

# DEPARTMENT OF FINANCE

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MICHELLE L. LIZAMA, DEPUTY DIRECTOR



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## 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

March 1, 2023, 10:10 AM

Conference Room 211 & Via Videoconference

In consideration of

### Senate Bill 1465, SD 1

### 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 strongly supports Senate Bill 1465, SD1. 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 after crossover.

The Asato v. Procurement Policy Board ruling made it very difficult for the County of Kaua'i 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. We look forward to our continued discussions and consensus-building as this measure advances.

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

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](mailto: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  
March 1, 2023, 10:10 AM

SENATE BILL 1465, 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 Senate Bill 1465, SD1. 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 improved flow, style, and clarity when less than three persons respond to a professional services notice.

RECOMMENDATION: The SPO recommends removing in its entirety Section 2, page 7, lines 12-20; page 8, lines 1-21; page 9, 1-21; and page 10, lines 1-3.

The SPO also recommends amending 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 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.

(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



**LATE**



**OFFICE OF THE MAYOR**  
COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.mauicounty.gov](http://www.mauicounty.gov)

February 28, 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:** February 28, 2023

**SUBJECT: SUPPORT OF SB1465, SD1, RELATING TO PROCUREMENT**

Thank you for the opportunity to testify in **SUPPORT** of this important measure. The purpose of this measure 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.

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

1. This measure provides the means for State and County departments and agencies to seek both repetitive and alternative means to award critical services to professional vendors and services who have been deemed qualified to provide vital services.
2. 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.
3. 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.



February 27, 2023

TO: Honorable Donovan Dela Cruz, 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: Senate Bill 1465 SD1  
Relating to Procurement**

The American Institute of Architects

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

T (808) 628-7243  
contact@aiahonolulu.org  
[aiahonolulu.org/AIAHawaiiStateCouncil](http://aiahonolulu.org/AIAHawaiiStateCouncil)

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

My name is Reid Mizue, President, AIA Hawaii Council testifying with **COMMENT** to the current language of Senate Bill 1465 SD1. AIA Hawaii would like to commend the legislature on the progress this bill has made and we appreciate the Senate including our suggested language within SD1:

- 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 SB 1465 SD1 versus companion HB 1184 HD1**

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 Senate Bill 1465 SD1.

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

**LATE**

**ACEC**

AMERICAN COUNCIL OF ENGINEERING COMPANIES  
of Hawaii

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

March 1, 2023

**Senate Committee on Ways and Means**

**Hearing Date: Wednesday, March 1, 2023, 10:10 a.m.**

Honorable Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Senate Committee on Ways and Means

Subject: **SB 1465, SD1, Relating to Procurement;  
Providing Comments**

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

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

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 is actively working with stakeholders, including SPO, AIA, the County of Kauai, and the County of Maui. ACECH suggests 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