

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 GOVERNMENT OPERATIONS

FEBRUARY 14, 2023, 3:10 PM
CONFERENCE ROOM 225 & VIDEO CONFERENCE

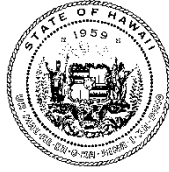
S.B. 1465

RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Gabbard, and Members of the Committee, thank you for the opportunity to submit testimony in support of Senate Bill (S.B.) 1465 which 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.

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.

Thank you for the opportunity to submit testimony on this measure



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 SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
February 14, 2023; 3:10 pm

SENATE BILL 1465
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Gabbard, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 1465. The State Procurement Office (SPO) provides the following comments and recommendations:

This bill provides direction when the requisite number of responses are not received while conducting the professional services method of procurement. The bill explains that the statute as currently written "forces the procuring official to continue expending time and resources to fulfill the solicitation and, if the requisite number or responses is never received, leaves the agency no options to proceed.

The bill contradicts the intent which is to save time and resources. The bill amends Section 103D-304, Hawaii Revised Statutes subsection (g) by adding:

"If fewer than three qualified persons respond to a solicitation that has been posted for at least thirty days and in accordance with subsection (b), with qualifications assessed in accordance with subsection (c), the purchasing agency shall: (1) Post another solicitation for at least another thirty days, which may be identical or modified;

1. The current statute does not impose a specific number of days that a professional services notice must be posted. Thirty days may not be necessary in certain situations.
2. There is no guarantee that another thirty days posting will provide for additional names, especially if the notice is identical to the first notice.

Furthermore, the purpose of the bill is to allow agencies to rank fewer than three persons 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.

The bill requires that if the purchasing agency ranks fewer than three persons, "the purchasing agency shall issue a notice of the *intent to award* a contract for five working days." Inclusive of issuing a notice of the intent to award, the bill allows for a protest period pursuant to section 103D-701. HRS 103D-701 allows an aggrieved to protest *an award*. The bill is confusing, and these multiple steps of allowing for protest pre-negotiation and then again upon award contradicts the intent of the bill, which is to save time and resources

Hawaii Revised Statutes chapter 103D-304 (j) already provides direction and allows 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.

This bill is unnecessary based on data for the Executive Branch that in the last ten years, there have been no requests for waiver or exemption to conduct negotiations because less than three qualified persons have been received for a professional services procurement.

If the intent of the legislature is to allow agencies the ability to award a professional services contract when less than three qualified persons respond to a notice, then the SPO recommends the following language:

Section 103D-304, Hawaii Revised Statutes, is amended by amending subsection (g) to read as follows:

"(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. If less than three qualified persons respond to a solicitation, the agency may submit a request for alternative procurement approval from the chief procurement officer. 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."

Thank you.



UNIVERSITY OF HAWAII SYSTEM

‘ŌNAEHANA KULANUI O HAWAII

Legislative Testimony

Hō'ike Mana'o I Mua O Ka 'Aha'ōlelo

Testimony Presented Before the
Senate Committee on Government Operations
February 14, 2023 at 3:10 p.m.

By

Jan Gouveia

Vice President for Administration
University of Hawai'i System

SB 1465 – RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Gabbard, and Members of the Committee:

The University of Hawai'i is in support of SB 1465 which allows agencies to proceed with two or fewer qualified persons in the procurement of professional services, provided that the purchasing agency posts a notice of intent to award for five working days.

This would provide flexibility in securing professional services when the University has less than three qualified persons. Because this is not an uncommon occurrence, allowing agencies to proceed upon posting a notice of intent to award for five working days is in the best interest of the state.

Thank you for the opportunity to testify in support of SB 1465.

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
Senate Committee on Government Operations
February 14, 2023; 9:30 a.m.
Conference Room 225 & Via Videoconference

In consideration of
Senate Bill 1465
Relating to Procurement

Honorable Chair Angus L.K. McKelvey, Vice Chair Gabbard, and Members of the Committee:

The County of Kaua'i is in **support** of Senate Bill 1465, which 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.

The Asato v. Procurement Policy Board ruling made it very difficult for us 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.

As Kaua'i is a small market, many of the services required to fulfill County functions are unavailable on the island. There have been times when we have not been able to move forward with a service award at all because of the current restrictions. The current bill 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.

We have reviewed the opposition testimony that was submitted when this bill was presented during the last session. We are sensitive to the issues raised by the professional consultants and believe we have responsibly addressed these concerns within the body of Senate Bill 1465. The content of the bill ensures the integrity of the professional services process, and incorporates definitive due process and responsible checks and balances to preserve the ethical obligations of government in the award and contracting processes.

It is for these reasons, that we **support** SB 1465. Thank you for your consideration of this testimony.



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February 14, 2023

Senate Committee on Government Operations

Hearing Date: Tuesday, February 14, 2023, 3:10 p.m.

Honorable Chair McKelvey, Vice Chair Gabbard, and Members of the Senate Committee on Government Operations

Subject: **SB 1465, Relating to Procurement; Professional Services; Ranking; Qualified Persons Providing Comments**

Dear Chair McKelvey, Vice Chair Gabbard, 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 provides the following comments on this bill.

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. In the last legislative session, ACECH worked 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 suggests the following language revisions to require that a solicitation be re-posted for a minimum of 30-days along with the published notice that the agency intends to move forward with ranking fewer than three persons. This suggestion allows for qualified professionals to respond to a second solicitation and adds a layer of protection from abuse of this proposed change.

- (1) *Post another solicitation for at least another thirty days, which may be identical or modified; ~~or~~ **and***
- (2) *Publish a notice that the agency intends to move forward with ranking fewer than three persons **if additional qualified professionals do not respond during the 30-day extension;***



ACECH also requests that the “notice of intent to award” and the timeframe to file a written protest be extended to 30-days. Protests pursuant to Section 103D-701 currently pertains to bidders and contractors for whom the date of award is known to the parties. Awards for professional services do not have prescheduled award dates and therefore we feel it is necessary to extend the written protest period to 30-days.

Lastly, ACECH is very concerned regarding the language “alternative procurement procedures”. This language is undefined and vague. To add a layer of transparency, we suggest the following revisions:

If no qualified person responds to a solicitation, the agency may request permission from the Chief Procurement Officer to use alternative procurement procedures. The requested procurement method shall be described in writing and included as part of the published notice required in subsection (g)(2).

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

SB-1465

Submitted on: 2/13/2023 2:51:19 PM

Testimony for GVO on 2/14/2023 3:10:00 PM

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

Comments:

I echo the concerns of the American Council of Engineering Companies - HI. Thank you.

KAUAHIKAUA & CHUN ARCHITECTS
3456 Kaimuki Avenue
Honolulu, Hawaii 968 16



February 14, 2023

Honorable Angus McKelvey, Chair
Senate Committee on Government Operations

Re: **Senate Bill 1465**
Relating to Procurement

Dear Chair McKelvey and Members of the Committee,

I am Daniel Chun, partner of Kauhikaua & Chun Architects. I **STRONGLY OPPOSE** current language of Senate Bill 1465 that adversely modifies subsection (g). My concerns will be lessened with new dedicated subsection (k) having following positive features:

1. Legislate “bright light” sequential agency procedures, allowing subsection (g) to stand unamended as 2003 reform law; much-preferred “gold standard” public policy for procuring design professional services.
2. Situates “less than three” just following subsection (k) that allows “at least any two” under certain conditions. I lack information as to how often subsection (k) is used. You might consider raising dollar value of small purchases, if this would relieve some problems. Written in 2002 with smaller agencies such as counties in mind. Dollar value is governed in separate procurement section to maintain 103D-304 as kind of inviolate statute. QBS law is “third rail” of political advocacy.
3. Considers “less than three”, not as an “exemption”, but as “factual situation” directly caused by lack of response on part of the private sector; not public agency corruptible intent.
4. Builds upon stakeholder discussions that progressed in 2022 session. These were intently focused on making clear sequential procedures for private and public parties.

I was actively involved in language of 103D-304 some 20 years ago to reform procurement of design professional services in response to public corruption. I am deeply concerned over this bill that “messes up” the sequential steps of subsection (g) with lots of language that ought to be used only in very rare situations.

I call your attention to attached past proposal by AIA for dedicated subsection. In procurement law, every single word that is changed can have big consequences. Explanatory notes for 2022 AIA testimony are omitted, but can be found in legislative records. Just one example, “**qualified under state law**” is used to prevent agencies from disqualifying any design professional applicant for contract by agency subjective decision of “unqualified.” Bear in mind that Review

Committees make potentially corruptible decisions without public oversight. That's what triggered Asato decision. This bill also has no such prevention.

PROPOSED DEDICATED SUBSECTION 2022

Attached to American Institute of Architects testimony to House Finance for Senate Bill 2385 HD2 (2022 session) and needing more stakeholder discussion

(k)¹ For a factual situation in which fewer than three persons qualified under state law² respond to the additional notice of need in subsection (b)³ that has been posted for at least 30 days; the purchasing agency may request State Procurement Office approval to proceed under rules adopted by the policy board.⁴ The request shall include the dates of all solicitation notices and names of persons on the list of subsection(c); including situation in which no person responds.⁵ Submissions shall then be evaluated by the selection committee in accordance with subsections (d), (e) and (f).

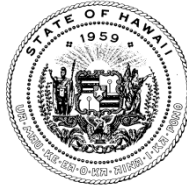
(1) For two persons, the selection committee shall rank them based on the criteria in subsection (e). If both persons hold the same qualifications, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among persons holding the same qualifications. The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

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

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

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

Today's hearing is amazing timing because Valentine's Day was date that Hawaii Supreme Court issued its decision in Asato v. Hawaii Procurement Policy Board. Thank you for this opportunity to **STRONGLY OPPOSE** proposed language of subsection (g) in this bill.



TESTIMONY BY:
EDWIN H. SNIFFEN
DIRECTOR

Deputy Directors
DREANALEE K. KALILI
TAMMY L. LEE
ROBIN K. SHISHIDO
JAMES KUNANE TOKIOKA

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

Tuesday, February 14, 2023
3:10 P.M.
Conference Room 225 & Videoconference
State Capitol

LATE

S.B. 1465
RELATING TO PUBLIC PROCUREMENT

Senate Committee on Government Operations

The Department of Transportation (DOT) **supports** this measure that would 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.

The Department supports the qualifications-based process and follows its provisions for all consultant selections for both state and federal funding. For the majority of our initiatives, we do not have issues with receiving at least three qualifications. However, there have been request for qualifications that were issued multiple times because we could not receive the minimum three qualifications. In these instances, the state was unnecessarily delayed in its processes due to lack of interest or expertise in the offering.

In these situations, the state should have the flexibility of moving forward with less than three submittals if it is in the best interest of the state. We believe the language in this measure provides the state the flexibility to move forward efficiently while demonstrating transparency and accountability for its decisions.

However, while the DOT supports this measure, a recommendation would be to follow the existing procurement code exemption process and proposes the following revision to Hawaii Revised Statutes, 103D-304(g):

(g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. If fewer than three persons respond to a notice to providers of professional services, the agency may submit a request to the chief procurement officer to allow the ranking of less than three persons and to proceed with selection and contract award under the provisions of this chapter. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualifications under this

section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications. The recommendations of the selection committee shall not be overturned without due cause.

Thank you for the opportunity to provide testimony.