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REVISED LATE TESTIMONY

GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

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February 2, 2012

TO: THE HONORABLE REPRESENTATIVES ANGUS MCKELVEY, CHAIR,
ISAAC CHOY, VICE CHAIR AND MEMBERS OF THE COMMITTEE ON
ECONOMIC REVITALIZATION & BUSINESS

SUBJECT: **COMMENTS AND PROPOSED AMENDMENT TO H.B. 2122,
RELATING TO THE PROCUREMENT CODE.** Suspends the ability of a
contractor to protest the awarding of a contract under the State Procurement Code
for five years. Effective July 1, 2012.

NOTICE OF HEARING

DATE: Thursday, February 2, 2012
TIME: 8:30 AM
PLACE: Conference Room 312

Dear Chair McKelvey, Vice Chair Choy and Members of the Committee:

The General Contractors Association (GCA) is an organization comprised of over six hundred (600) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is celebrating its 80th anniversary this year; GCA remains the largest construction association in the State of Hawaii. GCA is submitting **comments and recommending an amendment to H.B. 2122**, Relating to the Procurement Code.

H.B. 2122 proposes to suspend the ability of a contractor to protest a contract award under the State Procurement Code for five years.

GCA applauds the legislature's effort to address some of the problems that the procurement code presents for construction projects. GCA is in favor of this bill's objective which is to expedite construction procurement awards. However, the removal of the protest process may raise some due process concerns.

As an alternative, GCA would like to propose language to replace H.B. 2122 as proposed in the attached proposed HD1 amendment. GCA's proposed language retains a bid protester's right to a hearing before the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH), but limits the hearing officer's review to the record of the procuring agencies decision below. The OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be arbitrary, capricious, fraudulent, or clearly erroneous. (See American Bar Association 2000 Model Procurement Code)

GCA's proposal balances the desire to expedite procurements delayed by constant protest appeals while preserving a limited right of review of a procuring agency's decision to the DCCA OAH. See attached proposed language replacing H.B. 2122.

The GCA understands the intent of H.B. 2122, but respectfully requests that the abovementioned amendment be considered and adopted as an HD1. Upon this Committee's adoption of the proposed language, GCA will be in support of this measure.

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

BULLET POINTS FOR H.B. 2122, PROPOSED HD1

- Intent of bill is to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process, while preserving the right of review of a procuring agency's decision to the DCCA office of administrative hearings (OAH)
- Identical language in existing statutes and/or model codes were used as much as practicable
- The bill removes the power of *de novo* review from hearings officers of the OAH. Instead, the OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be arbitrary, capricious, fraudulent, or clearly erroneous (words taken from the ABA 2000 Model Procurement Code)
- Words were added to limit OAH review to only those issues raised in the protest to the procuring agency, but permits the OAH to consider newly discovered evidence/material
- OAH time limits (but not the appeal bond provisions) from Act 175 (SLH 2009) were also added to further expedite the OAH proceedings and resolution. Although Act 175 sunset in July 2011, many bills are in the hopper to reinstate many of its provisions to expedite the procurement appeals process
- The HRS §103D-710 judicial (circuit court) review of the OAH determination remains intact

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

SECTION 1. Section 103D-709, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review:

(1) Review and determine de novo, any request from any bidder, offeror, contractor, person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, ~~103D-701,~~ or 103D-702- pursuant to subsection (b) below; and

(2) Review and determine any request from any bidder, offeror, contractor, person, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-701; ~~provided that the determination of the chief~~

~~procurement officer, head of a purchasing agency, or a
designee of either officer shall be affirmed unless there is
clear and convincing evidence that the decision was arbitrary,
capricious, fraudulent, or clearly erroneous."~~ pursuant to
subsection (c) below;

2. By amending subsections (b), (c), and (d) to read:

"(b) Hearings to review and determine any request made
pursuant to subsection (a) (1) shall be conducted as follows:

(1) Hearings shall commence within twenty-one calendar days
of receipt of the request. The hearings officers shall
have power to issue subpoenas, administer oaths, hear
testimony, find facts, make conclusions of law, and
issue written decision which shall be final and
conclusive unless a person or governmental body
adversely affected by the decision commences an appeal
in the circuit court of the circuit where the case or
controversy arises under section 103D-710-~~;~~

(2) The party initiating the proceeding shall have the
burden of proof, including the burden of producing
evidence as well as the burden of persuasion. The
degree or quantum of proof shall be a preponderance of
the evidence. All parties to the proceeding shall be
afforded an opportunity to present oral or documentary
evidence, conduct cross-examination as may be required,

and argument on all issues involved. The rules of evidence shall apply;

(3) The hearings officers shall ensure that a record of each proceeding which includes the following is compiled:

- (a) All pleadings, motions, intermediate rulings;
- (b) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (c) Offers of proof and rulings thereon;
- (d) Proposed findings of fact;
- (e) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought under section 103D-710; and

(4) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

~~(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and [103D-702(g)] may initiate a proceeding under this section. The party initiating the proceeding shall have the burden of proof, including the~~

~~burden of producing evidence as well as the burden of persuasion.~~
~~The degree or quantum of proof shall be a preponderance of the~~
~~evidence. All parties to the proceeding shall be afforded an~~
~~opportunity to present oral or documentary evidence, conduct~~
~~cross-examination as may be required, and argument on all issues~~
~~involved. The rules of evidence shall apply. Hearings to review~~
~~and determine any request made pursuant to subsection (a) (2)~~
shall be conducted as follows:

- (1) Within ten calendar days of the filing of an application
for review pursuant to subsection (a) (2), the chief
procurement officer, head of a purchasing agency, or a
designee of either officer shall transmit the record of
the protest proceedings under section 103D-701 to the
office of administrative hearings of the department of
commerce and consumer affairs;
- (2) The review shall be scheduled as expeditiously as
practicable. It shall be conducted on the record of the
protest proceedings under section 103D-701, and briefs
and oral argument. No new evidence, nor new issues not
raised in the proceedings before the procuring agency,
shall be introduced, except that the hearings officer
appointed to hear the case may, if evidence is offered
which is clearly newly discovered evidence and material
to the just decision on appeal, admit the same; and

(3) Upon No later than thirty days from the filing of the application for administrative review, based upon review of the record, the appointed hearings officer shall affirm the decision of the purchasing agency, or it may either remand the case with instructions for further proceedings or reverse the decision but only if substantial rights may have been prejudiced because the findings, conclusions, decisions, or orders of the purchasing agency are found to be arbitrary, capricious, fraudulent, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; provided that if an application for review is not resolved by the thirtieth day from the filing of the application, the hearings officer shall lose jurisdiction and the decision of the purchasing agency shall not be disturbed. All time limitations on actions, as provided for in section 103D-712, shall remain in effect.

(d) ~~The hearing officers shall ensure that a record of each proceeding which includes the following is compiled:~~

- ~~(1) All pleadings, motions, intermediate rulings;~~
- ~~(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;~~

~~(3) Offers of proof and rulings thereon;~~

~~(4) Proposed findings of facts;~~

~~(5) A recording of the proceeding which may be transcribed if judicial review of written decision is sought under section 103D-710. Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709 (a), 103D-310 (b), and 103D-702 (g) may initiate a proceeding under this section.~~

3. By amending subsection (f) to read:

~~"(f) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter (deleted).~~

SECTION 2. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

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

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