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

**TO THE
HOUSE COMMITTEE
ON
FINANCE**

February 13, 2012

2:00 p.m.

HB 192

RELATING TO PROCUREMENT.

Chair Luke, Vice Chair Nishimoto, Vice-Chair Johanson and committee members, thank you for the opportunity to testify on HB 192. This bill proposes to repeal 'de novo' review for a hearings officer administrative review of an appeal on a protest, to not allow review of any other issue(s) not brought forth to the chief procurement officer for consideration in the protest process.

The State Procurement Office (SPO) has no objections to this bill. The amendments would impact the Department of Commerce and Consumer Affairs, Office of Administrative Hearing, that would limit review to the initial protest, and not have to consider any new issues raised subsequent to the filing of a protest. This amended process may further improve the timeliness on the appeal review process.

Thank you.



NEIL ABERCROMBIE
GOVERNOR

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LT. GOVERNOR

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**TO THE HOUSE COMMITTEE ON FINANCE
TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013**

Date: Wednesday, February 13, 2013

Time: 2:00 p.m.

Conference Room: 308

**TESTIMONY FOR HEARING ON HB 192
RELATING TO PROCUREMENT**

TO THE HONORABLE SYLVIA LUKE, CHAIR & THE HONORABLE SCOTT Y. NISHIMOTO, VICE CHAIR, AND MEMBERS OF THE HOUSE COMMITTEE

The Office of Administrative Hearings (OAH) of the Department of Commerce and Consumer Affairs ("the Department") appreciates the opportunity to offer comments for the Committee's Hearing on House Bill 192, relating to Procurement. My name is David Karlen, and I am the Senior Hearings Officer of the OAH.

The Bill provides for repealing the de novo standard of review currently in use by DCCA hearings officers to review procurement protests. The OAH has administered procurement protest reviews under this de novo standard since the Hawaii Procurement

Code was enacted in 1993. For the reasons set forth below, the Department strongly opposes this bill.

1. There is no need for this legislation, as a similar bill was vetoed last session in favor of a DCCA sponsored measure that significantly streamlined the procurement protest process.

The present proposal is a rerun of HB 1671 HD2 SD2 that was vetoed by the Governor at the end of the last legislative session. In his veto message, the Governor stated that the bill would be counterproductive to the goal of streamlining the procurement protest process because it would place operational burdens on the procuring agencies that they would not be able to meet and would prolong, rather than shorten, the protest process.

Similarly, this bill would place the responsibility for conducting a full review of the procurement protest on the agencies' chief procurement officer rather than on the hearings officer.

If the procuring agencies had to compile a complete record, including oral testimony, exhibits, and proposed findings of fact, the agencies would in effect be conducting contested case proceedings they were ill equipped in terms of experienced staff to carry out. The present more informal protest review process at the agency level would be eliminated, and the new formalized agency process would slow down the decision making process.

In contrast, noted the Governor, the DCCA hearings officers are already trained and experienced in conducting contested case hearings. Delays would be minimal in view of another bill enacted into law last session.

Act 173 of the 2012 Legislature was strongly supported by the DCCA. It significantly streamlined the procurement protest process by: (1) requiring a minimum amount in controversy (10% for smaller contracts and \$10,000 for larger contracts) before a protest would be heard by the DCCA; (2) requiring a protestor to post a protest bond (a sliding scale up to \$10,000 for larger contracts) that would be forfeited to the general fund if the protest were unsuccessful; and (3) requiring the DCCA hearings officers to make a final decision within forty-five (45) days of the date the protest was filed.

Act 173 has worked. In the six months before its passage, there were twenty-one procurement protests filed with the OAH. In the seven months since its passage, there have been only nine (9) procurement protests filed. Of that small number, two were promptly dismissed for failure to file a protest bond, six were settled or otherwise voluntarily withdrawn, and one was dismissed with a resultant bond forfeiture. All of these results were accomplished in less than the forty-five day limit.

2. The fiscal impact of this bill on the State will be significant even though it cannot be exactly quantified. First, all agencies, regardless of their resources, will need to assign and train personnel to be involved at a higher level in protests. Second, the procurement process will be delayed because of the more cumbersome agency process as compared to a hearing before trained and experienced hearings officers who are bound by a strict forty-five day time limit. Since the procurement is stayed until the protest is finally decided, significant delay costs could easily arise with respect to any major procurement that is challenged. These delay costs might even involve a lapse in State or federal funding sources and the cancellation of the entire procurement. There

is no need to replace the present system with a basically unknown system where each procuring agency would be working on an ad hoc basis outside of its natural areas of expertise. The present legislation would foster an uncoordinated, non-uniform protest system that would lead to serious delays and institute just the opposite of what an accountable procurement protest process should be.

3. The second portion of the proposed legislation is unnecessary because it duplicates present law.

The bill prohibits DCCA hearings officers from reviewing and determining matters not already raised and initially decided by the procuring agency. This is already the law under which the DCCA hearings officers proceed.

It should be noted that every final procurement protest decision by the OAH has been posted online. There are no secret or hidden legal rules in these proceedings. See the Procurement Decisions entry on www.hawaii.gov/dcca/oah/oah_decisions. The following cases are examples of DCCA decisions limiting protests to issues already raised and initially decided by the procuring agency:

Oceanic Companies, Inc. v. Department of Budget and Fiscal Services, PCH 2004-16 (December 23, 2004)

Maui Master Builders v. DOT, PCH 2007-008 (February 25, 2008)

Kiewit Infrastructure West Co. v. DOT, PCH 2011-016 (June 6, 2011)

Refrigerant Recycling v. Department Budget and Fiscal Services, PCY-2012-005 (September 17, 2012)

There is no need for the Legislature to, in effect, micromanage procurement protest proceedings by establishing rules on issues already clearly decided by DCCA hearings officers.

Thank you for the opportunity to provide comments on this proposed legislation.