

DAVID Y. IGE  
GOVERNOR



BONNIE KAHAKUI  
ACTING ADMINISTRATOR

**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>  
Twitter: [@hawaiispo](https://twitter.com/hawaiispo)

TESTIMONY  
OF  
BONNIE KAHAKUI, ACTING ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE  
ON  
WAYS AND MEANS

February 18, 2022; 10:00 AM

SENATE BILL 2385 SD1  
RELATING TO PROCUREMENT

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the committee, thank you for the opportunity to submit testimony on SB2385 SD1. The State Procurement Office (SPO) supports this bill and submits the following comments:

In 1995, the Procurement Policy Board created 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Due to the results of the *Asato v. Procurement Policy Board* ruling by the Hawaii Supreme Court, HAR § 3-122-66 was repealed on June 15, 2016.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.

The SPO supports SB2385 SD1 to increase government efficiency.

Thank you.



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

---

Testimony Presented Before the  
Senate Committee on Ways and Means  
February 18, 2022 at 10:00 a.m.

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

### SB 2385 SD1 – RELATING TO PROCUREMENT

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the committee:

Thank you for the opportunity to present testimony on SB 2385 SD1 – Relating to Procurement. The University of Hawai'i supports this bill, which allows agencies to seek alternative procurement approval for the procurement of professional services when fewer than three qualified persons submit bids or proposals.

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 SD1.

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  
SENATE COMMITTEE  
ON  
WAYS AND MEANS

FRIDAY, FEBRUARY 18, 2022, 10:00 A.M.  
CONFERENCE ROOM 211, STATE CAPITOL

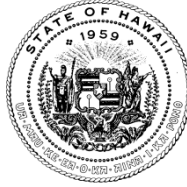
S.B. 2385, S.D. 1

RELATING TO PROCUREMENT

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 2385, S.D. 1. 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.

DAGS also recommends that the proposed insertion language on page 2, lines 11 - 13, be revised to read, “...provided that if there are fewer than three qualified respondents to solicitations for qualifications, the agency may submit a request for alternative procurement approval from the chief procurement officer or designee.”

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



**LATE**

**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

February 18, 2022  
10:00 a.m.  
State Capitol, Teleconference

**S.B. No. 2385, S.D. 1**  
**RELATING TO PROCUREMENT**

Senate Committee on Ways and Means

---

The Department of Transportation (DOT) **provides comments** to this bill.

S.B. No. 2385 proposes that if less than three qualified persons are available, the agency may submit a request for "alternative procurement approval" from the chief procurement officer or designee.

Hawaii Revised Statute, Chapter 103D-301, lists procurement methods as competitive sealed bids, competitive sealed proposals, professional services procurement, small purchases, sole source procurement, and emergency procurement. Solicitations are posted on the State Procurement Office's HANDS (Hawaii Awards & Notices Data System) for a minimum 30 calendar days, providing all firms adequate time to offer submittals. The DOT believes resoliciting professional services using an alternative procurement will not guaranty additional qualified persons and will only cause project delay.

DOT proposes amendment to S.B. No. 2385 allowing "If less than three qualified persons are available, the agency may proceed with two or fewer qualified persons, provided that the agency determines in writing that it is in the best interests of the State to proceed with fewer than three qualified persons."

Thank you for the opportunity to provide testimony.

# 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 Ways and Means**  
February 18, 2022 at 10:00 am  
211 Via Videoconference

In consideration of  
**Senate Bill 2385 SD1**  
**Relating to Procurement**

Honorable Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Committee:

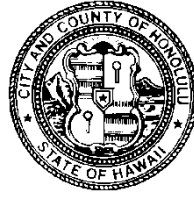
The Finance Department of the County of Kaua'i **supports** SB 2385 SD1, which allows greater flexibility for engaging in a professional services contract if we are unable to obtain three qualified responses. The Asato v. Procurement Policy Board ruling made it very difficult for us to timely move forward on many professional service initiatives.

Being that Kauai 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 SD1. 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 SENATE COMMITTEE ON WAYS AND MEANS  
**February 18, 2022, 10:00 AM, Conference Room 211 and Videoconference**

TO: The Honorable Donovan M. Dela Cruz, Chair  
and Members of the Senate Committee on Ways and Means

RE: SUPPORT OF SENATE BILL 2385, SD1, RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **supports** Senate Bill (SB) 2385, SD1, 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.

The City has one comment, to amend page 2, Section 2, sentence starting on line 8 and ending on line 13:

“(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; ~~provided that~~ if fewer than three qualified persons submit bids or proposals, the agency may submit a request for alternative procurement approval from the chief procurement officer or designee, except for design professional services furnished by licensees under chapter 464.”

For the reasons stated above, the City respectfully supports Senate Bill 2385, SD1.

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](mailto:bfspurchasing@honolulu.gov).

# ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES  
of Hawaii

50 Years of Excellence

## 2021-2022 Board of Directors

### **President**

Derek Mukai, P.E.  
Community Planning  
& Engineering, Inc.  
Ph: (808) 531-4252

### **President-Elect**

Nimr Tamimi, P.E.  
Engineering Partners, Inc.  
Ph: (808) 930-7823

### **Treasurer**

Kyle Kaneshiro, P.E.  
The Limtiaco Consulting Group  
Ph: (808) 586-7790

### **Secretary**

Shannon Holman, P.E.  
Orion Engineers & Associates  
Ph: (808) 282-7986

### **Past President**

Garret Masuda, P.E.  
InSynergy Engineering, Inc.  
Ph: (808) 521-3773

### **National Director**

Sean K. Sugai, P.E.  
Ronald N.S. Ho & Associates, Inc.  
Ph: (808) 941-0577

### **Directors**

Michele Adolpho, P.E.  
ECS, Inc.  
Ph: (808) 591-8181

Charles Jury, P.E.  
Okahara and Associates, Inc.  
Ph: (808) 524-1124

Ross Kaneko, P.E.  
Jacobs Engineering Group, Inc.  
Ph: (808) 440-0225

Ginny M. Wright  
ACECH Executive Director  
350 Ward Ave. Ste. #160-83  
Honolulu, Hawaii 96814  
Ph: (808) 741-4772  
Email: [gwright@acechawaii.org](mailto:gwright@acechawaii.org)  
Website: [www.acechawaii.org](http://www.acechawaii.org)

February 16, 2022

## **Senate Committee on Ways and Means**

**Hearing Date: Friday, February 18, 2022, 10:00 a.m.**

Honorable Senators Donovan M. Dela Cruz, Chair; Gilbert S.C. Keith-Agaran, Vice Chair; and Members of the Senate Committee on Ways and Means

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

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, 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 **OPPOSES this bill** as written due the potential for corruption of the procurement process with respect to procurement of design professionals. We believe the "alternate procurement" language is too vague and could be used to sidestep Qualification-Based Selection, which is the standard procurement method for professional services. We remember the corruption that tarnished our state prior to passage of Section 103D-304 and seek to avoid diminishing the regulation and the protections it provides to the public. Recent news of corruption is a good reminder of the need for rigorous procurement procedures.

ACECH met with the State DOT-Highways to understand their challenges and worked to develop alternative language that we believe addresses their concerns and provides a rigorous procedure to address the rare situation when they receive less than three offerors. Our proposed revisions to Section 103D-304 are attached. We would support the bill if modified so that Section 103D-304 contains the protections provided by this language.

We appreciate the opportunity to provide testimony on this matter. Please contact us if you have any questions.

Respectfully submitted,  
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII



Derek Mukai, P.E.  
President



Proposed revisions to Section 103D-304:

(f) The selection committee shall evaluate the submissions of persons on the list prepared pursuant to subsection (c) and any other pertinent information which may be available to the agency, against the selection criteria listed in subsection (e). The committee may conduct confidential discussions with any person who is included on the list prepared pursuant to subsection (c) regarding the services which are required and the services they are able to provide. In conducting discussions, there shall be no disclosure of any information derived from the competing professional service offerors.

(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. 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.

(h) If less than three qualified persons respond to a solicitation that has been posted for at least 30 days and in accordance with subsection (b), with qualifications assessed in accordance with subsection (c), the purchasing agency shall (1) provide clearer project requirements in the scope of work and post another solicitation for at least another 30 days or (2) publish a notice that the agency intends to move forward with ranking fewer than three persons. Submissions shall be evaluated by the review committee and selection committee in accordance with subsections (c), (d), (e) and (f). For two persons, the selection committee shall rank them based on the criteria in subsection (e) and send the ranking to the head of the purchasing agency. For any situation of ranking less than three persons, the purchasing agency shall issue a 30-day notice of the intent to award a contract. The notice shall include the date, period, and tracking number of the solicitation notice(s), 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. 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.

(hi) The head of the purchasing agency or designee shall negotiate a contract with the first ranked person, including a rate of compensation which is fair and reasonable, established in writing, and based upon the estimated value, scope, complexity, and nature of the services to be rendered. If a satisfactory contract cannot be negotiated with the first ranked person, negotiations with that person shall be formally terminated and negotiations with the second ranked person on the list shall commence. The contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked or next ranked person. Failing accord with the second ranked person, negotiations with the next ranked person on the list shall commence. If a contract at a fair and reasonable



price cannot be negotiated, the selection committee may be asked to submit a minimum of three additional persons for the head of the purchasing agency to resume negotiations in the same manner provided in this subsection. Negotiations shall be conducted confidentially.

(ij) Contracts awarded under this section for \$5,000 or more shall be posted electronically within seven days of the contract award by the chief procurement officer or designee and shall remain posted for at least one year. Information to be posted shall include, but not be limited to:

- (1) The names of the persons submitted under subsection (g);
- (2) The name of the person or organization receiving the award;
- (3) The dollar amount of the contract;
- (4) The name of the head of the purchasing agency or designee making the selection; and
- (5) Any relationship of the principals to the official making the award.

(jk) 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 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.

(kl) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §10; am L 1997, c 21, §1 and c 352, §7; am L 2000, c 141, §1; am L 2003, c 52, §5; am L 2004, c 216, §1]



Senate Committee on Ways and Means  
Hearing Date: Friday, February 18, 2022, 10:00 a.m.

February 17, 2021

Honorable Senators Donovan M. Dela Cruz, Chair; Gilbert S.C. Keith-Agaran, Vice Chair; and Members of the Senate Committee on Ways and Means

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

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, 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 1,400 employees, including 330+ professional engineers. *CONSOR is ranked #69 on Engineering News-Record's Top 500 firms list for 2021.*

We participated in the meeting that ACECH held with the State DOT-Highways group to understand their challenges and together we have worked to develop alternative language that we believe addresses their concerns and provides a rigorous procedure to address the rare situation when they receive less than three offerors. Our proposed revisions to Section 103D-304 are attached. ***We would support the bill if modified so that Section 103D-304 contains the protections provided by this language.***

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

Mahalo,  
CONSOR Engineers, LLC

A handwritten signature in blue ink that reads "Ikaika Kincaid". The signature is fluid and cursive, written over the printed name.

Ikaika Kincaid, PE, CCM  
Regional Director, Hawaii

**Proposed revisions to Section 103D-304:**

(f) The selection committee shall evaluate the submissions of persons on the list prepared pursuant to subsection (c) and any other pertinent information which may be available to the agency, against the selection criteria listed in subsection (e). The committee may conduct confidential discussions with any person who is included on the list prepared pursuant to subsection (c) regarding the services which are required and the services they are able to provide. In conducting discussions, there shall be no disclosure of any information derived from the competing professional service offerors.

(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. 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.

(h) If less than three qualified persons respond to a solicitation that has been posted for at least 30 days and in accordance with subsection (b), with qualifications assessed in accordance with subsection (c), the purchasing agency shall (1) provide clearer project requirements in the scope of work and post another solicitation for at least another 30 days or (2) publish a notice that the agency intends to move forward with ranking fewer than three persons. Submissions shall be evaluated by the review committee and selection committee in accordance with subsections (c), (d), (e) and (f). For two persons, the selection committee shall rank them based on the criteria in subsection (e) and send the ranking to the head of the purchasing agency. For any situation of ranking less than three persons, the purchasing agency shall issue a 30-day notice of the intent to award a contract. The notice shall include the date, period, and tracking number of the solicitation notice(s), 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. 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.

(~~h~~i) The head of the purchasing agency or designee shall negotiate a contract with the first ranked person, including a rate of compensation which is fair and reasonable, established in writing, and based upon the estimated value, scope, complexity, and nature of the services to be rendered. If a satisfactory contract cannot be negotiated with the first ranked person, negotiations with that person shall be formally terminated and negotiations with the second ranked person on the list shall commence. The contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked or next ranked person. Failing accord with the second ranked person, negotiations with the next ranked person on the list shall commence. If a contract at a fair and reasonable price cannot be negotiated, the selection committee may be asked to submit a minimum of three additional persons for the head of the purchasing agency to resume negotiations in the same manner provided in this subsection. Negotiations shall be conducted confidentially.

(i) Contracts awarded under this section for \$5,000 or more shall be posted electronically within seven days of the contract award by the chief procurement officer or designee and shall remain posted for at least one year. Information to be posted shall include, but not be limited to:

- (1) The names of the persons submitted under subsection (g);
- (2) The name of the person or organization receiving the award;
- (3) The dollar amount of the contract;
- (4) The name of the head of the purchasing agency or designee making the selection; and
- (5) Any relationship of the principals to the official making the award.

(~~j~~k) 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 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~~) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed. [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §10; am L 1997, c 21, §1 and c 352, §7; am L 2000, c 141, §1; am L 2003, c 52, §5; am L 2004, c 216, §1]







February 17, 2022

**Senate Committee on Ways and Means  
Hearing Date: Friday, February 18, 2022, 10:00 a.m.**

Honorable Senators Donovan M. Dela Cruz, Chair; Gilbert S.C. Keith-Agaran, Vice Chair; and Members of the Senate Committee on Ways and Means

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

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, and Committee Members:

As the President of a local engineering and construction management company, I **OPPOSE** SB 2385 (as-written) for the following reasons:

- As-written, this bill opens to door to corruption because “alternate procurement” is too vague and could be used to sidestep Qualification-Based Selection.
- The American Council of Engineering Companies of Hawaii (ACECH) is currently working with State DOT-Highways to understand their challenges. ACECH has worked to develop better language for this bill, that addresses DOT-Highways’ concerns and provides a rigorous procedure to address the rare situation when agencies receive less than three offerors.
- If this bill (proposing to amend HRS §103D-30) moves forward, it should only do so with the above-referenced language that ACECH and DOT-Highways has collaborated on – not the current language in this bill.

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". The signature is written in a cursive, flowing style.

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

**SB-2385-SD-1**

Submitted on: 2/17/2022 9:50:38 AM

Testimony for WAM on 2/18/2022 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Janice Marsters	Testifying for Hart Crowser, a division of Haley & Aldrich	Oppose	No

Comments:

Honorable Chair Dela Cruz, Vice-Chair Keith-Agaran, and Committee Members:

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 oppose the bill in its current form because of my concern about the erosion of “qualifications-based selection” (QBS) for design professionals. QBS is the national gold standard for selection of professional services. The vagueness of the bill's language on alternative procurement would open the door to abuse and is not in the public's best interest.

The American Council of Engineering Companies of Hawaii, of which we are a member, has worked with the State DOT to arrive at compromise language that would allow for procurement with "less than three" but preserve the intent of QBS and its transparent processes. We urge adoption of this alternative language if the bill is to move forward.

Thank you for the opportunity to provide testimony.

Janice Marsters

808.371.8504





**LATE**

February 17, 2022

TO: Honorable Donovan Dela Cruz, Chair  
Senate Committee on Ways and Means

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

SUBJECT: **Re: Senate Bill 2385 SD1  
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](http://aiahonolulu.org/AIAHawaiiStateCouncil)

Dear Chair Dela Cruz and Members of the Committee,

My name is Reid Mizue VP/President-elect AIA Hawaii Council submitting **STRONG OPPOSITION** to the current language of Senate Bill 2385 SD1 amending subsection (g). The bill amends HRS 103D-304 with underscored text provided that if fewer than three qualified persons submit bids or proposals, the agency may submit a request for alternative procurement approval from the chief procurement officer or designee. AIA objection is based on:

AIA position is based on following:

1. The current language of HRS 103D-304 Hawaii's Qualifications-Based Selection stands **unamended** for two decades; having been enacted as reform following allegations of public corruption in award of design professional contracts.
2. The language "minimum of three" has been constant feature of Hawaii Procurement Code since its inception in 1993; consistent with procurement laws of federal government and majority of other states. The Hawaii Procurement Policy Board made an administrative rule allowing less than three persons to be considered, but the rule was struck down by Hawaii Supreme Court in *Asato v. Procurement Policy Board*.
3. Our understanding is that only handful of protests have been filed at State Procurement Office for design contracts awarded among all four licensed design professions. Few protests typically mean a procurement law is working well.
4. Over the decades, our architect members have competed for and have been awarded public design contracts in very large numbers with high cumulative dollar values. AIA has no recorded complaints from architects regarding the 103D-304 process. AIA also has no record of public agencies saying to us that they lack enough competitors from our pool of about 180 local companies.

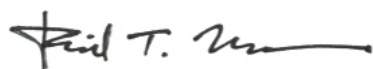
5. We do hear informally from engineer colleagues that there are a very few incredibly unique projects for which some agencies have had difficulty attracting three competitors; even after publishing additional notices pursuant to subsection (c ). Looking into federal procurement practices since federal QBS law was enacted in 1972; “**re-scoping**” by an agency is recommended. Testing of new bridge guardrails to replicate historic guardrails was mentioned. AIA questions why the agency did not “**re-scope**” the project to include, along with engineers, the several Hawaii architects who have qualifications in **historic preservation**; while engaging nationally-qualified testing laboratory as sub-consultant. On-line search for guardrail testing laboratories suggests that none hold Hawaii engineer license under HRS Chapter 464; so perhaps testing service might be procured under another chapter of Hawaii Procurement Code. Testing results, while important, will not be directly placed as construction drawings sent to authorities for building permit approvals. Instead, guardrail must be included in overall bridge structural design; then sealed and signed by the project’s professional engineer-of-record licensed under Chapter 464.

### **SB 2385 SD 1 leaves small businesses “in the dark”**

SB 2385 SD1 amends long-established national-standard process for Hawaii design professional businesses competing for public contracts. “Alternative procurement” leaves small business “in the dark” as to how design contracts might be awarded. It violates the ideal that legislation affecting small businesses must be “bright light” legislation; leaving us at the mercy of the state’s discretionary power exercised without transparency. AIA disagrees with the major language change for a problem limited to only a single agency as reported to us.

Thank you for this opportunity to **STRONGLY OPPOSE** Senate Bill 2385 SD1.

Sincerely,



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

My name is Daniel Chun, an architect writing in **STRONG OPPOSITION** to Senate Bill 2385 SD1. Beginning 1993, I began almost 3 decades as legislative liaison for American Institute of Architects – Hawaii. During late 1990s, I worked very closely with our engineer allies for passage of current Hawaii Qualifications-Based Selection law HRS chapter 103D-304. Our multi-year struggle to pass procurement reform is forgotten because only Senator Lorraine Rodero Inouye remains in office.

I was there at closing days of session to ease normal challenges of refining bill language. The bill was moving in response to charges of public corruption in design contract awards. House wanted “stand alone” procurement law specifically addressing design professional services. Senate wanted to include design professionals in then 103D-304. You know who gets their way! Thus the language of subsection (a) was amended to specify that design professional services shall be procured **only** under 103D-304 or 103D-307 emergency procurement; the only request by State Department of Transportation.

In closing days of session, I recall that City & County of Honolulu said it supported QBS, but it needed some “flexibility” in some circumstances; such as “less than three design professionals making submissions”. To allow flexibility the permissive language of 103D-304 subsection (j) was added, by conference committee, for “at least any two persons” - meaning an agency could evaluate more than that number. Reference to 103D-305 small purchase is only for contract dollar limit; precluding need to periodically “open up” QBS law whenever legislature adjusted \$ limits. Specific procurement procedures are in subsection (j) by referencing subsections (c) (h) and (e) as follows:

HRS Section 103D-304 (j) in quotation marks

“(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 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.”

In drafting opposing testimony for SB 2385, I checked on some finer points of procurement. I was surprised to find below HAR 3-122-74 (b) might be in conflict with itself. A “plain reading” of bold text says design professional services shall be procured in accordance with section 103D-304 HRS, the section that encompasses subsection (j). But language of 3-122-74 (b) implies that subsection (j) is not to be used for procurement of design professional services – when read in conjunction with AGS Justification Sheet for previous bills like SB 2385.

**Hawaii Administrative Rules §3-122-74 General provisions.**

“(a) Small purchases shall be subject to section 103D-305, HRS, and do not require public notice or public bid openings.

(b) Small purchase contracts for professional services may be procured pursuant to this subchapter or section 103D-304(j), HRS; **provided that small purchase of design professional services furnished by licensees under chapter 464, HRS, shall be procured in accordance with section 103D-304, HRS.** [emphasis added]”

In 2015 session the DAGS had introduced House Bill 895, attempting to legislate alternate procurement of design professional services using “less than three persons” when too few submissions occurred. The bill would skirt the Hawaii Supreme Court ruling in Asato v. Procurement Policy Board. The Court said PPB rule violated statute because the legislature had clear intent for “minimum of three persons.” AIA and engineer allies strongly opposed HB 895 and Governor Ige subsequently withdrew his bill. Below is AGS justification sheet that I have never read until now. Having worked intimately on current 103D-304 legislation, the bold text is incorrect justification being presented to the legislature.

### **JUSTIFICATION SHEET for House Bill 895 (2015) by Accounting & General Services**

“A BILL FOR AN ACT RELATING TO PROCUREMENT OF PROFESSIONAL SERVICES.

...The Asato case noted **alternative** methods of procurement (small purchases pursuant to section 103D-305, sole source pursuant to section 103D-306, or emergency pursuant to section 103D-307) available to address situations of less than three qualified persons; **however, there are no alternatives available for professional services by licenses under chapter 464 (professional engineers, architects, surveyors and landscape architects) other than emergency procurement (section 103D- 307), pursuant to section 103D—304(a).** [emphasis added]

Alternative methods of procurement that are available to other professional services in certain circumstances are often not practicable or advantageous to the state: there is often not enough time to resolicit; redefining the scope of services is inappropriate **if** proper acquisition planning accurately defined the scope; emergency procurement is not intended to be utilized for ineffective solicitations; and **small purchase procurement does not address the specific circumstances of professional services.** [emphasis added]”

I have not read the Justification Sheets for Governor Ige’s current attempt to overturn QBS law for the worse; but these likely read very similar. AGS justification sheet confirms that rule against using 103D-304(j) “at least any two” for design professional contracts is the case. Contrary to what AGS Justification Sheet says, 103D-304 (j) does address specific circumstances of design professional services by referencing subsections (c ) (h) and (e) for operational use. The SPO administrative rule 3-122-74 (b) and AGS Justification Sheet for HB 895 seem like Asato

case “turned upside down.” Per Asato ruling, PPB exceeded its authority by making rule for “less than three” while statute required “minimum of three.” Based on what I read in AGS Justification Sheet, administrators of the law are exceeding their authority by preventing use of “at least any two” intended by legislature.

WAM Committee needs to clarify AGS justification with respect to “less than three persons” that “there are no **alternatives** available for professional services by licenses under chapter 464 (professional engineers, architects, surveyors and landscape architects) other than emergency procurement (section 103D- 307)”.

Subsection (j) will not resolve every instance, but it could work for some small purchase contracts ethically awarded by agencies such as counties where fewer design professionals operate or where it is more challenging to seat the formalized selection committee. Contrary to what AGS Justification Sheet says, 103D-304 (j) does address specific circumstances of design professional services by referencing subsections (c ) (h) and (e) for agency proceedings. WAM should defer this bill because the law already provides some “flexibility” with \$100,000-limited alternative to “minimum of three.” I concur with testimony of AIA Hawaii that this bill is too great a change for relatively small instances; when compared to large number and cumulative dollar value of design contracts awarded over past two decades. Thank you for the opportunity to **strongly oppose** SB 2385 SD1.

BTW: Asato v. Procurement Policy Board ruling was issued on Valentine’s Day 2014. Section I of this bill needs correction. In Asato case, I am not questioning qualifications of the top-ranked awardees. Asato questioned why “fewer than three” competitors were evaluated for each of 26 contracts related to the largest public works project in Hawaii history – contracts worth cumulative \$144 million dollars?

**SB-2385-SD-1**

Submitted on: 2/17/2022 9:08:11 AM

Testimony for WAM on 2/18/2022 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Sandie Wong	Individual	Oppose	No

Comments:

I strongly oppose SB2385 as written. I can only support if the current language is stricken and replaced with proposed language that the American Council of Engineering Companies - Hawaii has provided to DOT, Committee on GVO, and this Committee. Thank you.