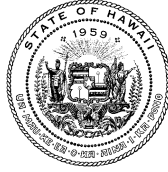


DAVID Y. IGE  
GOVERNOR



CURT T. OTAGURO  
COMPTROLLER  
AUDREY HIDANO  
DEPUTY COMPTROLLER

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

WRITTEN TESTIMONY  
OF  
CURT T. OTAGURO, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE

HOUSE COMMITTEE  
ON  
CONSUMER PROTECTION AND COMMERCE

TUESDAY, MARCH 22, 2022, 2:00 P.M.  
CONFERENCE ROOM 211, STATE CAPITOL

S.B. 2385, S.D. 2, H.D. 1

RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Kitagawa, and Members of the Committee, thank you for the opportunity to submit testimony on S.B. 2385, S.D. 2, H.D.1. The Department of Accounting and General Services (DAGS) supports this bill as it allows agencies more timely alternatives to complete procurement of professional services when there are fewer than three qualified respondents to solicitations.

Thank you for the opportunity to submit testimony on this matter.

**SB-2385-HD-1**

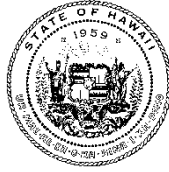
Submitted on: 3/21/2022 12:23:05 PM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Eric Nishimoto	DAGS	Support	In Person

Comments:

Available to answer questions on behalf of State Comptroller.



**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

P.O. Box 119  
Honolulu, Hawaii 96810-0119  
Tel: (808) 586-0554  
email: [state.procurement.office@hawaii.gov](mailto:state.procurement.office@hawaii.gov)  
<http://spo.hawaii.gov>

TESTIMONY  
OF  
BONNIE KAHAKUI, ACTING ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE  
ON  
CONSUMER PROTECTION & COMMERCE

March 22, 2022; 2:00 PM

SENATE BILL 2385, SD2, HD1  
RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Kitagawa, and members of the committee, thank you for the opportunity to submit testimony on SB2385, SD2, HD1. The State Procurement Office (SPO) provides comments on this bill and proposes amendments to page 2, SECTION 2, lines 11-15 of the bills as follows:

"If fewer than three qualified persons respond to a solicitation, the agency may submit a request for ~~alternative procurement approval from~~ exemption to the chief procurement officer ~~or chief procurement officer's designee~~ pursuant to section 103D-102(b)(4)(L)."

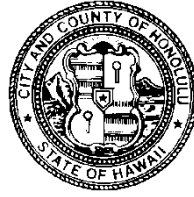
In 1995, the Procurement Policy Board created Hawaii Administrative Rule (HAR) § 3-122-66 to address the situation if less than three qualified persons responds to a professional services notice. With no opposition from the public, the rule became effective on December 15, 1995.

Due to the results of the *Asato v. Procurement Policy Board* ruling by the Hawaii Supreme Court, HAR § 3-122-66 was repealed on June 15, 2016. Since its repeal, agencies were required to broaden or reduce the scope of work, as applicable, and repeatedly resolicit until three responses were received.

SB2385, SD2, HD1 will help to increase government efficiency and will provide flexibility in securing professional services when an agency receives less than three qualified persons responses.

Thank you.

RICK BLANGIARDI  
MAYOR



ANDREW T. KAWANO  
DIRECTOR

CARRIE CASTLE  
DEPUTY DIRECTOR

TESTIMONY OF ANDREW T. KAWANO  
DIRECTOR OF BUDGET AND FISCAL SERVICES  
CITY AND COUNTY OF HONOLULU  
BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE  
**March 22, 2022, 2:00 PM, Conference Room 329 and Videoconference**

TO: The Honorable Aaron Ling Johanson, Chair  
and Members of the House Committee on Protection & Commerce

RE: SUPPORT OF SENATE BILL 2385, SD2, HD1 RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **supports** Senate Bill (SB) 2385, SD2, HD1 Relating to Procurement.

Hawaii Revised Statutes §103D-304 does not allow for an alternative if the minimum three (3) qualified persons cannot be obtained. Professional service procurements may be delayed indefinitely until the minimum is obtained.

For the reason stated above, the City respectfully supports Senate Bill 2385, SD2, HD1.

Mahalo for the opportunity to testify on this bill. Should you have any questions or concerns, please feel free to contact the Department of Budget & Fiscal Services' Division of Purchasing at 808-768-5535 or [bfs purchasing@honolulu.gov](mailto:bfs purchasing@honolulu.gov).

# DEPARTMENT OF FINANCE

REIKO MATSUYAMA, DIRECTOR

MICHELLE L. LIZAMA, DEPUTY DIRECTOR



DEREK S.K. KAWAKAMI, MAYOR  
MICHAEL A. DAHLIG, MANAGING DIRECTOR

## Testimony of Reiko Matsuyama Director of Finance, County of Kaua'i

Before the  
**Committee on Consumer Protection & Commerce**  
March 22, 2022 at 2:00 pm  
Conference Room 329

In consideration of  
**Senate Bill 2385 SD2, HD1**  
**Relating to Procurement**

Honorable Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

The Finance Department of the County of Kaua'i **supports** SB 2385 SD2, HD1, which allows greater flexibility for engaging in a professional services contract if we are unable to obtain three qualified responses. The Asato v. Procurement Policy Board ruling made it very difficult for us to timely move forward on many professional service initiatives.

Being that Kaua'i is a small market, many of the services required to fulfill County functions are unavailable on the island. There have been times when we have not been able to move forward with a service award at all because of the current restrictions. Other times, we have had to resolicit multiple times until three responses were received.

This has created a substantial number of inefficiencies and delays which have hampered necessary County functions and adversely impacted the people of our community who are ultimately the beneficiaries of these services.

It is for these reasons, that we **support** SB 2385 SD2, HD1. Thank you for your consideration of this testimony.



**AIA**  
Hawaii

March 21, 2022

**REVISED W/ SUGGESTED LANGUAGE**

TO: Honorable Aaron Ling Johanson, Chair  
House Committee on Consumer Protection  
and Commerce

FROM: Reid Mizue, AIA  
VP/President-elect / Legislative Advocacy Group  
**American Institute of Architects, Hawaii State Council**

SUBJECT: **Re: Senate Bill 2385 SD2 HD1  
Relating to Procurement**

The American Institute of Architects

AIA Hawaii  
828 Fort Street Mall, Suite 100  
Honolulu, HI 96813

T (808)628-7243  
contact@aiahonolulu.org  
[aiahonolulu.org/StateWideAdvocacy](http://aiahonolulu.org/StateWideAdvocacy)

Dear Chair Johanson,

My name is Reid Mizue of the American Institute of Architects Hawaii State Council (AIA). Last November, 2021 our AIA Hawaii delegation met intimately with you via ZOOM to discuss our organization's Legislative concerns prior to Session. One of our talking points was maintaining the strength of the Qualifications Based Selection (QBS) law that has been in place to avoid potential for corruption when selections for design consultant government projects are made. As the VP / President-elect of AIA Hawaii we are sending language on behalf of the AIA Hawaii State Council for proposed HD2 version of this bill. AIA Hawaii is **STRONGLY OPPOSED** to the current language of the Bill:

- HD 1 language leaves architect small businesses "in the dark" as to what "alternate procurement" might entail. AIA believes that laws affecting private businesses must be "bright light" statutes without over-reliance on rules yet to be formulated. Current lack of detail could result in increased business overhead and potential for public corruption.
- HD 1 language leaves private sector wide open to administrative decisions that lack balance between contractors and agencies; especially if "less than three persons" is as common as many agencies testify.
- HD 1 language actually has potential to delay contract awards because it leaves numerous state-wide purchasing agencies "in the dark" as to what procurement procedures are to be used. There is strong possibility that state-county agencies may use widely-varying procedures.

Our objections would be lessened if attached language is embedded in current HRS 103D-304. Qualifications-Based Selection for Professional Services:

- Statutory change is “bright light” and transparent information for private sector businesses. Architects have no idea of what “alternate procurement” is being proposed in HD 1. We venture to say that the legislature does not know either.
- Proposed language leaves current “minimum of three” in subsection (g) in a prominent position because it is “gold standard” that must be more often used.
- New dedicated subsection is proposed for “less than three” as an “exception” that many agencies testify that they need. It must be less utilized than “minimum of three” that meets federal standards.
- Proposed language relies heavily on existing sequential subsections of 103D-304, in effect for almost 20 years, long-familiar to both private and public sectors. So the bill can take immediate effect upon approval.
- AIA has testified against using Hawaii Administrative Rules to govern “less than three” because rule-making is much less transparent to private sector. Rule-making is also slow; often taking years to get approved. One rule-making feature that AIA does like is that the small business review gives us opportunity to protest any currently unknown rule that negatively impacts our small businesses. AIA prefers a statute with black-and-white instructions, between which purchasing agencies have some operating flexibility and discretionary contract awards. Currently 103D-304 has very few rules.
- Lastly, rule making is so slow while amending statute is swift to respond to any operational needs. Incredibly HAR 3-122-66, repealed due to Asato decision, was framed in 1995 – almost ten years before the current QBS reform law was passed. For a dozen years, the Rule was in violation of several more subsections of 103D-304 than the Hawaii Supreme Court ruled upon.

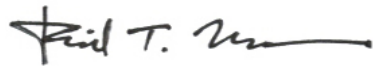
In closing, AIA is grateful for your studious attention to procurement legislation affecting consumer protection and businesses. The attached language is our response to agency problems cited in their testimony; although the extent of their problems is still unknown to us.

In our long legislative experience, competing interests were often charged by committee chairs to meet and resolve their differences. This has not happened with bills that would amend 103D-304. The

legislature, using three committee hearings, seems intent on forcing passage of deliberately vague language to the sole benefit of public agencies. Appending new draft numbers disguises the lack of any genuine progress toward resolving this issue.

Please contact us should you have comments or questions. Thank you for any consideration of improved language for Senate Bill 2385 SD2 HD1.

Sincerely,

A handwritten signature in black ink, appearing to read "Reid T. Mizue". The signature is fluid and cursive, with a long horizontal stroke at the end.

Reid Mizue, AIA  
American Institute of Architects, Hawaii State Council

\*SEE SUGGESTED LANGUAGE REVISIONS TO HB 2385 HD1 BELOW



## **SUGGESTED AIA Hawaii LANGUAGE REVISIONS TO HB 2385 HD1**

w/ Commentary & Footnotes in Italics:

(j) Contracts for professional services of ~~less than~~ within<sup>1</sup> the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, with at least any two persons 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.

(k)<sup>2</sup> If less than three persons qualified under state law<sup>3</sup> respond to the additional notice of need in subsection (b)<sup>4</sup> that has been posted for at least 30 days, the purchasing agency shall publish a notice of intent to move forward with ranking of fewer than three persons. The review committee shall not have made unwarranted decision to restrict competition.<sup>5</sup> Submissions shall be evaluated by the selection committee in accordance with subsections (d), (e) and (f).

(1) For two persons, the selection committee shall rank them based on the criteria in subsection (e). If both persons hold the same qualifications, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among persons holding the same qualifications. The ranking shall be sent to the head of the purchasing agency for negotiations conducted in the manner set forth in subsection (h).<sup>6</sup> The rankings of the selection committee shall not be overturned without due cause.

(2) For only one person, the purchasing agency may negotiate a contract with that person.<sup>7</sup>

(3) For a situation in which no person responds, the purchasing agency may engage in direct negotiations with a qualified person if the Administrator of the State Procurement Office determines in writing that it is neither practicable nor advantageous for the State to procure a service by again soliciting statements of qualifications and expressions of interest. When making this determination, consideration shall be given to the competition in the marketplace and whether the additional potential cost of preparing, soliciting, and evaluating responses is expected to exceed the benefits normally associated with the solicitations.<sup>8</sup>

For any contract to be awarded under this subsection<sup>9</sup>, the purchasing agency shall issue a 30-day notice of intent to award a contract. The notice of intent shall include the date, period, and tracking number of all previous notices, the name(s) of the respondents, the name of the proposed awardee, and protest procedures. Protests pursuant to section 103D-701 shall be filed in writing with the chief procurement officer or designee within 30 days after the notice under this subsection. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. Every agency shall report to State Procurement Office all of the contracts awarded under this subsection in the previous fiscal year.<sup>10</sup>

### ***Discussion for footnotes below in italics:***

*<sup>1</sup>Revised for clarity in SD 2 version.*

*<sup>2</sup>AIA wants separate subsection in lieu of amending subsection (g); allowing **main body** of QBS law to be **uninterrupted** because it is the most **standard** recommended practice for great majority of A-E contracts both in number and cumulative \$ value. Subsection (g) is the most historic language since Hawaii Procurement Code framed in 1993. Amending subsection (g) is **undesirable** because **“fewer than three” should be exception rarely used**. Subsection (j) is small purchase “at least any two persons on the pre-qualified list.” Proposed*

subsection (l) allows “fewer than three” as SB2385 intends; without regard to \$ value.

<sup>3</sup>“Low-bar” for qualifications because it is said that holding license is only criteria for placement on list of subsection (c). AIA wants “less than three persons” driven by private sector interest or lack thereof; not by public sector review committee (executive session) that could be interested in restricting number of persons to be ranked. (Subject to corruption.) (Note any kind of procurement section is allowed for other than design professional services)

<sup>4</sup>Subsection (b) details additional notices required. Assume DOT first notice prior to fiscal year includes all federal aid projects. Second DOT federal aid project-specific notice is the “additional notice” required by subsection (b) (2) that reads “The response to the initial notice does not result in adequate representation of available sources.” Added “of need” to ensure that two notices are issued for “new needs” in subsection (b)(3).

<sup>5</sup>The review committee shall not have made unwarranted decision to restrict competition. Possible source of corruption. The sentence is out of time sequence, but allows “less than three persons” to stand right next to subsection designation.

<sup>6</sup>Price negotiation in manner of subsection (h) – essential to QBS process. Otherwise, top two ranked persons could be asked to offer competing prices resulting in increased A-E business overhead cost. Competing prices would be allowed by current SD2 language. A-E increased business overhead would have to be paid by other public agencies faithful to standard QBS procedures. Increased overhead would likely impact consulting engineers more severely than architects; in a time when consultants are increasingly difficult to engage.

<sup>7</sup>Language allows for only one person; critical part of the bill’s intent from agency perspective.

<sup>8</sup>For situation of “less than three persons” in which no person responds, permissive language for direct negotiations is based on former HAR 3-122-66 (1995) repealed due to Asato v. Procurement Policy Board decision. “High bar” of written determination by SPO Administrator. Ideally not to be used, but makes subsection(k) a comprehensive solution for “less than three persons.”

<sup>9</sup>What could result in sole-source procurement requires two notices; the second one similar to 103D-306 Sole Source Procurement (can’t practically use 103D-306 because both time and \$ limits could be exceeded by A-E design contract).

<sup>10</sup>Currently there is no accumulated information relating to how often “minimum of three” cannot be achieved. Preventive measure highlighting pattern of potentially corrupt practices and need for purchasing agency to promote more future competition.

If AIA knew the details of agency problems, one solution could be to increase \$ value of 103D-305 where small purchase design professional services have dedicated \$ value – now \$100K.

**SB-2385-HD-1**

Submitted on: 3/21/2022 9:15:53 AM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Derek Mukai	Community Planning and Engineering, Inc.	Oppose	Written Testimony Only

Comments:

I am a Principal with Community Planning and Engineering, Inc., a private civil engineering and construction management company on Oahu. Our company was founded in 1957 and is responsible for the design of many residential communities west of Aloha Stadium. I have been practicing design engineering in Hawaii for over 30 years and currently serve as the President of the American Council of Engineering Companies Hawaii (ACECH).

We **STRONGLY OPPOSE SB2385 SD2 HD1**. The Qualifications-Based Section (QBS) process established by HRS 103D-304 safeguards public health and safety and taxpayer dollars by providing the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. QBS is the industry “gold” standard for selection of professional services, and it has been proven on projects throughout this country that it provides consistent project success, reduced cost, and improved quality of construction documents.

ACECH has worked tirelessly with State agencies to craft language that would allow flexibility for times when there are less than three design professionals, however, there is still disagreement on the appropriate language. I urge that this measure be referred to a working group to allow time to vet the potential impacts this could have on the State of Hawaii and its taxpayers.

We appreciate the opportunity to provide testimony on SB2385.

Respectfully submitted,

COMMUNITY PLANNING AND ENGINEERING, INC.

Derek K. Mukai, P.E., CCM

Principal



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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Testimony Presented Before the  
House Committee on Consumer Protection and Commerce  
March 22, 2022 at 2:00 p.m.

By  
Jan Gouveia  
Vice President for Administration  
University of Hawai'i

SB 2385 SD2 HD1 – RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Kitagawa, and members of the committee:

Thank you for the opportunity to present testimony on SB 2385 SD2 HD1 – Relating to Procurement. The University of Hawai'i supports this bill, which allows agencies to seek alternative procurement approval from the chief procurement officer or designee for the procurement of professional services when fewer than three qualified persons respond to a solicitation.

This would provide flexibility in securing professional services when the University has less than three qualified persons. Because this is not an uncommon occurrence, allowing agencies to proceed with the solicitation upon approval serves the best interest of the state.

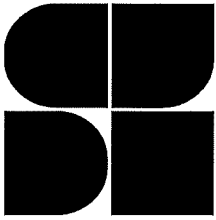
Thank you for the opportunity to testify in support of SB 2385 SD2 HD1.

1916 Young St. • 2<sup>nd</sup> Floor

Honolulu, HI 96826

PH (808) 942-9100

FAX (808) 942-1899



## SHIGEMURA, LAU, SAKANASHI, HIGUCHI AND ASSOCIATES, INC.

March 21, 2022

**House Committee on Consumer Protection and Commerce**  
**Hearing Date: Tuesday, March 22, 2:00 p.m., Conference Room 329**

Honorable Representatives Aaron Ling, Chair; Lisa Kitagawa, Vice Chair; and  
Members of the House Committee on Consumer Protection and Commerce

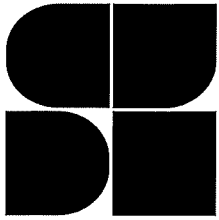
Subject: **SB2385 SD2 HD1**  
**TESTIMONY IN OPPOSITION**

Howard K.C. Lau  
Craig H. Sakanashi  
Wayne K. Higuchi  
Beverly Ishii-Nakayama

**Shigemura, Lau, Sakanashi, Higuchi and Associates strongly opposes** SB2385 SD2 HD1. The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.

Respectfully submitted,

Howard K.C. Lau  
President



## SHIGEMURA, LAU, SAKANASHI, HIGUCHI AND ASSOCIATES, INC.

March 21, 2022

**House Committee on Consumer Protection and Commerce**  
**Hearing Date: Tuesday, March 22, 2:00 p.m., Conference Room 329**

Honorable Representatives Aaron Ling, Chair; Lisa Kitagawa, Vice Chair; and  
Members of the House Committee on Consumer Protection and Commerce

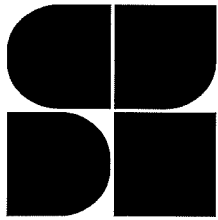
Subject: **SB2385 SD2 HD1**  
**TESTIMONY IN OPPOSITION**

**Shigemura, Lau, Sakanashi, Higuchi and Associates strongly opposes SB2385 SD2 HD1.** The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.

Respectfully submitted,

Beverly Ishii-Nakayama  
Principal

Howard K.C. Lau  
Craig H. Sakanashi  
Wayne K. Higuchi  
Beverly Ishii-Nakayama



## SHIGEMURA, LAU, SAKANASHI, HIGUCHI AND ASSOCIATES, INC.

March 21, 2022

**House Committee on Consumer Protection and Commerce**  
**Hearing Date: Tuesday, March 22, 2:00 p.m., Conference Room 329**

Honorable Representatives Aaron Ling, Chair; Lisa Kitagawa, Vice Chair; and  
Members of the House Committee on Consumer Protection and Commerce

Subject: **SB2385 SD2 HD1**  
**TESTIMONY IN OPPOSITION**

Howard K.C. Lau  
Craig H. Sakanashi  
Wayne K. Higuchi  
Beverly Ishii-Nakayama

**Shigemura, Lau, Sakanashi, Higuchi and Associates strongly opposes SB2385 SD2 HD1.** The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.

Respectfully submitted,

Wayne K. Higuchi  
Vice-President



THE LIMTIACO CONSULTING GROUP  
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

Committee on Consumer Protection & Commerce  
Hearing Date: Tuesday, March 22, 2022, 2:00 p.m.

March 21, 2022

**Honorable Representatives Aaron Ling Johanson, Chair; Lisa Kitagawa, Vice Chair; and Members of the Committee on Consumer Protection & Commerce**

**Subject: SB2385 SD2 HD1, Relating to Procurement  
TESTIMONY IN STRONG OPPOSITION**

Dear Chair Johanson, Vice Chair Kitagawa, and Committee Members:

The Limtiaco Consulting Group (TLCG) is a local civil and environmental engineering firm and is proud to be voted one of Hawaii's Best Places to Work and is consistently one of the top engineering firms according to Pacific Business News. TLCG is an active member of the American Council of Engineering Companies of Hawaii and other professional engineering organizations. TLCG principals believe it is important to give back to the communities we serve through beneficial engineering projects and meaningful volunteerism.

**TLCG strongly opposes SB2385 SD2 HD1 because the propose changes would encourage the “pay-to-play” and unethical procurement practices.**

Qualifications-based selection (QBS) is the nationally recognized model procurement code for the procurement of design professional services. Hawai'i's QBS law, §103D-304 has been in place for almost 30 years and works to protect public safety by ensuring the most qualified design professionals are selected for projects. SB2385 proposes language that could open the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.

Thank you for this opportunity to submit testimony. Please feel free to contact me if you have any questions.

Sincerely,  
THE LIMTIACO CONSULTING GROUP, INC.

Kyle H. Kaneshiro, P.E.  
Principal



**SB-2385-HD-1**

Submitted on: 3/21/2022 11:42:42 AM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Sean K. Sugai	Ronald N.S. Ho & Associates, Inc.	Oppose	Written Testimony Only

Comments:

Ronald N.S. Ho & Associates, Inc. **strongly opposes** SB2385 SD2 HD1. The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.



**Senate Committee on Consumer Protection and Commerce**  
**Hearing Date: Tuesday, March 22, 2022, 2:00 p.m.**

**March 21, 2022**

Honorable Senators Aaron Johanson, Chair; Lisa Kitagawa, Vice Chair; and Members of the Senate Committee on Consumer Protection and Commerce

**Subject: TESTIMONY IN STRONG OPPOSITION - SB 2385 SD2, HD1, Relating to Procurement**

Dear Chair Johanson, Vice Chair Kitagawa, and Committee Members:

CONSOR Engineers, LLC (CONSOR) is a multi-discipline firm providing engineering services for structural engineering, water-wastewater, transportation planning and design, and construction services. CONSOR's project portfolio, spans thousands of transportation projects across North America, Canada, Hawaii, and Overseas. Our firm's extensive roster of clients is comprised of numerous state departments of transportation, the US Army Corps of Engineers, the US Coast Guard, the US Navy, and the US Department of the Interior. CONSOR has conducted engineering work in 49 states and is familiar with numerous state and local procurement and contracting regulations. With 60 offices and more than 1,200 employees, including 330+ professional engineers. *CONSOR is ranked #69 on Engineering News-Record's Top 500 firms list for 2021.*

The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.

Mahalo for hearing our testimony, if you would like to discuss further, I can be available for consultation on this matter.

A handwritten signature in blue ink that reads "Ikaika Kincaid". The signature is fluid and cursive, written in a professional style.

Ikaika Kincaid, PE, CCM  
Regional Director, Hawaii









March 21, 2022

**House Committee on Consumer Protection & Commerce**  
**Hearing Date: Tuesday, March 22, 2022, 2:00 p.m.**

Honorable Chair Johanson, Vice Chair Kitagawa, and Committee Members

Subject: **SB 2385 SD2 HD 1, Relating to Procurement**  
**TESTIMONY IN OPPOSITION**

Dear Chair Johanson, Vice Chair Kitagawa, and Committee Members:

On behalf of our local engineering and construction management company, my colleagues and I strongly oppose SB2385 SD2 HD1 because it does not include appropriate language and safeguards to:

- 1) Prevent procurement abuse and corruption by government officials and staff; and
- 2) Ensure prudent efforts are made to select the most qualified design professionals for a particular project, in accordance with the Qualifications-Based Selection (QBS) process established by HRS §103D-304.

The loopholes created by this proposed bill are significant and will lead to further erosion of the public's trust in our government while also reducing some elements of public health and safety that the current QBS process provides.

For the aforementioned reasons, we support the American Council of Engineering Companies of Hawaii in requesting a working group so that the stakeholders can work together to find agreeable language.

Please do not hesitate to contact me if you have any questions regarding this letter of opposition.

Yours truly,  
Yogi Kwong Engineers, LLC

A handwritten signature in black ink that reads "Jeffrey K. Kalani".

Jeffrey K. Kalani, P.E.  
President/CEO

**SB-2385-HD-1**

Submitted on: 3/21/2022 1:21:34 PM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Sheryl Nojima	Gray Hong Nojima & Assoc., Inc.	Oppose	Written Testimony Only

Comments:

Gray, Hong, Nojima & Associates, Inc. is a small business of consulting civil engineers. We have been in business in Honolulu, HI for 50 years. We strongly oppose **SB2385 SD2 HD1, Relating to Procurement**. The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai'i in requesting a working group so that the stakeholders can work together to find agreeable language.

We appreciate the opportunity to provide testimony regarding **SB2385 SD2 HD1**. Please do not hesitate to contact us if you have any questions regarding our testimony.

Respectfully submitted,

GRAY HONG NOJIMA & ASSOCIATES, INC.

Sheryl E. Nojima, PhD, PE

**SB-2385-HD-1**

Submitted on: 3/21/2022 12:00:37 PM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Sandie Wong	Individual	Oppose	Remotely Via Zoom

Comments:

I strongly oppose SB2385,HD1 and join in the testimony submitted by the American Council of Engineering Companies, Hawaii.

Please defer this bill or amendment to form a working group for further study and discussion. This issue is so important, that we need to be sure that we fully vet any change to the statute.

Thank you.



My name is Daniel Chun and I do strongly concur with testimony submitted by American Institute of Architects. Ideally a **“bright light” statute** governs award of professional service contracts. It is not ideal for “fewer than three persons” to be considered for contracts. However, agencies have sent vague testimony alleging that their situation is quite common. One hopes that testimony is not intent on hiding the number of contracts to be awarded under deliberately vague language. Every committee draft to date “see-saws” between variations of alarming vague language without any legislative attempt to forge well-written “bright light” statutory agreement between public agency critical needs and private sector design professions with whom they normally have relevant collaborative relationship. SD 2 version seems to violate *ejusdem generis* as was already pointed out in Hawaii Supreme Court Asato vs. PPB decision.

Based on my three decades of legislative advocacy, there is a sense that “alternate language” for “flexibility” may be attempt to “hide” from this legislature, the public and the design professions; operating details of “fewer than three persons” by using Procurement Policy Board PPB decisions. Even worse, SB 2385 HD1 allows every state and county agency to use any kind of procurement deviating from benefits of state-wide procurement system.

There is understandable reluctance to ask legislature for statute authorizing contracts awarded under sole source or even direct solicitations when no person indicates interest. These smack of some kind of favoritism, while these are factual situations inhibiting completion of vital construction projects. So why not face the situation “head on” and amend the statute with as much transparency as is practicable?

In contrast, rule making is more concerned with administrator convenience than “open government.” HAR process can take several years. It is not unusual for agencies to operate under “Draft Administrative Rules” not yet made official. So we could be faced with significant use of “fewer than three”, agencies claim situation is common, with many contracts awarded under draft rules unrevealed at this time.

- 1993 procurement statute had selection committee compile long list of architects meeting **minimum** qualifications. Committee sent these names to head of the agency, the governor’s political appointee, to make final award using selection criteria that legislature left unlimited per statute. That statute was invented to reward campaign contributors. **Current language of SB 2385 HD 1 allows minimum qualified process.**
- For several years, Maui County required that competing prices be submitted for contract consideration. This increased architect-engineer business overhead costs at expense of other public agencies that used QBS - with its lower business overhead cost. **Current language of SB 2385 HD 1 allows higher overhead competing prices.**
- In late 1990s architects and our allied engineers were defamed in the press and fined for illegal campaign contributions. PPB proposed to debar many engineers from public contracts. AIA stopped PPB saying debarment was “double jeopardy” and architects would have to hire out-of-state consulting engineers. PPB attempt was outrageous because the seller was being punished, when the buyer bought the services on basis of campaign contributions. No buyer was ever reprimanded. Hence this young legislature must be more understanding. Current reform of 103D-304 took several years for AIA and ACEC to pass under strong resistance from “old guard” legislators. Hence our opposition to SB 2385 with its open-ended language strongly contrasting to rest of carefully-crafted procurement process. Recently we had situation of public corruption and it revived bad memories of troubles we had with “flexibility” in award of design professional service contracts. **Current language of SB 2385 HD1 opens the door to corrupt practices.**

# ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES  
of Hawaii

50 Years of Excellence

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March 22, 2022

## **House Committee on Consumer Protection & Commerce Hearing Date: Tuesday, March 22, 2022, 2:00 p.m.**

Honorable Chair Johanson, Vice Chair Kitagawa, and Members of the House  
Committee on Consumer Protection & Commerce

### **Subject: SB 2385 SD2 HD1, Relating to Procurement TESTIMONY IN OPPOSITION**

Dear Chair Johanson, Vice Chair Kitagawa, and Committee Members:

The American Council of Engineering Companies of Hawaii (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; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play. Not only does qualifications-based selection (QBS) provided by HRS §103D-304 safeguard public health and safety by providing for the most qualified firms to design critical infrastructure work; a recent national study by the ACEC Research Institute documented more consistent project success, reduced costs, and improved quality of construction documents when QBS is used.

**ACECH strongly opposes this bill.** ACECH and other industry partners worked extensively with the legislature 25 years ago to pass the QBS bill to eliminate corruption occurring in the selection of design professional services. When passing the original QBS bill, the legislature, in their wisdom, allowed for all other professional services to be selected by a variety of methods but restricted procurement of design professional services licensed under HRS §464 to only §103D-304 and §103D-307 (emergency procurement) because they recognized the necessity of good QBS processes. **We are concerned that the current proposed language provides a loophole that could be used to avoid QBS, accountability, and transparency.** ACECH has testified on every iteration of this bill and provided comments and/or suggested language that should allow flexibility for the rare situation where less than three design professionals respond to a solicitation, while requiring reporting to protect the intent of QBS. The history of this bill during the session shows that there is still disagreement on the appropriate language. ACECH strongly feels that a change to a statute as important as HRS §103D-304 deserves proper vetting to ensure the protection of Hawaii's taxpayers.

**ACECH requests that this measure be referred to a working group** to allow time for the stakeholders to talk through this issue and properly vet the potential impacts of such changes to a law that was enacted to protect the interests of the State and its taxpayers. ACECH is committed to working with agencies to understand this issue and develop a solution. We feel it is important for ACECH and AIA to be included in the working group as principal stakeholders.



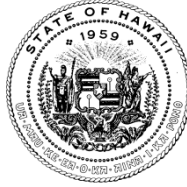
The SPO testified that HAR §3-122-66 was adopted without public opposition, but our industry was not consulted or informed that such a rule was being proposed. We note that HAR §3-122-66 was struck down as invalid by the Supreme Court of Hawai‘i. It’s important that the stakeholders work together to agree on language that will withstand challenge.

Respectfully submitted,  
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

A handwritten signature in black ink, appearing to read "Derek Mukai", is positioned above the typed name.

Derek Mukai, P.E.  
President

DAVID Y. IGE  
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY  
DIRECTOR

Deputy Directors  
ROSS M. HIGASHI  
EDUARDO P. MANGLALLAN  
PATRICK H. MCCAIN  
EDWIN H. SNIFFEN

**LATE**

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

March 22, 2022  
2:00 PM

State Capitol, Conference Room 309/Teleconference

**S.B. 2385, S.D. 2 H.D. 1  
RELATING TO PROCUREMENT**

House Committee on Consumer Protection & Commerce

The Department of Transportation (DOT) **provides comments** to this bill that allows a purchasing agency to submit a request for alternative procurement approval from the chief procurement officer or chief procurement officer's designee if fewer than three qualified persons respond to a solicitation.

The DOT respectfully **prefers S.B. 2385, S.D. 2** to this H.D. 1 measure as unlike the alternative procurement method, the exemption from procurement method is clearly defined and there currently exists a request for an exemption process under the procurement code.

The language of **S.B. 2385, S.D. 2** proposed the following revision to Hawaii Revised Statutes (HRS) 103D §-304(g):

“(1) Should fewer than three persons submit statements of qualifications the agency may make a request for an exemption pursuant to 103D-102(b)(4)(L)”

Approval of the exemption would follow an already existing transparent and fair process. Allowing for an exemption under the Hawaii Administrative Rules (HAR) § 3-120-5 provides for a posting of the exempted procurement of professional services for seven (7) calendar days before any approval action, effectively giving time for inquiries to the procuring agency or objections to be submitted to the chief procurement officer. There are no similar procedures under the alternative procurement requirements.

While neither the HRS nor the HAR clearly define an alternative procurement, the HAR allows for waivers to procurement in both the competitive sealed bidding and competitive sealed proposals methods of procurement. The HAR waivers to procurement allow for alternative procurements to include direct negotiations. Direct negotiations may provide the procuring agency with the most flexibility, however, direct negotiations could also include some subjectivity and might lead to challenges and

project delay. It also does not withstand the level of scrutiny and transparency that a request for an exemption would provide.

For example, for the competitive sealing bidding method, HAR 3-122-35(b)(2), provides for an alternative procurement when there are no bids received or there are no responsive responsible bidders and a rebid would be neither practicable, nor advantageous to the State, “an alternative procurement method may be selected to include, but not be limited to, direct negotiations.”

Another example is the competitive sealed proposal waiver to procurement when there is only one responsible offeror submitting an acceptable proposal at HAR 3-122-59(a)(4), “[a]n alternative procurement method may be conducted to include, but not be limited to, direct negotiations with the sole offeror first, and then with any contractor or vendor should negotiations with the sole offeror fail...” This includes direct negotiations with a vendor that did not submit a proposal.

The Department supports the qualifications-based process and follows its provisions for all consultant selections for both state and federal funding. For the majority of our initiatives, we do not have issues with receiving at least three qualifications. However, there have been request for qualifications that were issued multiple times because we could not receive the minimum three qualifications. In these instances, the state was unnecessarily delayed in its processes due to lack of interest or expertise in the offering.

In these situations, the state should have the flexibility of moving forward with less than three submittals if it is in the best interest of the state. We believe the language in **S.B. 2385, S.D. 2** provides the state the flexibility to move forward efficiently while demonstrating transparency and accountability for its decisions. H.D. 1 as written does not define an alternative procurement and may be problematic as a new process would need to be developed to implement.

Thank you for the opportunity to provide testimony.

**LATE**

**SB-2385-HD-1**

Submitted on: 3/21/2022 2:00:14 PM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Janice Marsters	Hart Crowser	Oppose	Remotely Via Zoom

Comments:

Honorable Representatives:

I am a Senior Principal with Hart Crowser, a division of Haley & Aldrich, a geotechnical, environmental, and natural resources consulting firm with offices on O‘ahu and Maui. I have led design professional firms in Hawai‘i for more than 30 years. I was also involved heavily in working with the legislature 25 years ago to pass HRS Section 103D-304, the State's Qualification-Based Selection (QBS) bill.

At the time, the negative press associated with the corruption was occurring in the selection of design professionals was a black mark on our industry and on government agencies. The law enacted follows the model procurement process for selection of design professional services nationally.

I oppose the bill because of my concern about the erosion of “qualifications-based selection” (QBS) for design professionals and the potential negative impacts on public health and safety and taxpayer funds. I know that ACECH has tried throughout this session to negotiate language that would satisfy the concerns of all stakeholders. At a minimum, more reporting is required to prevent the abuses of the past. I request that a working group be established to work through these concerns so that appropriate language could be advanced in next year's session.

Respectfully submitted,

Janice Marsters

808.371.8504

**SB-2385-HD-1**

Submitted on: 3/21/2022 3:55:26 PM

Testimony for CPC on 3/22/2022 2:00:00 PM



Submitted By	Organization	Testifier Position	Testify
Barbara Shideler	Mason Architects, Inc.	Oppose	Written Testimony Only

Comments:

**Sample Firm testimony regarding SB2385 SD2 HD1:**

Mason Architects, Inc. **strongly opposes** SB2385 SD2 HD1. The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. We support American Council of Engineering Companies of Hawai‘i in requesting a working group so that the stakeholders can work together to find agreeable language.

**LATE**

**SB-2385-HD-1**

Submitted on: 3/21/2022 3:22:44 PM

Testimony for CPC on 3/22/2022 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Kevin Gooding	Individual	Oppose	Written Testimony Only

Comments:

My name is Kevin Gooding, and I am the Hawaii Operations Manager for INTERA, a geosciences company working in water resources and coastal engineering. INTERA's office is in Kailua and I live in Waimanalo. I oppose SB2385 SD2 HD1. The Qualifications-Based Selection process established by HRS §103D-304 safeguards public health and safety and taxpayer dollars by providing for the most qualified firms to design critical infrastructure projects. The proposed language opens the door for abuse in selection of professional services. I believe that a change in the statute is premature and that a working group should be formed so that the stakeholders can work together to find agreeable language.