

**HB 2133 HD1**

**EDT**

LINDA LINGLE  
GOVERNOR



PROCUREMENT POLICY BOARD  
DARRYL W. BARDUSCH  
LESLIE S. CHINEN  
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KEITH T. MATSUMOTO  
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AARON S. FUJIOKA  
ADMINISTRATOR

**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

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

**TO THE  
SENATE COMMITTEE  
ON  
ECONOMIC DEVELOPMENT AND TECHNOLOGY**

March 8, 2010

1:15 p.m.

HB 2133, HD1

**RELATING TO PROCUREMENT**

Chair Fukunaga, Vice Chair Baker, and committee members, thank you for the opportunity to testify on HB 2133, HD1.

PART I of this bill proposes that an award will be made within 45-days of 'initial request for proposals but in no case later than fifteen days after the deadline for proposals' and once notice of award is made, a contract shall be effective, and the solicitation, offer, bid or proposal and the notice of award shall serve as the contract document. No other written document will be required.

This proposed bill treats all procurements equally, but they are not all the same. For example, for professional services contracts, while there is a solicitation, there is no offer, only a statement of interest and qualifications, and the terms of the scope of work, agreement period, fee, etc. are not in writing until the negotiated written contract is completed.

For regular competitive sealed bidding and competitive sealed proposals without a separate written contract, there is no assurance that the parties are referring to the same documents and have a common understanding of what is in the contract. This may result in complications during the course of the performance of the contract when the parties viewing different documents have different expectations of their obligations and the obligations of the other party. There would be circumstances when it would be beneficial to the governmental body to have a separate written contract, for instance when there are numerous addenda and series of offers and a separate written contract would serve to confirm the agreement between the parties.

In instances where an alternative method of procurement is utilized as a result of a procurement conducted through competitive sealed bidding, competitive sealed proposals or professional services whereby negotiation would take place, the written contract would include what was agreed to. The written contract assures that both parties are in agreement as to what goods, services or construction will be provided at the agreed price and agreed terms and conditions. With all the changes that may occur during the procurement, this written contract confirms the parties' agreement.

The bill would work best for simple, straightforward competitive sealed bidding when the solicitation requires an all-in-one solicitation/offer form, that way the solicitation and offer are contained and referenced in the same document, and the notice of award serves as the government's acceptance of the offer.

The SPO does not support PART I of this bill because it would be problematic and not feasible for all methods of procurement, only as stated in the above paragraph for the simple straightforward competitive sealed bidding. However, if this bill moves forward, ATTACHMENT A is provided to support the intent and further the discussion.

The proposed amendment to PART II is unnecessary, and recommend be deleted. WSCA solicitation allows contract manufacturers to designate resellers, with the terms and conditions for ordering and payment identified in the master agreement. If the master agreement allows for ordering and payment directly to a local reseller, SPO complies with those provisions. It would be inappropriate to require a contractor to accept a reseller, or to dictate the terms and conditions between the contractor and resellers. The proposed language may limit Hawaii's participation in multi-state cooperative agreements and prevent the State of taking advantage of the volume discounts provided by these cooperative agreements. However, if this bill moves forward, ATTACHMENT B is provided for your consideration.

ATTACHMENT A

PART I, page 1 -

"§103D- **Contract awards; contract formation.** Notwithstanding any other law to the contrary, in any contract to be awarded under section 103D-302, 103D-303, 103D-304, 103D-305, 103D-306, or 103D-307:

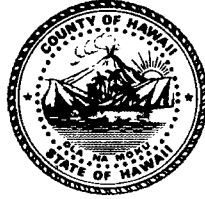
- (1) The **procurement officer shall ensure** award shall be made within forty-five days of the initial ~~request~~ for proposals **receipt of offer** but in no case later than fifteen days after the deadline for proposals; **provided the procurement officer may determine in writing when an extension of time is necessary due to delays in award.**
- (2) A contract shall be deemed effective ten days after the notice of the award;
- (3) The solicitation, offer, bid, or proposal and the notice of award shall constitute the entire contract and agreement between the governmental body and the contractor; and
- (4) A subsequent written and executed contract document shall not be required."

ATTACHMENT B

PART II, page 4 -

"§103D- Reseller agreements. The state procurement office shall authorize reseller agreements as part of any multi-state contracting agreement **and allow orders placed directly with resellers, provided authorized and designated by the original equipment manufacturer or the awarded contractor.**"

William P. Kenoi  
Mayor



Nancy E. Crawford  
Director

Deanna S. Sako  
Deputy Director

## County of Hawaii

### Finance Department

25 Aupuni Street, Suite 2103 • Hilo, Hawaii 96720  
(808) 961-8234 • Fax (808) 961-8248

March 5, 2010

The Honorable Senator Carol Fukunaga, Chair,  
and Members of the Senate Committee on Economic Development and Technology  
Hawai'i State Capitol  
415 South Beretania Street  
Honolulu, Hawai'i 96813

Dear Chair Fukunaga and Members of the Committees:

RE: Testimony in Opposition to H.B. 2133, H.D.1, Relating to Procurement  
Hearing Monday, March 8, 2010, at 1:15 p.m., Conference Room 016

Hawai'i County strongly opposes H.B. 2133, H.D.1, which seeks to set short, specific time constraints on award and contract formation for procurement of goods and services, including construction. The bill also defines what will constitute the contract between the vendor and government body. This proposal rests upon the mistaken assumption that all contracts are simple and identical. It does not reflect the reality of contracting or the business world in terms of duties, scope, liabilities or indemnifications.

The conditions proposed in the referenced legislation require that an award, which along with the solicitation, offer and proposal constitutes the final contract, be issued within 45 days of the initial notice of a request for proposals. State procurement law includes many requirements that render that deadline virtually impossible to manage. Requirements for pre-bid conferences and follow-up amendments to the solicitation require time for preparation and response. **It does not benefit the government agency, the public or the contractors to rush procurement and not allow the contractors time to ask questions, calculate costs, solicit sub-contractors, and make an informed bid or proposal.**

The proposed bill includes language that the solicitation, offer, bid or proposal, and the notice of award shall constitute the entire contract and agreement between the governmental body and the contractor. However, the Hawai'i County Charter requires a certification of funds at the time of contracting. The Hawai'i County Charter also limits authority for entering into contracts and further mandates that the Mayor must execute our contracts. H.B. 2133, H.D.1 seeks to remove the County's authority to govern itself by subrogating its Charter. **Eliminating an actual contract document from the process removes the opportunity for the County to have legal review, certification of funds and execution by the Mayor, all requirements under Hawai'i County Law.**

Thank you for your attention to our concerns. We urge you to file H.B. 2133, H.D.1.

Sincerely,

Nancy Crawford  
Director of Finance

CHARMAINE TAVARES  
Mayor



KALBERT K. YOUNG  
Director of Finance

AGNES M. HAYASHI  
Deputy Director of Finance

COUNTY OF MAUI

**DEPARTMENT OF FINANCE**

200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793

March 5, 2010

The Honorable Carol Fukunaga, Chair  
The Honorable Rosalyn H. Baker, Vice Chair  
And Members, Senate Committee on Economic Development and Technology  
Hawaii State Senate  
Hawaii State Capitol, Room 216  
Honolulu, Hawaii 96813

**RE: HB 2133, HD1. RELATING TO PROCUREMENT**

Dear Senators Fukunaga and Baker and Committee Members:

**Part I – Section 1**

The County of Maui strongly opposes deadlines of 45 days from the date of the initial solicitation, or 15 days from the receipt of proposals, to award a contract under sections 103D-302 (Competitive Sealed Bidding), 103D-303 (Competitive Sealed Proposals), 103D-304 (Procurement of Professional Services), and 103D-306 (Sole Source Procurements

With respect to Competitive Sealed Bidding, there are numerous impediments to completing the award process in 15 days, including the ability of a contractor to receive due process under a protest process; the ability of the procurement personnel to research and properly respond to a protest; the ability of finance personnel to finalize project funding arrangements; the ability of a project manager to consider and negotiate value engineering alternatives, secure and complete various internal and external project requirements, etc.

With respect to Competitive Sealed proposals, the most simple procurements require the availability of a committee of at least 3 people to be able to read and evaluate all of the proposals, score all the proposals, justify each score with comments, and find time in their busy schedules to meet and discuss the proposals. A complex RFP such as a major software procurement can require hundreds of hours for proposal evaluation, reference checks, and vendor presentations. It can take 6 months of diligent effort to complete the process for committee members juggling their normal responsibilities.

With respect to the Procurement of Professional Services, most agencies including the County of Maui put out an annual solicitation and develop an annual list. Subsequently, the professional services contracts are negotiated separately for each project as time permits. The County of Maui needs up to 18 months to complete this work, and we also need the option of having an extensive period of time to be able to

negotiate contracts with consultants, including the option to start over with a 2<sup>nd</sup> or 3<sup>rd</sup> choice provided that negotiations with the higher ranked candidates fail.

With respect to the Sole Source Procurement process, the County of Maui often needs extensive time beyond the submission of a proposal to evaluate the validity of a sole source request, post the sole source notice for 7 days, and complete a subsequent contract or purchase order.

The imposition of deadlines for awarding a contract will force the County of Maui to utilize the Chief Procurement Officer exemption for many of our procurements, and we believe this is neither good procurement practice nor the desire of the legislature.

#### **Part I – Section 2**

The County of Maui Corporation Counsel is expressing concern over potential legal problems related to the elimination of a formal contract document, including signature verification, notarization, and how the courts would adjudicate a contract dispute.

#### **Part II**

The County of Maui opposes reseller agreements attached to WSCA contracts because in most of the contracts there is existing competition between manufacturers. Most resellers will not add any value to the process and they may add additional cost to the process. In addition, manufacturers may not respond favorably to having the State of Hawaii dictate their marketing channels, which could also increase our costs.

#### **Part III**

While the County of Maui supports procuring to small and/or local businesses, we must be cognizant that instituting preferential language or allowances for higher costs and bids does favor a small constituency group (businesses that sell to the State and Counties), and could be at the expense of the general taxpayer in the form of higher costs. We are also balancing the challenge of paying higher costs (in preferences) with diminishing County revenues.

Thank you for considering this testimony in opposition to HB 2133, HD1 relating to procurement.

Sincerely,



KALBERT YOUNG  
Director of Finance

DEPARTMENT OF DESIGN AND CONSTRUCTION  
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 11<sup>TH</sup> FLOOR  
HONOLULU, HAWAII 96813  
Phone: (808) 768-8480 • Fax: (808) 768-4567  
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MUFI HANNEMANN  
MAYOR



CRAIG I. NISHIMURA, P.E.  
DIRECTOR

COLLINS D. LAM, P.E.  
DEPUTY DIRECTOR

March 4, 2010

The Honorable Carol Fukunaga, Chair  
and Members of the Economic Development and Technology Committee  
State Senate  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Fukunaga and Members:

Subject: House Bill No. 2133 HD1

The Department of Design and Construction (DDC) respectfully **opposes** House Bill 2133 HD1 because it will negatively impact the construction of City projects. DDC manages the planning, design and construction of approximately 90% of the City's projects. In our experience, providing a reasonable bid time, most suitable to the particular job, results in better bid proposals. The 45-day bid advertisement to contract award time limit will result in lower quality proposals, change orders, cancelled projects, potentially higher bids and cost-escalation claims. A typical project takes 30 days to advertise for bids. Then bids are opened, and if the lowest bidder is qualified, awarded the construction contract. HB 2133 HD1 does not account for the complexity and issues common to construction projects. In addition, in many of our projects, contractors need time to coordinate with mainland manufacturers, resulting in the need for additional time.

- 1) For example the recently completed Ala Moana Wastewater Pump Station Modification project took \$23 million and 670 days to complete. It is not hard to visualize that the bidding required a much longer time to assemble bids due to the number of components and trades involved. A 45-day time frame for bid advertisement to contract award would have resulted in the contract not being awarded on time.
- 2) The contractor will claim escalation costs if the contract is not awarded on time. The City would then pay the escalation costs or fight the claim. Either way the project is cancelled or delayed and costs the City and tax payers more than what it was worth had a more reasonable amount of bid time been used.
- 3) Design-build and Best-value type projects utilize a multi-stage process to choose the best proposal. City project manager(s) review and

comment on the initial bids and the bidders then get a chance to amend their proposals for a second go-around. Depending on the number and quality of proposals, choosing the best design and value can easily take longer than 45 days. Shortening this process time will result in lower quality design and problems in construction.

- 4) Unforeseen design issues, and specialty or long-lead type materials and equipment are sometimes realized during the bidding process. These issues are dealt through addendums that delay the bid opening from one to several weeks. A 45-day time frame would not be enough to manage these addendums. Large change orders or project cancellations would ensue, again costing much more money and time than the project was worth if the bid process was managed with a time frame flexible and suitable to the particular project.

HB2133 HD1 may work with very simple projects or the procurement of goods, but applies terribly to construction contracts. The scope, complexity, and unforeseen issues that arise are just too varied. In our experience, providing a reasonable bid time, most suitable to the particular job, results in better bid proposals. The 45-day limit will result in lower quality bid proposals, large change orders, cancelled projects, and cost-escalation claims.

Regarding DDC consultant contracts, HB2133HD1 is completely incompatible. DDC advertises for consultant planning and design services once a year. On average, about 175 consultants respond to the advertisement ever year. We compile the qualified consultants into a list that is used throughout the year as planning and design services become necessary. It would be virtually impossible to choose and award all planning and design contracts within 45 days of our advertisement for consultant services.

Accordingly, we respectfully **oppose** HB2133 HD1. We urge you to keep the bidding time as well as contract award for consultant and construction contracts to the discretion of City Departments.

Thank you for the opportunity to testify.

Very truly yours,



Craig I. Nishimura, P.E.  
Director

MUFI HANNEMANN  
MAYOR



RIX MAURER III  
DIRECTOR

MARK K. OTO  
DEPUTY DIRECTOR

March 8, 2010

The Honorable Carol Fukunaga, Chair  
and Members  
Senate Committee on Economic  
Development and Technology  
The Twenty-Fifth State Legislature  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Fukunaga and Members:

Subject: HB 2133, HD 1, Relating to Procurement

The City and County of Honolulu (City) appreciates the intent of HB 2133, HD 1 to expedite the award of contract to our vendors. However, we feel that an expedited schedule in award may actually increase the cost of the contract and would not be in the best interests of the City.

Section 1 of HB 2133, HD 1 imposes a 45-day deadline for award of contracts secured through a competitive sealed proposal method of procurement. Pursuant to HAR 3-122-16.02, the minimum time period between the first date of the public notice and the proposal due date shall be 30 calendar days. To comply with HB 2133, the creation of the priority list, discussion, Best and Final Offer, and notice of award must be done within 15 days. Such a shortened schedule will only serve to compromise our review of the proposals and to defeat the purpose of the discussion process which is to promote an understanding of the City's requirements. As a result of this, Offerors will increase their prices to compensate for any uncertainties and also increase the opportunities for potential protests. We also risk prematurely awarding to contractors without the opportunity to conduct proper due diligence.

With regard to the re-engineering of the contract to include the solicitation, offer, bid or proposal and the notice of award without subsequent execution of a written form, this is an internal process which should not be addressed in the Procurement Code. This requirement would significantly impact the encumbrance process in the City. However, we appreciate this suggestion and will investigate the possibility of incorporating this process.

The Honorable Carol Fukunaga, Chair  
and Members  
March 8, 2010  
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Section 3 of the bill requires the State Procurement Office to establish reseller agreements between the seller and the contractor providing goods to the City under multi-state contracting agreements. Such reseller agreements would insert unnecessary middle men between the suppliers of products and the City, which would drive up costs to the City in these difficult economic times.

Section 4 of the bill requires the City to determine if a business has not less than 35 percent of its employees residing within the state for the purpose of applying the small business preference. It would be difficult and probably impossible to verify where the employees of a business reside due to privacy concerns.

We believe HB 2133, HD 1 raises significant concerns which will increase cost to the City as well as potentially impact proper awarding of a contract. Consequently, we must oppose the bill in its present form.

Sincerely,

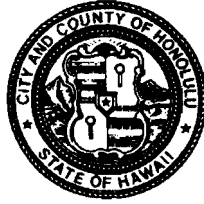


Rix Maurer, III  
Director

DEPARTMENT OF ENVIRONMENTAL SERVICES  
**CITY AND COUNTY OF HONOLULU**

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MUFI HANNEMANN  
MAYOR



TIMOTHY E. STEINBERGER, P.E.  
DIRECTOR

MANUEL S. LANUEVO, P.E., LEED AP  
DEPUTY DIRECTOR

ROSS S. TANIMOTO, P.E.  
DEPUTY DIRECTOR

IN REPLY REFER TO:  
WAS 10-65

March 5, 2010

The Honorable Carol Fukunaga, Chair  
and Members of the Committee on  
Economic Development and Technology  
State Senate  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Fukunaga and Members:

Subject: House Bill No. 2133, HD1, Relating to Procurement

The Department of Environmental Services **opposes** House Bill (HB) 2133, HD1, Relating to Procurement. HB 2133, HD1, which would impose strict deadlines for award of contracts based the date of either the initial request for proposals or the deadline for proposals; would deem a contract effective ten days after notice of award; would make the proposal and the notice of award constitute the entire contract; and, would not require a separate subsequent written and executed contract.

While we applaud the idea of expediting the procurement and contracting process, the inclusion of arbitrary deadlines is not the answer. There are many reasons that require longer periods to advertise, award, and contract for our work. These include the development of very complex projects containing hundreds of pages of specifications; the ability to review and determine the responsiveness of proposals to said specifications; the often required need to clarify mis-understanding about the specifications/scope of work during the response period; the ability to determine fully responsiveness before award; and the need to insure that the interests of the public and its government bodies are protected through fully executed legal contracts.

It is likely that imposition of short and fixed deadlines would result in significant numbers of cancellations of proposals rather than award an inappropriate contract just because of timelines. This costs both the government and potential vendors funds and would further delay the delivery of appropriate and necessary work.

The significant variation in procurement needs between acquisition of pre-manufactured things; the acquisition of specially manufactured things; the acquisition of services; the acquisition of professional services; and the acquisition of construction projects, is clearly not considered in this bill since it is a one size fits all approach.

The Honorable Carol Fukunaga, Chair  
and Members of the Committee on  
Economic Development and Technology  
March 5, 2010  
Page 2

Procurement needs to be done at a speed appropriate to what is being procured consistent with the protection of the resources of the government and its citizens.

This bill is seriously flawed and should not be passed.

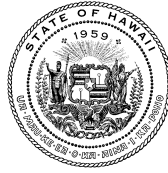
Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy E. Steinberger', with a large, sweeping flourish extending to the left.

Timothy E. Steinberger, P.E.  
Director

LINDA LINGLE  
GOVERNOR



RUSS K. SAITO  
Comptroller

SANDRA L. YAHIRO  
Deputy Comptroller

**STATE OF HAWAII  
DEPARTMENT OF ACCOUNTING  
AND GENERAL SERVICES**  
P.O. BOX 119  
HONOLULU, HAWAII 96810-0119

**LATE**

TESTIMONY  
OF  
RUSS K. SAITO, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
SENATE COMMITTEE  
ON  
ECONOMIC DEVELOPMENT AND TECHNOLOGY  
ON  
March 8, 2010

H.B. 2133, H.D. 1

RELATING TO PROCUREMENT

Chair Fukunaga and members of the Committee, thank you for the opportunity to testify on H.B. 2133, H.D. 1.

The Department of Accounting and General Services (DAGS) has concerns about H.B. 2133, H.D.1 because imposing a strict 45 day interval for the time between a project being advertised and the time its contract is executed is not practical. The interval between a project being advertised and awarded is based on several considerations including the size and complexity of the project, as well as the source selection method that is used.

DAGS suggests that in a construction project subject to the procurement code, the basic intervals that need to be managed are project initiation, planning, design, bidding, and construction. These intervals need to be managed to optimize project objectives and

results. In parallel, site selection, environmental assessments, impact statements and approvals need to be secured, land use, special management area, conditional use, conservation district use, special, subdivision, height waiver, health, industrial, and building permits must be obtained.

Setting optimal intervals are project specific, but common intervals can be looked at. For projects solicited under Chapter 103D-302, one of these is the interval between the bid opening date and the award date (which should include certification). The other is the interval between the award date and the start of construction date.

For projects solicited under Chapter 103D-303, one key is the interval between the offer received and contract award date. The difference between 103D-302 and 103D-303 is that in 103D-302, the bid is against a design that has already been completed. In 103D-303, which for construction projects involves design and build under the same contract, the design starts after the award. In addition, the 103D-303 process allows for discussions and a “best and final” offer after the original offers are received. As a result, the interval between the bid received and contract date awarded for 103D-302 will be different from the interval between the offer received and contract awarded date under 103D-303. In addition there will be a large difference between contract award and start of construction under 103D-302 versus 103D-303.

My testimony is specific to construction projects and address what I believe to be the primary concern of the construction industry task force, which is moving projects through the procurement and contracting process into construction as quickly as practical. The source selection methods referred to in this bill apply to procurements of all goods, services and construction. Requirements that apply to construction should not be automatically applied to other procurements. With that in mind, DAGS suggests that this

bill may address the shortening of intervals for construction projects by directing the Procurement Policy Board to set optimum intervals for the following:

Advertising to bid open (103D-302) or offer received (103D-303)

Bid open or offer received to contract award (including certification) (The interval will be shorter for 103D-302 than for 103D-303)

Contract award to start of construction (The interval will be considerably shorter for 103D-302 than for 103D-303)

DAGS defers to the State Procurement Office on Section 2 of the bill. We believe that reseller agreements are allowed under the WSCA contract. These agreements should be between the vendors and their resellers, and not compelled by the State. The State does not become a party in contracts between a contractor and the contractor's subcontractor.

Thank you for the opportunity to testify on this matter.

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



# GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

March 8, 2010

TO: THE HONORABLE SENATOR CAROL FUKUNAGA, CHAIR AND MEMBERS OF  
THE COMMITTEE ON ECONOMIC DEVELOPMENT AND TECHNOLOGY

SUBJECT: H.B. 2133, HD1 RELATING TO PROCUREMENT.

**LATE**

NOTICE OF HEARING

DATE: Monday, March 08, 2010  
TIME: 1:15 p.m.  
PLACE: Conference Room 016

Dear Chair and Members of the Committee:

The General Contractors Association (GCA), an organization comprised of over five hundred and seventy (570) general contractors, subcontractors, and construction related firms, offer the following comments on H.B. 2133, HD1, Relating to Procurement.

HD1 added Sections 2 and 3 concerning reseller agreements in cooperative multi-state contracting. The GCA has **no comment** on these sections of the bill.

HD1 also added Section 4 that changes HRS Section 103D-906 Preference for small businesses to give a 5% preference for Hawaii small businesses in lieu of a more comprehensive set-aside program for small businesses in general. Without the benefit of reasons and problems associated with the original wording of the law, the GCA would **oppose** such a change as it would add another burden on the already burdensome bid process subject to protest and questions on what constitutes a "Hawaii small business".

With respect to the HD1 changes to Section 1 of the bill, the GCA generally **supports the intent** of the bill to speed up the current procurement process affecting construction contracting. However, the GCA favors reducing the deadline for award after bid opening to 30 days (in lieu of 45 days) and making clear that the award would authorize the contractor to begin ordering materials to minimize the risks of volatile material price fluctuations after the fixed price bid proposal. The GCA also suggests the bill's effect should be limited to "low-bid" contracting process covered by HRS Section 103D-302 Competitive sealed bidding as evaluation of bids is generally a ministerial function and would not require extensive review by procurement officers. The GCA suggests deferring application to the other procurement sections (which may require more extensive/subjective reviews) pending experience with the new low-bid deadline.

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