

# ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES  
of Hawaii

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February 2, 2022

## **House Committee on Government Reform**

## **House Committee on Legislative Management**

**Hearing Date: Friday, February 4, 2022, 9:30 a.m.**

Honorable Chairs Angus L.K. McKelvey and Dale T. Kobayashi and Members of the Committees

Subject: **HB 2492, Relating to State Procurement Reform**  
**TESTIMONY IN OPPOSITION**

Dear Chair McKelvey, Chair Kobayashi, and Committee Members:

The American Council of Engineering Companies of Hawaii (ACECH) represents more than 70 member firms with over 1,500 employees throughout Hawaii. ACECH member firm projects directly affect the quality of the water we drink; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play.

ACECH supports strong procurement policy and the Professional Standard of Care for design professionals. However, the provisions of HB 2492 run counter to these time-proven concepts, are ill-advised, and do not benefit the State. This bill proposes the following amendments *italicized* followed by our comments:

**“§103D- Cost overruns; liability determination. In the event of construction cost overruns, a procurement officer shall create a report documenting the determination whether to pursue damages against a design professional or contractor. The report shall identify the factors used by the procurement officer in making the procurement officer’s determination.”**

Firstly, there are appropriate provisions existing in the procurement code and in State contracts to address situations where an agency may find fault with the performance of a design professional or contractor. Therefore, this provision is unnecessary.

Secondly, the technical aspects of cost overruns are often complicated and require technical competence to adjudicate. The Professional Standard of Care is held in common law as the ordinary and reasonable care usually exercised by a design professional, on the same type of project, at the same time and in the same place, under similar circumstances and conditions. Determination of whether a design professional’s design was negligent, and whether such negligence was the cause of construction cost overruns may be beyond a procurement officer’s scope expertise and places an inappropriate judicial burden on procurement officers.

Finally, ACECH is concerned about the vagueness of the term “cost overruns”. What is the basis of determining a cost overrun, i.e., the professional engineer’s opinion of probable construction cost or the contractor’s bid price, or some other method? When a similar bill was introduced last year, DAGS testified that most cost overruns have nothing to do with designer or contractor negligence.

Instead, they typically result from owner-driven changes during construction, or from unexpected site conditions. This bill would create additional work for the design professional just to defend their design whether found to be negligent or not, leading to an increase in the cost to do business and a reluctance to propose on State projects.

- **“§103D- Professional services; disqualified vendors. The chief procurement officer shall develop a list of all construction companies and design professionals who are not in compliance with a provision of this chapter or have outstanding fines or other penalties incurred for violations of this chapter. This list shall be made publicly available on the state procurement office’s website. Noncompliant construction companies and design professionals shall remain on the list for five years.”**

ACECH requests clarification on the definition of “noncompliance with a provision of this chapter”. “This chapter” does not address cost overruns, so it is difficult to know what “noncompliance” entails. Is the intent that any design professional firm that has any projects with cost overruns in construction would be disqualified from future work with the State even before negligence is established? As previously noted, the State already has appropriate and rigorous provisions to address situations where an agency may find fault with the performance of a design professional or contractor.

In addition, this section does not establish how often the list of design professionals in noncompliance will be updated. ACECH is also concerned regarding publicly posting this list due to the vagueness of what constitutes “noncompliance”. Improper implementation or management of the list may hinder our member firms’ ability to have an equal opportunity to compete in a fair and open environment.

- **“§672B- Cost overrun. Construction cost overruns shall constitute a tort for the purposes of this chapter.”**

The proposed addition to §672B represents a misunderstanding of the principal of the Design Claim Conciliation Panel. §672B establishes a panel of experts to review and render findings and advisory opinions on the issues of liability and damages in tort claims against design professionals licensed under §464. Presuming that cost overruns automatically constitute a tort provides a pre-judgement of the design professional’s guilt.

Studies of construction cost overruns and change orders do not support design professional negligence as the prevalent cause. Despite meeting the standard of care, changed site conditions occur to some degree on almost every project and frequently require additional design and construction services that must be compensated by contingency funds. Other frequent sources of construction cost concerns are inadequately funded projects and client/user requests that expand the project scope. The investigation conducted during design is always a balance of obtaining information and the costs of doing so, and it would increase project costs greatly for design professionals to provide a project free of change orders. Instead, it is important that project owners properly fund projects with appropriate contingency funds.

An unreasonable risk climate can have significant effects on the successful completion of government infrastructure projects. Owners must be prepared to pay substantially higher-than-normal design fees to compensate for extension of each design professional’s contractual liability beyond that normally encountered in the marketplace. If firms are concerned about uninsurable risk, agencies may find a vastly reduced pool of design professionals. These effects run counter to the State’s wishes to obtain professional design services at reasonable cost, to encourage wide and open competition in the marketplace, and to have the best qualified firms design their projects.



- *“Section 103D-110 (1) A mandatory fundamental training and development session; provided that this section shall include training on the procurement officer’s duty to hold design professionals contractually liable for breaches of professional standards;”*

ACECH is concerned that the language appears to establish that the procurement officer will determine if a design professional is contractually liable for breaches of professional standards. Pursuant to Act 207 all malpractice claims against design professionals must be submitted to the Design Claim Conciliation Panel (DCCP). The DCCP is responsible for conducting informal hearings by legal and technical professionals to assess a claim’s validity before proceeding to a lawsuit. If the procurement office is making the determination, is the claim to be submitted to DCCP and will the design professional be included on the “disqualified vendor” list only if DCCP determines the claim should be pursued?

- *“SECTION 103D-302(b). An invitation for bids shall be issued, and shall include a purchase description, all contractual terms and conditions applicable to the procurement, and a liability contingency fund of \_\_\_\_\_ per cent of the project cost to avoid cost overruns.”*

While ACECH strongly supports the budgeting of contingency funds in all projects to accommodate changes that inevitably occur during construction, the proposed approach has serious flaws. Firstly, this would let the construction contractors know to expect a certain contingency budget amount, which would complicate the bidding of the project. Secondly, there is no way to “avoid” or predict cost overruns. A good rule of thumb is 20% but complicated or unusual projects may require more. Finally, the term “liability contingency fund” again presumes liability with using a contingency fund, when it is well documented that most cost overruns are not the fault of the design professional or contractor and do not constitute liability.

- *“SECTION 672E-1. “Construction defect” means a deficiency in, or arising out of, the design, specifications, surveying, planning, construction, supervision, or observation of construction of a dwelling or premises. “Construction defect” includes construction cost overruns.”*

As previously noted, and as testified by DAGS on a similar bill last year, construction cost overruns are typically not the fault of the designer or contractor and do NOT constitute a deficiency or construction defect.

Because of the many flaws of this bill, the inappropriate burden it would place on state agencies and their consultants and contractors, and the existing appropriate avenues for holding design professionals and construction contractors liable in situations when they are actually at fault, we strongly urge the Committees to defer this bill.

We appreciate the opportunity to provide testimony on this matter. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,  
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

A handwritten signature in black ink, appearing to read "Derek Mukai".

Derek Mukai, P.E.  
President



House Committee on Government Reform  
House Committee on Legislative Management  
Hearing Date: Friday, February 4, 2022, 9:30 a.m.

February 3, 2022

Honorable Chairs Angus L.K. McKelvey and Dale T. Kobayashi and Members  
of the Committees

Subject: **TESTIMONY IN OPPOSITION - HB 2492, Relating to State Procurement Reform**

Dear Chair McKelvey, Chair Kobayashi, and Committee Members:

CONSOR Engineers, LLC (CONSOR) is a multi-discipline firm providing engineering services for structural engineering, water-wastewater, transportation planning and design, and construction services. CONSOR's project portfolio, spans thousands of transportation projects across North America, Canada, Hawaii, and Overseas. Our firm's extensive roster of clients is comprised of numerous state departments of transportation, the US Army Corps of Engineers, the US Coast Guard, the US Navy, and the US Department of the Interior. CONSOR has conducted engineering work in 49 states and is familiar with numerous state and local procurement and contracting regulations. With 60 offices and more than 1,200 employees, including 330+ professional engineers. *CONSOR is ranked #69 on Engineering News-Record's Top 500 firms list for 2021.*

Echoing the testimony provided by the Hawai'i Branch of the American Council of Engineering Companies (ACECH), CONSOR supports strong procurement policy and the Professional Standard of Care for design professionals. However, the provisions of HB 2492 run counter to these time-proven concepts, are ill-advised, and do not benefit the State. This bill proposes the following amendments italicized followed by our comments:

*"§103D- Cost overruns; liability determination. In the event of construction cost overruns, a procurement officer shall create a report documenting the determination whether to pursue damages against a design professional or contractor. The report shall identify the factors used by the procurement officer in making the procurement officer's determination."*

Firstly, there are appropriate provisions existing in the procurement code and in State contracts to address situations where an agency may find fault with the performance of a design professional or contractor. Therefore, this provision is unnecessary.

Secondly, the technical aspects of cost overruns are often complicated and require technical competence to adjudicate. The Professional Standard of Care is held in common law as the ordinary and reasonable care usually exercised by a design professional, on the same type of project, at the same time and in the same place, under similar circumstances and conditions. Determination of whether a design professional's design was negligent, and whether such negligence was the cause of construction cost overruns may be beyond a procurement officer's scope expertise and places an inappropriate judicial burden on procurement officers.

Finally, CONSOR is concerned about the vagueness of the term "cost overruns". What is the basis of determining a cost overrun, i.e., the professional engineer's opinion of probable construction cost or the contractors bid price, or some other method? When a similar bill was introduced last year, DAGS testified that most cost over-runs have nothing to do with designer or contractor negligence.

Mahalo for hearing our testimony, if you would like to discuss further, I can be available for consultation on this matter.

A handwritten signature in blue ink that reads "Ikaika Kincaid". The signature is fluid and cursive.

Ikaika Kincaid, PE, CCM  
Regional Director, Hawaii



February 4, 2022

TO: Honorable Angus McKelvey, Chair  
House Committee on Government Reform

FROM: Reid Mizue, AIA  
Vice President / Legislative Advocacy Group  
**American Institute of Architects, Hawaii State Council**

SUBJECT: **Re: House Bill 2492**  
**Relating to State Procurement Reform**

**The American Institute of Architects**

AIA Hawaii State Council  
828 Fort Street Mall, Suite 100  
Honolulu, HI 96813

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Dear Chair McKelvey and Members of the Committee,

My name is Reid Mizue VP/President-elect AIA Hawaii Council submitting **OPPOSITION** to House Bill 2492. Last Session, 2021 House Bill (HB 1355) of the same subject, the language was vaguely drafted. Current HB 2492 again does not respond to public agency comments previously made last session. In addition HB 2492 does not seem to have proposed language underscored for clarity; nor striking out current language to be deleted. AIA specific opposition:

**Section 1 Professional services; disqualified vendors**

Construction companies are not "professional services" under state of Hawaii DCCA licensing laws. AIA has questions as to what is non-compliance or fines or penalties resulting from violations of this chapter? Historically set practice for decades, terms and conditions are detailed in each contract on project-by-project basis. "Violations" are based on contracts administered by Executive Branch and not managed by Legislative Branch. Requiring SPO to post non-compliant design professionals on the list for five years ignores possibility that an early settlement or absolution may be made. Even if violations result in disqualification, the five years has absolutely no relationship to the degree of violation.

**Section 2 Construction cost overruns shall constitute a tort for the purposes of this chapter**

Proposed language is gross violation of "betterment doctrine" whereby the state must pay for what the public benefits from over decades. There are numerous situations that can cause construction cost overruns that are often not attributed to the

architect; such as user agency scope changes, volatility of labor and building material unit prices (ie. steel and lumber), subsurface conditions, numerous unforeseen conditions uncovered during construction, (ie. discovery of human remains) or receiving very few competing construction bids during Bid phase.

**Section 6 Construction "defects" to include construction cost overruns**

AIA offers that this is uninsurable because architects do not control Hawaii's construction industry and labor force; or the national and world market for construction services and materials. For example, building materials currently have supply chain problems related to Covid-19, factory shutdowns, raw material supplier buyouts, international taxation of imported building material changes, and natural disasters like wild fires, floods, snow storms; potentially causing major cost overruns.

The reference to Section 672 E-1 is questionable because, having advocated for the "right to repair" law, AIA believes Section 672 E-1 is intended only for residential buildings contracted for by private sector.

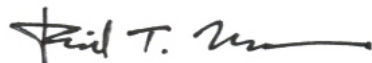
**This bill is notably damaging in its intent to punish design professionals**

For Procurement Code to function, the public sector needs to receive many competing offers from the private sector if the state is to fulfill public needs. AIA understanding of legislative practice is that if a bill has added cost and potentially onerous implications for private businesses such as Section 1, then the bill must have more "bright light" detail.

AIA does not regulate business practices of its members. However, onerous contract language has historically caused architects to be apprehensive towards some contracts or dramatically inflate design fees to cover these uninsurable business conditions.

Thank you for this opportunity to **OPPOSE** House Bill 2492.

Sincerely,



Reid Mizue, AIA  
American Institute of Architects, Hawaii State Council

**HB-2492**

Submitted on: 2/2/2022 8:04:51 PM

Testimony for GVR on 2/4/2022 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Sandie Wong	Individual	Oppose	Yes

Comments:

I oppose this measure and join in the Testimony of the American Council of Engineering Companies - Hawaii. Thank you,

**HB-2492**

Submitted on: 2/3/2022 8:50:04 AM

Testimony for GVR on 2/4/2022 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Janice Marsters	Hart Crowser, Inc.	Oppose	No

Comments:

Honorable Representatives:

I am a Senior Principal with Hart Crowser, a division of Haley & Aldrich, a geotechnical engineering, environmental engineering, and natural resources consulting firm with offices on O‘ahu and Maui. I have led design professional firms in Hawai‘i for 30 years.

Every proposed measure of this bill is flawed in presupposing that construction cost “overruns” are the result of design professional negligence or constitute a tort. As indicated by numerous studies on construction change orders and as testified last year by DAGs on a similar measure, construction change orders are typically the result of unexpected conditions encountered during construction or by owner-driven changes.

State contracts have appropriate and robust provisions for pursuing design professionals and construction contractors if they are at fault and the State suffers damages on a project. The measures proposed in this bill are unnecessary and would create an uninsurable risk that would limit the number of engineering firms willing to do work the State, at a time when we are trying to accomplish many infrastructure improvements.

In addition, the measures would greatly increase the cost of projects for the State. For projects to have no change orders, more effort and investigation would need to go into the design phase. Design professionals typically start the project with only a concept provided by the project owner. The designer works in partnership with the owner to develop that concept, providing several iterations of the design documents to the owner until agreement is reached on the design that will be issued for bidding. This iterative process typically includes trade-offs between what the owner wants, what they can afford, and the risks they are willing to assume. Agencies who understand the construction process don’t want to spend more money on design and understand the need for construction contingency funding.

I request that you defer this bill.

Respectfully submitted,

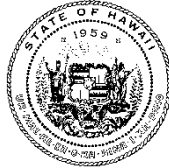
Janice Marsters

808.371.8504





DAVID Y. IGE  
GOVERNOR



BONNIE KAHAKUI  
ACTING ADMINISTRATOR

**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

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Honolulu, Hawaii 96810-0119  
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TESTIMONY  
OF  
BONNIE KAHAKUI, ACTING ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE  
ON  
GOVERNMENT REFORM  
February 4, 2022; 9:30 A.M

HOUSE BILL 2492  
RELATING TO PROCUREMENT REFORM

Chair Mckelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on HB2492. The State Procurement Office (SPO) recognizes the intent of the bill and respectfully provides comments on specific sections of the bill:

- Section 1, page 1, lines 4 to 9, "Cost overrun; liability determination".

The SPO supports the need for a report to document the matter and provide clarity of the situation that may warrant pursuing legal action. All documentation is required to be in the procurement/contract file.

- Section 1, page 1 lines 10 to 16, and page 2 lines 1 to 2. "Professional service; disqualified vendors."

This amendment, to the procurement code, is not necessary. Chapter 103D-702, HRS, "Authority to debar or suspend" requires the State to do its due diligence in determining if a vendor is to be suspended or debarred from being awarded a contract. Contractors suspended or debarred are listed on the State Procurement Office website.

- Section 3, page 2, lines 18 to 20, and page 3 lines 1 to 4. "...training... to holding design professionals contractually liable for breach of professional standards..."

and

Section 4, page, lines 9 to 13. “.. aligned with current federal practices.”

The SPO supports the intent of the amendment, however, does not have the expertise or resources to provide such training. Funding is required to obtain the resources needed to develop a comprehensive training manual and design training workshops. The SPO will require additional time to research the cost of a consultant to develop the necessary training program.

- Section 5, page 5, lines 3 to 5. “... liability contingency fund... to avoid cost overruns.”

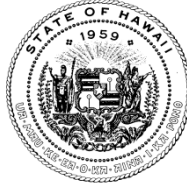
The SPO does not have the information or data to determine, the appropriate percent, if any, for contingencies. Research should be conducted to determine the appropriate liability contingency fund to cover known contract risk factors.

Thank you.

((CONTINUATION OF TESTIMONY))



DAVID Y. IGE  
GOVERNOR



**TESTIMONY BY:**

JADE T. BUTAY  
DIRECTOR

Deputy Directors  
ROSS M. HIGASHI  
EDUARDO P. MANGLALLAN  
PATRICK H. MCCAIN  
EDWIN H. SNIFFEN

**STATE OF HAWAII**  
**DEPARTMENT OF TRANSPORTATION**  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

February 4, 2022  
9:30 A.M.  
State Capitol, Teleconference

**H.B. 2492**  
**RELATING TO STATE PROCUREMENT REFORM**

House Committee on Government Reform & Legislative Management

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The Department of Transportation, provides **concerns** to Sections 1 and 5 to this bill that proposes to require procurement officers to document whether to pursue a design professional or contractor for damages in the event of construction cost overruns. Requires the chief procurement officer to compile a public list of construction companies or design professionals that are noncompliant or owe penalties. Makes construction cost overruns a tort for purposes of the design claim conciliation panel. Requires the state procurement office to include training on the duty of procurement officers to hold design professionals liable for breaches of professional standards. Requires bids for a contract under the competitive sealed bidding process to include a liability contingency fund. Makes cost overruns a construction defect for the purposes of the contractor repair act. Establishes a procurement professional standards task force.

Section 1 proposes to add two new sections to the Procurement Code. We address the first proposed new section: cost overruns; liability determination, which would require the procurement officer to create a report to document whether to pursue damages against a design professional or contractor, identifying factors used in this determination.

There are provisions both in the Hawaii Administrative Rules (HAR) § 3-125-4 and General Conditions, AG-008 103D, on the change order requirements that are made part of each State contract that address changes in both construction and design professional contracts. Should adjustments in price be contemplated, HAR § 3-125-4 provides for adjustments in contract price, "made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract. Failure of the parties to agree to an adjustment shall not excuse a contractor from proceeding with the contract as changed, provided that the State promptly and duly makes such

provisional adjustments in payment or time for the direct costs or the work as changed as the State deems reasonable.” The General Conditions contain similar language.

Therefore, should the contract provisions in the HAR and the General Conditions on the change order be followed, there would be no need for a cost overrun liability determination, the procurement officer may make the determination of a reasonable price adjustment and whether there should be changes to construction or design professional contracts before issuance of the change order.

Section 5, adding an undetermined liability contingency fund pay item to an invitation for bid to avoid cost overruns would drive up project costs, arguably what this proposed bill is trying to minimize. As discussed under Section 1 of the proposed bill, should HAR and the General Conditions that are made part of the contract be followed, there would be no need for a liability contingency fund pay bid item.

Thank you for the opportunity to provide testimony.

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Website: [www.gcawhawaii.org](http://www.gcawhawaii.org)



**GCA of Hawaii**

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 4, 2022

TO: HONORABLE ANGUS MCKELVEY, CHAIR, HONORABLE TINA WILDBERGER, VICE CHAIR, COMMITTEE ON GOVERNMENT REFORM

SUBJECT: **OPPOSITION OF H.B. 2492, RELATING TO STATE PROCUREMENT REFORM.** Requires procurement officers to document whether to pursue a design professional or contractor for damages in the event of construction cost overruns. Requires the chief procurement officer to compile a public list of construction companies or design professionals that are noncompliant or owe penalties. Makes construction cost overruns a tort for purposes of the design claim conciliation panel. Requires the state procurement office to include training on the duty of procurement officers to hold design professionals liable for breaches of professional standards. Requires bids for a contract under the competitive sealed bidding process to include a liability contingency fund. Makes cost overruns a construction defect for the purposes of the contractor repair act. Establishes a procurement professional standards task force.

HEARING

DATE: Friday, February 4, 2022  
TIME: 9:30 a.m.  
PLACE: Capitol Room 309

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

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA is in **opposition** of H.B. 2492, which among other things, requires procurement officers to document whether to pursue a design professional or contractor for damages in the event of construction cost overruns.

The Legislature already passed legislation last year seeking to hold bad contractors accountable through a past performance database.

This measure assumes that cost overruns are due to design professionals/contractors. That is not the case. There are many unforeseen circumstances that cause cost overruns, including client requests. Also, one of the major unforeseen circumstances affecting projects this past year was the supply chain disruptions caused by the COVID pandemic.



For these reasons we ask that the Committee defer this measure.

Thank you for this opportunity to testify in opposition of this measure.