

STAND. COM. REP. NO.

2409

Honolulu, Hawaii

FEB 14 2014

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

Honorable Donna Mercado Kim  
President of the Senate  
Twenty-Seventh State Legislature  
Regular Session of 2014  
State of Hawaii

Madam:

Your Committees on Economic Development, Government Operations and Housing and Commerce and Consumer Protection, to which was referred S.B. No. 2463 entitled:

"A BILL FOR AN ACT RELATING TO PROCUREMENT,"

beg leave to report as follows:

The purpose and intent of this measure 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; provided 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, engineer, architect, surveyor, or landscape architect.

Your Committees received testimony in support of this measure from the American Council of Engineering Companies of Hawaii; Building Industry Association of Hawaii; General Contractors Association of Hawaii; Subcontractors Association of Hawaii; American Society of Civil Engineers; Sam O. Hirata, Inc.; Brown and Caldwell; Yogi Kwong Engineers, LLC; Healy Tibbitts Builders, Inc.; Gary, Hong, Nojima and Associates, Inc.; Waltz Engineering, Inc.; The Limtiaco Consulting Group, Inc.; Pacific Geotechnical Engineers, Inc.; S & M Sakamoto, Inc.; and one individual. Your Committees received testimony in opposition to this measure from

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the State Procurement Office and Hawaii Insurers Council. Your Committees received comments on this measure from the Department of the Attorney General.

Your Committees find that contracts for public works often include a duty to defend clause, requiring the contractor to defend governmental entities before the contractor's negligence or fault is determined. Public works often involve large risks due to site circumstances, public environmental concerns, and high public usage. Highways and public buildings have necessarily long service lives relative to other services procured, thereby increasing the contractor risk beyond that of other government contracts.

Your Committees further find that although some state and county agencies recognize the negative implications of the duty to defend clause and have removed it, inconsistency among agencies and departments still exists. This clause is detrimental in the long term by negatively affecting competition for contracts and innovation.

Your Committees have amended this measure by:

- (1) Inserting findings to clarify that for higher limits, the insurance industry does not provide reasonable coverage for another party's defense costs if the design professional is not negligent; thus, design professionals would not be burdened with the duty to defend and do not require the protections proposed by this measure;
- (2) Amending language in the findings to clarify that the purpose of this measure is to provide certain limits on the duty to defend for persons licensed under chapter 444, Hawaii Revised Statutes;
- (3) Deleting amendments that would have prohibited duty to defend clauses in government procurement contracts that are exclusively for the services of a person licensed under chapter 444 or 464, Hawaii Revised Statutes;
- (4) Inserting language that provides that beginning July 1, 2014, the requirement for persons licensed under chapter 444, Hawaii Revised Statutes, to defend the governmental body, or its officers, employees, or agents, from claims

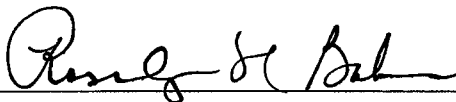


arising out of the contractor's performance under the contract shall not extend beyond the expiration of the time limitation in section 657-8, Hawaii Revised Statutes;

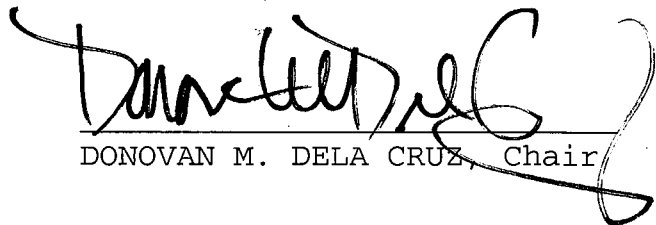
- (5) Inserting language to specify that no person licensed under chapter 464, Hawaii Revised Statutes, that has agreed in any contract to defend a governmental body shall be required to defend the governmental body in a lawsuit filed more than ten years beyond the owner's final acceptance of the project;
- (6) Deleting language that defined "governmental body";
- (7) Inserting an effective date of July 1, 2050, to encourage further discussion; and
- (8) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the records of votes of the members of your Committees on Economic Development, Government Operations and Housing and Commerce and Consumer Protection that are attached to this report, your Committees are in accord with the intent and purpose of S.B. No. 2463, as amended herein, and recommend that it pass Second Reading in the form attached hereto as S.B. No. 2463, S.D. 1, and be referred to the Committee on Judiciary and Labor.

Respectfully submitted on  
behalf of the members of the  
Committees on Economic  
Development, Government  
Operations and Housing and  
Commerce and Consumer  
Protection,



ROSALYN H. BAKER, Chair




DONOVAN M. DELA CRUZ, Chair



The Senate  
 Twenty-Seventh Legislature  
 State of Hawai'i

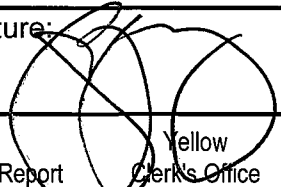
**Record of Votes**  
**Committee on Economic Development, Government Operations and Housing**  
**EGH**

Bill / Resolution No.:*	Committee Referral:	Date:		
SB2463	EGH / CPN, JDL	2/10/14		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is:				
<input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
DELA CRUZ, Donovan M. (C)	X			
SLOM, Sam (VC)	X			
BAKER, Rosalyn H.	X			
CHUN OAKLAND, Suzanne	X			
ENGLISH, J. Kalani				X
THIELEN, Laura H.	X			
WAKAI, Glenn	X			
<b>TOTAL</b>	6	0	0	1
Recommendation:				
<input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
				
<b>Distribution:</b>				
Original File with Committee Report	Yellow Clerk's Office	Pink Drafting Agency	Goldenrod Committee File Copy	

\*Only one measure per Record of Votes

The Senate  
 Twenty-Seventh Legislature  
 State of Hawai'i

**Record of Votes**  
**Committee on Commerce and Consumer Protection**  
**CPN**

Bill / Resolution No.:* <b>SB 2463</b>	Committee Referral: <b>ECM/CPN, JDL</b>	Date: <b>2/10/14</b>		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
BAKER, Rosalyn H. (C)	✓			
TANIGUCHI, Brian T. (VC)				✓
NISHIHARA, Clarence K.				✓
WAKAI, Glenn	✓			
SLOM, Sam	✓			
<b>TOTAL</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>2</b>
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature: 				
<b>Distribution:</b> Original             Yellow             Pink             Goldenrod File with Committee Report             Clerk's Office             Drafting Agency             Committee File Copy				

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