



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

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

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

April 5, 2022
1:30 PM

State Capitol, Conference Room 308/Teleconference

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

House Committee on Finance

The Department of Transportation (DOT) **supports** this bill that allows a purchasing agency to submit a request for an exemption from the procurement process from the chief procurement officer or chief procurement officer's designee if fewer than three qualified persons respond to a solicitation and proposes a revision to this measure.

The DOT proposes the following revision to Hawaii Revised Statutes, 103D-304(g):

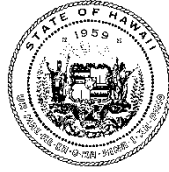
(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. If fewer than three persons respond to a notice to providers of professional services, the agency may submit a request to the chief procurement officer to allow the ranking of less than three persons and to proceed with selection and contract award under the provisions of this chapter. 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. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause.

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 this

measure provides the state the flexibility to move forward efficiently while demonstrating transparency and accountability for its decisions.

Thank you for the opportunity to provide testimony.



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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

**TESTIMONY OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE**

TO THE HOUSE COMMITTEE ON FINANCE

April 5, 2022; 1:30 PM

**SENATE BILL 2385, SD2, HD2
RELATING TO PROCUREMENT**

Chair Luke, Vice Chair Yamashita, and members of the committee, thank you for the opportunity to submit testimony on SB2385, SD2, HD2. The State Procurement Office (SPO) provides comments on this bill and proposes amendments to page 2, SECTION 2, lines 11-14 of the bills as follows (revisions/additions in red):

"If there are fewer than three [qualified] persons [respond to a solicitation], the agency may submit a request for exemption from the chief procurement officer pursuant to section 103D-102(b)(4)(L) to allow the ranking of less than three persons and to proceed with selection and contract award under the provisions of this chapter. The request for exemption shall include the names of the persons submitted by the selection committee."

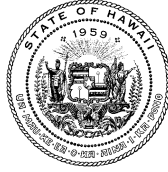
Historical Background. In 1995, the Procurement Policy Board created Hawaii Administrative Rule (HAR) § 3-122-66 to address the situation if less than three qualified persons responds to a professional services notice. With no opposition from the public, the rule became effective on December 15, 1995.

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, HD2 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.

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

COMMITTEE ON FINANCE

APRIL 5, 2022, 1:30 P.M.
VIA VIDEOCONFERENCE/CONFERENCE ROOM 308, STATE CAPITOL

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

RELATING TO PROCUREMENT

Chair Luke, Vice Chair Yamashita, and Members of the Committee, thank you for the opportunity to submit testimony on S.B. 2385, S.D. 2, H.D.2. The Department of Accounting and General Services (DAGS) supports the intent of the 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.

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 Finance
April 5, 2022 at 1:30 pm
Conference Room 308

In consideration of
Senate Bill 2385 SD2, HD2
Relating to Procurement

Honorable Chair Luke, Vice Chair Yamashita, and Members of the Committee:

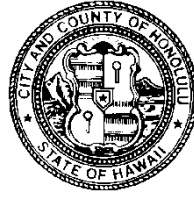
The Finance Department of the County of Kaua'i **supports** SB 2385 SD2, HD2, which allows greater flexibility for engaging in a professional services contract if we are unable to obtain three qualified responses. The Asato v. Procurement Policy Board ruling made it very difficult for us to timely move 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, HD2. Thank you for your consideration of this testimony.

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 FINANCE
April 5, 2022, 1:30 PM, Conference Room 308 and Videoconference

TO: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

RE: SUPPORT OF SENATE BILL 2385, SD2, HD2 RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **supports** Senate Bill (SB) 2385, SD2, HD2 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.

Hearing all previous testimony regarding the exemption of architects and engineers, the City offers the following comments:

1. On Page 2, beginning on Line 11, add the following:

“If fewer than three qualified persons respond to a solicitation, the agency may submit a request for exemption from the chief procurement officer pursuant to section 103D—102(b)(4)(L)-, except for design professional services furnished by licensees under chapter 464.”

2. If HRS 103D-304 is amended as proposed in this bill or as proposed above, HRS 103D-102(b)(4)(L) must also be amended:

“(L) Any other goods or services which the policy board determines by rules or the chief procurement officer determines in writing is available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State; or any professional services pursuant to section 103D-304(g); and”

In accordance with HRS §103D-104, *Definitions*:

“Services” means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.

“Professional Services” means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, public finance bond underwriting, public finance bond investment banking, or any other practice defined as professional by the laws of this State or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook.

For the reason stated above, the City respectfully supports Senate Bill 2385, SD2, HD2.

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 bfspurchasing@honolulu.gov.

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

50 Years of Excellence

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April 05, 2022

House Committee on Finance

Hearing Date: Tuesday, April 5, 2022, 1:30 p.m.

Honorable Chair Luke, Vice Chair Yamashita, and Members of the House Committee on Finance

Subject: **SB 2385 SD2 HD2, Relating to Procurement Providing Comments**

Dear Chair Luke, Vice Chair Yamashita, 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 **provides comments** on this bill and proposes the following amendments:

"(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. If there are fewer than three persons, the agency may submit a request for exemption from the chief procurement officer pursuant to section 103D-102(b)(4)(L) to allow the ranking of less than three persons and to proceed with selection and contract award under the provisions of this chapter. The request for exemption shall include the names of the persons submitted by the selection committee. 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. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause."



While ACECH supports the proposed amendments, we do so with reservations. We are concerned the rush of the legislative session did not provide time for adequate discussion among other stakeholders to vet the potential negative effects of enacting such a change. The many different proposals for language alternatives as the bill moved through the legislature shows that it's a complicated issue that deserved a more thoughtful approach. 103D-304 provides vital protection to residents of the State to ensure that taxpayer-funded projects are performed by the most qualified professional. Throughout the session, ACECH repeatedly asked for the bill to be deferred to allow a working group that would give stakeholders the opportunity to craft the right solution to the rare problem identified by the agencies. We strongly recommend that future proposed modifications to the 103D-304 be discussed prior to Legislative Session among all stakeholders, including ACECH and AIA.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

A handwritten signature in black ink, appearing to read "Derek Mukai".

Derek Mukai, P.E.
President



April 5, 2022

TO: Honorable Sylvia Luke, Chair
House Committee on Finance

FROM: Reid Mizue, AIA
Vice President / Legislative Advocacy Group
American Institute of Architects, Hawaii State Council

SUBJECT: **Re: Senate Bill 2385 HD2
Relating to Procurement**

The American Institute of Architects

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

T (808) 628-7243
contact@aiahonolulu.org
aiahonolulu.org/AIAHawaiiStateCouncil

Dear Chair Luke and Members of the Committee,

My name is Reid Mizue VP/President-elect AIA Hawaii Council testifying in **CONSTRUCTIVE OPPOSITION** to the current language of Senate Bill 2385 HD2; specifically:

Authorizing “fewer than three” makes statute in conflict with itself

Currently subsection (b)(1) requires additional notice if response to initial notice is inadequate. With “fewer than three” being authorized by SB 2385, means that if no persons respond to the first notice – no additional notice is required [DOT excepted]. An agency may then proceed to alternate procurement such as direct negotiations. This seems potentially corruptible in a repeat of the turn-of-the century controversy surrounding award of design professional public contracts for campaign contributions. AIA is extremely concerned because we as design professional services providers do not desire to see a repeat of misuse resulting in punishable offenses.

Reliance on HRS 103D-102(b)(4) contravenes Hawaii Supreme Court ruling in Asato case

“Accordingly, the factual situation of less than three qualified persons under the Board's rule HAR § 3-122-66, cannot be rationalized as an unenumerated exception within the scope of HRS § 103D-102(b)(4).” Based on doctrine of *ejusdem generis*, exemption for less than three qualified persons cannot be construed in connection with the list of items (A) through (K) preceding it. Items (A) through (K) enumerate specific types of goods or services **[professional services are not specifically enumerated]**, whereas less than three qualified persons is a particular **factual situation** – not a good or service.

Hawaii Supreme Court No. SCAP-12-0000789 O2-14-2014

AIA objections will be satisfied with HD3 for new “bright light” subsection in 103D-304:

- If legislated into 103D-304 as public policy, it is “sunshine law” governing design professional services procurement that has had history of public corruption.
- It is all the authority needed for contract consideration for two persons, one person or even if no person applies; using direct negotiations. Language is not an “exemption” nor an “exception.” It is a “**factual situation**” predicament that public agencies testify they find themselves in due to occasional lack of private sector response.
- Language sets minimum number of solicitation notices as “threshold” for “fewer than three” approval by **State Procurement Office using existing HAR 3-120-5 workflow.**
- Dedicated subsection (k), with “bright light” sequential agency procedures, allowing the rest of 103D-304 to stand unamended as 2003 reform law meeting the “gold standard” for procuring design professional service contracts.
- May be immediately operational without procurement directives or rules. Language has origins in testimony sent to Senate WAM on Feb 18. We have revised several times. Proposed HD3 language is based on minutes that AIA received for the only meeting with SPO/DOT held Mar 30.

There has been insufficient opportunity to craft perfect language. Hence the bill should properly be deferred OR working group be assembled before 2023 session to advance any “glitch bill” required if revised subsection is approved. There is also opportunity for refinement using HD3 or conference committee process.

Thank you for this opportunity to **CONSTRUCTIVELY OPPOSE** current language of Senate Bill 2385 by offering HD3 lanugage below:

Sincerely,
American Institute of Architects, Hawaii State Council

Note:

(See following page for suggested HD3 Language, benefitting all parties.)

PROPOSED HD 3 LANGUAGE FOR DEDICATED SUBSECTION

(k)¹ For a factual situation in which fewer than three persons qualified under state law² respond to the additional notice of need in subsection (b)³ that has been posted for at least 30 days; the purchasing agency may request State Procurement Office approval to proceed under rules adopted by the policy board.⁴ The request shall include the dates of all solicitation notices and names of persons on the list of subsection(c); including situation in which no person responds.⁵ Submissions shall then 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). The rankings of the selection committee shall not be overturned without due cause.

(2) For only one person; the selection committee shall first evaluate qualifications and may then send the name to the head of the purchasing agency to negotiate a contract at a fair and reasonable price.⁶

(3) For a situation in which no person responds, the head of the purchasing agency may determine that there is only one source for the required service and engage in direct negotiations with a qualified person.⁷ For any contract to be awarded, the purchasing agency shall issue a "Notice of Sole Source" at least seven days prior to awarding a contract.⁸ Persons may file written objections to the issuance of a contract within seven days. Rules of the policy board shall provide for the disposition of objections, including a written summary of the disposition. The written determination, any objection, past performance evaluations relied upon, and a written summary of the disposition of any objection shall be included in the contract file. The written determination shall contain such information as the rules of the policy board require.⁸

Every agency shall report to State Procurement Office all of the contracts awarded under this subsection in the previous fiscal year.⁹

Explanation below for footnotes required due to limited stakeholder discussions.

THIS IS NOT PART OF PROPOSED HD3 for STATUTE

*¹AIA wants separate subsection in lieu of amending subsection (g); allowing **main body** of QBS law to be **uninterrupted** because it is*

the **standard** recommended practice for great majority of A-E contracts in number and cumulative \$ value. Amending subsection (g) is **undesirable** because **“fewer than three” should ideally be situation rarely used.**

²“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 agency discretion. Add “qualified under state law” to prohibit discretionary restriction of respondents under HAR 3-122-16.04.

³Subsection (b) details additional notices required. As example 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).

⁴Used existing rules adopted for HAR 3-120-5 exemptions; thus includes posting notice and other protections such as change order reviews by SPO to prevent abuse.

⁵Add dates of notices to ensure project has been adequately advertised. Add list of names on list of subsection (c) based on respondents OR no person responding. These names are basis for “fewer than three.”

⁶Language allows for only one person; critical part of SB 2385 intent from agency testimony.

⁷For situation of “less than three persons” in which no person responds, permissive language for direct negotiations is based on language of HRS 103-306 sole source procurement. **If legislature believes that sole source professional service contracts are more open to corruption, it can delete (k)(3) language.** HRS 103D-302 and HRS 103D-303 both allow direct negotiations via HAR.

⁸The written determination, 7-day public notice and protest procedures are based on sole-source contracts HRS 103D-306. New work flow required at SPO to link with first HAR 3-122-5 notice.

⁹Currently 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.

SB-2385-HD-2

Submitted on: 4/4/2022 2:37:55 PM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Brent Tokita	AIA Hawaii State Council	Comments	Written Testimony Only

Comments:

I concur with AIA Testimony.

SB-2385-HD-2

Submitted on: 4/1/2022 4:31:00 PM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Palmer Hafdahl	Palms Hawaii Architecture LLC	Comments	Written Testimony Only

Comments:

I concur with AIA Testimony. Having participated in the careful AIA consideration while recognizing the current public sentiment against excessive regulation, I believe the current direction is throwing out the baby with the bath water.

Mahalo,

pH

SB-2385-HD-2

Submitted on: 4/1/2022 6:17:50 PM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
David Kaahaaina, Jr.	Individual	Comments	Written Testimony Only

Comments:

As a member of the American Institute of Architects (AIA) Hawaii State Council, I am in favor of the testimony submitted by the AIA on this vital matter of importance to our profession.

SB-2385-HD-2

Submitted on: 4/3/2022 2:51:01 PM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
JJ	AIA LAG	Comments	Written Testimony Only

Comments:

I concur with the AIA Testimony

SB-2385-HD-2

Submitted on: 4/4/2022 2:31:16 AM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Daniel G. Chun	Individual	Oppose	Written Testimony Only

Comments:

I worked on the current language of HRS 103D-304 over twenty years ago. I **STRONGLY OPPOSE** current language of this bill as "black hole" in subsection (g) with statute in conflict with itself. This has happened before in mid-1990s, also in association with "fewer than three persons." I worked on passage of another bill on this subject in late 1990s; only to have Governor Waihee VETO it over a single flawed word in language. So I recognize a poorly written bill when I see one. SB 2385 is one!

I do concur with testimony of American Institute of Architects.

SB-2385-HD-2

Submitted on: 4/4/2022 10:07:33 AM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Sandie Wong	Individual	Comments	Remotely Via Zoom

Comments:

I join in the comments submitted by the American Council of Engineering Companies - Hawaii and will be available for questions. Thank you.

SB-2385-HD-2

Submitted on: 4/4/2022 4:14:44 PM

Testimony for FIN on 4/5/2022 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Katherine MacNeil	Individual	Comments	Written Testimony Only

Comments:

I concur with AIA Testimony