

**SB2463**

**SD1**

## TESTIMONY OF MICHAEL TANOUE

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SENATE COMMITTEE ON JUDICIARY AND LABOR  
Senator Clayton Hee, Chairman  
Senator Maile Shimabukuro, Vice Chair

Tuesday, February 25, 2014  
10:30 a.m.

### **SB 2463, SD1**

Chair Hee, Vice Chair Shimabukuro, and members of the Committees, 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 amendments. SB 2463, SD1 attempts to limit exposure to contractors and subcontractors required to defend the government if they have no liability in a government contract for the period contained in the statute of repose which is ten years. We believe that the intent of the bill is good and suggest the following amended language to ensure that subcontractors are treated in the same manner as contractors. Our recommended language for subsection (b) is as follows:

“(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 time limitation set forth in section 657-8.”

Thank you for the opportunity to testify.



AMERICAN SOCIETY OF CIVIL ENGINEERS

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February 24, 2014

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 of Senate Bill 2463 SD 1 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 testimony provided by the American Council of Engineering Companies of Hawaii and the General Contractors Association of Hawaii supporting Senate Bill 2462 SD1.

We recommend your passage of Senate Bill 2463 SD 1. 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](mailto:owen@hawaii.edu)



Civil Engineers – Designers and Builders of the Quality of Life



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February 24, 2014

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

**Subject:** TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,  
Relating to Procurement  
Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16

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

The American Council of Engineering Companies of Hawaii (ACECH) strongly supports the removal of the “defend” term but respectfully requests that SD1 be revised as attached (Attachment 1 – proposed SD2). The correction brings the bill back to its original intent and is based on negotiations with stakeholders (Attachment 2).

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 conducting work for some government entities are often required to sign contract terms and conditions requiring the design professional to defend the government in any lawsuit related to the project, regardless of whether the professional has any fault related to the project. This requirement to defend the government before negligence or fault is shown is an inappropriate attempt to shift the government’s liability to Hawaii’s hardworking businesses, and is not insurable under our professional liability insurance (PLI). We attach letters obtained from the PLI industry attesting that such coverage is not available to design professionals, due to the nature of PLI (Attachment 3). We note that our contracts would still contain an indemnification clause that requires the professional to pay damages, including attorney’s fees, if found to be at fault, and we believe this provides reasonable protection for the government.

The Federal Government, many states, and private clients 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 government 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:



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- 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”.
- 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. 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 Senate to encourage a fair and reasonable business climate in Hawaii, and respectfully urge you pass this bill, with the revised language attached. 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

THE SENATE  
TWENTY-SEVENTH LEGISLATURE, 2014  
STATE OF HAWAII

S.B. No. 2463 S.D.1  
Proposed S.D.2

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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 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.

Designing and constructing public works projects are unique among services procured by the government. Public agencies have a strong involvement in budgeting and scoping services and working in collaboration with the contractor. Public works often involve large risks due to site circumstances, public environmental concerns and high public usage. Highways and public buildings have necessarily long service lives relative to other services procured, thereby increasing contractor risk beyond that of other government contracts.

~~[For higher limits,]~~ Design professionals licensed under HRS chapter 464 are able to obtain professional liability insurance that covers the contractor for indemnifying the government; however, the insurance industry does not provide reasonable coverage for another party's defense costs if the design

professional is not negligent. Thus, the legislature finds that design professional contractors [~~would~~] should not be burdened with the duty to defend a governmental body before the contractor's negligence or fault is determined.

Further, the legislature finds that requiring a construction contractor licensed under HRS chapter 444 to defend the public agency beyond the owner's acceptance of the project and a reasonable contractor's warranty period is overly burdensome. Thus, the legislature finds that any contractual requirement to defend the governmental body by a construction contractor should be limited to the construction and warranty period up to a maximum of one year after final acceptance.

[~~However, the~~] The legislature finds that upon determination of negligence or fault, contractors 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. Further, this legislation is not intended to restrict the ability of a government agency to require a construction contractor to provide general liability insurance coverage for a particular project, either independently or as an additional insured under the contractor's policy, for the protection of governmental body, its officers and employees.

The legislature further finds that, while some state and

county agencies recognize the negative implications and have removed the duty to defend clause, inconsistency between agencies and departments still exists. The legislature further finds that the clause is detrimental in the long term by negatively affecting competition for contracts and innovation.

The purpose of this Act is to standardize differing contract conditions regarding the duty to defend clause by prohibiting defense clauses in contracts entered into by persons licensed under chapter 464, Hawaii Revised Statutes, and to provide certain limits on the duty to defend for persons licensed under chapter 444[, Hawaii Revised Statutes].

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

**"[§103D-713] Defense of a governmental body.** (a) ~~[No]~~ Beginning July 1, 2014, 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 464, ~~[may]~~ shall 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) Beginning July 1, 2014, the requirement for a person licensed under chapter 444, HRS 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]~~ person's performance under the contract shall not extend beyond the ~~[time limitation set forth in section 657-8]~~ owner's final acceptance of the project and the contractor's warranty period up to a maximum of one year after final acceptance.

(c) Subsections (a) and (b) 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 therefore 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.

(d) No person licensed under chapter 464 that has agreed in any contract to defend a governmental body, including those contracts entered into before or after July 1, 2007, shall be required to defend the governmental body in a lawsuit filed more

than ten years beyond the owner's final acceptance of the project, except that this subsection shall not apply to any lawsuit that has been filed prior to July 1, 2007.

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

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

SECTION 4. This Act shall take effect on July 1, [~~2050~~]  
2014.

THE SENATE/THE HOUSE OF  
REPRESENTATIVES  
TWENTY-EIGHTH LEGISLATURE, 2014  
STATE OF HAWAII

S.B. No. 2463

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A BILL FOR AN ACT

Relating to procurement of public works.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that contracts for public works often include a duty to defend clause, ~~unfairly~~ requiring the contractor to defend governmental entities before the contractor's negligence or fault is determined.

Designing and constructing public works projects are unique among services procured by the government. Public agencies have a strong involvement in budgeting and scoping services and working in collaboration with the contractor. Public works often involve large risks due to site circumstances, public environmental concerns and high public usage. Highways and public buildings have necessarily long service ~~life-lives~~ relative to other services procured, thereby increasing contractor risk beyond that of other government contracts.

Design professionals licensed under HRS chapter 464 are able to obtain professional liability insurance that covers the contractor for indemnifying the government; however, the insurance industry does not provide reasonable coverage for another party's defense costs if the design professional is not negligent. Thus, the legislature finds that design ~~and construction service professional~~ contractors should not be burdened with the duty to defend a governmental body before the contractor's negligence or fault is determined.-

Further, the legislature finds that requiring a construction contractor licensed under HRS chapter 444 to defend the public agency beyond the owner's acceptance of the project and ~~the~~ a reasonable contractor's warranty period is overly burdensome. Thus, the legislature finds that any contractual requirement to defend the governmental body by a construction contractor should be limited to the construction and warranty period up to a maximum of one year after final acceptance.

Upon determination of negligence or fault 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. Further, this legislation is not intended to restrict the ability of a government agency to require a construction contractor to provide general liability insurance coverage for a particular project, either independently or as an additional insured under the contractor's policy, for the protection of governmental body, its officers and employees.

The legislature further finds that, while some state and county agencies recognize the negative implications and have removed the duty to defend clause, inconsistency between agencies and departments still exists. The legislature further finds that the clause is detrimental in the long term by negatively affecting competition for contracts and innovation. The purpose of this Act is to standardize differing contract conditions regarding the duty to defend clause by prohibiting defense clauses in contracts entered into by persons licensed under ~~Chapter~~ HRS chapter 464, and to provide certain limits on the duty to defend for persons licensed under HRS chapter 446, ~~HRS~~.

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

~~"[E]§103D-713[.]~~ **Defense of a governmental body.** (a) ~~[Nø]~~ Beginning July 1, 2014, 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 chapters ~~s 444 or~~ 464, HRS may shall 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. ~~contractor's performance under the contract with the governmental body.~~

(b) [Nø] Beginning July 1, 2014, the requirement for a person licensed under chapter 444, HRS 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 person's performance under the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a maximum of one year after final acceptance.

~~(bc)~~ Subsections (a) and (b) 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 therefore 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.

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

~~(de)~~ 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 the State and all agencies thereof, any public body corporate within the State and all agencies thereof, and any non-incorporated public body within the 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 on July 1, 2014.

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

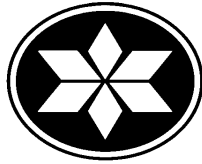
**Report Title:**

Procurement Contracts; Liability

**Description:**

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.

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



FINANCE INSURANCE, LTD.

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February 24, 2014

To Whom it May Concern

Subject: **SB 2463 and HB 2047**

As the insurance agent for many of the architectural and engineering firms doing business in Hawaii, I would like to clarify coverage under the Professional Liability policy.

Coverage for the defense of parties other than the insured is not covered under the professional liability policy. This is the same for all professional policies including those for attorneys, doctors, accountants, etc. It is not available in the insurance marketplace.

I would also like to clarify that if the insured party is determined to be negligent, then losses, costs and expenses, which could include the cost of the other party's defense is covered. It's the "upfront" cost, before negligence is determined, that is an "out-of-pocket" expense for the insured. Any contractual agreement not tied to the insured's negligence is considered uninsurable.

Please feel free to contact me at 808-522-2095 if you have any questions.

Sincerely,

Karen Hong  
Agent  
Architects and Engineers Program

Mr. Kevin Wooley  
Marsh US Consumer  
Seabury & Smith Inc.  
701 Market St. Ste 1100  
St. Louis, MO 63101

24 February 2014

**Re: Professional liability insurance coverage of Hawaii indemnity**

**Beazley Group**

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Dear Mr. Wooley:

We understand that an issue regarding professional liability insurance coverage has arisen related to bills in the 2014 Hawaii State Legislature (SB2463 and HB2047) advocated by a number of design professional organizations in Hawaii, including the American Council of Engineering Companies of Hawaii, the American Institute of Architects Hawaii State Council, the Hawaii Chapter of the American Society of Civil Engineers, and the Coalition of Hawaii Engineering and Architectural Professionals.

You asked us to provide input regarding professional liability insurance coverage of contractual indemnity provisions.

Professional liability insurance covers the design professional only for claims arising out of its negligence. An acceptably worded indemnity provision is one that limits the design professional's indemnity obligation to the extent the damages are caused by the design professional's negligent performance of services under the agreement. If the indemnity provision is not appropriately negligence-based, the design professional may be exposed to liability beyond that for which it is insured.

We recommend deleting any language in an indemnity provision requiring the design professional to defend the client. The word "defend" raises significant insurability issues, regardless of the insurance company involved. The duty to defend is problematic because it is broader than the duty to indemnify. Accordingly, when a design professional has a duty to defend, the design professional may be required to defend a claim based upon a mere allegation of negligence, unlike a duty to indemnify which is triggered by actual negligence. The duty to defend a client may be interpreted as a contractual obligation rather than an

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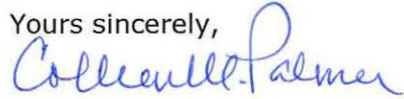
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obligation triggered by adjudication of your negligence. As a contractual obligation, the duty to defend would not be covered by your professional liability insurance policy.

Please let me know if you have any questions.

Yours sincerely,



Colleen M. Palmer

Direct tel: (617) 239 2606

email: [colleen.palmer@beazley.com](mailto:colleen.palmer@beazley.com)



**Business Insurance  
Services, Inc.**

February 24, 2014

Beverly Ishii-Nakayama  
Shigemura, Lau, Sakanashi, Higuchi and Associates  
1916 Young Street, 2<sup>nd</sup> Floor  
Honolulu, Hawaii 96826

RE: Professional Liability Insurance in Hawaii

Dear Beverly:

We understand that an issue regarding Professional Liability Insurance (PLI) coverage has arisen related to bills in the 2014 Hawaii State Legislature (SB2463 and HB2047) advocated by a number of design professional organizations in Hawaii, including the American Council of Engineering Companies of Hawaii, the American Institute of Architects Hawaii State Council, the Hawaii Chapter of the American Society of Civil Engineers, and the Coalition of Hawaii Engineering and Architectural Professionals. The question raised is whether PLI covers certain terms in an indemnification clause.

The purpose of this letter is to clarify the coverage under PLI. Specifically:

The insurance requirements of some clients reflect a misunderstanding of the nature and scope of PLI coverage for architects, engineers, surveyors, and other design professionals. When Clients attempt to mandate specific insurance coverage, they usually do so to seek financial protection and to structure insurance requirements in what you consider to be standard terms. In some cases, it is impossible for design professionals to comply with such requirements. As such, it is a good idea to become educated about the nuances of PLI coverage. This is especially important when the requirements, as stated, are actually adverse to your interests or are simply impossible to meet under the terms of the design professional's PLI coverage.

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## **Naming the Client as an Additional Insured**

Clients may think that they will be better protected against third-party claims by being included as a named insured or an additional insured on the PLI policy.

This may be true for some forms of insurance, but it is not an option in the PLI policies. The reason is that since Clients do not perform professional services, they do not assume the risks that the PLI policy is designed to cover.

Unlike other types of insurance policies, the PLI policy does not make payments to the insured. Instead, the PLI policy pays “*on behalf of*” the insured in the event that the insured’s negligence in rendering professional services causes damage or injury. If you were named as an insured under the PLI policy, you would be unable to collect damages since an insured cannot make a claim against itself and recover under the PL policy.

Professional liability claims are complex, and often involve multiple parties and an absence of clear responsibility. This complexity is one factor that distinguishes PLI policies from other policies such as the commercial general liability (CGL) policy, which does allow additional insureds.

Some clients believe that additional insured status will provide adequate coverage for their in-house design professionals. Clients would be better served by purchasing their own PLI policy to cover the activities of in-house design professionals. By doing so, they can better manage risks by obtaining coverage and policy limits that meet their specific needs.

## **Contractual Liability Coverage**

Some clients may ask design professionals to have their PLI policy endorsed to specifically insure contractual liability—that is, the risks the design professional assumes under the professional services agreement. Clients often ask for contractual liability coverage from design professionals because such coverage is found under a contractor’s CGL policy. Such a request is problematic, however, because CGL contractual liability is *broad form* coverage due to the contractor’s broad risk exposure. Conversely, the PLI policy has a *limited form* contractual liability because the design professional’s risk exposure is limited to professional negligence.

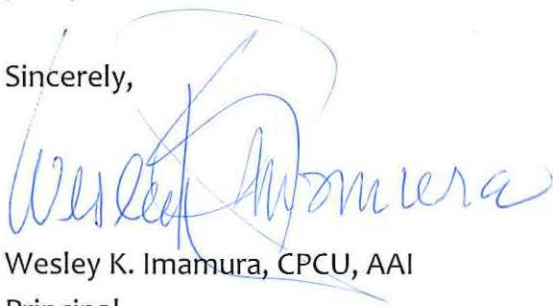
The PLI policy automatically includes limited *form* contractual liability coverage to the extent that the liability is predicated on the insured's negligence in the rendering of professional services. If your request for contractual liability coverage is consistent with the coverage already provided by the policy, a special endorsement is unnecessary.

On the other hand, if the coverage requested goes beyond what the policy already covers, you have put the design firm in the position of assuming a business risk that is uninsurable. Examples of uninsurable contractual liabilities include express warranties and guarantees, representations that services will be free from fault and defect, and representations that the project, when finished, will be fit for its intended purpose. It is to your benefit to have contractual obligations that are insurable so that there's an increased chance of availability of a remedy to address any claim caused by the design professional's negligence.

Professional liability coverage is designed to pay on behalf of an insured firm that does not meet the standard of care in fulfilling professional obligations; it is not designed to stand behind *all* contractual obligations.

By law, design professionals are liable for their own negligence as well as for the negligence of those they have assumed vicarious liability (generally, professional consultants). If design professionals agree by contract to accept liability for more than this negligence, they are assuming a business risk that is not covered under PLI policy.

Sincerely,

A handwritten signature in blue ink that reads "Wesley K. Imamura". The signature is written in a cursive style with a large, sweeping initial "W".

Wesley K. Imamura, CPCU, AAI  
Principal

February 21, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,**  
Relating to Procurement  
**Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16**

Dear Chair Hee, Vice Chair Shimabukuro 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 SB2463, Relating to Procurement, with the revisions proposed by the American Council of Engineering Companies (ACEC).**

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, with revisions proposed by ACEC.

Very truly yours,  
Fukunaga & Associates, Inc.



Jon K. Nishimura, P.E.  
President





THE LIMTIACO CONSULTING GROUP  
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

February 23, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed ACECH revisions) of SB2463 SD1 Relating to Procurement**

**Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16**

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

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 beneficial engineering projects and meaningful volunteerism.

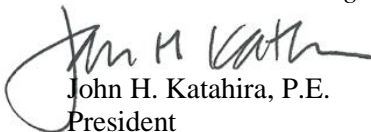
TLCG faces numerous business challenges, being a small business in Hawaii. One such challenge is being addressed in SB2463 SD1, Relating to Procurement. We are in full support of this bill with ACECH revisions.

As licensed professional engineers, we understand our duty to be responsible for our error; however, the current State contract language requires us to pay for defense costs even if we are not negligent. This defend clause is also uninsurable, meaning defense costs would need to be paid out of pocket and our engineers could be held personally liable for damages...even if our engineering services had nothing to do with the claim. (Professional liability insurance only applies when an engineer is negligent.) This unreasonable defend clause jeopardizes 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 to 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



February 21, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,**  
Relating to Procurement  
**Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16**

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

We are in support of this bill, with the revisions proposed by the American Council of Engineering Companies. Our firm provides 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 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.

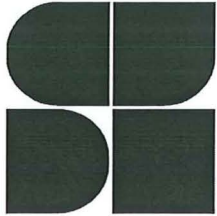
Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done 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. We note that the contract would continue to require us to indemnify and pay attorney's fees if we are found to be negligent.

Our company provides excellent service to government entities, but we struggle with making the decision to conduct government work under these terms, and we won't accept these contract terms for high-risk projects. This bill benefits the State and its citizens by encouraging greater participation by qualified firms such as ours. We respectfully urge you restore fairness to government contracts and to pass this bill. Thank you for an opportunity to express our views in SUPPORT of this bill, with revisions.

Respectfully submitted,

A handwritten signature in blue ink that reads "William H.Q. Bow".

William H.Q. Bow, P.E.  
President



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

February 21, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,  
Relating to Procurement  
Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16**

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

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

We are in support of this bill, with the revisions proposed by the American Council of Engineering Companies. Our firm provides 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 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.

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. We note that the contract would continue to require us to indemnify and pay attorney's fees if we are found to be negligent.

Our company provides excellent service to government entities, but we struggle with making the decision to conduct government work under these terms, and we won't accept these contract terms for high-risk projects. This bill benefits the State and its citizens by encouraging greater participation by qualified firms such as ours. We respectfully urge you restore fairness to government contracts and to pass this bill. Thank you for an opportunity to express our views in SUPPORT of this bill, with revisions.

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

Howard K.C. Lau, P.E.  
President

CONSULTING STRUCTURAL ENGINEERS





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

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**

February 24, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,**  
Relating to Procurement  
**Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16**

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

We are in support of this bill, with the revisions proposed by the American Council of Engineering Companies. My firm, Gray Hong Nojima & Associates, provides 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 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.

Our firm's professional's professional liability insurance 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 and unfair 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. We note that the contract would continue to require us to indemnify and pay attorney's fees if we are found to be negligent.

Gray Hong Nojima & Associates provides excellent service to government entities, but we struggle with making the decision to conduct government work under these terms, and we won't accept these contract terms for high-risk projects. This bill benefits the State and its citizens by encouraging greater participation by qualified firms such as ours. We respectfully urge you restore fairness to government contracts and to pass this bill. Thank you for an opportunity to express our views in SUPPORT of this bill, with revisions.

Respectfully submitted,

GRAY, HONG, NOJIMA & ASSOCIATES, INC

Sheryl E. Nojima, PhD, PE  
President

SN:dkh

February 24, 2014

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

**Subject:** TESTIMONY IN **SUPPORT (with proposed revisions)** of SB 2463, Relating to Procurement

Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16

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

**The Coalition of Hawaii Engineering & Architectural Professionals** represents several professional Engineering and Architectural organizations including American Council of Engineering Companies Hawaii; Hawaii Chapter of the American Society of Civil Engineers; American Public Works Association Hawaii Chapter; Structural Engineering Association of Hawaii; and the Hawaii Society of Professional Engineers. The State Contract Language for General Terms and Conditions is a generic document and 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 professional liability insurance. We strongly support the removal of the “defend” term but respectfully request that the bill language be revised. The correction brings the bill back to its original intent, is based on negotiations with stakeholders, and corrects issues with the current language.

*"~~[[§103D-713]]~~ **Defense of a governmental body.** (a) ~~[Not]~~ Beginning July 1, 2014, 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 464, HRS [may] shall 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) Beginning July 1, 2014, the requirement for a person licensed under chapter 444, HRS 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 person's performance under the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a maximum of one year after final acceptance.*

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.

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

Sincerely,

Coalition of Hawaii Engineering & Architectural Professionals  
Lester H. Fukuda, P.E., FACEC

*Lester H Fukuda*



Suite 1500, Pacific Park Plaza □ 711 Kapiolani Boulevard; Honolulu, Hawaii 96813 □ Telephone (808) 593-1676 □ FAX (808) 593-1607

ParEn, Inc. □ dba **park engineering**

February 24, 2014

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

Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,  
Relating to Procurement  
Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16

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

ParEn Inc. dba Park Engineering is in support of this bill, with the revisions proposed by the American Council of Engineering Companies. Our firm provides civil engineering and surveying consultation services for a number of State and County projects.

A design professional's professional liability insurance 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 creates 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 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. We note that the contract would continue to require us to indemnify and pay attorney's fees if we are found to be negligent.

Our company provides excellent service to government entities, but we struggle with making the decision to conduct government work under these terms, and we won't accept these contract terms for high-risk projects. This bill benefits the State and its citizens by encouraging greater participation by qualified firms such as ours. We respectfully urge you restore fairness to government contracts and to pass this bill. Thank you for an opportunity to express our views in SUPPORT of this bill, with revisions.

Respectfully submitted,

ParEn Inc.  
dba PARK ENGINEERING

Keith S. Uemura, P.E.  
Executive Vice President



February 24, 2014

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

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Very truly yours,

Derek K. Mukai, P. E.  
Principal Engineer



TERRANCE S. ARASHIRO, P.E.  
STANLEY T. WATANABE  
IVAN K. NAKATSUKA, P.E.  
ADRIENNE W. L. H. WONG, P.E., LEED AP  
DEANNA HAYASHI, P.E.  
PAUL K. ARITA, P.E.  
ERIK S. KANESHIRO, L.P.L.S., LEED AP

February 24, 2014

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Our company provides excellent service to government entities, but we struggle with making the decision to conduct government work under these terms, and we won't accept these contract terms for high-risk projects. This bill benefits the State and its citizens by encouraging greater participation by qualified firms such as ours. We respectfully urge you restore fairness to government contracts and to pass this bill. Thank you for an opportunity to express our views in SUPPORT of this bill, with revisions.



Senate Committee on Judiciary and Labor

February 24, 2014

Sincerely,

AUSTIN, TSUTSUMI & ASSOCIATES, INC.

By 

IVAN K. NAKATSUKA, P.E.  
Vice President



TERRANCE S. ARASHIRO, P.E.  
STANLEY T. WATANABE  
IVAN K. NAKATSUKA, P.E.  
ADRIENNE W. L. H. WONG, P.E., LEED AP  
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PAUL K. ARITA, P.E.  
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February 24, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,**  
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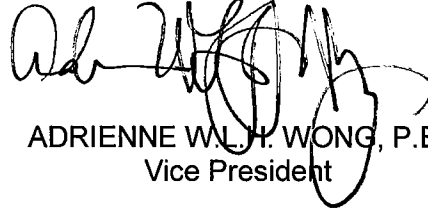
Senate Committee on Judiciary and Labor

February 24, 2014

Sincerely,

AUSTIN, TSUTSUMI & ASSOCIATES, INC.

By



ADRIENNE W.L.H. WONG, P.E.  
Vice President





TERRANCE S. ARASHIRO, P.E.  
STANLEY T. WATANABE  
IVAN K. NAKATSUKA, P.E.  
ADRIENNE W. L. H. WONG, P.E., LEED AP  
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PAUL K. ARITA, P.E.  
ERIK S. KANESHIRO, L.P.L.S., LEED AP

February 24, 2014

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

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Senate Committee on Judiciary and Labor

February 24, 2014

Sincerely,

AUSTIN, TSUTSUMI & ASSOCIATES, INC.

By 

PAUL K. ARITA, P.E.  
Vice President

February 22, 2014

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

**Subject: TESTIMONY IN SUPPORT (with proposed revisions) of SB 2463,**  
Relating to Procurement  
**Hearing: Tuesday, February 25, 10:30 a.m., Conference Room 16**

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

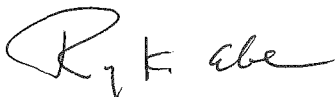
I have been a local professional civil engineer specializing in the field of sanitary engineering for the past 33 years. I have provided important and often critical wastewater design services for numerous City and County of Honolulu, County of Maui, County of Kauai, and State of Hawaii projects. I am currently a vice president with HDR Engineering, Inc. and would like to express my support for SB 2463 with the revisions proposed by the American Council of Engineering Companies (ACEC).

I am very concerned about the State's contract language for design professionals, as well as similar county contract language patterned after the State's contract language. The contract language that requires design professionals to obtain professional liability insurance for consulting work, but also includes the word "defend" in an indemnity clause and requires us to indemnify the State and counties for the liability of others, creates liability that is not covered by our insurance. Design professionals should only be required to indemnify our clients when the design professional is at fault or negligent.

The inclusion of uninsurable clauses increases consultant design fees due to the need to cover the substantial amount of added risk. It may also reduce the availability of services from a number of competent consulting firms that are unable or unwilling to take on uninsurable risks. The resulting higher design costs for government contracts ultimately hurts the taxpayers and general public.

I sincerely appreciate the continuing efforts of your committees and the members of the Senate to improve the business climate in Hawaii, and respectfully urge you support SB 2463 with the ACEC proposed amendments. Thank you very much for this opportunity to express my concerns and for your consideration of this important bill.

Respectfully submitted,



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