT for Senate Bill 504, SD1 Relating to Procurement**

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 the members either own or work for an engineering firm that would be classified as a small business. Much of their work is for state and county agencies on contracts regulated by the procurement code either as the prime consultant or part of a team of subconsultants working within many of the specialized areas of civil engineering. While contracted to perform work for a government body, the terms and conditions of their contractual relation may vary depending on the attorney's providing legal support.

Senate Bill 504, SD1 amends the public procurement code to prohibit a governmental body from requiring a contractor providing professional design services to indemnify the governmental body for the governmental body's negligence. The Bill would assure the consultant would not be required to defend the governmental agency for liability due to negligence or fault that is not the result of the consultant's actions.

I urge your support for Senate Bill 504, SD1. Thank you for the opportunity to present my testimony.

Owen Miyamoto, PE, FASCE  
Local Legislative Liaison  
3209 Paty Drive  
Honolulu, HI 96822-1439  
Phone: (808) 832-3726  
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Civil Engineers – Designers and Builders of the Quality of Life

 **TOMCO CORP.**  
*General Contractors*

Via E-mail: [JDLTestimony@capitol.hawaii.gov](mailto:JDLTestimony@capitol.hawaii.gov)  
Via Fax: (808) 586-7334

February 25, 2013

**SUBJECT: STRONG OPPOSITION TO S.B. 504, SD1 & INSTEAD REQUESTED AMENDMENTS, RELATING TO PROCUREMENT.** 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 26, 2013  
TIME: 10:00 a.m.  
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee,

**TOMCO CORP. strongly opposes the passage of S.B. 504, SD1, Relating to Procurement, 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.

S.B. 504, SD1 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, TOMCO CORP. strongly opposes S.B. 504, SD1 as currently drafted and requests that GCA's amendments be adopted.**

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

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**Lic# ABC 16941**



ALBERT C.  
**KOBAYASHI, INC.**  
GENERAL CONTRACTORS

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Waipahu, Hawaii 96797 • Phone (808) 671-6460 • FAX 676-5832 • Lic. #ABC-07819

Via E-mail: [JDLTestimony@capitol.hawaii.gov](mailto:JDLTestimony@capitol.hawaii.gov)  
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February 25, 2013

SUBJECT: **STRONG OPPOSITION TO S.B. 504, SD1 & INSTEAD REQUESTED AMENDMENTS, RELATING TO PROCUREMENT.** 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 26, 2013  
TIME: 10:00 a.m.  
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee,

**ALBERT C. KOBAYASHI, INC. strongly opposes the passage of S.B. 504, SD1, Relating to Procurement, 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.

S.B. 504, SD1 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, ALBERT C. KOBAYASHI, INC. strongly opposes S.B. 504, SD1 as currently drafted and requests that GCA's amendments be adopted.**

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



general contractor license #ABC 21576

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February 25, 2013

SUBJECT: **STRONG OPPOSITION TO S.B. 504, SD1 & INSTEAD REQUESTED AMENDMENTS, RELATING TO PROCUREMENT.** 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 26, 2013  
TIME: 10:00 a.m.  
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee,

**LYZ, Inc. strongly opposes the passage of S.B. 504, SD1, Relating to Procurement, 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.

S.B. 504, SD1 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, LYZ, Inc. strongly opposes S.B. 504, SD1 as currently drafted and requests that GCA's amendments be adopted.**

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

A handwritten signature in black ink, appearing to read 'James N. Kurita', enclosed within a large, stylized circular flourish.

James N. Kurita  
Vice President/ Chief Operating Officer



# S & M SAKAMOTO, INC.

GENERAL CONTRACTORS

Via E-mail: [JDLTestimony@capitol.hawaii.gov](mailto:JDLTestimony@capitol.hawaii.gov)

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February 26, 2013

**SUBJECT: STRONG OPPOSITION TO S.B. 504, SD1 & INSTEAD REQUESTED AMENDMENTS, RELATING TO PROCUREMENT.** 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 26, 2013

TIME: 10:00 a.m.

PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee,

**S&M Sakamoto, Inc. strongly opposes** the passage of S.B. 504, SD1, Relating to Procurement, **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.

S.B. 504, SD1 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, S&M Sakamoto, Inc. strongly opposes S.B. 504, SD1 as currently drafted and requests that GCA's amendments be adopted.**

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

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**GCA of Hawaii**

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 26, 2013

TO: HONORABLE CLAYTON HEE, CHAIR, HONORABLE MAILE SHIMABUKURO,  
VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON JUDICIARY  
AND LABOR

SUBJECT: **STRONG OPPOSITION TO S.B. 504, SD1 AND INSTEAD REQUESTED  
AMENDMENTS. RELATING TO PROCUREMENT.** 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 defend the governmental body against liability not arising from the  
contractor's own negligence or fault. (SD1)

HEARING

DATE: Tuesday, February 26, 2013  
TIME: 10:00 a.m.  
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro and Members of the Committee,

The General Contractors Association (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 **strongly opposed** to the passage of S.B. 504, SD1 as currently proposed and would like to request the attached amendments **to remove any requirement to indemnify the state under contracts awarded to persons licensed under Chapter 444, HRS for Licensed Contractors.** This bill proposes to prohibit any governmental procurement contracts 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.

**Background**

In 2007, the legislature passed S.B. 17, SD2, HD2, CD1 which was enacted as Act 246, Session Laws of Hawaii, 2007. Although, GCA had concerns with the bill at that time, the GCA did not oppose the bill since the rationale given for its enactment was to permit small engineering and architectural firms and sole proprietorships the ability to bid on state public works contracts. It was believed that those smaller engineering and architectural firms would not be able to do otherwise because of their inability to obtain liability insurance with the requirement to indemnify the state. Thus, a limit of one million dollars (\$1,000,000) was placed on the no indemnification provision.

This current measure proposes to undue the original intent of Act 246 (2007), significantly changing the impact to those involved in direct procurement of public works projects with the state, particularly the general contractor.

**S.B. 504, SD1 and Requested Amendments**

The current bill, S.B. 504, SD1 proposes to remove the \$1,000,000 limitation such that all contracts between the state and all engineers, architects, surveyors and landscape architects who enter into contracts with the state could no longer provide that they be required to indemnify the state.

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 and may result in some contractors no longer being able to obtain liability insurance coverage and thus unable to bid on state public works contracts. An example of the inequity of this situation is that a design professional would only be required to defend and pay for its own negligence or omissions, while the construction contractor, who may be entirely faultless, or not even named as a party in the suit would be required to defend the state and pay all the damages awarded against the state.

The GCA believes that no awardee of a state contract should be required to indemnify the state, and that each party named in a suit which names the state as a party, be responsible to pay only its share of damages, resulting from its own negligent action.

In an effort to ensure fairness, GCA respectfully requests the adoption of the attached proposed amendments. **The GCA is in opposition as the bill is currently written and would support, to remove any requirement to indemnify the state under contracts awarded to persons licensed not only under Chapter 464 for Professional engineers, architects, surveyors and landscape architects, but under Chapter 444, HRS for Licensed Contractors as well. Please see attached requested amendments.**

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



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. The legislature finds that governmental procurement contracts for the services of engineers, architects, surveyors, and landscape architects ~~and contractors who bid on public works contracts~~ often require design professionals to indemnify and defend governmental entities when the ~~design professional~~ awardee is not negligent or at fault.

The legislature further finds that such contract terms are detrimental to the State in the long term, and negatively affect procurement, project costs and quality, and innovation. ~~Also, such contract terms are uninsurable through professional liability insurance required by governmental entities, limiting the recovery available to the government.~~

The legislature further finds that, while some state agencies recognize the negative implications and have removed these terms, inconsistency between agencies and departments slows the procurement process and creates a climate of unreasonable risk and uncertainty ~~for Hawaii's design professionals.~~

The purpose of this Act is to prohibit indemnification clauses in governmental procurement contracts that are ~~entered into with professionals who hold licenses under Chapter 444 and 464, HRS exclusively for the services of engineers, architects, surveyors, or landscape architects,~~ unless the liability arises from the contractor's own negligence or fault.

SECTION 2. Chapter 103D-713, Hawaii Revised Statutes, is amended to read as follows:

"~~[§103D-713]~~ **Defense of a governmental body.** (a) ~~[Nø]~~ On or after the effective date of this Act, no contract [of less than \$1,000,000] that is entered into [on or after July 1, 2007,] by any governmental body, and is exclusively for services that may only lawfully be provided by with a person licensed under chapter, 444 or 464, HRS may require the contractor 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 the contract.

(b) Subsection (a) notwithstanding, the contract may require the contractor providing the services to indemnify and hold harmless the governmental body and its officers, employees, and agents from and against any liability, damage, loss, cost, and expense, including reasonable

attorneys' fees, and all claims, suits, and demands therefor arising out of or resulting from the negligent, reckless, intentional, or wrongful acts, errors, or omissions of the contractor, the contractor's employees, officers, agents, or subcontractors in the performance of the contract or the contractor's professional services, and the provisions may remain in full force and effect notwithstanding the expiration or early termination of the contract.

(c) No person licensed under chapter ~~444~~ or 464 that has agreed in any contract to defend a governmental body, including those contracts ~~of less than \$1,000,000 entered into before or after July 1, 2007~~2013, shall be required to defend the governmental body in a lawsuit ~~filed more than ten years beyond the substantial completion of the project.~~ except that this subsection shall not apply to any lawsuit that has been filed prior to July 1, 2007.

(d) As used in this section, "person" means any person, partnership, corporation, or other entity conducting business in the State.

(e) As used in this section, "governmental body" means this State and all agencies thereof, any public body corporate within this State and all agencies thereof, and any non-incorporated public body within this State of whatever nature and all agencies thereof. "Governmental body" includes but is not limited to cities, counties, school districts, authorities, universities and community colleges, and their employees and agents, including but not limited to other business entities retained by or contracting with the public entity to manage or administer the contract for the public entity."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: \_\_\_\_\_

**Report Title:**

Procurement Contracts; Liability

**Description:**

Prohibits governmental procurement contracts of any amount that are exclusively for the services of general contractors, 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.

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

Proposed Changes include Contractors who bid on Public Works Contracts



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February 25, 2013

**SUBJECT: STRONG OPPOSITION TO S.B. 504, SD1 & INSTEAD REQUESTED AMENDMENTS, RELATING TO PROCUREMENT.** 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 26, 2013  
TIME: 10:00 a.m.  
PLACE: Conference Room 016

Dear Chair Hee, Vice Chair Shimabukuro 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 S.B. 504, SD1, Relating to Procurement, **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.

S.B. 504, SD1 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 S.B. 504, SD1 as currently drafted and requests that GCA's amendments be adopted.**

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

## TESTIMONY OF MICHAEL TANOUE

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COMMITTEE ON JUDICIARY AND LABOR  
Sen. Clayton Hee, Chair  
Sen. Maile S.L. Shimabukuro, Vice Chair

Tuesday, February 26, 2013  
10:00 a.m.

### **SB 504, SD1**

Chair Hee, Vice Chair Shimabukuro, and members of the Committee on Judiciary and Labor, 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 40% of all property and casualty insurance premiums in the state.

The Hawaii Insurers Council **opposes** SB 504, SD1.

SB 504, SD1 seeks to amend Hawaii Revised Statutes Section 103D-713, which is entitled "Defense of a governmental body." Section 103D-713 currently has two major components:

Subsection (a) provides, in essence, that no contract of less than \$1,000,000 between a governmental body and a person licensed under Chapter 464 (i.e., engineers, architects, surveyors, or landscape architects) may require such contractor to defend the governmental body from any liability or damages arising out of the contractor's performance under the contract; and

Subsection (b) provides, in essence, that, subsection (a) notwithstanding, the contract may require the contractor to indemnify and hold harmless the governmental body from liability and damages arising out of or resulting from the negligent, reckless, intentional, or wrongful acts, errors, or omissions of the contractor in the performance of the contract or of the contractor's professional services.

SB 504, SD1 seeks to remove the \$1,000,000 dollar threshold dealing with the defense obligation. In other words, under current law, engineers, architects, surveyors, and landscape architects may be required to defend governmental bodies in contracts of a \$1,000,000 or more. However, under SB 504, SD1, these same professionals may not be required to defend governmental bodies in contracts of any amount.

SB 504, SD1 does **not** alter subsection (b), regarding a contractor's obligation to indemnify and hold harmless the governmental bodies.

The Hawaii Insurers Council objects to SB 504, SD1 for at least two reasons.

First, exempting only engineers, architects, surveyors, and landscape architects from any obligation to defend governmental bodies, regardless of contract amount, affords such professionals unequal benefits under the law. Contractors – prime and general contractors and subcontractors – are **not** afforded the same protections under current Section 103D-713 or SB 504, SD1. Indeed, SB 504, SD1 exacerbates the inequality because, if enacted, it would require contractors potentially to shoulder the **entire** defense obligation in contracts with governmental bodies. This could result in increased insurance premiums for contractors and subcontractors, burdening their bottom-line and negatively affecting the State's "procurement, project costs and quality, and innovation."

Second, the unequal treatment of professionals licensed under Chapter 464 and contractors may be subject to constitutional challenge under the equal protection clause. See, e.g., *Shibuya v. Architects Hawaii, Ltd.*, 65 Haw. 26, 647 P.2d 276 (1982) (statute of repose protecting the architect, general contractor, and subcontractor of a building, but not the manufacturer of equipment used in the building, violated the equal protection guaranty); *Fujioka v. Kam*, 55 Haw. 7, 514 P.2d 568 (1973) (statute of repose protecting engineer and contractor, but not owner of the building, violated the equal protection guaranty).

Based on the foregoing, the Hawaii Insurers Counsel opposes SB 504, SD1, and requests that it be held. Thank you for the opportunity to testify.