
A BILL FOR AN ACT

RELATING TO PROCUREMENT OF PROFESSIONAL SERVICES.

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

1 SECTION 1. The purpose of this Act is to authorize the
2 procurement policy board to adopt administrative rules pursuant
3 to section 103D-202, Hawaii Revised Statutes, to provide an
4 effective procurement process for situations where a review
5 committee is unable to send three or more qualified persons'
6 submittals to provide professional services to the head of the
7 purchasing agency pursuant to section 103D-304, Hawaii Revised
8 Statutes.

9 SECTION 2. Section 103D-304, Hawaii Revised Statutes, is
10 amended by amending subsection (g) to read as follows:

11 "(g) The selection committee shall rank a minimum of three
12 persons based on the selection criteria and send the ranking to
13 the head of the purchasing agency. In the event there are fewer
14 than three qualified persons that can be sent to the head of the
15 purchasing agency, a request for an alternative procurement may
16 be made to the chief procurement officer in accordance with
17 administrative rules adopted by the procurement policy board.

18 The contract file shall contain a copy of the summary of



1 qualifications for the ranking of each of the persons provided
2 to the head of the purchasing agency for contract negotiations.
3 If more than one person holds the same qualifications under this
4 section, the selection committee shall rank the persons in a
5 manner that ensures equal distribution of contracts among the
6 persons holding the same qualifications. The recommendations of
7 the selection committee shall not be overturned without due
8 cause."

9 SECTION 3. New statutory material is underscored.

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



Report Title:

Procurement; Professional Services; Minimum Three Qualified

Description:

Authorizes requests for alternative procurement in accordance with rules adopted by the procurement policy board in situations of fewer than three qualified persons for procurement of professional services. (SD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



DAVID Y. IGE
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SARAH ALLEN
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TESTIMONY

OF

SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE

ON

ECONOMIC DEVELOPMENT & BUSINESS

MARCH 17, 2015, 9:00 A.M.

SENATE BILL 1064 SD1
RELATING TO PROCUREMENT OF PROFESSIONAL SERVICES

Chair Kawakami, Vice-Chair Kong, and members of the committee, thank you for the opportunity to submit testimony on SB1064 SD1.

The State Procurement Office (SPO) strongly SUPPORTS this measure.

This bill effectively re-authorizes administrative rules that have been successfully applied over the last twenty years, since 1995. These rules allowed for an alternate process if less than three qualified offerors could be ranked as part of a professional services process.

In 2014, the Hawaii Supreme Court invalidated the Rules in a recent case, *Asato v. Procurement Policy Board*. It was deemed that the rules were less restrictive than the statute. This bill looks to correct the verbiage in statute in order to continue using the rules as written.

If an alternate process is not an option, the requirement is then to continue re-soliciting until at least three qualified offerors do propose and thus can be ranked. For specialized work, where attaining three offerors may be impossible, the only solution will be to re-solicit over and over, becoming an infinite loop, essentially forcing the procuring official into a stalemate, unable to continue. Some may suggest that the only alternative for the procuring official at this point, would be to add a non-qualified offeror to the ranking in order to achieve the 'three persons' requirement. SPO maintains that ranking persons who do not meet the qualification requirements in order to circumvent the requirement is inappropriate and thus a procurement violation.

This measure accounts for the operational reality of professional services procurement by allowing the procurement to move forward under an alternative procedure only for the very limited situations discussed above. When these situations do occur, the Chief Procurement Officer shall make the determination, similar to lifting a stay—when it is necessary to protect “substantial interests of the State.” SPO supports the amendments to the original bill reflected in SD1.

Thank you.

March 16 , 2015



Honorable Derek Kawakami, Chair
Senate Committee on Government Operations

Senate Bill 1064 SD1
Relating to the Procurement of Professional Services

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Dear Chair Kawakami and Members of the Committee,

My name is Daniel Chun, President of the American Institute of Architects (AIA) Hawaii State Council that represents some 600 Hawaii licensed architects. I have 38 years of local architectural business practice experience. I am the Hawaii delegate to the AIA State Government Network comprised of the 50 states. I worked personally on the current language of HRS 103D-304 during the Lingle Administration to bring the procurement of architectural design services into conformity with federal procurement and the great preponderance of the 50 states. The current language was carefully drafted, lobbied and enacted in response to charges of political corruption in the award of local design professional services contracts.

AIA is **VERY STRONGLY OPPOSED** to the language that allows less than three persons to be considered using an “alternative procurement” in administrative rules yet to be written by Procurement Policy Board PPB. “Less than three persons” overturns many years of the statute requiring a minimum of three persons to be considered for design professional contracts.

SB 1064 SD1 re-opens the door to public corruption

Surrendering the legislature’s duty to enact good law to PPB opens the possibility its new rules may again be declared “invalid” as in *Asato vs. Procurement Policy Board*. AIA sent letter to State Procurement Office on September 27, 2014 stating our opposition to the proposed bill. In House EDB hearing for companion House Bill 895, it was said by SPO that these bills are needed to address rare situations where few to only one person meets qualifications. Our subsequent inquiry into *Asato vs. PPB* shows the impetus was the City & County of Honolulu using the PPB “less than three” rule **TWENTY SIX TIMES** in contract awards, many for architectural – engineering services. AIA contends that 26 times under the former city administration is not a rare situation. If the legislature gives PPB authority to make rules for “less than three persons” this can lead to two problems. Firstly, architect businesses will be at the mercy of a small group of civil servants and appointees instead of having the people’s’ elected representatives craft a statutory balance among all competing interests. Secondly, a “less than three

persons” rule could easily lead to public corruption that the current 103D-304 sought to ban forever.

SB 1064 SD1 has huge potential to \$ damage architect businesses

The bill sets up no definitive process to replace the long-standing cost-effective and time efficient QBS law. An “alternate procurement” under PPB rules could cost Hawaii businesses increased overhead expenses and lead to low-price based fee competition that violates the procedures used by the federal government and 46 other states; as did the PPB rule declared invalid by the court.

SB 1064 SD1 is detrimental to the taxpayers

Ethical conduct aside, ranking “less than three persons” reduces the ability of agencies to negotiate fair and reasonable contract prices, as required by 103D-304, as there is less pressure upon competitors to agree to agency budgeted fees. So passage of SB 1064 SD1 is also detrimental to taxpayer interests.

SB 1064 SD1 is in conflict with HRS 103D-304 (j) italicized below:

*(j) Contracts for professional services of less than the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, **with at least any two persons** [emphasis added] on the list of qualified persons established pursuant to subsection (c). Negotiations shall be conducted in the manner set forth in subsection (h), with ranking based on the selection criteria of subsection (e) as determined by the head of the agency.*

Subsection (j) is for small purchase contracts worth less than \$100,000, a feature of existing QBS law. The SD1 language may also be in conflict with subsection (a). AIA prefers rare and limited use of exemption to deal with the alleged problem cited by SPO instead of hasty rewrite of QBS law.

House Bill 895 HD1 language

After architects’ opposing testimony at House EDB, AIA discussed compromise language with SPO that resulted in HD1 language. It was represented to AIA that the court required these bills due to the Asato ruling. However, this was a **HALF TRUTH** in that the court said a bill is required **ONLY IF** the long-standing 2004 statute and historic practice of “no less than three persons” is to be overturned by the legislature. You do not need to pass any bill. Please do not force AIA to come back to you next session to restore our excellent QBS law. Thank you for the opportunity to **VERY STRONGLY OPPOSE** Senate Bill 1064 SD1.



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March 16, 2015

**House Committee on Economic Development and Business
Hearing Date: Tuesday, March 17, 9:00 a.m., Conference Room 312**

Honorable Representatives Derek S.K. Kawakami, Chair; Sam Satoru Kong, Vice Chair; and Members of the House Committee on Economic Development and Business

Subject: **SB 1064 SD1, Relating to Procurement of Professional Services
TESTIMONY IN OPPOSITION**

Dear Chair Kawakami, Vice Chair Kong, and Committee Members:

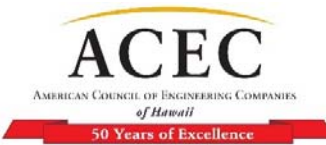
The American Council of Engineering Companies of Hawaii (ACECH) **strongly OPPOSES** SB1064 SD1.

ACECH represents more than 70 member firms with over 1,500 employees throughout Hawaii. ACECH member firm projects directly affect the quality of the water we drink and the food we eat; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play. Procurement of design professional services is a serious business.

ACECH is a business entity and is interested in efficient procurement processes that facilitate the award of public works projects. However, we are also committed to ethical and proper processes that safeguard the public interest.

“Qualifications-based selection” (QBS) is the nationally recognized model procurement code for the procurement of design professional services. ACECH is a strong supporter of HRS §103D-304, the State’s QBS law. The Committee may recall that, prior to enactment of §103D-304, procurement of professional design services in Hawaii was rife with abuse and corruption, and negative news articles greatly damaged public faith in our procurement processes. §103D-304 was strongly supported by ACECH to provide fairness and transparency in public procurement, and to restore public faith in procurement of design professional services. The legislature clearly felt that design professional procurement deserved special care, as it limited procurement of professional services to sections 103D-304 and -307 (emergency), while allowing other professional services to be obtained through other methods (including sole source procurement).

Following enactment of §103D-304, the state procurement office put into place rules (HAR §3-122-663) that did not follow the intent of the law. In February 2014, a decision of the Supreme Court of the State of Hawaii upheld a 2012 Circuit Court decision that found that the rule was invalid and that the law “must be read by its plain and obvious meaning” and the rule “could not be justified by the need to “fill a gap left in HRS § 103D-304,” because “[t]he plain language of section 304 does not leave any such gaps[.]” (Decision SCAP-12-0000789). The Court’s ruling resulted in considerable negative press regarding procurement actions that were conducted using the rules and in violation of the law. It was reported that the rule was used by the City to award more than \$250 million dollars in rail design consulting contracts without the benefit of the QBS process. We believe that an examination of these procurement actions may find that there were at least three qualified firms available to the agencies, and that the actions were not in the best interest of the public.



The State Procurement Office (SPO) has testified that the goal of this bill is to “correct the verbage in statute in order to continue to use the rules as written,” i.e., to reinstate HAR §3-122-66 struck down by the court. ACECH is strongly opposed to the rules as written. Apart from our assertion that the “minimum of three” requirement is well crafted and in line with model procurement code across the country, the rules further discuss price in an inappropriate manner, potentially circumventing the intent of §103D-304 (h), one of the mainstays of “qualification-based selection.”

The main problem with the rule is that it does not provide sufficient controls for the “waiver.” It is easy to imagine that the rule can be used for political appointments (the “request for qualifications” could be written so narrowly as to favor one firm), and set the State back 15 years to the corruption we saw in the past. In addition, the language of the rule seems technically flawed in that it allows an alternative procurement process “(i)f the names of less than three qualified persons are submitted pursuant to section 103D-304 (g), HRS...”. However, §103D-304 (g) only addresses the ranking, not the selection of qualified firms. It may give an agency the power to “rank” only one firm, even if more than one firm was determined “qualified” by the review committee.

ACECH beseeches this committee to uphold the model procurement law established by §103D-304, and to defer this bill. ACECH would be happy to work with the SPO in the next year to evaluate circumstances where the rule was used, to identify the specific nature of the problem, and to develop proposed legislation and rules. We appreciate the opportunity to provide testimony on this matter. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

A handwritten signature in blue ink that reads "William H.Q. Bow".

William H.Q. Bow, P.E.
President



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Puna Kaneakua, P.E.

March 16, 2015

Honorable Derek S. K. Kawakami, Chair,
Honorable Sam Satoru Kong, Vice Chair,
Honorable Members of the House Committee on Economic Development & Business,

I am testifying in OPPOSITION to Senate Bill 1064, SD1, Relating to Procurement of Professional Services.

The American Society of Civil Engineers was established in 1852 and is the oldest professional engineering organization in the United States. The Hawaii Section of ASCE was established in 1937 and its 1000 civil engineers come from both the public and private practice.

Senate Bill 1064, SD1, would authorize the an alternate procurement process whenever less than three qualified persons propose to provide professional services for a government contract.

ASCE urges any legislation for the procurement of professional services clearly require selection to be based on a qualifications based selection process. Senate Bill 1064, SD1 would authorize the State Procurement Office to revise existing regulations for the selection process. The engineering professionals in Hawaii have long supported a qualifications based selection process. Attached is a copy of ASCE Policy Statement 304 describing the selection process for professional services from a list of qualified candidates proposing to provide such services.

I urge the Committee table any further action on Senate Bill 1064, SD1. Thank you for the opportunity to testify on this legislation

Owen Miyamoto, P.E.
Local Legislative Liaison
ASCE Hawaii Section
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Attachment: ASCE Policy Statement 304



POLICY STATEMENT 304 - QUALIFICATIONS-BASED SELECTION OF PROFESSIONAL ENGINEERS

Approved by the Engineering Practice Policy Committee on August 6, 2013

Approved by the Public Policy Committee on August 14, 2013

Adopted by the Board of Direction on October 8, 2013

Policy

The American Society of Civil Engineers (ASCE) believes that the selection of Professional Engineers as prime consultants and subcontractors should be based on the qualifications of the engineering firm. Qualifications including education, training, experience, past-performance, capabilities, personnel and workloads should be evaluated when selecting an engineering firm.

Cost of engineering services, while important and meriting careful negotiations, is related to work to be performed which often is not clearly defined at the time the engineer is selected. Therefore, selecting consultants based on cost is not recommended.

ASCE supports qualifications-based selection (QBS) procedures such as those specified by the Brooks Architect-Engineers Act of 1972, 40 U.S.C. 1101 et seq., more than 40-mini Brooks Acts, and the American Bar Association's Model Procurement Code for State and Local Governments for the engagement of engineering services. ASCE recommends that the application of these procedures to the development of a scope of work and the selection, procurement and administration of contracts for engineering services be the responsibility of technically qualified staff of the project owner.

Issue

Often an owner may believe that the pivotal issue in the selection of a professional engineer is the cost of services. Also, an owner may perceive that accepting the low

price to perform the work produces the project with the lowest total cost. In some instances, engineering services are essentially subject to bid based on the lowest offered fee, whether or not the proposed services and professional qualifications are substantially equal.

The relevant experience, ability, and specific technical approaches of the proposing design professionals are more important to the life-cycle cost of any project than is the initial engineering fee, which is generally a relatively small percentage of the overall project cost.

Rationale

The QBS procedure is characterized by three basic steps: (1) the owner selects the professional engineer believed best qualified to perform the required work without considering fee; (2) the owner and the selected professional engineer confer to determine and/or review the scope of work, including contract scheduling; and (3) a fee for engineering services is negotiated based upon the mutually developed scope of work. In the event a mutually acceptable scope of services and fee cannot be negotiated, the owner may move on to the next highest ranked qualified professional. Thus, cost is addressed at the appropriate time after the scope of services has been fully defined.

The cost of engineering services, while important and meriting careful negotiations, is generally a relatively small percentage of the overall cost to plan, design, build, operate and maintain a project and may be related to work that is not clearly defined at the time the engineer is selected. Therefore, selecting consultants based solely on the cost of their initially proposed services is not recommended.

*ASCE Policy Statement 304
First Approved in 1985*

Note: See ASCE Manual No.45 "How to Work Effectively with Consulting Engineers: Getting the Best Project At the Right Price," and ASCE Manual of Professional Practice, "Quality in the Constructed Project: A Guideline for Owners, Designers, and Constructors," for more detailed examination of this subject.



March 16, 2015

**House Committee on Economic Development and Business
Hearing Date: Tuesday, March 17, 9:00 a.m., Conference Room 312**

Honorable Representatives Derek S.K. Kawakami, Chair; Sam Satoru Kong, Vice Chair; and Members of the House Committee on Economic Development and Business

Subject: **SB1064 SD1 - Relating to Procurement of Professional Services**

TESTIMONY IN OPPOSITION

As a professional engineer in Hawaii with over 35 years of experience in the public works area. I feel that is of utmost importance to maintain the integrity of our Hawaii design professional procurement system for the selection of the best qualified firms to perform public works projects.

Our current procurement law, Relating to Procurement of Design Professional Services (for Engineers and Architects) is based on qualification-based selection (QBS) law. QBS procedures in HRS §103D-304 are based on the nationally recognized model procurement code for the procurement of design professional services. The law protects the public by providing an open and transparent procurement process to select the best qualified firms.

We **oppose** measures that can potentially threaten or weaken our current design professional QBS procurement system. Solicitations by agencies should be written to allow for fair competition of qualified firms. Agencies that establish rules that allow selection of design professional firms without following the proper selection procedures are in violation. A court ruling stating that §103D-304 must be followed resulted in considerable negative press regarding the procurement actions that occurred without following the QBS procedure. The administrative rules should follow the current QBS law relating to the selection of qualified A/E firms based on the main criteria of: Experience, Past Performance and Capacity to do the work. This Brooks Act language is followed throughout the Federal FAR systems of selections.

We urge you to defer this bill.

Sincerely,
Lester Fukuda, PE

kong3

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, March 15, 2015 1:38 PM
To: edbtestimony
Cc: amybrinker@mac.com
Subject: *Submitted testimony for SB1064 on Mar 17, 2015 09:00AM*

SB1064

Submitted on: 3/15/2015

Testimony for EDB on Mar 17, 2015 09:00AM in Conference Room 312

Submitted By	Organization	Testifier Position	Present at Hearing
Amy Brinker	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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