

SB 2463

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.



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

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

BEFORE THE:
SENATE COMMITTEES ON ECONOMIC DEVELOPMENT, GOVERNMENT
OPERATIONS AND HOUSING AND ON COMMERCE AND CONSUMER PROTECTION

DATE: Monday, February 3, 2014 **TIME:** 3:15 p.m.
LOCATION: State Capitol, Room 16
TESTIFIER(S): David M. Louie, Attorney General, or
Stella M. Kam, Deputy Attorney General

Chairs Dela Cruz and Baker and Members of the Committees:

The Department of the Attorney General has the following concerns about this bill. The premise of this bill is that it is always unfair for the government to require its contractors to defend the government before the contractor's negligence or fault is determined. We would respectfully argue that it is unfair to allow contractors to treat the government owner differently than the private sector owner when the standard general practice for construction projects is to require the contractor to defend the owner.

We note the government is prohibited from requiring design professionals licensed under Hawaii Revised Statutes chapter 464, to defend the government in design contracts of less than \$1,000,000. However, just because design professionals cannot be made to defend the government does not mean the same should hold true for contractors. 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 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, is added as an additional insured. Design professionals normally carry errors and omissions insurance which we understand does not allow the owner, whether private or public, to be included as an additional insured. (We understand the design professional would have to pay out of pocket beyond the errors and omissions

insurance to cover any duty to defend the owner.) Inclusion as an additional insured on a commercial general liability insurance policy is what distinguishes the contractor's situation from that of the design professionals. The contractors have insurance that already includes the owner as an additional insured, whereas the design professional may not.

Further, this bill would allow the contractor to unfairly escape having to defend the government for the contractor's own act or failure to act which 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.

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.

We respectfully disagree with Section 1 of the bill and its arguments for the differences between public works projects and private sector projects, for like a public owner, the private owner can be just as involved in the budgeting, scoping, and collaboration with the contractor, and like a public works project, a private construction can be just as large and risky and subject to the same environmental concerns and public demands. We appreciate the risks inherent in construction projects, but there is risk borne by the owner as well as by the contractor; the public owner should not be treated differently than a private owner.

If the Legislature believes that public owners should be treated differently from all other owners with regard to this subject, the Legislature should nevertheless still not treat all construction contracts the same. Projects can vary greatly and to remove the contractor's duty to defend in all instances would be detrimental to the public interest. At a minimum, we believe large contracts with construction contractors should not be exempt. If construction contractors enter into large contracts with the government, it is entirely reasonable for the government to require defense, as those government entities do with other contractors for other goods and services. Similarly, we would like to retain the \$1,000,000 contract amount for design professionals to defend the government. The government should not be expected to bear all the risk alone.

Finally, the bill provides a new definition of “governmental body” that is different from the definition already existing in section 103D-104, Hawaii Revised Statutes. Providing two different definitions for the same term may cause confusion, and the two definitions should be harmonized to minimize any such ambiguity.

We respectfully ask the Committees to consider our comments.

NEIL ABERCROMBIE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEES
ON
ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING
AND
COMMERCE AND CONSUMER PROTECTION

February 3, 2014, 3:15 p.m.

SB 2463

RELATING TO PROCUREMENT

Chairs Dela Cruz and Baker, Vice-Chairs Slom and Taniguchi, and members of the committee, thank you for the opportunity to submit testimony on SB2463.

The State Procurement Office (SPO) opposes this bill and offers an amendment to the associated code. SPO comments are as follows:

The requirement to exclude persons licensed under chapter 464 was enacted in SLH 2007. The original dollar threshold was \$5,000,000. This requirement was specifically aimed at Architects and Engineers-type professional services, and not construction as a whole. The intent of the dollar threshold was to minimize the burden on small businesses.

The need to protect the government from liability due to contractor performance is one based on risk and the materiality of the dollar amount involved.

A general contractor (chapter 444) should be accountable in a State construction contract as they are responsible for liability, damage, loss, or claim, action, or proceeding arising out of its performance under the contract.

SB 2463

Senate Committees on Economic Development, Government Operations and Housing
And Commerce and Consumer Protection

February 3, 2014

Page 2

SPO proposes to amend HRS 103D-713, Defense of a governmental body as follows:

"~~[§103D-713]~~ **Defense of a governmental body.** (a) No contract of less than \$5,000,000 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 a person licensed under chapter 464, 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, or at the discretion of the Chief Procurement Officer (CPO)."

Thank you.

ACEC

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of Hawaii

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March 1, 2014

Senate Committee on Economic Development, Government Operations and Housing: Honorable Senators Donovan M. Dela Cruz, Chair; Sam Slom, Vice Chair; and Members of the Committee

Senate Committee on Consumer Protection and Commerce: Honorable Senators Rosalyn H. Baker, Chair; Brian T. Taniguchi, Vice Chair; and Members of the Committee

**Subject: TESTIMONY IN SUPPORT of SB 2463, Relating to Procurement
Hearing: Monday, February 3, 3:15 p.m., Conference Room 16**

Dear Chairs Dela Cruz and Baker, and Members of the Committees:

The American Council of Engineering Companies of Hawaii (ACECH) represents about 70 member firms with over 1,300 employees throughout Hawaii. Projects designed by ACECH's member firms directly affect the quality of the water we drink and the food we eat; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play. Most projects start as problems or opportunities in need of solutions. Design professionals have the expertise to develop viable solutions to society's problems.

Design professionals and construction contractors (contracting entity) conducting work for government entities do so under contract terms and conditions requiring the entity to defend the state in any lawsuit related to the project, regardless of whether the contracting entity has any fault related to the project. This requirement to defend the state before negligence or fault is shown is an inappropriate attempt to shift the government's liability to Hawaii's hardworking businesses. The contract contains an indemnification clause that requires contracting entities to pay damages, including attorney's fees, if found to be at fault.

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

In 2007, ACECH worked with the State Legislature to pass a bill that became law (HRS §103D-713), prohibiting governmental bodies from requiring design professionals to defend the government, and that also linked our liability to our negligence. The bill covered only contracts less than \$1 million, and did not include construction contractors. In the years since the relief provided by that bill, we have seen continuing issues:

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

Page 2 of 2

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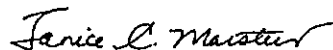
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- The unfair contract terms do not favor teams of local small firms that may band together to pursue larger projects, but would each individually be subject to the onerous contract terms. This favors larger, out-of-state firms that can afford to “self-insure”.
- Many of our best firms decline to do work for the State under the unfair contract terms, negatively impacting the procurement process, and potentially increasing costs to the State as less firms are “in the pool” of qualified consultants.
- Many agencies are unsure if HRS §103D-713 applies to them, and firms frequently struggle to have the applicable language used in contracts, slowing down the procurement process.
- An unreasonable risk climate serves to limit innovative design, since engineers and contractors are more likely to stick to “tried-and-true” solutions to avoid potential risk situations. Since the State administration has clearly seen the link between economic growth and commercial technological advances and innovation, as evidenced by various innovation programs, the stifling of local innovation because of such unfair contract terms is counterproductive.

In conclusion, requiring contracting entities to sign contracts containing unfair terms that cause them to assume an unreasonable degree of risk is poor public policy and has no public benefit. For State and County public works projects, the main beneficiary of these projects is the public. Contracting entities receive a limited short-term financial benefit, compared to the very long-lasting benefit to the State and its citizens. In many cases, the owner’s lack of maintenance or subsequent upgrades affect the project’s risk profile far more than does the initial design. Risk exists for all projects. All parties, including the public owners, should assume their fair share of the risk.

This bill will encourage more of our small businesses to work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms and contractors. We appreciate the continuing efforts of your committees and the members of the Senate 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



Janice Marsters, Ph.D.
Legislative Committee Co-Chair

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

THE VOICE OF THE CONSTRUCTION INDUSTRY

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simplicityHR by ALTRES

TESTIMONY TO THE SENATE COMMITTEE ON ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING AND COMMERCE AND CONSUMER PROTECTION

MONDAY, FEBRUARY 3, 2014

3:15 P.M.

HAWAII STATE CAPITOL - ROOM 016

SUBJECT: S.B. 2463 - RELATING TO PROCUREMENT

Dear Chairs Dela Cruz and Baker, Vice-Chairs Slom and Taniguchi, and members of the Committees:

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

The costs involved in defending the state prior to a contractor's fault being determined can be costly. S.B. 2463 would no longer require government contractors to defend the state prior to negligence being established. However, this bill would not preclude the contractor's obligation to indemnify the state in the event that there is a judgment finding fault against the contractor. S.B. 2463 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. S.B. 2463 would bring government contracts into uniformity by prohibiting defense clauses in contracts that are entered into by persons licensed under Chapters 444 and 464, Hawaii Revised Statutes.

Based on the foregoing reasons, BIA-Hawaii supports S.B. 2463.

We appreciate the opportunity to share with you our views.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 3, 2014

TO: HONORABLE DONOVAN DELA CRUZ, CHAIR, HONORABLE SAM SLOM, VICE CHAIR AND COMMITTEE ON ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING

HONORABLE ROSALYN BAKER, CHAIR, HONORABLE BRIAN TANIGUCHI, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

SUBJECT: **SUPPORT OF S.B. 2463. RELATING TO PROCUREMENT.** Prohibits governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault. Provides that the contractor may still be required to indemnify and hold harmless the governmental body from claims arising out of or resulting from the negligent, reckless, or wrongful acts, errors, or omissions of the contractor.

HEARING

DATE: Monday, February 3, 2014
TIME: 3:15 p.m.
PLACE: Conference Room 016

Dear Chairs Dela Cruz and Baker, Vice Chairs Slom and Taniguchi and Members of the Committees,

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

The GCA believes that no awardee of a state contract should be required to initially defend the state prior to negligence being established. This bill would make it the responsibility of each party named in a suit, which would include the state as a party, to cover the initial defense costs 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 bill provides a consistent clarification for all state and county agencies to follow.

GCA **supports** S.B. 2463 and we respectfully request that this Committee pass this bill.



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Alison Powers
Executive Director

TESTIMONY OF MICHAEL TANOUE

SENATE COMMITTEE ON ECONOMIC DEVELOPMENT, GOVERNMENT
OPERATION AND HOUSING
Senator Donovan M. Dela Cruz, Chair
Senator Sam Slom, Vice Chair

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
Senator Rosalyn H. Baker, Chair
Senator Brian Taniguchi, Vice Chair

Monday, February 3, 2014
3:15 p.m.

SB 2463

Chair Dela Cruz, Chair Baker, Vice Chair Slom, Vice Chair Taniguchi 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 **opposes** this measure. This bill attempts to broaden those who cannot be required to defend the government if they have no liability in a government contract. We believe that this language is flawed as written and unfairly pushes the burden of the duty to defend onto subcontractors and insurers. It attempts to exclude those licensed under Chapter 464 which are design professionals (architects and engineers) and Chapter 444 which includes general contractors and subcontractors. However, the governmental body does not contract "with" subcontractors, rather they contract with the general contractor. Therefore this language appears to leave two entities left to assist governmental bodies with the duty to defend: Subcontractors and insurers of all of these classes: Architects and Engineers, General Contractors, and Subcontractors. There is no justification to exclude some and not others.

Hawaii Insurers Council believes that this law should either include all those involved, in other words, the bill is not necessary - or that the law should exclude all who do not have any liability, which leaves the governmental bodies to defend themselves fully. If the language were to exclude all private entities involved with no liability, the language would read as follows:

"Section 103D-713 Defense of a governmental body. (a) [No] 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] shall require a person licensed under chapters 444 or 464, HRS, or such person's insurer, [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] relating to the contract[-] with the governmental body."

Thank you for the opportunity to testify.

SAH - Subcontractors Association of Hawaii

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Phone: (808) 537-5619 + Fax: (808) 533-2739

February 3, 2014

Testimony To: Senate Committee on Economic Development,
Government Operations and Housing
Senator Donovan M. Dela Cruz, Chair

Senate Committee on Commerce and Consumer Protection
Senator Rosalyn H. Baker, Chair

Presented By: Tim Lyons
President

Subject: S.B. 2463 - RELATING TO PROCUREMENT

Chair Dela Cruz, Chair Baker and Members of the Joint Committee:

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

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 generally support this bill but we vitally need an amendment that will be sure to cover the subcontractors on government jobs. As we read the language in this bill, we find that it is only the contractor who entered into the contract with the governmental body that is covered. It is typical that only the prime contractor enters into the contract with the government and there may be as many as 15 or 16 other subcontractors who enter into a contract directly with the prime contractor. It is our feeling that these individuals must be accommodated as well, and that could be done through an amendment in Section 2, 103D-713(a) by adding, "or any of the subcontractors who work on the project".

In the absence of doing that, we find that it is entirely possible that the prohibition will protect the prime contractor, the engineer, the architect, the surveyor or the landscape architect but not any of the subs thereby leaving them to "stand alone" in any lawsuit.

Based on the above, we respectfully request your amendment to this bill.

Thank you.



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YOUNGER MEMBER FORUM

PRESIDENT

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January 31, 2014

Honorable Donovan M. Dela Cruz, Chair
 Honorable Sam Slom, Vice Chair
 Honorable Members of the Senate Committee on Economic Development, Government Operations and Housing
 Honorable Rosalyn H. Baker, Chair
 Honorable Brian T. Taniguchi, Vice Chair
 Honorable Members of the Senate Committee on Commerce and Consumer Protection

I am testifying in support of Senate Bill 2463 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. Some 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 defend the state against any and all suits for injury that occurs 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.

Senate Bill 2463 would prohibit state and county agencies to require the design professional and the construction contractor to defend the agency from liability for claims that are not caused by the design or construction of the project. Design or construction errors would still be subject to the requirement to defend the government.

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

Sincerely yours,

Owen Miyamoto, PE, FASCE
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Civil Engineers -- Designers and Builders of the Quality of Life

Sam O. Hirota, Inc.

February 1, 2014

Senate Committee on Commerce and Consumer Protection

Honorable Senator Rosalyn H. Baker, Chair; Senator Brian T. Taniguchi, Vice Chair; and
Members of the Senate Committee on Commerce and Consumer Protection

Subject: **TESTIMONY IN SUPPORT of SB 2463, Relating to Procurement**

Hearing: Monday, February 3, 3:10 p.m., Conference Room 16

Dear Chair Baker, Vice Chair Taniguchi, and Members of the Committee:

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

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

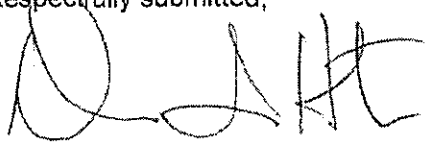
As a University of Hawaii Regent (2008-2012), I worked to remove such clauses from design contracts at UH during that time since it was my belief that design professionals were supposed to provide design services and not be a source of liability insurance for the institution, which is self insured. I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

As you may know, a design professional's PLI only covers harm caused by the design professional's negligence; **it will NOT advance the cost of defending other parties before the negligence of the design professional is established**, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

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

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Hirota". The signature is fluid and cursive, with a large initial "D" and a stylized "H".

Dennis I. Hirota, PhD, PE, LPLS

President

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

February 2, 2014



Senate Committee on Economic Development, Government Operations and Housing: Honorable Senators Donovan M. Dela Cruz, Chair; Sam Slom, Vice Chair; and Members of the Committee

Senate Committee on Consumer Protection and Commerce: Honorable Senators Rosalyn H. Baker, Chair; Brian T. Taniguchi, Vice Chair; and Members of the Committee

**Subject: TESTIMONY IN SUPPORT of SB 2463, Relating to Procurement
Hearing: Monday, February 3, 3:15 p.m., Conference Room 16**

Dear Chairs Dela Cruz and Baker, and Members of the Committees:

I am a licensed civil engineer in the State of Hawaii, and have provided design services for many State and County projects for over 30 years. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language for design professionals. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by my company's insurance.

A design professional's PLI only covers harm caused by the design professional's negligence; it will not cover the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they are not negligent or at fault. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to their contracts.

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

Respectfully submitted,
Brown and Caldwell

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

Douglas B. Lee, P.E.
Vice President



February 1, 2014

Senate Committee on Economic Development, Government Operations and Housing: Honorable Senators Donovan M. Dela Cruz, Chair; Sam Slom, Vice Chair; and Members of the Committee

Senate Committee on Consumer Protection and Commerce: Honorable Senators Rosalyn H. Baker, Chair; Brian T. Taniguchi, Vice Chair; and Members of the Committee

**Subject: TESTIMONY IN SUPPORT of SB 2463, Relating to Procurement
Hearing: Monday, February 3, 3:15 p.m., Conference Room 16**

Dear Chairs Dela Cruz and Baker, and Members of the Committees:

I am a practicing engineer in the State of Hawaii, and have provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

A design professional's PLI only covers harm caused by the design professional's negligence; it will not advance the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

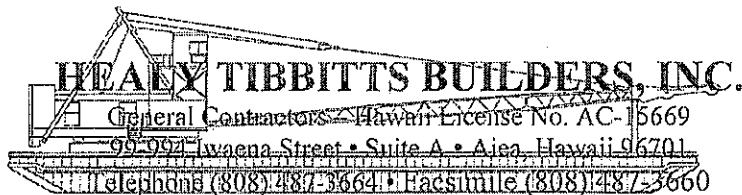
Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to public contracts.

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

Respectfully submitted,
YOGI KWONG ENGINEERS, LLC

A handwritten signature in black ink that reads "Jeffrey K. Kalani". The signature is written in a cursive, flowing style.

Jeffrey K. Kalani
Associate



SENT VIA E-MAIL: EGHtestimony@capitol.hawaii.gov

February 1, 2014

TO: HONORABLE DONOVAN DELA CRUZ, CHAIR, HONORABLE SAM SLOM, VICE CHAIR AND COMMITTEE ON ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING

HONORABLE ROSALYN BAKER, CHAIR, HONORABLE BRIAN TANIGUCHI, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

SUBJECT: **SUPPORT OF S.B. 2463. RELATING TO PROCUREMENT.** Prohibits governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault. Provides that the contractor may still be required to indemnify and hold harmless the governmental body from claims arising out of or resulting from the negligent, reckless, or wrongful acts, errors, or omissions of the contractor.

HEARING

DATE: Monday, February 3, 2014

TIME: 3:15 p.m.

PLACE: Conference Room 016

Dear Chairs Dela Cruz and Baker, Vice Chairs Slom and Taniguchi and Members of the Committees:

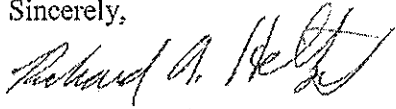
Healy Tibbitts Builders, Inc. is a general contractor in the State of Hawaii and has been actively engaged in construction work in Hawaii since the early 1960's.

Healy Tibbitts is **in support** of S.B. 2463, which would no longer require government contractors to defend the State prior to negligence being established. This bill does not preclude the contractor's obligation to indemnify the State in the event that there is a judgment finding fault on part of the contractor. The costs involved in defending the State prior to a contractor's own fault being determined can be costly.

Healy Tibbitts believes that no awardee of a State contract should be required to initially defend the State prior to negligence being established. This bill would make it the responsibility of each party named in a suit, which would include the State as a party, to cover the initial defense costs prior to negligence being established.

In an effort to spur innovation, encourage local companies to develop local infrastructure projects and ensure fairness in all aspects of procurement, Healy Tibbitts, requests your favorable consideration of S.B. 2463.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard A. Heltzel".

Richard A. Heltzel
President



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
Telephone: (808) 521-0306
Fax: (808) 531-8018
email@grayhongnojima.com**

February 1, 2014

Senate Committee on Economic Development, Government Operations and Housing: Honorable Senators Donovan M. Dela Cruz, Chair; Sam Slom, Vice Chair; and Members of the Committee

Senate Committee on Consumer Protection and Commerce: Honorable Senators Rosalyn H. Baker, Chair; Brian T. Taniguchi, Vice Chair; and Members of the Committee

Subject: TESTIMONY IN SUPPORT of SB 2463, Relating to Procurement

Hearing: Monday, February 3, 3:15 p.m., Conference Room 16

Dear Chairs Dela Cruz and Baker, and Members of the Committees:

I am a practicing engineer and owner of a woman-owned small business in the State of Hawaii. Our firm has provided design services for a number of State and County projects. In light of recent court decisions across the country bringing attention to contractual indemnification clauses, I am very concerned about the State's contract language. The State requires design professionals to obtain professional liability insurance (PLI) for our work, but inclusion of the word "defend" in an indemnity clause, and requiring us to indemnify the State for the liability of others, creates liability that is not covered by our insurance.

Design professionals and construction contractors (contracting entity) conducting work for government entities do so under contract terms and conditions requiring the entity to defend the state in any lawsuit related to the project, regardless of whether the contracting entity has any fault related to the project. This requirement to defend the state before negligence or fault is shown is an inappropriate attempt to shift the government's liability to Hawaii's hardworking businesses. The contract contains an indemnification clause that requires contracting entities to pay damages, including attorney's fees, if found to be at fault.

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

In 2007, ACECH worked with the State Legislature to pass a bill that became law (HRS §103D-713), prohibiting governmental bodies from requiring design professionals to defend the government, and that also linked our liability to our negligence. The bill covered only contracts less than \$1 million, and did not include construction contractors. In the years since the relief provided by that bill, we have seen continuing issues:

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

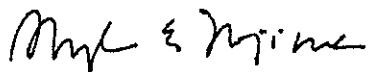
- The unfair contract terms do not favor teams of local small firms that may band together to pursue larger projects, but would each individually be subject to the onerous contract terms. This favors larger, out-of-state firms that can afford to “self-insure”.
- Many of our best firms decline to do work for the State under the unfair contract terms, negatively impacting the procurement process, and potentially increasing costs to the State as less firms are “in the pool” of qualified consultants.
- Many agencies are unsure if HRS §103D-713 applies to them, and firms frequently struggle to have the applicable language used in contracts, slowing down the procurement process.
- An unreasonable risk climate serves to limit innovative design, since engineers and contractors are more likely to stick to “tried-and-true” solutions to avoid potential risk situations. Since the State administration has clearly seen the link between economic growth and commercial technological advances and innovation, as evidenced by various innovation programs, the stifling of local innovation because of such unfair contract terms is counterproductive.

In conclusion, requiring contracting entities to sign contracts containing unfair terms that cause them to assume an unreasonable degree of risk is poor public policy and has no public benefit. For State and County public works projects, the main beneficiary of these projects is the public. Contracting entities receive a limited short-term financial benefit, compared to the very long-lasting benefit to the State and its citizens. In many cases, the owner’s lack of maintenance or subsequent upgrades affect the project’s risk profile far more than does the initial design. Risk exists for all projects. All parties, including the public owners, should assume their fair share of the risk.

This bill will encourage more of our small businesses to work with governmental agencies and benefits the State and its citizens by encouraging greater participation by qualified firms and contractors. We appreciate the continuing efforts of your committees and the members of the Senate 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.

Sincerely,

GRAY, HONG, NOJIMA & ASSOCIATES, INC.



Sheryl E. Nojima, PhD, PE
President

February 3, 2014

TO: HONORABLE DONOVAN DELA CRUZ, CHAIR, HONORABLE SAM SLOM, VICE CHAIR AND
COMMITTEE ON ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING

HONORABLE ROSALYN BAKER, CHAIR, HONORABLE BRIAN TANIGUCHI, VICE CHAIR AND
MEMBERS OF THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

SUBJECT: **SUPPORT OF S.B. 2463. RELATING TO PROCUREMENT.** Prohibits governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault. Provides that the contractor may still be required to indemnify and hold harmless the governmental body from claims arising out of or resulting from the negligent, reckless, or wrongful acts, errors, or omissions of the contractor.

HEARING

DATE: Monday, February 3, 2014
TIME: 3:15 p.m.
PLACE: Conference Room 016

Dear Chairs Dela Cruz and Baker, Vice Chairs Slom and Taniguchi and Members of the Committees,

We are Waltz Engineering, Inc. a locally owned family business of nearly 30 years as licensed contractor, providing, installing and servicing industrial laundry and heating equipment, computer access floors and operable walls. More times than not, because of our specialties, we are subcontractors to Primes, but in either situation (as a Subcontractor or as being the Prime ourselves), we have been forced to be in an unfair position of signing to the terms of "duty to defend" or walking away from participation.

Waltz Engineering, Inc. is in support of S.B. 2463, which would no longer require government contractors to defend the state prior to negligence being established. This bill does not preclude the contractor's obligation to indemnify the state in the event that there is a judgment finding fault on part of the contractor. The costs involved in defending the state prior to a contractor's own fault being determined can be costly.

Waltz Engineering, Inc. believes that no awardee of a state contract should be required to initially defend the state prior to negligence being established. This bill would make it the responsibility of each party named in a suit, which would include the state as a party, to cover the initial defense costs prior to negligence being established.

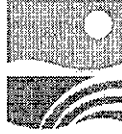
In an effort to spur innovation, encourage local companies to develop local infrastructure projects and ensure fairness in all aspects of procurement, ***Waltz Engineering, Inc.*** requests your favorable consideration of S.B. 2463.

Sincerely,

Lorinda L.S. Waltz, President

Richard A. Waltz, Vice President

WALTZ ENGINEERING, INC., 500 Alakawa Street, Bldg. 119, Honolulu, Hawaii 96817



THE LIMTIACO CONSULTING GROUP
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

January 31, 2014

Senate Committee on Economic Development, Government Operations and Housing:
Honorable Senators Donovan M. Dela Cruz, Chair; Sam Slom, Vice Chair; and Committee Members

Senate Committee on Consumer Protection and Commerce: Honorable Senators Rosalyn H. Baker, Chair; Brian T. Taniguchi, Vice Chair; and Committee Members

Subject: TESTIMONY IN SUPPORT of SB2463, Relating to Procurement
Hearing: Monday, February 3, 3:15 p.m., Conference Room 16

Dear Chairs Dela Cruz and Baker, and Committee Members:

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

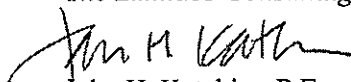
As a small business in Hawaii, we face numerous business challenges. One such challenge is being addressed in SB2463, Relating to Procurement.

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

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

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

With aloha,
The Limtiaco Consulting Group, Inc.


John H. Katahira, P.E.
President



Pacific Geotechnical Engineers, Inc.
Soils & Foundation Engineering Consultants

94-417 Akoki Street
Waipahu, Hawaii 96797
Telephone: (808) 678-8024
Facsimile: (808) 678-8722
Email: pge@pacificgeotechnical.com

February 1, 2014

**Senate Committee on Economic Development, Government Operations
And Housing:** Honorable Senators Donovan M. Dela Cruz, Chair; Sam Slom, Vice Chair; and
Members of the Committee

Senate Committee on Consumer Protection and Commerce: Honorable Senators Rosalyn H.
Baker, Chair; Brian T. Taniguchi, Vice Chair; and Members of the Committee

**Subject: TESTIMONY IN SUPPORT of SB 2463, Relating to Procurement
Hearing: Monday, February 3, 3:15 p.m., Conference Room 16**

Dear Chairs Dela Cruz and Baker, and Members of the Committees:

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A design professional's PLI only covers harm caused by the design professional's negligence; it will not advance the cost of defending other parties before the negligence of the design professional is established, and will not cover damages caused by other parties. The current contract language provides an unacceptable risk, especially considering that we design professionals are personally liable, and that this liability follows us into retirement.

Since the State and its citizens derive much more benefit from public works projects than design professionals, requiring design firms to defend the State in absence of negligence is unreasonable. It is simply not fair to require design professionals to pay for damages or defense costs if they have done nothing wrong. Most states do not have such contract requirements, and other states have recently revised their contract language to bring fairness to public contracts.

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

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

Respectfully submitted,

Pacific Geotechnical Engineers, Inc.

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



S & M SAKAMOTO, INC.

GENERAL CONTRACTORS

Via E-mail: EGHtestimony@capitol.hawaii.gov

Via Fax (808) 586-6091

February 3, 2014

TO: HONORABLE DONOVAN DELA CRUZ, CHAIR, HONORABLE SAM SLOM, VICE CHAIR AND COMMITTEE ON ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING

HONORABLE ROSALYN BAKER, CHAIR, HONORABLE BRIAN TANIGUCHI, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

SUBJECT: **SUPPORT OF S.B. 2463, RELATING TO PROCUREMENT.** Prohibits governmental procurement contracts of any amount that are exclusively for the services of contractors, engineers, architects, surveyors, or landscape architects, from requiring the person to defend the governmental body against liability not arising from the contractor's own negligence or fault. Provides that the contractor may still be required to indemnify and hold harmless the governmental body from claims arising out of or resulting from the negligent, reckless, or wrongful acts, errors, or omissions of the contractor.

HEARING

DATE: Monday, February 3, 2014

TIME: 3:15 p.m.

PLACE: Conference Room D16

Dear Chairs Dela Cruz and Baker, Vice Chairs Slom and Taniguchi and Members of the Committees,

S & M Sakamoto, Inc. is in support of S.B. 2463, which would no longer require government contractors to defend the state prior to negligence being established. This bill does not preclude the contractor's obligation to indemnify the state in the event that there is a judgment finding fault on part of the contractor. The costs involved in defending the state prior to a contractor's own fault being determined can be costly.

S & M Sakamoto, Inc. believes that no awardee of a state contract should be required to initially defend the state prior to negligence being established. This bill would make it the responsibility of each party named in a suit, which would include the state as a party, to cover the initial defense costs prior to negligence being established.

In an effort to spur innovation, encourage local companies to develop local infrastructure projects and ensure fairness in all aspects of procurement, **S & M Sakamoto, Inc.**, requests your favorable consideration of S.B. 2463.

Very truly yours,
S & M Sakamoto, Inc.

Dale S. Yoneda
Senior Vice President

From: mailinglist@capitol.hawaii.gov
To: [EGHTestimony](#)
Cc: mendezj@hawaii.edu
Subject: *Submitted testimony for SB2463 on Feb 3, 2014 15:15PM*
Date: Friday, January 31, 2014 9:05:08 AM

SB2463

Submitted on: 1/31/2014

Testimony for EGH/CPN on Feb 3, 2014 15:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov