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February 15, 2015

Senate Committee on Government Operations

Hearing Date: Tuesday, February 17, 1:20 p.m., Conference Room 414

Honorable Senators Donovan M. Dela Cruz, Chair; Clarence K. Nishimura, Vice Chair; and
Members of the Senate Committee on Government Operations

**Subject: SB 1282, Relating to Procurement
TESTIMONY IN OPPOSITION**

Dear Chair Dela Cruz, Vice Chair Nishimura, 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.

We are concerned that this bill is too vague, and doesn't adequately identify the problem it seeks to resolve. In a hearing of the House version of this bill, the State Procurement Office stated that the goal of the bill is to bring currently exempt procurement activities under the procurement code. We fail to see how this bill would address exempt procurement activities, as the bill doesn't mention the exemptions. The procurement code already contains many "innovative" and flexible procurement methods, including "competitive sealed proposals" (if the agency does not want price to be the driving factor), sole source procurement (if the agency determines only one source is available); and emergency procurements. Public-private partnerships are addressed in other bills in the current session.

ACECH is a strong supporter of HRS §103D-304, the State's "qualification-based selection" (QBS) law for procurement of professional services, which is the nationally recognized model procurement code for the procurement of professional services. Following enactment of §103D-304, the state procurement office put into place rules (HAR §3-122-663) that did not follow the intent of the law. In February 2014, a decision of the Supreme Court of the State of Hawaii upheld a 2012 Circuit Court decision that found that the rule was invalid and that the law "must be read by its plain and obvious meaning" and the rule "could not be justified by the need to "fill a gap left in HRS § 103D-304," because "[t]he plain language of section 304 does not leave any such gaps[.]" (Decision SCAP-12-0000789). The Court's ruling resulted in considerable negative press regarding the HART procurement actions that were conducted using the rules.

While SB 1282 does not discuss section §103D-304, it does include "professional services" among the list of contracted services that may be procured using an "innovative" procurement method. ACECH is concerned with the potential use of a process, other than QBS for the procurement of professional AE services, that could lead to corruption that was seen in Hawaii prior to enactment of §103D-304, and concerned that the state procurement office may develop rules under this "innovative" procurement law that would circumvent the intent of §103D-304. Therefore, if the committee intends to pass this bill, we request that the attached revision be made.

We appreciate the opportunity to provide testimony on this matter. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII


William H.Q. Bow, P.E.

Proposed Revised Text (ACECH added text shown in *bold italics*):

SECTION 2. Chapter 103D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§103D- **Special innovative procurement.** (a) Contracts for supplies, services, professional services, or construction may be awarded without regard to sections 103D-302 or 103D-303 using a special innovative procurement process in accordance with this section and procedures set forth in rules adopted by the procurement policy board; *provided that design professional services furnished by licensees under chapter 464 shall be procured pursuant to section 103D-304 or 103D-307.* The special innovative procurement process authorized by this section shall only be used when the chief procurement officer determines in writing that it is advantageous to the State to use the process for procurement of new or unique requirements of the State, new technologies, or to achieve best value.