

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

Committee on Ways and Means

April 4, 2023, 10:30 AM

Conference Room 211 & Via Videoconference

In consideration of

House Bill 1184, HD 1, SD1

Relating to Procurement

Honorable Chair Donovan M. Dela Cruz, Vice Chair Gilbert S.C. Keith-Agaran, and Members of the Committee:

The County of Kaua'i respectfully recommends that, upon the concurrence of the Committee on Government Operations, the honorable members of this committee adopt the following language based on consensus between the American Council of Engineering Companies of Hawaii (ACEC-H), the American Institute of Architects, the State Procurement Office, and the County of Kauai:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the procurement of professional services pursuant to section 103D-304, Hawaii Revised Statutes, currently requires a selection committee to rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency to begin negotiations. This requirement was upheld in *Asato v. Procurement Policy Board*, 322 P.3d 228 (Haw. S. Ct. 2014). However, when an agency procures professional services and does not receive the requisite number of responses, it must continue to re-solicit. This forces the procuring official to continue expending time and resources to fulfill the solicitation and, if the requisite number of responses is never received, leaves the agency no options to proceed.

Accordingly, the purpose of this Act is to allow agencies to rank fewer than three persons for professional services when fewer than three qualified persons respond to the solicitation or request to use alternative procurement procedures when no qualified person responds to the solicitation.

SECTION 2. Section 103D-304, Hawaii Revised Statutes, is amended to read as follows:

"§103D-304 Procurement of professional services. (a) Professional services shall be procured in accordance with sections 103D-302, 103D-303, 103D-305, 103D-306, or 103D-307, or this section; provided that design professional services furnished by licensees under chapter 464 shall be procured pursuant to this section or section 103D-307. Contracts for professional services shall be awarded on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(b) At a minimum, before the beginning of each fiscal year, the head of each purchasing agency shall publish a notice inviting persons engaged in providing professional services [~~which~~] that the agency anticipates needing in the next fiscal year, to submit current statements of qualifications and expressions of interest to the agency. Additional notices shall be given if:

- (1) The response to the initial notice is inadequate;
- (2) The response to the initial notice does not result in adequate representation of available sources;
- (3) New needs for professional services arise; or
- (4) Rules adopted by the policy board so specify.

The chief procurement officer may specify a uniform format for statements of qualifications. Persons may amend these statements by filing a new statement prior to the date designated for submission.

(c) The head of the purchasing agency shall designate a review committee consisting of a minimum of three persons with sufficient education, training, and licenses or credentials for each type of professional service [~~which~~] that may be required. In designating the members of the review committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of the review committee established under this section shall be placed in the contract file.

The committee shall review and evaluate all submissions and other pertinent information, including references and reports, and prepare a list of qualified persons to provide these services. Persons included on the list of qualified persons may amend their statements of qualifications as necessary or appropriate. Persons shall immediately inform the head of the purchasing agency of any change in information furnished [~~which~~] that would disqualify the person from being considered for a contract award.

(d) Whenever during the course of the fiscal year the agency needs a particular professional service, the head of the purchasing agency shall designate a selection committee to evaluate the statements of qualification and performance data of those persons on the list prepared pursuant to subsection (c) along with any other pertinent information, including references and reports. The selection committee shall be comprised of a minimum of three persons with sufficient education, training, and licenses or credentials in the area of the services required. In designating the members of the selection committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of a selection committee established under this section shall be placed in the contract file.

(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.

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

(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause.

(h) The head of the purchasing agency or designee shall

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

(i) If, after ten business 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 head of the purchasing agency, except as provided in subsection i(3) below, for approval to proceed under this subsection. Submissions shall be evaluated, by the selection committee, in accordance with subsection (e), provided that:

(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 provided 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 the person's qualifications and may then provide the name of the person to the head of the purchasing agency to negotiate a contract at a fair and reasonable price. If the head of the purchasing agency

determines in writing that either the price of the offer received is not fair and reasonable, or that the qualifications of the offeror is not adequate to meet the procurement needs, the head of the purchasing agency may request approval from the Chief Procurement Officer to proceed as if no person had responded;

- (3) If no qualified person responds, the head of the purchasing agency may determine in writing that the need for the service continues and 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 and competition in the marketplace.
- a. In the event of this determination, the head of the purchasing agency shall submit a written request to the chief procurement officer for approval to engage in direct negotiations with a qualified person. The written request shall be made on a "Notice of No Interest" form provided by the Chief Procurement Officer and shall include the following:
 - i. The date(s) of the solicitation notice(s) and the estimated dollar amount of the contract; and
 - ii. The names of persons on the list; including the situation in which no person responds.
 - b. If the requirements of subpart (a) are met, negotiations may proceed provided that:
 - i. The chief procurement officer shall post a copy of the request on an internet site accessible to the public for seven days;
 - ii. Any objections to the request shall be submitted in writing and received by the chief procurement officer, within the seven-day public posting period; and
 - iii. The chief procurement officer has approved the request, after considering the circumstances of each individual case.

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

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

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

~~(j)~~ (k) Contracts for professional services of less than the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, with at least any two persons on the list of qualified persons established pursuant to subsection (c). Negotiations shall be conducted in the manner set

forth in subsection (h), with ranking based on the selection criteria of subsection (e) as determined by the head of the agency.

~~(*)~~ (1) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

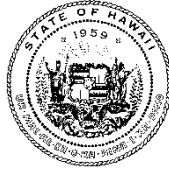
SECTION 5. This Act shall take effect on July 1, 2112.

These suggested revisions to House Bill 1184, HD 1, SD1 reflect the consensus that has been achieved between the State and County procurement personnel, professional architects, engineers, and consultants, who have been actively engaged in meetings and discussions to achieve consensus regarding 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.

We extend our heartfelt appreciation and thanks to the numerous professionals and consultants who provided the opportunity for dialogue and consensus building throughout the meeting discussions that occurred. It is for these reasons, that we support and respectfully recommend the adoption of the enclosed revisions to House Bill 1184, HD 1, SD1.

Thank you for your consideration of this testimony.



STATE OF HAWAII | KA MOKU'ĀINA O 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 SENATE COMMITTEE
ON
WAYS AND MEANS
April 4, 2023; 10:30 a.m.

House Bill 1184, HD1, SD1
RELATING TO PROCUREMENT

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the committee, thank you for the opportunity to submit testimony on House Bill 1184, HD1, SD1. The State Procurement Office (SPO) supports the intent of the bill and provides the following 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 the following changes.

(i) If, after ten business 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 head of the purchasing agency, except as provided in subsection i(3) below, for approval to proceed under this subsection. Submissions shall be evaluated, by the selection committee, in accordance with subsection (e), provided that:

(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 provided 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 the person's qualifications and may then provide the name of the person to the head of the purchasing agency to negotiate a contract at a fair and reasonable price. If the head of the purchasing agency determines in writing that either the price of the offer received is not fair and reasonable, or that the qualifications of the offeror is not adequate to meet the procurement needs, the head of the purchasing agency may request approval from the Chief Procurement Officer to proceed as if no person had responded;

(3) If no qualified person responds, the head of the purchasing agency may determine in writing that the need for the service continues and 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 and competition in the marketplace.

- a. In the event of this determination, the head of the purchasing agency shall submit a written request to the chief procurement officer for approval to engage in direct negotiations with a qualified person. The written request shall be made on a "Notice of No Interest" form provided by the Chief Procurement Officer and shall include the following:

- i. The date(s) of the solicitation notice(s) and the estimated dollar amount of the contract; and
 - ii. The names of persons on the list; including the situation in which no person responds.
- b. If the requirements of subpart (a) are met, negotiations may proceed provided that:
 - i. The chief procurement officer shall post a copy of the request on an internet site accessible to the public for seven days;
 - ii. Any objections to the request shall be submitted in writing and received by the chief procurement officer, within the seven-day public posting period; and
 - iii. The chief procurement officer has approved the request, after considering the circumstances of each individual case.

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

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

- (1) The names of the persons submitted under subsection (g) or (i);
- (2) The name of the person or organization receiving the award;
- (3) The dollar amount of the contract;

(4) The name of the head of the purchasing agency or designee making the selection; and

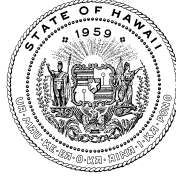
(5) Any relationship of the principals to the official making the award.

~~[(j)]~~ (k) Contracts for professional services of less than the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, with at least any two persons on the list of qualified persons established pursuant to subsection (c). Negotiations shall be conducted in the manner set forth in subsection (h), with ranking based on the selection criteria of subsection (e) as determined by the head of the agency.

~~[(k)]~~ (l) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed.

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

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



KEITH A. REGAN
COMPTROLLER
KA LUNA HO'OMALU HANA LAULĀ

MEOH-LENG SILLIMAN
DEPUTY COMPTROLLER
KA HOPE LUNA HO'OMALU HANA LAULĀ

STATE OF HAWAII | KA MOKU'ĀINA O HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES | KA 'OIHANA LOIHELU A LAWELAWE LAULĀ
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY
OF
KEITH A. REGAN, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE

COMMITTEE ON WAYS AND MEANS

APRIL 4, 2023, 10:30 AM
CONFERENCE ROOM 211 AND VIA VIDEOCONFERENCE, STATE CAPITOL

H.B. 1184, H.D. 1, S.D. 1

RELATING TO PROCUREMENT

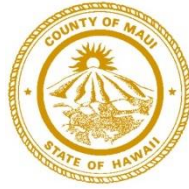
Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Committee, thank you for the opportunity to submit testimony providing **comments** to House Bill (H.B.) 1184, H.D. 1, S.D. 1, which provides a process by which agencies may rank fewer than three persons for professional services when fewer than three qualified persons respond to the solicitation or request to use alternative procurement procedures when no qualified person responds to the solicitation.

These provisions will allow state agencies to fulfill the purposes of solicitations fairly and transparently without the unnecessary excessive expenditure of time and state resources that now stymies our projects. In addition, the Department of Accounting and General Services defers to and supports the comments made by the State Procurement Office.

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

RICHARD T. BISSEN, JR.
Mayor

KEKUHAUPIO R. AKANA
Managing Director



OFFICE OF THE MAYOR
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov

April 3, 2023

TO: Honorable Senator Donovan M. Dela Cruz, Chair
Honorable Senator Gilbert S.C. Keith-Agaran, Vice Chair
Senate Committee on Ways and Means

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

DATE: April 3, 2023

SUBJECT: **SUPPORT OF HB 1184, HD1, SD1, 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.



April 3, 2023

TO: Honorable Donovan Dela Cruz, Chair
Honorable Gilbert Keith-Agaran, Vice-Chair
Senate Committee on Ways and Means

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

SUBJECT: **Re: House Bill 1184 HD1 SD1
Relating to Procurement**

The American Institute of Architects

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

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

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

My name is Reid Mizue, President, AIA Hawaii Council testifying with **COMMENTS** on HB 1184 HD1 SD1. AIA is pleased with progress for dedicated subsection of §103D-304 HRS for situation when fewer than three persons submit letters of interest. New “alternate procurement” procedures are entirely in statute and make extensive cross-reference to existing subsections in 20-year old law.

AIA has been an active participant along with other stakeholders to develop **consensus language** to ensure the new procedures are qualifications-based, fair to all parties, transparent and immediately operational without waiting for Rules.

Thank you for this opportunity to **COMMENT** on HB 1184 HD1 SD1.

Sincerely,

A handwritten signature in black ink that reads "Reid T. Mizue".

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

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

50 Years of Excellence

2022-2023 Board of Directors

President

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

President-Elect

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

Treasurer

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

Secretary

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

Past President

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

National Director

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

Directors

Tim Goshi, P.E.
KAI Hawaii, Inc.
Ph: (808) 791-3966

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

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

April 3, 2023

Senate Committee on Ways and Means

Hearing Date: Tuesday, April 4, 2023, 10:30 a.m.

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

Subject: **HB1184, HD1, SD1, Relating to Procurement
Testimony requesting adoption of alternative language**

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

ACECH has worked extensively with stakeholders (State Procurement Office, County of Kaua'i, AIA) to craft consensus language on this bill. It is our understanding that the consensus language has concurrence from Senate GVO but does not appear to be reflected in the SD1. The consensus language addresses several concerns and potential unintended consequences of the SD1 language identified by the stakeholders.

Therefore, we humbly request the committee adopt the consensus language (attached) as an SD2.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII



Nimr Tamimi, P.E.
President

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the procurement of professional services pursuant to section 103D-304, Hawaii Revised Statutes, currently requires a selection committee to rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency to begin negotiations. This requirement was upheld in *Asato v. Procurement Policy Board*, 322 P.3d 228 (Haw. S. Ct. 2014). However, when an agency procures professional services and does not receive the requisite number of responses, it must continue to re-solicit. This forces the procuring official to continue expending time and resources to fulfill the solicitation and, if the requisite number of responses is never received, leaves the agency no options to proceed.

Accordingly, the purpose of this Act is to allow agencies to rank fewer than three persons for professional services when fewer than three qualified persons respond to the solicitation or request to use alternative procurement procedures when no qualified person responds to the solicitation.

SECTION 2. Section 103D-304, Hawaii Revised Statutes, is amended to read as follows:

"§103D-304 Procurement of professional services. (a) Professional services shall be procured in accordance with sections 103D-302, 103D-303, 103D-305, 103D-306, or 103D-307, or this section; provided that design professional services furnished

STAKEHOLDERS (County of Kauai, State Procurement Office, AIA, and the American Council of Engineering Professionals - Hawaii's) Consensus Language for HB1184, SD2

by licensees under chapter 464 shall be procured pursuant to this section or section 103D-307. Contracts for professional services shall be awarded on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(b) At a minimum, before the beginning of each fiscal year, the head of each purchasing agency shall publish a notice inviting persons engaged in providing professional services [~~which~~] that the agency anticipates needing in the next fiscal year, to submit current statements of qualifications and expressions of interest to the agency. Additional notices shall be given if:

- (1) The response to the initial notice is inadequate;
- (2) The response to the initial notice does not result in adequate representation of available sources;
- (3) New needs for professional services arise; or
- (4) Rules adopted by the policy board so specify.

The chief procurement officer may specify a uniform format for statements of qualifications. Persons may amend these statements by filing a new statement prior to the date designated for submission.

(c) The head of the purchasing agency shall designate a review committee consisting of a minimum of three persons with sufficient education, training, and licenses or credentials for each type of professional service [~~which~~] that may be required. In designating the members of the review committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of the review committee established under this section shall be placed in the contract file.

The committee shall review and evaluate all submissions and other pertinent information, including references and reports, and prepare a list of qualified persons to provide these services. Persons included on the list of qualified persons may amend their statements of qualifications as necessary or appropriate. Persons shall immediately inform the head of the purchasing agency of any change in information furnished [~~which~~] that would disqualify the person from being considered for a contract award.

(d) Whenever during the course of the fiscal year the agency needs a particular professional service, the head of the purchasing agency shall designate a selection committee to evaluate the statements of qualification and performance data of those persons on the list prepared pursuant to subsection (c) along with any other pertinent information, including references and reports. The selection committee shall be comprised of a minimum of three persons with sufficient education, training, and licenses or credentials in the area of the services required. In designating the members of the selection committee, the head of the purchasing agency shall ensure the impartiality and independence of committee members. The names of the members of a selection committee established under this section shall be placed in the contract file.

(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.

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

(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause.

(h) The head of the purchasing agency or designee shall negotiate a contract with the first ranked person, including a rate of compensation [~~which~~] that is fair and reasonable, established in writing, and based upon the estimated value, scope,

complexity, and nature of the services to be rendered. If a satisfactory contract cannot be negotiated with the first ranked person, negotiations with that person shall be formally terminated and negotiations with the second ranked person on the list shall commence. The contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked or next ranked person. Failing accord with the second ranked person, negotiations with the next ranked person on the list shall commence. If a contract at a fair and reasonable price cannot be negotiated, the selection committee may be asked to submit a minimum of three additional persons for the head of the purchasing agency to resume negotiations in the same manner provided in this subsection. Negotiations shall be conducted confidentially.

(i) If, after ten business 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 head of the purchasing agency, except as provided in subsection i(3) below, for approval to proceed under this subsection. Submissions shall be evaluated, by the selection committee, in accordance with subsection (e), provided that:

(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 provided 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 the person's qualifications and may then provide the name of the person to the head of the purchasing agency to negotiate a contract at a fair and reasonable price. If the head of the purchasing agency determines in writing that either the price of the offer received is not fair and reasonable, or that the qualifications of the offeror is not adequate to meet the procurement needs, the head of the purchasing agency may request approval from the Chief Procurement Officer to proceed as if no person had responded;
- (3) If no qualified person responds, the head of the purchasing agency may determine in writing that the need for the service continues and 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 and competition in the marketplace.
- a. In the event of this determination, the head of the purchasing agency shall submit a written request to the chief procurement officer for approval to engage in direct negotiations with a qualified person. The written request shall be made on a "Notice of No Interest" form provided by the Chief Procurement Officer and shall include the following:
- i. The date(s) of the solicitation notice(s) and the estimated dollar amount of the contract; and
 - ii. The names of persons on the list; including the situation in which no person responds.
- b. If the requirements of subpart (a) are met, negotiations may proceed provided that:
- i. The chief procurement officer shall post a copy of the request on an internet site accessible to the public for seven days;
 - ii. Any objections to the request shall be submitted in writing and received by the chief procurement officer, within the seven-day public posting period; and
 - iii. The chief procurement officer has approved the request, after considering the circumstances of each individual case.
- (4) The determinations required by this subsection shall be final and conclusive unless the determinations are clearly erroneous, arbitrary, capricious, or contrary to law.

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

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

~~[(j)]~~ (k) Contracts for professional services of less than the limits in section 103D-305, may be negotiated by the head of the purchasing agency, or designee, with at least any two persons

on the list of qualified persons established pursuant to subsection (c). Negotiations shall be conducted in the manner set forth in subsection (h), with ranking based on the selection criteria of subsection (e) as determined by the head of the agency.

[~~(k)~~] (l) In cases of awards made under this section, nonselected professional service providers may submit a written request for debriefing to the chief procurement officer or designee within three working days after the posting of the award of the contract. Thereafter, the head of the purchasing agency shall provide the requester a prompt debriefing in accordance with rules adopted by the policy board. Any protest by the requester pursuant to section 103D-701 following debriefing shall be filed in writing with the chief procurement officer or designee within five working days after the date that the debriefing is completed."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2112.

Report Title:

Procurement; Professional Services; Ranking; Qualified Persons

Description:

Allows agencies to rank fewer than three persons for professional services when fewer than three qualified persons respond to the solicitation or request to use alternative procurement procedures when no qualified person responds to the solicitation. Effective 7/1/2112. (SD2)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.