

Honolulu, Hawaii
March 21, 2014

RE: S.B. No. 2463
S.D. 2
H.D. 1

Honorable Joseph M. Souki
Speaker, House of Representatives
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Sir:

Your Committee on Consumer Protection & Commerce, to which was referred S.B. No. 2463, S.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO PROCUREMENT,"

begs leave to report as follows:

The purpose of this measure is to standardize differing public works contract conditions relating to government indemnity against liability for design and construction by:

- (1) Prohibiting duty to defend clauses in contracts entered into by licensed design professionals; and
- (2) Providing certain limits on the duty to defend for licensed construction contractors.

The State Procurement Office, American Society of Civil Engineers, Building Industry Association of Hawaii, Pacific Resource Partnership, Hawaii Insurers Council, Subcontractors Association of Hawaii, American Council of Engineering Companies of Hawaii, American Institute of Architects, and General Contractors Association of Hawaii testified in support of this measure. The Department of the Attorney General testified in opposition to this measure.



Your Committee finds that the opposition of the Department of the Attorney General is based on the fact that no contracts have a statutory exemption from the duty to defend for state projects. During the testimony, the Attorney General recognized that design professionals are unable to secure general liability insurance and opined that design professionals should be exempt from a duty to defend in these contracts. Rather than a complete exemption from a duty to defend clause, your Committee recognizes that the current law already prohibits the State from requiring a duty to defend clause in contract with design professionals for contracts of \$1,000,000 or less, and therefore, by raising the threshold to \$10,000,000 the compelling interest of the State in facilitating relief can be granted through the least restrictive means necessary. Moreover, if design professionals are expected to defend on state contracts, then design professionals will stop bidding on state jobs thereby slowing down the process and endangering federal funds that are sometimes attached to these projects. Your Committee is sympathetic to construction contractors, but as noted by the Attorney General, no other state statutorily abolishes the duty to defend for construction contractors on state projects.

Your Committee has amended this measure by:

- (1) Permitting the inclusion of duty to defend clauses only for public works contracts with a licensed design professional for \$10,000,000 or more;
- (2) Deleting limitations on a construction contractor's duty to defend, including conforming amendments;
- (3) Changing its effective date to December 21, 2112, to encourage further discussion; and
- (4) Making technical, nonsubstantive amendments for the purposes of clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Consumer Protection & Commerce that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 2463, S.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 2463, S.D. 2, H.D. 1, and be referred to the Committee on Judiciary.



Respectfully submitted on
behalf of the members of the
Committee on Consumer
Protection & Commerce,



ANGUS L.K. MCKELVEY, Chair



