



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 1, 2021, 2:30 P.M.

SENATE BILL 788, SD2, HD2
RELATING TO PROCUREMENT

Chair Luke, Vice Chair Cullen, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 788, SD2, HD2. The State Procurement Office (SPO) offers the following comments and recommendations.

Comments:

The current language allowing a 24-hour period for bidders to correct their subcontractor listing artificially extends the bid deadline to allow bidders to make corrections versus being disciplined in the formation of their bids. In HAR §3-122-31, Mistakes in Bids, the Procurement Policy Board desired to permit relief for certain mistakes made in the calculation and submission of bids to allow the government to take advantage of what it knows, or should know, is an error by the bidder and to avoid depriving the government of an advantageous offer solely because the bidder made a mistake. However, to allow the bidder to rectify this failure by obtaining a subcontractor after bid opening violates the provisions of Chapter 103D, Hawaii Revised Statutes, Hawaii Public Procurement Code, which is designed to treat all bidders fairly and equitably in their dealings with the government procurement system and increase public confidence in the integrity of the government procurement. Additionally, if a bidder is unable to submit accurate bids by the original deadline, it raises concerns in the bidder's ability to perform and meet deadlines.

If the committee decides to pass this bill, Section 12, page 13, lines 18-21, should be revised to have a clear definition of "non-material" and "technical" information. The proposed language, as is, may lead to further complaints and protests. One of the primary purposes of the listing requirement is to prevent bid shopping and bid peddling. The listing requirement was based in part on the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other potential

subcontractors. The Code seeks to guard against bid shopping and bid peddling by forcing the contractor to commit, when it submits the bid, to utilizing a specified subcontractor. The SPO has also identified multiple bills with past performance language, and prefers the language in House Bill 526, HD1, SD1. HB526, HD1, SD1 has a more inclusive statement to include necessary steps to implement the use of Past Performance.

The State finds that, per its adoption of the ABA Model Procurement Code, that past performance is already allowable inside of the procurement statute. What is missing is the guidance that is found as supplemental Rules. Thus, on May 28, 2019, the Procurement Policy Board voted to approve to development of past performance Rules.

In 2019, the SPO contracted the services of a consultant to review the Comptroller Construction Task Force Report of 2015, analyze the current environment, assist in the development of past performance rules, and make recommendations for the creation of a database. The SPO is currently reviewing the consultant's report and recommendations, along with feedback from CPO jurisdictions and the contractor community, to determine how best to incorporate the information when amending the Rules.

The Rules will cover how to incorporate past performance criteria in a bid or offer, how to evaluate past performance, how to evaluate performance post-award, and how to collect and share that information across siloed agencies through the use of a central state-wide database.

As important and valuable as this measure is, it must provide the resources necessary for a project of this scope and magnitude. In fact, this project will be an extensive undertaking, requiring expertise, staffing, and funding resources in order to develop any new processes, procedures, templates, contract terms and conditions, and reporting requirements compliant with the Hawaii Code, which will require resources the SPO does not have.

Recommendation:

Create the tools and infrastructure for buyers to adopt a new policy is essential for successful implementation. In order to continue this work, the SPO is requesting time and funding. Time is required to verify and implement rules, begin creating the database, develop training, and coordinate and execute the training. The SPO is requesting one-time initial funding of \$164,000 pretax to develop and implement the guidance and related implementation training to cover at least the first two years, and annual maintenance funding of \$13,500 to develop the following tools:

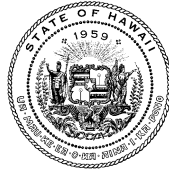
	Delivery	Funding Request
1	Past Performance Guide	\$15,000
	Prepare a past performance implementation guide that provides information for Hawaii contracting officers with more user-friendly detailed instructions on how to effectively implement the Administrative Rules into practice. The implementation guide will include detailed explanations on how to evaluate past performance, examples of quality past performance narratives, and explanations regarding recording negative performance without using the past performance evaluation as a punitive tool outside of due process.	
2	Past Performance Database Functional Requirements Document	\$30,000
	Prepare a Past Performance Database Functional Requirements Document (FRD). The FRD will describe the Database's functional requirements. Our FRD will explain the objectives of the Past Performance Database, the forms and data to be entered, workflow of a performance evaluation, users and roles, system outputs, and applicable regulatory requirements, etc. An FRD is solution independent. It is a statement of what the database is to do - not how it functions technically. The FRD does not commit the Database developers to a design. The SPO will be able to include the FRD in a solicitation for design and delivery of the Past Performance Database.	
3	Create Past Performance Database	\$50,000
4	Preparation and Publication of Rules	\$5,000
5	Rules must be prepared, surveys sent, facilitated discussions and the publication fee	\$4,000
6	Training	\$46,500
	Total One Time Funding	\$150,500
7	Annual Database Maintenance (est. at 27% of cost of \$50,000)	13,500
	Total Funding Recurring Annually	13,500

The SPO is committed to working with the State Legislature and Agencies to develop the best policy and procedures for procurement that allow for streamlining, efficiencies, innovation, cost control, and fair and equal contracting opportunities across the State of Hawaii, and recognizes the benefits of a past performance database system. Therefore, the cost of implementing a successful past performance database is estimated to start at a minimum of \$164,000 for fiscal year 2021-2022.

The SPO also recommends removing Section 5 on pages 5 and 6, in its entirety, as efforts have already begun to address past performance in competitive sealed bidding in the HAR 3-122, Subchapter 5.

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

THURSDAY, APRIL 01, 2021, 2:30 P.M.
CONFERENCE ROOM 308, STATE CAPITOL

S.B. 788, S.D. 2, H.D. 2

RELATING TO PROCUREMENT.

Chair Luke, Vice Chair Cullen, and members of the Committee, thank you for the opportunity to submit testimony supporting the intent of S.B. 788, S.D. 2, H.D. 2, with comments.

The Department of Accounting and General Services (DAGS) supports the intent of improving procurement practices and appreciates the elimination of the provisions which would have allowed negotiations with the apparent low bidder. However, DAGS remains very concerned that the requirements of this legislative bill will negatively impact the procurement process.

S.B. 788, S.D. 2, H.D. 2, reduces the transparency and perceived fairness of the procurement process and increases potential subjectivity, thereby significantly increasing the likelihood of protests. Part IV also represents a notable reduction in the responsiveness and responsibility expectations of bidders, making State projects more attractive to bidders who are unable to perform well under time constraints and effectively develop and implement quality control measures.

Part III - Past Performance Database and the Mandate to Consider Past

Performance.

In summary, this legislation is highly inadvisable for the following reasons:

- The current procurement code already allows for the consideration of past performance.
- There are other practices and tools available that can achieve the same goal without the associated negative impacts.
- There is already a process within the procurement code to address “poor performing” contractors and provide this information to all State and County agencies.
- The consideration of past performance introduces an element of subjectivity to the construction procurement process. The consideration of past performance is, by nature, subjective due to the lack of objective criteria, lack of uniformity in rating systems (including interpretations regarding the evaluation criteria and terminology), the lack of uniformity of data used to make decisions on responsibility (this problem is compounded when an entity is forced to use the data of others without direct experience), as well as the subjectivity inherent in determining what information should be considered (i.e. recent, relevant, etc.).
- Increased subjectivity reduces the transparency and perceived fairness of the procurement process. DAGS has strong concerns that this will increase the potential for protests and project delays. These negative impacts will be most pronounced for large, critical, high profile projects where the cost and other public impacts may be the greatest.

- Lack of resources (staffing, time, and funding) to properly implement the proposed measure. The additional costs of implementation are not limited to the creation of a database. This legislation will have substantial impacts on the resources of all agencies who conduct construction procurements.

PART IV - 24 Hour Period after the bid submission deadline to ‘clarify or correct non-material or technical information’ in the subcontractor listing.

There is an inherent contradiction between the intent of this legislation and the implementation of the corrective action. Page 11, lines 7-13, state, in part, that “...most protests allege technical issues stemming from the subcontractor listing requirement.” The section then proceeds to define technical mistakes to include instances where a bidder failed to list a required subcontractor or when a listed subcontractor did not possess the appropriate license and was not qualified to perform the work.” In most cases, such mistakes can only be cured by the addition or substitution of subcontractors and/or changes to the nature and scope of work. In fact, page 11, lines 18-21, indicate legislative intent to provide additional time to make corrections of that very nature. However, this legislation, as modified to protect the interests of subcontractors in keeping with the intent of the subcontractor listing requirement as stated on page 10, lines 19-21, and on page 11, lines 1-4, prohibits the addition or substitution of subcontractors as well as changes to the nature and scope of work. Therefore, it’s not clear that this legislation can reasonably be expected to effectively reduce the number of protests nor achieve its stated intent.

In addition, the current process expects bidders to be disciplined in the formation of their bids. Part IV of this legislation remains inadvisable because:

- By artificially extending the bid deadline to allow bidders to make corrections, this legislation rewards and encourages bidders who are not able to perform tasks (including quality control functions) in a timely manner. Bidders who cannot perform tasks within established deadlines and have poor quality control procedures in place for their work products are more likely not to meet performance deadlines and requirements during the construction process. It is not in the best interests of the State to encourage and attract such bidders.
- This legislation requires the State to take on the role of “enabling” such undesirable bidders by making the following significant modifications to its processes:
 - Delaying the bid opening
 - Requiring the State to keep track of multiple submittals to ensure that the most recently submitted version of the subcontractor listing is included with the bid package before the package can be opened; and
 - Requiring the State to compare the final and original versions of the subcontractor listing to ensure that any changes made to the subcontractor listing do not involve changes of the type prohibited by page 13, line 21, through page 14, line 3.
 - This legislation reduces transparency of the process by allowing the submission of multiple “corrections” without the knowledge of other bidders and subcontractors, who will only see the final version of the bid package. The nature of such corrections would not be transparent.

Due to its significant reduction in the transparency (and perceived fairness) of the construction procurement process, this legislation is very likely to increase the number of protests received.

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

SB-788-HD-2

Submitted on: 3/31/2021 11:29:01 AM

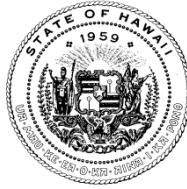
Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Audrey Hidano	Department of Accounting and General Services	Comments	No

Comments:

I will be available for comments and am testifying on behalf of DAGS Comptroller Curt Otaguro.

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

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

April 1, 2021

2:30 P.M.

State Capitol

Conference Room 308
VIA VIDEOCONFERENCE



**S.B. 788, S.D. 2, H.D. 2
RELATING TO PROCUREMENT**

House Committee on Finance

The Department of Transportation (DOT) **supports the intent with comments** of the bill to amend the state procurement code for the overall purpose of increased economy, efficiency, effectiveness, and impartiality in public procurement.

DOT supports the intent of amending the language of section 103D-304(e), Hawaii Revised Statutes, to allow selection committees for procurement of professional services the flexibility to weigh the selection criteria in the order of importance relevant to their agency and project.

DOT supports the intent of past performance as a valuable and appropriate factor for evaluation in competitive sealed proposals and professional services methods of procurement. Past performance may be used to provide relevant and pertinent information for procurement stakeholders in determining and evaluating the responsibility component of an offeror during selection and award. Past performance, as another level of consideration and diligence in evaluating responsibility, may provide additional insight to positively impact the award selection to optimally support increased accountability, enhanced quality performance, and efficient and effective utilization of taxpayer dollars in respect to contract awards and the respective deliverables.

DOT offers strong comments of concern (opposition), specifically regarding the proposed amendment to allow bidders of public works construction projects to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline and requiring bids for construction be publicly opened no sooner than twenty-four hours after the bid submission deadline.

The competitive sealed bidding or IFB method of procurement, as the default method, is structured with the intent to ensure fair, ethical, and open bidding opportunities with award to the lowest responsive and responsible bidder. The procurement requirements

outline reasonable timelines for advertising, amendments by means of addenda, pre-bid conferences for added clarification and information, and a designated date and time for public bid opening. These guidelines serve to optimally create a procurement environment for fair and ethical competition and bids are evaluated through an objective and measurable process.

Bidders respond to publicly advertised solicitation(s) freely, mindfully, and intentionally. Further, when a bidder responds to an advertised solicitation, the bidder has committed to and bears the responsibility of fulfilling the bidding requirements of the solicitation, to include adherence to bid specifications and provisions with respective timelines. Given the designated date and time explicitly outlined in the bid documents for public reading or electronic opening, it is the bidder's sole responsibility to prepare their bids adequately and diligently for submission by the designated deadline.

Further, the current requirement of bidders to submit a sealed bid for public bid opening at the designated date and time ensures no external handling of the bid document prior to public opening. The bid opening conducted as outlined in the procurement code gives bidders a level of assurance their bid proposals are opened and read as intended and submitted. The bid opening process, from sealed bid submittal to public opening, is key to avoid any possible misperception of compromise to the integrity of the process. By allowing the additional twenty-four hours to correct and clarify non-material or technical information results in submittal of two bids, one to meet the original bid submittal deadline and the second with corrections. The logistics of securely and appropriately managing the multiple bids creates a burden on the State in conducting the bid opening to ensure the corrected bid documents are accurately changed out for the public reading. More importantly, the additional handling by the State of the bidder's proposal document may introduce the potential for inaccurate and false speculation and accusations by bidders to find fault with the submitted bid and hold the State accountable, should there be an unfavorable result with the bid evaluation and contract award.

The proposed twenty-four hour extension of the public bid opening of sealed bids after the bid submission deadline for purposes of clarifying and correcting bid issues creates the potential of issues like bid shopping for subcontractor listing and dilutes the responsibility factor of the bidder in preparing an acceptable bid by the designated deadline.

Thank you for the opportunity to provide testimony.

SAH - Subcontractors Association of Hawaii

1188 Bishop St., Ste. 1003**Honolulu, Hawaii 96813-2938

Phone: (808) 537-5619 ✦ Fax: (808) 533-2739

April 1, 2021

Testimony To: House Committee on Finance
Representative Sylvia Luke, Chair

Presented By: Tim Lyons, President

Subject: S.B. 788, SD 2, HD 2 – RELATING TO PROCUREMENT

Chair Luke and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct contracting trade organizations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL AND AIR CONDITIONING NATIONAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We can generally support this bill.

The gist of this bill comes out of recommendations by a third party consultant hired by the State to study the procurement system.

The amended version of this bill is supportable by us conditioned by no further amendments to Part IV, Section 12 (b) (2). This is a huge compromise on our part and one that we are willing to accept on a trial basis. We appreciate the clarification in House Standing Committee Report from CPC regarding the prohibition on substitution and hope Finance Committee will mirror the intention.

Thank you.

SB-788-HD-2

Submitted on: 3/30/2021 7:36:33 PM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael P. Matsumoto	SSFM International, Inc.	Oppose	No

Comments:

It is my understanding the SB788 was amended to strike the order of preference for selection of design professional services. The current Qualifications Based Selection (QBS) law, HRS 103D-304, enacted in 1993, models federal procurement best practices established by the Brooks Act in 1972.

As the nationally accepted best practice endorsed by all architectural, engineering, and construction organizations, including the American Bar Association, the American Public Works Association, and the General Contractors Association, QBS and HRS 103D-304 is a fair and transparent procurement process for professional services.

I oppose SB788.

SB-788-HD-2

Submitted on: 3/31/2021 5:40:00 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Michele Adolpho	ECS, Inc.	Oppose	No

Comments:

ECS, Inc. is a Honolulu-based consulting electrical engineering firm. I strongly oppose SB 788 for the following reasons:

- 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. It has been well shown in national studies that QBS saves public agencies time and money.
- The proposal in Part II of the bill to delete the order of preference in selection criteria is based on a reported difference between Hawai‘i’s QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria “*in order of preference...*”
- The bill states that removing the order of preference in HRS § 103D-304 “*will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.*” In addition to these statements on comparison to federal language being incorrect, removing the order of preference would set the State back in terms of procurement transparency and public safety. What criteria could be more important to a public agency than having the most qualified firm provide the design?
- The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm’s capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

Respectfully submitted,

Michele Adolpho, P.E.

President

ECS, Inc.

SB-788-HD-2

Submitted on: 3/31/2021 7:20:49 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Keith Uemura	ParEn Inc. dba Park Engineering	Oppose	No

Comments:

Chair Luke, Vice Chair Cullen, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 788.

I respectfully express my opposition of S.B. 788.

As a design professional with three decades of experience working on State and County projects in Hawaii, I can attest that Hawaii's Qualifications Based Selection (QBS) law, in its current form, works to protect public safety by ensuring the most qualified design professionals are selected for projects. The proposed changes to §103D-304 jeopardizes that protection by introducing language that eliminates the qualifications-based order of preference in making selections. Subjectivity in the selection process would undo the progress made with the QBS law and would tarnish the transparency of the procurement process.

SB-788-HD-2

Submitted on: 3/31/2021 7:27:15 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Sheryl Nojima	Gray Hong Nojima & Assoc., Inc.	Oppose	No

Comments:

Gray Hong Nojima & Associates is a small business that has been providing engineering services for State, County, and Federal projects for almost 50 years here in Hawaii. We strongly oppose SB 788 for the following reasons:

- “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. It has been well shown in national studies that QBS saves public agencies time and money.
- The proposal in Part II of the bill to delete the order of preference in selection criteria is based on a reported difference between Hawai‘i’s QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria “*in order of preference...*”
- The bill states that removing the order of preference in HRS § 103D-304 “*will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.*” ACECH contends that, in addition to these statements on comparison to federal language being incorrect, removing the order of preference would set the state back in terms of procurement transparency and public safety. What criteria could be more important to a public agency than having the most qualified firm provide the design?
- The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm’s capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

We appreciate the opportunity to provide testimony.

Respectfully submitted,

Sheryl E. Nojima, PhD, PE

President

SB-788-HD-2

Submitted on: 3/31/2021 8:01:37 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Derek Mukai	Community Planning and Engineering, Inc.	Oppose	No

Comments:

Community Planning and Engineering, Inc. has been one of Hawaii's top infrastructure and land development experts for over six decades having master planned and designed communities throughout the State of Hawaii. We **strongly oppose SB 788 Relating to Procurement**. We believe the revisions to HRS § 103D-304 proposed by SB 788 would tarnish the State's reputation as a champion of fair and transparent procurement processes and would risk public health and welfare and successful project outcomes.

Hawaii's Qualifications Based Selection (QBS) law, HRS § 103D-304, was enacted almost 30 years ago, to model federal procurement best practices established by the Brooks Act (P.L 92-582) in 1972. For many years, Hawai'i engineering and architectural professional organizations, including ACECH, American Society of Civil Engineers, Structural Engineering Association of Hawai'i, Hawai'i Society of Professional Engineers, and the American Institute of Architects, fought for this law to provide transparent procurement of crucial design professional services in keeping with the best national practice. Prior to enactment of the law, the procurement of design professional firms was plagued with corruption.

QBS is so widely accepted as "procurement best practice" that it is endorsed by other organizations involved in construction, including the American Bar Association, the American Public Works Association, and the General Contractors Association. QBS results in the best firm selected for a project, reducing problems that may arise during construction and providing the best value in delivering projects to the public.

We appreciate the opportunity to provide testimony regarding SB 788.

Respectfully submitted,

COMMUNITY PLANNING AND ENGINEERING, INC.

Derek K. Mukai, P.E., CCM

Principal

SB-788-HD-2

Submitted on: 3/31/2021 8:04:55 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
SEAN K SUGAI	Ronald N.S. Ho & Associates, Inc.	Oppose	No

Comments:

Ronald N.S. Ho & Associates, Inc. believes that the revision to HRS § 103D-304 proposed by SB788 is based on incorrect assertions in the Ikaso report, would tarnish the State’s reputation as a champion of fair and transparent procurement processes, and would risk public health and welfare and successful project outcomes.

Our opposition to the bill is based on the following:

1. “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. It has been well shown in national studies that QBS saves public agencies time and money.
2. The proposal in Part II of the bill to delete the order of preference in selection criteria is based on a reported difference between Hawai‘i’s QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria “*in order of preference...*”
3. The bill states that removing the order of preference in HRS § 103D-304 “*will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.*” In addition to these statements on comparison to federal language being incorrect, removing the order of preference would set the State back in terms of procurement transparency and public safety. What criteria could be more important to a public agency than having the most qualified firm provide the design?
4. The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm’s capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

In summary, QBS is so widely accepted as “procurement best practice” that it is endorsed by other organizations involved in construction, including the American Bar Association, the American Public Works Association, and the General Contractors Association. QBS results in the best firm selected for a project, reducing problems that may arise during construction and providing the best value in delivering projects to the public. Design professional services are also highly and increasingly technically specialized and should be selected primarily based on qualifications.

March 31, 2021

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

Subject: Testimony Opposing SB 788 SD2 HD1, Relating to Procurement

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

I am writing on behalf of Carollo Engineers, Inc., a local water and wastewater engineering firm to strongly oppose the subject legislation for the following reasons:

- “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. It has been well shown in national studies that QBS saves public agencies time and money.
- The proposal in Part II of the bill to delete the order of preference in selection criteria is based on a reported difference between Hawai‘i’s QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria “in order of preference...”
- The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm’s capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

Thank you for the opportunity to provide testimony on this matter. Please do not hesitate to contact me if you have questions.

Sincerely,



Cari K. Ishida, PhD, P.E., ENV SP
Honolulu Office Manager
Carollo Engineers, Inc.

SB-788-HD-2

Submitted on: 3/31/2021 8:21:29 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ikaika Kincaid	CONSOR Engineers	Oppose	No

Comments:

We strongly OPPOSE this bill because it will essentially eliminate “Qualifications-based selection” (QBS) and that is not in the best interest for the public and for public safety!

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. It has been well shown in national studies that QBS saves public agencies time and money.

The proposal in Part II of the bill to delete the order of preference in selection criteria is based on a reported difference between Hawai'i's QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria “*in order of preference...*”

The bill states that removing the order of preference in HRS § 103D-304 “*will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.*” ACECH contends that, in addition to these statements on comparison to federal language being incorrect, removing the order of preference would set the state back in terms of procurement transparency and public safety. What criteria could be more important to a public agency than having the most qualified firm provide the design?

The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm's capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcawhawaii.org
Website: www.gcawhawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 31, 2021

TO: HONORABLE AARON LING JOHANSON, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

SUBJECT: **PROVIDING COMMENTS ON S.B. 788 S.D.2 H.D.2, RELATING TO PROCUREMENT.** Allows selection committees for procurement of professional services to weigh the selection criteria in the order of importance relevant to their agency and project. Beginning 12/31/2022, requires the state procurement office to develop a vendor past performance information system. Allows a bidder of a public works construction project to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline. Requires bids for construction to be publicly opened no sooner than twenty-four hours after the bid submission deadline.

HEARING

DATE: Thursday, April 1, 2021
TIME: 2:30 p.m.
PLACE: Capitol Room 329

Dear Chair Johanson, Vice Chair Kitagawa and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA is providing comments and suggested amendments to S.B. 788 S.D.2 H.D.2.

GCA is in opposition to part III of this measure and believes that the language could have the unintended consequence of increasing administrative costs, creating additional bureaucracy, and increasing the number of protests. Past performance introduces a considerable amount of subjectivity that will result in increased protests. GCA agrees with DAGS testimony on past performance (See SB1017 and HB526).

GCA is in strong support with amendments of part V which seeks to reduce the risks of protests due to the subcontractor listing requirements of the Procurement Code. The subcontractor listing requirement has become a way in which bidders attack the responsiveness of a proposal, resulting in awards to non-low bidders, increased costs to the state and taxpayers, and delayed projects due to a technicality in the submitted subcontractor list. As a result, not only does the lowest bidder

and their listed subcontractors get disqualified from the project, but the state could end up paying more for the project.

Under this part, the procurement officer would close the bidding in the usual manner, but would not open the bids until twenty-four hours after the closing. Each bidder shall have twenty-four hours after the bid closing to clarify and correct minor technical issues with the subcontractors list requirements under Section 103D-302, HRS. The proposed change will permit the bidder to ensure that all subcontractors who have submitted bids to the general contractor have met all of the requirements to perform work on state and county projects, including meeting all licensing, bonding and insurance requirements, as applicable. The additional time is necessary because in most cases the general contractor does not receive bid prices from the various subcontractors until shortly before the bid must be submitted to the state agency. This means that the general contractor does not have time to check whether the subcontractors who have submitted bids meet the requirements to work on the job, especially the proper licenses issued by the Contractors License Board. Given the large number of “C” (currently over 100 issued and growing), it becomes increasingly difficult for the general contractor to ascertain licenses and verify whether every subcontractor has the proper license to perform the work he has submitted a bid to do.

This legislation is not an attempt to give general contractors an advantage in submitting bids, nor is it, as some may argue, an opportunity to bid-shop. Instead, this legislation is increasing efficiency in the procurement process by allowing contractors to verify the information that subcontractors provide. The bill does not permit the contractor to change its proposed bid amount. The twenty-four hours will permit the bidder to ensure the subcontractor/joint contractor list is complete and listed subcontractors/joint contractors are properly licensed, are bondable (where applicable), and have all the required insurance coverage. This will reduce the likelihood of errors and result in reducing the number of bid protests which often delay public works projects and, in some cases, increase the cost of public works project for the state. This will result in more complete and accurate bid submittals and reduce the number of potential bid protests.

This would be very similar to California’s process and was included as an unofficial suggestion in the independent report submitted by the State Procurement Office. The report can be found here: https://spo.hawaii.gov/wp-content/uploads/2020/01/CPFR-Report_HR142-SLHL-2016-FINAL_01-13-20.pdf

The relevant portion starts on page 111 and the suggestion to adopt a variation of California’s model, which allows a 24 hour period to correct errors appears at the bottom of page 114 of the report. Further, the report specifies that in 2018, subcontractor listing accounts for over 60% of all construction related bid protests and that 45% of all protests the State received (including all protests related to non-construction) alleged a defect in the listing of subcontractors for a construction project.

GCA asks that the language read:

SECTION 14. Section 103D-302, Hawaii Revised Statutes, is amended by amending subsections (b), (c), and (d) to read as follows:

"(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall [specify];

(1) Specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each[.]; and

(2) Allow the bidder to clarify or correct non-material or technical information required by paragraph (1) for up to twenty-four hours after the bid submission deadline; provided that any additions or substitutions of listed joint contractors or subcontractors shall be prohibited, including changes to the nature and scope of work listed, unless the criteria in subparagraph (A) are met.

(A) The substitution of a listed joint contractor or subcontractor shall only be permissible when:

(1) The listed joint contractor or subcontractor provides written notice verifying that they agree to the substitution; and

(2) The general contractor provides a written declaration that the replacement joint contractor or subcontractor will not be paid less than the replaced joint contractor or subcontractor.”

This language should reduce the number of bid protests while guarding against bid shopping. Thank you for this opportunity to provide comments on this measure.



THE LIMTIACO CONSULTING GROUP
CIVIL ENGINEERING AND ENVIRONMENTAL CONSULTANTS

House Committee on Finance
Hearing Date: Thursday, April 1, 2021, 2:30 p.m.

March 31, 2021

Honorable Representatives Sylvia Luke, Chair; Ty J.K. Cullen, Vice Chair; and Members of the House Committee on Finance

**Subject: SB 788, Relating to Procurement
TESTIMONY IN OPPOSITION**

Dear Chair Luke, Vice Chair Cullen, 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 opposes SB 788 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. It has been well shown in national studies that QBS saves public agencies time and money. SB 788 proposes to delete the order of preference in selection criteria based on a reported difference between Hawai'i's QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria “in order of preference...”. In addition, the bill states that removing the order of preference in HRS § 103D-304 “will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.” ACECH contends that, in addition to these statements on comparison to federal language being incorrect, removing the order of preference would set the state back in terms of procurement transparency and public safety. What criteria could be more important to a public agency than having the most qualified firm provide the design?

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



1088 BISHOP STREET #408
HONOLULU, HI 96813
PH: (808) 597-1216

GREGG S. SERIKAKU
EXECUTIVE DIRECTOR

March 31, 2021

Representative Sylvia Luke, Chair
Representative Ty J.K. Cullen, Vice Chair
House Committee on Finance

Chair Luke, Vice Chair Cullen, and Members of the Committee:

SUBJECT: SB788 SD2 HD2 RELATING TO PROCUREMENT

My name is Gregg Serikaku, Executive Director for the Plumbing and Mechanical Contractors Association of Hawaii, and we are the State's largest association representing plumbing, air conditioning, refrigeration, steamfitter, and fire sprinkler contractors in Hawaii.

We support the position of the Subcontractors Association of Hawaii which clarifies the extent of the proposed allowances to correct non-material or technical information of the listed joint contractors or subcontractors. Such allowances should not include any additions, substitutions, and/or changes to the nature and scope of work of the joint subcontractors listed at the time of bid, as these are the exact types of changes that would significantly increase the practice of bid shopping.

Bid shopping reduces quality on the job, discourages competition, artificially inflates prices, and promotes unfair and unethical practices, therefore we strongly encourage this committee to adopt the recommended language.

Thank you for this opportunity to provide our testimony.

Respectfully yours,

A handwritten signature in black ink that reads "Gregg S. Serikaku". The signature is written in a cursive style with a large, prominent "G" and "S".

Gregg S. Serikaku
Executive Director



March 31, 2021

House Committee on Finance

Hearing Date: Thursday, April 1, 2021, 2:30 p.m.

Honorable Representatives Sylvia Luke, Chair; Ty J.K. Cullen, Vice Chair; and Members of the House Committee on Finance

Subject: **SB 788, SD2, HD2, Relating to Procurement
TESTIMONY IN OPPOSITION**

Dear Chair Luke, Vice Chair Cullen, and Committee Members:

The American Council of Engineering Companies of Hawaii (ACECH) **strongly OPPOSES Part II of this bill** and urges the Committee to defer the bill or to strike Part II. ACECH represents more than 70 member firms with over 1,500 employees throughout Hawaii. ACECH member firm projects directly affect the quality of the water we drink and the food we eat; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play. Procurement of design professional services by licensees regulated under HRS §464 is a serious undertaking. That is why ACECH was integrally involved in the passage of the legislation that created HRS §103D-304 almost 30 years ago.

“Qualifications-based selection” (QBS) is the nationally recognized model procurement code for the procurement of design professional services. The Committee may recall that, prior to enactment of HRS §103D-304, procurement of professional design services in Hawaii was rife with abuse and corruption, and negative news articles greatly damaged public faith in the procurement process and in government. HRS §103D-304 provides fairness and transparency in procurement of design professional services and protects public health.

SB788 proposes to revise the statute by removing the order of preference in selection criteria so that qualifications is no longer favored. Unfortunately, the assertions in the Ikaso procurement report regarding the key difference between Federal and State approach (stating that the Federal criteria have no ordering of importance) are WRONG. The Brooks Act requires an order of preference and all federal solicitations set forth the order of preference, with qualifications at the top.

Our chief concern is that inappropriate criteria, such as political favoritism, will be used to select design professionals, putting us back to the situations in the past this bill was designed to solve, because selection criteria (4) allows for “(a)ny additional criteria” to be used. Due to the public safety considerations, design professional services must be selected by qualification.

We appreciate the opportunity to provide testimony on this matter. We have also prepared a position paper on this matter, which is attached. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

Garret Masuda, P.E.
President

2020-2021 Board of Directors

President

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

President-Elect

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

Treasurer

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

Secretary

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

Past President

Ken Kawahara, P.E.
Akinaka & Associates, Ltd.
Ph: (808) 836-1900

National Director

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

Directors

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

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

Glenn Miyasato, P.E.
MKE Associates, LLC.
(808) 488-7579

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

Position on SB788, Relating to Procurement

ACECH believes that the revision to HRS § 103D-304 proposed by SB788 is based on incorrect assertions in the Ikaso report, would tarnish the State's reputation as a champion of fair and transparent procurement processes, and would risk public health and welfare and successful project outcomes. **We urge the revision to HRS § 103D-304 be deleted from the bill.**

Background

SB788 was amended to strike the order of preference for selection of design professional services, based on recommendations of a procurement review report prepared by a private consultant to the State Procurement Office (*Construction Procurement Policy Review Findings and Recommendations Report, Ikaso Consulting, December 18, 2019*). The American Council of Engineering Companies of Hawai'i (ACECH) has serious concerns about the repercussions of this bill and believe the unintended consequences will significantly damage the State.

Hawai'i's Qualifications Based Selection (QBS) law, HRS § 103D-304, was enacted in 1993, almost 30 years ago, to model federal procurement best practices established by the Brooks Act (P.L. 92-582) in 1972. For many years, Hawai'i engineering and architectural professional organizations, including ACECH, American Society of Civil Engineers, Structural Engineering Association of Hawai'i, Hawai'i Society of Professional Engineers, and the American Institute of Architects, fought for this law to provide transparent procurement of crucial design professional services in keeping with the best national practice. Prior to enactment of the law, the procurement of design professional firms was rife with corruption, with federal charges against firms selected based on political contributions and negative press for design firms and the State and County agencies involved. **We believe the Ikaso Consulting report is incorrect in its understanding of the federal law and its use and is misguided in its recommendation regarding HRS § 103D-304.** We provide the following comments and concerns:

1. The Ikaso statement that the federal law does not establish a priority is incorrect.

Ikaso states (page 27), *"The key difference between State and Federal considerations is the State expressly orders the importance of its criteria while the Federal criteria has no ordering of importance."* ACECH disagrees with this assertion. The Brooks Act states:

"Sec.903. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, **in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified** to provide the services required.

"Sec.904. (a) The agency head shall **negotiate a contract with the highest qualified firm** for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government.

As described in the Act, agencies must establish and publish criteria “in order of preference.” Although the Brooks Act does not lay out the preference order, professional qualification is clearly the most significant and preferred factor, as the Act cites “the highest qualified firm” several times.

In practice and as required by the Brooks Act, Federal government solicitations always include a list of the criteria and their order of preference, as seen in the example below for a recent NAVFAC HI solicitation. We believe the State’s clarity on the order of preference in the statute makes the procurement administration easier for the agency and for design firms by removing uncertainty.

N62478-21-R-5040 INDEFINITE DELIVERY/INDEFINITE QUANTITY CONTRACT FOR ARCHITECT-ENGINEER SERVICES FOR VARIOUS CIVIL ENGINEERING PROJECTS AND RELATED PROJECTS, VARIOUS LOCATIONS UNDER THE COGNIZANCE OF NAVFAC HAWAII

SELECTION CRITERIA

Firms/Offerors responding to this synopsis will be evaluated to determine the most highly qualified firms to perform the required services in accordance with the published selection criteria. Failure to comply with instructions, or provide complete information may affect the firm’s evaluation or disqualify the firm from further consideration. The selection criteria are in descending order of importance, with the last criterion for volume of work to serve as a tiebreaker. Specific selection criteria include:

1. Specialized Experience
2. Professional Qualifications
3. Past Performance
4. Quality Control Program
5. Program Management and Capacity
6. Sustainable Design
7. Firm Location
8. Volume of Work (tiebreaker)

2. **The Ikaso statement that firm experience is overvalued by HRS § 103D-304 is incorrect.**
Ikaso stated that agency interviewees felt constrained to overvalue vendors’ past State experience. In fact, past State experience is favored less by HRS § 103D-304 than in typical Federal solicitations, as indicated in the example herein. HRS § 103D-304 favors qualifications and experience equally as the most important criteria. This approach was taken to respond to the issues identified as a concern of the report, i.e., that new firms or smaller firms cannot be competitive. Provided that firms can show they are qualified to conduct the work, they should be able to receive contracts, whether they have done work for the procuring agency or not. We find the federal agency procurement more restrictive, i.e., many agencies construe “specialized experience” to mean that firms have done work for that agency and jurisdiction.
3. **The Ikaso recommendation to remove the order of preference in HRS § 103D-304 does not protect the State’s interest or public safety.**
Ikaso stated that removing the order of preference in HRS § 103D-304 “will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.” ACECH contends that, in addition to

these statements on comparison to federal language being incorrect, removing the order of preference would set the state back in terms of procurement transparency and public safety. It would allow agencies to set their own criteria and, without the federal requirement to publish the criteria, the selection could be capricious. The solicitation below is another example of a federal procurement for a dam & levee project where experience and qualifications are ranked most important. For a similar state procurement, the current HRS § 103D-304 requires the agency selection committee to rank a firm with dam/levee experience higher than a firm that has lots of capacity (perhaps because their clients are dissatisfied with their work quality) but no dam/levee experience. SB788 would change that, potentially putting lives at risk.

3. SELECTION CRITERIA: The selection criteria are listed below in descending order of importance. Criteria "a" through "e" are primary. Criteria "f" through "g" are secondary and will only be used as tiebreakers among equally rated firms.

a. Specialized Experience and Technical Competence will be evaluated, in performing design for the primary civil works programs, including dam and levee safety work within the South Pacific Division boundaries in categories listed below. All of the following items listed under section 3 a. are weighted equally; provided however that significant work experience within the Sacramento District boundaries will be considered more favorably in determining the most highly qualified firms. Specialized Experience and Technical Competence in performing the non-Civil Works secondary needs may be beneficial but are not necessary.

- Full service interdisciplinary design of new or remediation of existing structures, to include feasibility level design thru preparation of plans and specifications for

construction. Design experience will be evaluated to determine ability to design features such as: dams, levees, foundation improvement, seepage and stability berms, cutoff walls, relief wells, dewatering, bank protection, and other geotech-centric infrastructure projects.

- Engineering Reports (Feasibility Studies, Design Documentation Reports (DDR), Engineering Considerations and Information for Field Personnel (ECIFP), Operation and Maintenance Manual (O&M), and other engineering reports.
- Risk assessments (quantitative and qualitative, including economic and life loss consequences).
- Investigations, data collection, and testing (surveying, bathymetry, photogrammetry, drilling, geophysics, pump tests, laboratory testing, and other methods of site characterization).
- Data analysis (materials property development, seismicity and seismic analysis, seepage, soil and rock slope stability, blasting, erosion, hydrologic and hydraulic analysis to include physical modeling and other engineering analyses).
- Alternatives analysis (including cost/benefit) to include cost estimates (M-CACES);
- Infrastructure inspections.

b. Professional Personnel will be evaluated. Qualified professional personnel who are

What criteria could be more important to a public agency than having the most qualified firm provide the design? How could it be in the public interest to prioritize any other criteria? A/E

professionals design the highways and bridges we drive on, the water and wastewater treatment systems that protect public health and the environment, the electrical and mechanical infrastructure that keeps our communities functioning, and the buildings that protect us. The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm's capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

4. The Ikaso statement that the ranking does not allow agencies to award to new entrants that may be equally qualified is incorrect.

HRS § 103D-304 does not prevent selection of new entrants to the market who are "equally qualified" through experience and professional credentials. The intent of including additional criteria is to provide the agency a way to choose between two equally qualified firms. QBS also helps small firms compete by providing a forum to demonstrate their unique capabilities that often include a greater degree of niche market expertise, knowledge of local regulations and business practices, and greater involvement of senior level management in the execution of a project. The proposed revision to §103D-304 would permit a criterion, such as capacity, to be weighted at a higher importance than experience and qualification, potentially hindering small firms from competing due to the number of employees.

5. Ikaso did not consult with key stakeholders.

Ikaso did not consult with any of the professional organizations that fought for QBS in Hawai'i. The report contains a list of consulted parties, and no design professional organizations are listed. ACECH frequently worked with the State Procurement Office on procurement matters and should have been consulted. Although four engineering firm representatives were interviewed, they have reported to us that the questions asked were general and did not indicate that QBS would be a target of the report. One interviewee reported that he highly recommended that the interviewer contact ACECH. Sarah Allen, the Chief Procurement Officer overseeing the report, incorrectly cited that "all stakeholders" had been consulted in her introduction to the report.

Summary

QBS is so widely accepted as "procurement best practice" that it is endorsed by other organizations involved in construction, including the American Bar Association, the American Public Works Association, and the General Contractors Association. QBS results in the best firm selected for a project, reducing problems that may arise during construction and providing the best value in delivering projects to the public. No one would suggest that an orthopedic surgeon be selected to conduct your heart surgery because the orthopedic surgeon has more time in his schedule next week. Design professional services are also highly and increasingly technically specialized and should be selected primarily based on qualifications.

ACECH believes that the revision to HRS § 103D-304 proposed by SB788 is based on incorrect assertions in the Ikaso report, would tarnish the State's reputation as a champion of fair and transparent procurement processes, and would risk public health and welfare and successful project outcomes.



March 31, 2021

**TESTIMONY IN STRONG OPPOSITION TO SB788 SD2 HD2
HOUSE COMMITTEE ON FINANCE
HEARING DATE: THURSDAY, APRIL 1, 2021 at 2:30 P.M.**

Aloha Chair Luke, Vice Chair Cullen, and Members of the House Committee on Finance:

I am writing in strong opposition to Part II of SB788 SD2 HD2 (the subject bill). The revision to HRS §103D-304 proposed by the subject bill is based on incorrect assertions and bad recommendations in a report that was prepared by a private consultant to the State Procurement Office, the “Ikaso Report”, dated December 18, 2019.

Part II of the subject bill would eliminate the requirement for “Experience and professional qualifications relevant to the project type” to be the most important criteria when selecting a design professional, which would:

- 1) Risk public health and welfare, and successful project outcomes; and
- 2) Erase fair and transparent procurement processes.

Engineers practice in highly specific disciplines within the engineering profession, just like doctors practice in highly specific disciplines within the medical profession. Similar to specialized doctors, engineers require education, training and experience that are specific to the discipline in which they practice.

Therefore, engineers must be, and currently are, selected first and foremost based on their qualifications and experience relative to a particular project on a case-by-case basis. That is why the current language of HRS §103D-304 is written the way it is (and should remain that way), and why Part II the subject bill should be deleted from this bill, or the bill withheld.

Thank you for the opportunity to provide strong testimony in opposition to SB788 SD2 HD2.

Very truly yours,

Yogi Kwong Engineers, LLC

A handwritten signature in blue ink, appearing to read "Jeffrey K. Kalani", with a stylized flourish at the end.

Jeffrey K. Kalani P.E.
President / CEO

**Testimony Presented Before the
HOUSE COMMITTEE ON FINANCE**

April 1, 2021 at 2:30 p.m.

by

**Ken Hayashida
KAI Hawaii, Inc.**

SB 788 – RELATING TO PROCUREMENT

Chair Luke, Vice Chair Cullen and members of the committee:

Thank you for the opportunity to submit testimony on SB 788 which relates to the procurement process.

- “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. It has been well shown in national studies that QBS saves public agencies time and money.
- The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm’s capacity, their billing rates, their political connections, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

As a design professional, I oppose SB 788, SD2, HD2 relating to procurement. I believe that the revision to HRS 103D-304 proposed by SB 788 is based on incorrect assertions in the Ikaso report, would tarnish the State’s reputation as a champion of fair and transparent procurement processes, and would risk public health and welfare and successful project outcomes.

Thank you for your attention and time on this issue.

Respectfully submitted,

Ken Hayashida
President
KAI Hawaii, Inc.

SB-788-HD-2

Submitted on: 3/31/2021 1:53:22 PM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jon Nishimura	Fukunaga & Associates, Inc.	Oppose	No

Comments:

As design professional in Hawaii for over 40 years I would like to express OPPOSITION to this bill as written. It appears that this bill is trying to address procurement issues of construction contracts and contractors AS WELL AS professional services contracts and design professionals - these PROCUREMENT PROCESSES should be addressed separately and discussed with the stakeholders further to understand the issues involved in BID and NON-BID contracts and the method of award.

Thank you for this opportunity to testify.



Okahara and Associates, Inc.

ENGINEERS AND LANDSCAPE ARCHITECTS

March 31, 2021

House Committee on Finance

Hearing Date: Thursday, April 1, 2021, 2:30 p.m.

Honorable Representatives Sylvia Luke, Chair; Ty J.K. Cullen, Vice Chair; and Members of the House Committee on Finance

Subject: **SB 788, SD2, HD2, Relating to Procurement
TESTIMONY IN STRONG OPPOSITION**

Dear Chair Luke, Vice Chair Cullen, and Committee Members:

Okahara and Associates, Inc. is a multi-disciplined (civil, mechanical and landscape architecture) consulting engineering firm, which has been doing business in Hawai`i for the past 40 years. We are a Hawai`i based company with offices on Oahu and Hawai`i Island. We provide professional services for the State of Hawaii and are procured under §103D-304. We **STRONGLY OPPOSE** the proposed amendment to §103D-304.

“Qualifications-based selection” (QBS) is the nationally recognized model procurement code for the procurement of design professional services. The Committee may recall that, prior to enactment of §103D-304, procurement of professional design services in Hawaii was rife with abuse and corruption, and negative news articles greatly damaged public faith in our procurement processes. §103D-304 provides fairness and transparency in public procurement. §103D-304 has been in place for more than 20 years and, while several minor amendments improved the statute in the few years following its enactment, the law has not been revised since 2004, indicating that it is working.

Federal QBS procedures are prescribed in the Brooks Act (40 U.S.C. 1101 *et seq.*), which states:

*“The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated **competence and qualification** for the type of professional services required and at fair and reasonable prices.”*

The use of QBS ensures that federal agencies, and the taxpayer receive highly technical architect and engineering (A-E) services from the most experienced and most qualified firms at a fair and reasonable cost.

HRS §103D-304 emphasis the importance of ensuring qualified and competent A-E’s are selected. SB 788 proposes the following revision:

“(e) The selection criteria employed ~~in descending order of importance~~ shall be:

- (1) Experience and professional qualifications relevant to the project type;*
- (2) Past performance on projects of similar scope for public agencies or private industry, including corrective actions and other responses to notices of deficiencies;*
- (3) Capacity to accomplish the work in the required time; and*
- (4) Any additional criteria determined in writing by the selection committee to be relevant to the purchasing agency's needs or necessary and appropriate to ensure full, open, and fair competition for professional services contracts.”*

Removal of the statement “*in descending order of importance*” is of great concern. Removal of this language would no longer emphasize experience and qualification as the most important factor. The intent of removing this language, as stated in SB 788, is:

“to allow selection committees for the procurement of professional services the same flexibility afforded to their federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.”

The statement “*in descending order of importance*” is language that appears in Federal solicitations. We refer back to the Brooks Act that requires A-E services to be procured on the basis of competence and qualification. Of the remaining selection criteria in HRS §103D-304, none should take precedence over experience and qualification.

SB 788 also claims:

“the ranking has purportedly caused agencies to repeatedly award contracts to the same firms at the expense of new entrants that may be equally qualified”.

Under the current procurement code, an “*equally qualified firm*”, even a “*new entrant*” would have a fair opportunity to be selected by the State because they are indeed qualified. Equally qualified firms would then be evaluated based on the performance, capacity, and any additional criteria as described in HRS §103D-304. This procedure protects the State from repeated inefficiencies and substandard work while ensuring a qualified firm is selected.

Additionally, under the current law, being an equally qualified “*new entrant*” does not hinder a firm’s ability to be selected. The criteria of past performance states that performance is judged on projects for “*public agencies or private industry*”. Therefore, we contend that the current language of §103D-304 provides the State the flexibility to not “*repeatedly award contracts to the same firms*” as well as protect the public welfare by ensuring the selection of a highly qualified firm.

QBS protects the public welfare. Engineers design the highways and bridges we drive on, our water treatment systems, and all other infrastructure and systems upon which we rely. The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is important that only the most qualified and experienced firms be tasked with this critical function.

QBS also benefits small firms. QBS helps small firms compete by providing a forum to demonstrate their unique capabilities that often include a greater degree of niche market expertise, knowledge of local regulations and business practices, and greater involvement of senior level management in the execution of a project. The proposed revision to §103D-304 would permit a criterion, such as capacity, to be weighted at a higher importance than experience and qualification. This could hinder small firms from competing due to the number of employees, as well as endanger the public welfare.

We **STRONGLY OPPOSE** the proposed amendments to §103D-304. Our chief concern is that deleting the phrase “*in descending order of importance*” will reinstate loopholes in the procurement system that HRS §103D-304 was designed to protect against – a system that was rife with abuse and corruption. We respectfully request the deletion of Part II of SB788 SD2 HD2.

Thank you for your consideration on this important matter.

Sincerely,
Okahara and Associates, Inc.


Bruce K. Meyers, P.E.
President

SB-788-HD-2

Submitted on: 3/31/2021 2:20:45 PM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Janice Marsters	Hart Crowser, Inc.	Oppose	No

Comments:

Aloha e Chair Luke and Committee Members:

Hart Crowser is a geotechnical and environmental engineering consulting firm, and I manage our two offices with 17 engineering and scientific staff on O'ahu and Maui. With 95% of our work being conducted for State or County government agencies, we are frequently selected to provide services under HRS 103D-304. We also work for federal government agencies. We dispute the bill's statements that there is a difference in how Hawaii and Federal agencies procure design professionals. The Federal Brooks Act requires agencies to prioritize the selection criteria, and it is very clear that the greatest weight is to be given to qualifications. That's appropriate, given the serious nature of the work we do and the potential risks to public safety and the environment. The emphasis on qualifications is essential and protects the State and its citizens.

The bill references a procurement report by Ikafo and we also dispute its assertion that the emphasis on qualifications hurts new firms. After working for 20 years in Hawaii for other firms, I opened the first office of Hart Crowser 5 years ago. While the company didn't have historical experience with many Hawaii State and County agencies, we have submitted our qualifications every year through the process established by HRS 103D-304 and have steadily increased our workload and hiring highly qualified professionals. We believe the system works well. If qualifications-based selection was eliminated, I am concerned we would go back to the days, when I first started my career in Hawaii almost 30 years ago, of corruption and political favoritism driving firm selection. That doesn't serve anyone, least of all the citizens of our state.

I strongly urge you to defer this bill or, at least to remove Part II and the portions of Part I that refer to design professionals, from the bill.

Thank you for the opportunity to testify.



AKINAKA & ASSOCIATES, LTD.
Consulting Civil Engineers

Testimony of
Ken C. Kawahara

Before the Committee on Finance

Thursday, April 1, 2021
2:30 P.M.

Video Conference
Conference Room 308

In consideration of
BILL SB788 SD2 HD2
RELATING TO PROCUREMENT

Chair Luke, Vice-Chair Cullen and Honorable Members of the Committee on Finance:

I am writing today in strong opposition to Parts I and II of SB788, HD2. The proposed revision to HRS § 103D-304 proposed by SB788, HD2 is based on incorrect assertions in the Ikaso report. If Parts I and II of SB788 is passed out it would tarnish Hawaii's reputation as a champion of fair and transparent procurement processes. It would also risk public health and welfare, and successful project outcomes.

- Parts I and II of SB788, HD2 calls for the elimination of Qualification Based Selection ("QBS") in Hawaii's procurement process by no longer making "Experience and professional qualifications relevant to the project type" the most important criteria in the selection process of professional services.

"Qualifications-based selection" (QBS) is the nationally recognized model procurement code for the procurement of design professional services. Hawaii'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. It has been well shown in national studies that QBS saves public agencies time and money.


QBS is widely accepted as "procurement best practice" and is endorsed by many organizations including, but not limited to, the American Council of Engineering Companies, the American Bar Association, the American Public Works Association, and the General Contractors Association. QBS results in the best firm selection for a project, reducing problems that may arise during construction and providing the best value in delivering projects to the public.

- The proposal in Part II of the bill to delete the order of preference in selection criteria is based on a reported difference between Hawaii's QBS law and the Federal Brooks Act. This assertion is incorrect, as the Brooks Act requires the agency to establish selection criteria "*in order of preference...*"

- The bill states that removing the order of preference in HRS § 103D-304 “*will allow Selection Committees the same flexibility afforded to their Federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project.*” ACECH contends that, in addition to these statements on comparison to federal language being incorrect, removing the order of preference would set the state back in terms of procurement transparency and public safety. What criteria could be more important to a public agency than having the most qualified firm provide the design?
- The design services provided by engineering firms directly affect the health, safety and welfare of the public, and it is essential that appropriately qualified and experienced firms be tasked with this critical function. A firm’s capacity, their billing rates, or any other criteria an agency may develop, cannot be the driving criteria for selection of design professional services when public safety can be so critically affected.

Thus, I strongly oppose Parts I and II of SB788, HD2 and respectfully request that they be removed from the bill or that the bill be held.

Thank you for the opportunity to provide strong testimony in opposition to SB788, HD2.



Ken C. Kawahara, P.E.

SB-788-HD-2

Submitted on: 3/30/2021 1:09:34 PM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
John D. Smith	Individual	Support	No

Comments:

I support this to be passed through legislature.

SB-788-HD-2

Submitted on: 3/31/2021 7:52:44 AM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
DeAnna Hayashi	Individual	Oppose	No

Comments:

Qualifications-based selection is the nationally recognized model procurement code for the procurement of design services. Removing this requirement would be detrimental to the State as not every design professional can do all types of projects and the public's safety will be in jeopardy.

Sandra-Ann Y.H. Wong

Attorney at Law, a Law Corporation

1050 Bishop Street, #514

Honolulu, Hawaii 96813

**TESTIMONY IN STRONG OPPOSITION TO SB788, HD2
HOUSE COMMITTEE ON FINANCE
THURSDAY, APRIL 1, 2021 at 2:30 P.M.**

Aloha Chair Luke, Vice Chair Cullen, and Members of the Committee:

I am writing today in strong opposition to Parts I and II of SB788, HD2. The proposed revision to HRS § 103D-304 proposed by SB788, HD2 is based on incorrect assertions in the Ikaso report. If Parts I and II of SB788 is passed out it would tarnish Hawaii's reputation as a champion of fair and transparent procurement processes. It would also risk public health and welfare, and successful project outcomes.

Parts I and II of SB788, HD2 calls for the elimination of Qualification Based Selection ("QBS") in Hawaii's procurement process by no longer making "Experience and professional qualifications relevant to the project type" the most important criteria in the selection process of professional services.

QBS is widely accepted as "procurement best practice" and is endorsed by many organizations including, but not limited to, the American Council of Engineering Companies, the American Bar Association, the American Public Works Association, and the General Contractors Association. QBS results in the best firm selection for a project, reducing problems that may arise during construction and providing the best value in delivering projects to the public.

I would think that the State would want to continue to ensure that the most qualified professional is doing the job. No one would suggest that an orthopedic surgeon be selected to conduct heart surgery just because the orthopedic surgeon has more time or has never been selected to do heart surgery before. Design professional services are also highly and increasing technically specialized and should be selected primarily based on qualifications.

Thus, I strongly oppose Parts I and II of SB788, HD2 and respectfully request that they be removed from the bill or that the bill be held.

Thank you for the opportunity to provide strong testimony in opposition to SB788, HD2.

LATE

SB-788-HD-2

Submitted on: 3/31/2021 10:59:48 PM

Testimony for FIN on 4/1/2021 2:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kathleen Chu	Individual	Oppose	No

Comments:

Professional quality-based selections are vital for a solid design for the State's infrastructure. An agency may think they are getting a better bargain upfront and will likely end up paying significantly more during construction or for the maintenance of poorly designed and constructed structures or improvements.