



UNIVERSITY OF HAWAII SYSTEM

‘ŌNAEHANA KULANUI O HAWAII

Legislative Testimony

Hō'ike Mana'o I Mua O Ka 'Aha'ōlelo

Testimony Presented Before the
House Committee on Finance
February 27, 2023 at 10:00 a.m.

By

Jan Gouveia

Vice President for Administration
University of Hawai'i System

HB 1184 HD1 – RELATING TO PROCUREMENT

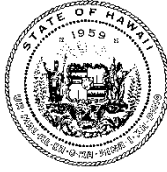
Chair Yamashita, Vice Chair Kitagawa, and Members of the Committee:

The University of Hawai'i is in support of HB 1184 HD1 which allows agencies to proceed with two or fewer qualified persons in the procurement of professional services and respectfully requests that the effective date be changed to July 1, 2023.

This would provide flexibility in securing professional services when the University has less than three qualified persons.

Thank you for the opportunity to testify in support of HB 1184 HD1.

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



BONNIE KAHAKUI
ACTING ADMINISTRATOR

STATE OF HAWAI'I | KA MOKU'ĀINA O HAWAI'I
STATE PROCUREMENT OFFICE

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
FINANCE
February 27, 2023, 10:00 AM

HOUSE BILL 1184 HD 1
RELATING TO PROCUREMENT

Chair Yamashita, Vice Chair Kitagawa, and members of the committee, thank you for the opportunity to submit testimony on House Bill 1184 HD1. The State Procurement Office (SPO) supports the intent of the bill and provides comments and recommendations.

COMMENT: The SPO had discussions with the architects, engineers, consultants, and County personnel, and we generally agree with the language of the bill. However, the SPO recommends changes to the bill that would allow for better continuity and clarity when less than three persons respond to a professional services notice.

RECOMMENDATION: The SPO recommends removing in its entirety Section 2, page 9, lines 1-21, and page 10, lines 1-21, page 11, lines 1-2.

The SPO also recommends mending Section 2, page 6 to read:

(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 person provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualification 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.

(1) In situations in which fewer than three qualified persons respond to the additional notice of need, as provided in subsection (b) that has been posted for at least 10 days; the purchasing agency may request approval from the head of the purchasing agency, except as provided in subsection (1)(c) below, to proceed. The request shall include the date of the solicitation notice and names of persons on the list; including the situation in which no person responds. Response(s) shall then be evaluated by the selection committee in accordance with subsections (d), (e) and (f).

(a) For two persons, the selection committee shall rank them based on the criteria in subsection (e). The ranking shall be sent to the head of the purchasing agency for negotiations conducted in the manner set forth in subsection (h). The rankings of the selection committee shall not be overturned without due cause.

(b) For only one person; the selection committee shall first evaluate qualifications, based on the criteria in subsection (e) and may then send the name of the person to the head of the purchasing agency to negotiate a contract at a fair and reasonable price.

(c) If no person responds, the head of the purchasing may determine in writing that there is no time for resolicitation or that resolicitation would likely be futile. When making this determination, consideration shall be given to time constraints, competition in the marketplace, and the additional cost of preparing, and re-soliciting. In the event of this determination the head of the purchasing agency may submit a written request to the chief procurement officer for approval to engage in direct negotiations with a qualified person. Prior to negotiating:

(1) The head of the purchasing agency shall submit a submit a "Notice of No Interest Received and Intent to Directly Negotiate" to the chief procurement officer.

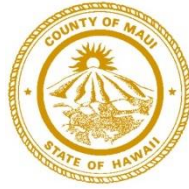
(2) The request shall be made on a form provided by the chief officer.

- (3) The chief procurement officer shall post a copy of the request on an internet site accessible to the public for seven days.
- (4) Any objections to the request shall be submitted in writing and received by the chief procurement officer, within the seven-day public posting period.
- (5) In determining whether to approve the request, the chief procurement officer shall consider the circumstances of each individual case.

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

RICHARD T. BISSEN, JR.
Mayor

KEKUHAUPIO R. AKANA
Acting Managing Director



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February 25, 2023

TO: Honorable Rep. Kyle T. Yamashita, Chair
Honorable Rep. Lisa Kitagawa, Vice Chair
House Committee on Finance

FROM: Richard T. Bissen, Jr., Mayor
Scott Teruya, Director of Finance

DATE: February 25, 2023

SUBJECT: **SUPPORT OF HB 1184, HD1, RELATING TO PROCUREMENT**

Thank you for the opportunity to testify in **SUPPORT** of this important measure. The purpose of this measure is to provide a process by which agencies may procure professional services when fewer than three qualified persons respond to an additional solicitation.

We **SUPPORT** this measure for the following reasons:

1. This measure will help ensure projects continue to move forward and can prevent unnecessary delays due to a lack of potential vendors or professional services.
2. Maui County, like other neighbor islands, lacks accessibility to readily available and qualified vendors or professional services. This measure will save time and resources exhausted on procuring local vendors or professional services that are scarcely available.

For the foregoing reasons, our administration **SUPPORTS** this measure.

DEPARTMENT OF FINANCE

REIKO MATSUYAMA, DIRECTOR

MICHELLE L. LIZAMA, DEPUTY DIRECTOR



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

Testimony of Ernest W. Barreira

Assistant Chief Procurement Officer, Division of Purchasing
Department of Finance, County of Kaua'i

Before the

House Committee on Finance

February 27, 2023, 10:00 AM

Conference Room 308 & Via Videoconference

In consideration of

House Bill 1184, HD 1

Relating to Procurement

Honorable Chair Kyle T. Yamashita, Vice Chair Kitagawa, and Members of the Committee:

The County of Kaua'i respectfully recommends that the honorable members of this committee adopt the contents of companion Senate Bill 1465, SD1 in its entirety. SB 1465, SD 1, accurately reflects the general consensus and agreements that have been achieved between the professional architects, engineers, and consultants, and the State and County procurement personnel who have been actively engaged in meetings and discussions to achieve consensus with regard to the contents of this measure. The County of Kaua'i commits any additional time, coordination, and discussions that may be needed to further refine this measure following crossover.

The Asato v. Procurement Policy Board ruling made it very difficult for the County of Kauai to timely move forward on many professional service initiatives and many times left our county departments and agencies unable to award and contract consulting initiatives vital to our County. This adversely impacted the people of our community who are ultimately the beneficiaries of these services.

SB 1465, SD 1 ensures the structural and procedural adherence consistent with the statute that governs professional services per HRS 103D-304. And at the same time, the bill provides the means for State and County departments and agencies to seek both repetitive and alternative means to award these critical services to those professional engineers, consultants and architects who have been deemed qualified to provide these vital services. The posting and notice requirements as noted in the bill clearly meets the transparency, accountability, and ethical expectations that are asserted through the procurement code. This will promote and ensure fairness in the review, evaluation, selection, award, and contracting processes.

The County of Kaua'i extends our appreciation and thanks to the numerous professionals and consultants who provided the opportunity for dialogue and consensus building thorough the meeting discussions that occurred.

It is for these reasons, that we **support** and respectfully recommend the adoption of SB 1465, SD 1.

Thank you for your consideration of this testimony.

HB-1184-HD-1

Submitted on: 2/26/2023 9:27:25 AM

Testimony for FIN on 2/27/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Sandie Wong	American Council of Engineering Companies - HI	Oppose	Remotely Via Zoom

Comments:

The American Council of Engineering Companies - Hawaii respectfully opposes HB1184, HD1 because of its unintended consequence of eroding Qualification Based Selection of Professional Services. We are currently working with stakeholders to reach resolution. Currently, it is our understanding that the stakeholders prefer the language in SB1465, SD1 with changes that are being discussed. (suggested language is attached to written testimony of ACEC-H that is being submitted separately).

Mahalo



February 26, 2023

TO: Honorable Kyle T. Yamashita, Chair
House Committee on Finance

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

SUBJECT: **Re: House Bill 1184 HD1
Relating to Procurement**

The American Institute of Architects

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

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contact@aiahonolulu.org
aiahonolulu.org/AIAHawaiiStateCouncil

Dear Chair Yamashita, Vice Chair and Members of the Committee,

My name is Reid Mizue, President, AIA Hawaii Council testifying with **COMMENT** to the current language of House Bill 1184 HD1. AIA Hawaii would like to commend the legislature on the progress this bill has made and we appreciate the House LGO Committee for including our suggested language within HD1:

- Leaves subsection (g) unamended as much-preferred “minimum of three persons .”
- Adds dedicated subsection in 103D-304 QBS law for “fewer than three” when public agencies find themselves in situation where repeated solicitations do not yield sufficient interest from private sector.
- Incorporates “less than three persons” entirely in statute 103D-304 for “bright light” procedures that agency staff can sequentially follow. New subsection cross-references many existing subsections; ensuring procedures of Qualifications-Based Selection QBS are being followed as much as practicable. Immediately operational without HAR.
- Includes requirements for additional notices to guard against public corruption that has plagued design professional service contract awards in years past.

**AIA comparison between HB 1184 HD1 versus
companion SB 1465 SD1**

Both bills contain some version of language that AIA sent to Senate GOV and House LGO hearings; but contain seemingly minor wording differences that have major importance in AIA opinion:

- HD1 first subsection sentence is **less “corruptible”** thus **superior** to similar first sentence in SD1 because the words **“qualified under state law”** (meaning holding appropriate license under HRS 464) prevent a Review Committee from **initially restricting competitors** using “corruptible” discretionary factors. Review Committee discretion seems to have kick-started the Asato court case. Review Committee deemed only two persons qualified 21 times for contracts worth \$80 million for largest public works project in Hawaii history; a project that ought to have motivated many design professionals to apply.
- HD1 third paragraph is **inferior** to SD1 because HD1 uses sole source determination “that there is only one source for the service.” CPO is more open to challenge because although “less than three persons” expressed interest; service is otherwise available from many sources. SD1 third paragraph uses language similar to HAR 3-122-66 repealed after current 103D-304 was passed. CPO determination is less open to challenge because timely need for the service continues and market factors have reduced private sector interest. AIA re-drafted this paragraph suggestion in between House LGO and Senate GVO hearings; accounting for the differences.

Text from SB 1465 SD1 by Senate GOV Committee

(i) If after thirty days fewer than three qualified persons respond to the additional notice of need posted pursuant to subsection (b), the purchasing agency may submit a request to the chief procurement officer for approval to proceed under this subsection. The request shall include the dates of all solicitation notices and names of qualified persons on the list prepared pursuant to subsection

(c). The following submissions shall be evaluated in accordance with subsections (d), (e), and (f):

(1) For two qualified persons, the selection committee shall rank the qualified persons based on the criteria in subsection (e). If both persons hold the same qualifications, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among persons holding the same qualifications. The

ranking shall be sent to the head of the purchasing agency for negotiations conducted in the manner set forth in subsection (h). The rankings of the selection committee shall not be overturned without due cause;

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

(3) For a situation in which no qualified person responds, the chief procurement officer may determine in writing that there is no time for resolicitation or that resolicitation would likely be futile; provided that when making this determination, consideration shall be given to time constraints, competition in the marketplace, and whether the additional potential cost of preparing, soliciting, and evaluating competitive responses is expected to exceed the benefits normally associated with solicitations. If such determination is made, the purchasing agency may engage in direct negotiations with a qualified person. For any contract to be awarded, the purchasing agency shall post a "Notice of No Interest Received and Intent to Directly Negotiate" on an internet website accessible to the public for seven days. Any objections shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the "Notice of No Interest Received and Intent to Directly Negotiate" request on hold, review the objection, and provide a written determination to the person submitting the objection. All documents relating to the objection, including written summary of the disposition of the objection, shall be kept with the procurement file;

(4) The determinations required by this subsection shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

AIA comments for future drafts

Discussions include State Procurement Office, County of Kauai, ACEC engineers and ourselves. These discussions have been cordial, productive with unified sense of purpose. The major comment AIA still has is seemingly contradictory:

AIA calls for "low bar" for qualifications by Review Committee to guard against restricting competition for possibly corrupt intentions. But this must shift to Selection Committee ranking persons based on

their qualifications. Paragraph 2 could become problematic because it has “dead end street” language; permissive language to reject the single offeror based on requisite “high bar” for project qualifications. The best interest of the State is most qualified person because of high cost of building and its long service life – possibly decades. There is also practical matter of negotiating a contract at fair and reasonable price; something simpler for agency to achieve when there is second-ranked person.

Repealed HAR 3-122-66 had language allowing CPO to determine that the only offeror had minimal qualifications for a project and that direct negotiations with “best and brightest” person should be held. AIA’s question is whether third paragraph should also deal with the situation of minimally qualified single offeror or failure to negotiate fair and reasonable contract price?

AIA does not like HRS 103D-304 opened up on any frequent basis. Over 20 years have gone by since passage and no amendment has yet succeeded; due to the determination of architects / engineers and understanding by the Legislature and State procurement. Meanwhile, thousands of professional service contracts have been awarded costing in many millions using this relatively shortly worded statute and almost no rules. The protest record is empty for this procurement method when compared to other methods. Therefore, we want to be extremely careful when drafting new amendments.

Thank you for this opportunity to provide **COMMENT** on current language of House Bill 1184 HD1.

Sincerely,

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

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

ACEC

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of Hawaii

50 Years of Excellence

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February 25, 2023

House Committee on Finance

Hearing Date: Monday, February 27, 2023, 10:00 a.m.

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

Subject: **HB 1184 HD1, Relating to Procurement;
Testimony in Opposition**

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

The American Council of Engineering Companies of Hawaii (ACECH) represents more than 70 member firms with over 1,500 employees throughout Hawaii. ACECH **Opposes this bill**, as written.

Qualification-based selection for the procurement of design professional services, in accordance with HRS §103D-304, is of great importance to the membership of ACECH as well as other groups representing design professionals. "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 was strongly supported by ACECH to provide fairness and transparency in public procurement, and to restore public faith in procurement of design professional services. The legislature clearly felt that design professional procurement deserved special care, as it limited procurement methods to sections 103D-304 and -307.

ACECH understands that a small number of projects solicited for professional services, pursuant to section 103D-304, does not receive the requisite number of responses and they must continue to re-solicit these projects. ACECH is working with stakeholders to attempt to draft language amenable to all parties. ACECH's main concern regards the potential erosion of the qualification-based selection process, and the resulting danger to public interest and health and safety. This proposed change for a small number of projects must be carefully and thoughtfully written to avoid abuse and misuse that would result in side-stepping the nationally recognized QBS model.

ACECH's has circulated proposed language to various stakeholders, including SPO, AIA, and the County of Kauai and we are waiting for their comments. ACECH can support this bill if the proposed revisions are replaced with the following language.

(dedicated subsection in 103D-304)

() When fewer than three persons qualified under state law respond to the additional notice of need in subsection (b) that has been posted for at least 30 days; the purchasing agency may request Chief Procurement Officer approval to proceed under this subsection. The request shall include the dates of all solicitation notices and names of all persons on the list of subsection(c); including the situation in which no person responds. Submissions shall then be evaluated by the selection committee in accordance with subsections (d), (e) and (f); provided that:

(1) If two persons qualified under the state law respond to the additional notice, the selection committee shall rank them based on the criteria in subsection (e). If both persons hold the same qualifications, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among persons holding the same qualifications. The ranking shall be sent to the head of the purchasing agency for negotiations conducted in the manner set forth in subsection (h). The rankings of the selection committee shall not be overturned without due cause;

(2) If only one person qualified under state law responds to the additional notice; the selection committee shall first evaluate the person's qualifications and may then send the name of the person to the head of the purchasing agency to negotiate a contract at a fair and reasonable price.

(3) For a situation in which no person responds to the additional notice, the Chief Procurement Officer may determine in writing that there is no time for resolicitation or that resolicitation would likely be futile. When making this determination, consideration shall be given to time constraints, competition in the marketplace, and whether the additional potential cost of preparing, soliciting, and evaluating competitive responses is expected to exceed the benefits normally associated with solicitations. In the event of this determination the purchasing agency may identify and engage in direct negotiations with a qualified person. For any contract to be awarded, the purchasing agency shall post a "Notice of No Interest Received and Intent to Directly Negotiate" on an internet site accessible to the public for seven days, providing the name of the person and the dollar amount of the contract. Any objections shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the "Notice of No Interest Received and Intent to Directly Negotiate" request on hold, review the objection, and provide a written determination to the person submitting the objection. All documents relating to the objection, including written summary of the disposition of the objection, shall be kept with the procurement file. The determinations required by this subsection shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

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

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII