



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
FEBRUARY 4, 2021, 3:00 PM

SENATE BILL 1017
RELATING TO PROCUREMENT

Chair Moriwaki, Vice-Chair Dela Cruz, and members of the committee, thank you for the opportunity to submit testimony on SB1017. The State Procurement Office (SPO) appreciates the intent of this bill, however, the SPO would require a minimum of \$164,000 pre-tax (e.g. one-time funding of \$150,500 and annual maintenance funding of \$13,500) to develop, implement, and maintain a vendor performance tracking system and would submit the following comments:

The State finds that, per its adoption of the ABA Model Procurement Code, that past performance is already allowable inside of the procurement statute. What is missing is the guidance that is found as supplemental Rules. Thus, on May 28, 2019, Procurement Policy Board voted to approve to development of past performance Rules.

In 2019, the State Procurement Office contracted the services of a consultant to review the Comptroller Construction Task Force Report of 2015, analyze the current environment, assist in the development of past performance rules, and make recommendations for the creation of a database. The SPO is currently reviewing the consultant's report and recommendations, along with feedback from CPO jurisdictions and the contractor community, to determine how best to incorporate the information when amending the Rules.

The Rules will cover how to incorporate past performance criteria in a bid or offer, how to evaluate past performance, how to evaluate performance post-award, and how to collect and share that information across siloed agencies through the use of a central state-wide database.

As important and valuable as this measure is, it must provide the resources necessary for a project of this scope and magnitude. In fact, this project will be an extensive undertaking, requiring expertise, staffing, and funding resources in order to develop any new processes, procedures, templates, contract terms and conditions, and reporting requirements compliant with the Hawaii Code, which will require resources the SPO does not have.

Upon receipt of the appropriated and allocated funding for the report, the SPO will first procure the respective consulting services so that the SPO will be able to create the tools and infrastructure for buyers to adopt a new policy, which is essential for successful implementation. In order to continue this work, the SPO is requesting one-time funding of \$150,500, and annual maintenance funding of \$13,500 to develop the following tools:

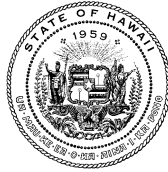
| | Delivery | Funding Request |
|---|--|------------------|
| 1 | Past Performance Guide | \$15,000 |
| | Prepare a past performance implementation guide that provides information for Hawaii contracting officers with more user-friendly detailed instructions on how to effectively implement the Administrative Rules into practice. The implementation guide will include detailed explanations on how to evaluate past performance, examples of quality past performance narratives, and explanations regarding recording negative performance without using the past performance evaluation as a punitive tool outside of due process. | |
| 2 | Past Performance Database Functional Requirements Document | \$30,000 |
| | Prepare a Past Performance Database Functional Requirements Document (FRD). The FRD will describe the Database's functional requirements. Our FRD will explain the objectives of the Past Performance Database, the forms and data to be entered, workflow of a performance evaluation, users and roles, system outputs, and applicable regulatory requirements, etc. An FRD is solution independent. It is a statement of what the database is to do - not how it functions technically. The FRD does not commit the Database developers to a design. The SPO will be able to include the FRD in a solicitation for design and delivery of the Past Performance Database. | |
| 3 | Create Past Performance Database | \$50,000 |
| 4 | Preparation and Publication of Rules | \$5,000 |
| 5 | Rules must be prepared, surveys sent, facilitated discussions and the publication fee | \$4,000 |
| 6 | Training | \$46,500 |
| | Total One-Time Funding | \$150,500 |
| 7 | Annual Database Maintenance (estimated at 27% of cost) | \$13,500 |
| | Total Funding Recurring Annually | \$13,500 |

The SPO is committed to working with the State Legislature and Agencies to develop the best policy and procedures for procurement that allow for streamlining, efficiencies, innovation, cost control, and fair and equal contracting opportunities across the State of Hawaii and recognizes the benefits of a past performance database system. Therefore, the cost of implementing a successful past performance database is estimated to start at a minimum of \$164,000 for fiscal year 2021-2022.

The SPO also recommends removing Section 5, pages 4 and 5, in its entirety, as efforts have already begun to address past performance in competitive sealed bidding in the HAR 3-122, Subchapter 5.

Thank you.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
COMMITTEE ON GOVERNMENT OPERATIONS

THURSDAY, FEBRUARY 4, 2021, 3:00 P.M.
CONFERENCE ROOM 016, STATE CAPITOL

S.B. 1017

RELATING TO PROCUREMENT

Chair Moriwaki, Vice Chair Dela Cruz, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 1017.

The Department of Accounting and General Services (DAGS) strongly opposes legislation mandating the consideration of past performance and the proposed amendment of §103D-302(h) to add the ability to negotiate with the low bidder if “the lowest responsive and responsible bid for a construction procurement significantly differs from the amount estimated by the State for that project.”

We strongly oppose legislation mandating the consideration of past performance for the following reasons:

- The current procurement code already allows for the consideration of past performance.

The Competitive Sealed Proposals method of procurement facilitates the consideration of past performance and may be used whenever a department determines that factors other than price (including past performance) should be a selection factor. This determination must be

made on a case-by-case basis, taking into consideration time and funding constraints, need, resources, and other project-specific details. DAGS has chosen to use this method to procure both equipment and services when it has deemed it appropriate to do so.

Even in the context of a Sealed Bid (Invitation for Bid, aka “low bid”) procurement, the procurement code allows an agency to use its own past experience with a bidder to disqualify its bid. The DAGS Interim General Conditions for Construction, as amended, Item 2.12.3, states that a bidder’s proposal may be rejected due to a “Lack of responsibility and cooperation as shown by past work such as failing to complete all of the requirements to close the project within a reasonable time or engaging in a pattern of unreasonable or frivolous claims for extra compensation.” In order to use this as a basis, the department would require a fact-based record/log supporting this assertion for past projects. Based on past testimony by the City and County of Honolulu, it appears this methodology is put into practice for their projects, as well.

- There is already a process within the procurement code to address “poor-performing” contractors and providing this information to all State and County agencies.

Any agency who has had a “poor-performing” contractor on a project can, with sufficient factual documentation, look to the State Procurement Office to undertake proceedings to suspend and/or debar the contractor. When a contractor is suspended pending investigation or debarred, it is announced to all agencies via a Procurement Circular.

- DAGS does not believe that this is the best, most effective method of addressing the issue of “poor-performing” contractors.

Among the wide range of solutions are: strengthening the government’s ability to enforce the contract documents, assessing liquidated damages, better evaluating the need for change

orders, documenting facts related to poor performance, and improving the suspension and debarment process; etc.

- The consideration of past performance introduces an element of subjectivity to the construction procurement process, which is increased when an agency is forced to rely on an indirect assessment.

There will always be an element of subjectivity to the consideration of past performance due to the lack of objective criteria; lack of uniformity in rating systems, including interpretations regarding the evaluation criteria and terminology; lack of uniformity in data used to make decisions on responsibility, this problem is compounded when an entity is forced to use the data of others without direct experience; and the subjectivity inherent in determining what information should be considered (i.e. recent, relevant, etc.).

If past performance is to be utilized, there must be a reliable third party to review all evaluations to be used by the agencies and to make determinations regarding the quality and consistency of the information and its impact on the issue of responsibility for each contractor.

DAGS has strong concerns that the increased degree of subjectivity introduced by the mandate to consider past performance within methods of procurement that are primarily an objective process will result in an increase in the number of protests. This increased potential for protests and project delays would negatively impact all construction projects. These negative impacts will be most pronounced for large, critical, high profile projects where the cost and other public impacts may be greatest.

- The utility of a database such as the one proposed for the purported intent may be problematic.

For example:

- Item 103D- (b)(1)(F) Whether the project was timely completed or not. This is not a reliable indicator of a poor contractor, because there may be many causes for the delayed completion of a project which are not under the control of the contractor (i.e. bad weather, COVID-related shutdowns, the discovery of unanticipated site conditions which needed to be addressed, etc.).
- Item 103D- (b)(1)(H) The positive or negative difference between the final cost of the project and the project's authorized budget, if any. This is also not a reliable indicator of a poor contractor, because there may be many causes for cost increases on a construction project which are not under the control of the contractor (i.e. additional costs resulting from unanticipated site conditions, work done as a result of a change initiated by the agency or user, etc.). Further, it is always the responsibility of the agency to deny unreasonable or unjustifiable requests on the part of the contractor which would increase the cost of a construction project.

Similarly, there may be many causes of a project being completed under the stated budget (i.e. reduction in scope by the agency, unused variable quantities, etc.).

- Lack of staffing and time to properly implement the proposed measure.

The implementation of past performance legislation of this nature would necessitate more than just the creation of a database. It would require additional staff time and effort to input information into the database as well as to communicate the information to contractors and to go

through the process to allow contractors to contest the information contained in the database.

This is not feasible given the current economy, budget, and staffing constraints.

DAGS strongly opposes the addition of the proposed language to §103D-302(h) because it would be unfair to other bidders. For example: Say the lowest bid looks unreasonably low in comparison with all other bids received for the project. Further inquiry indicates that the apparent low bidder left out an important component of the work. The proposed legislation would allow the low bidder to raise its bid to more closely align with the State's estimate, provided it is still below the second lowest bid, which would be unfair to all other bidders who may have expended the effort to include all of the required elements of work. Such a practice would encourage the practice of "low-balling" bids, which is not in the best interest of the State; be attractive to the "poor-performing" contractors the legislature is trying to avoid hiring; and encourage the use of contractors who are not careful in the preparation of their bids.

In summary:

Legislation mandating the consideration of past performance is not necessary because the current procurement code already allows for the consideration of past performance and contains mechanisms and processes which may be used to address the issue of "poor performing" contractors. Instead, DAGS recommends careful study of the problem in relation to existing and alternative means and methods of addressing the issues prior to mandating consideration of past performance to avoid expending large amounts of funds to unsuccessfully address a complex problem, and to preclude further negatively impacting the procurement process with a substantial increase in the number of protests.

S.B. 1017

It would also be inadvisable to amend §103D-302(h) as proposed, because it would have unintended negative impacts on the procurement process in terms of fairness and the ability of the State to hire good contractors.

Thank you for this opportunity to provide testimony on this matter.



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GREGG S. SERIKAKU
EXECUTIVE DIRECTOR

Via Email

February 2, 2021

Senator Y. Sharon Moriwaki, Chair
Senator Donovan M. Dela Cruz, Vice-Chair
Senate Committee on Government Operations

Chair Moriwaki, Vice Chair Dela Cruz, and Members of the Committee:

SUBJECT: SB1017 RELATED TO PROCUREMENT

My name is Gregg Serikaku, Executive Director for the Plumbing and Mechanical Contractors Association of Hawaii, and we are the State's largest association representing contractors that perform plumbing, air conditioning, refrigeration, steamfitter, and fire sprinkler work throughout Hawaii.

Our Association is **strongly opposed** to Section 14 of SB1017, which eliminates the requirement for bidders to provide the nature and scope of work to be performed by each person or firm to be engaged by the bidder as a subcontractor in the performance of the contract.

Elimination of the "nature and scope of work" requirement would further expose subcontractors to the unethical practice of bid shopping, as there would be no way for the procurement officer, listed subcontractor, other bidders, and stakeholders to determine which portion of work the listed subcontractor is performing. This void of information would then allow bidders to list the names of numerous subcontractors with overlapping licenses who could then be shopped against each other.

For example, in our industry we have many subcontractors who each hold multiple specialty licenses in areas such as plumbing, air conditioning, fire sprinkler, boiler, refrigeration, etc., and under this proposed bill, a bidder could list the names of several of these subcontractors without having to designate the scope of work for which they have been engaged, allowing the bidder to then shop these listed subcontractors against each other.

Bid shopping reduces quality on the job, discourages competition, artificially inflates prices, and promotes unfair and unethical practices, therefore we strongly encourage this committee to remove Section 14 of SB1017.

Thank you for this opportunity to provide our testimony.

Respectfully yours,

A handwritten signature in black ink that reads "Gregg S. Serikaku".

Gregg S. Serikaku
Executive Director

SAH - Subcontractors Association of Hawaii

1188 Bishop St., Ste. 1003**Honolulu, Hawaii 96813-2938

Phone: (808) 537-5619 ✦ Fax: (808) 533-2739

February 4, 2021

Testimony To: Senate Committee on Government Operations
Senator Sharon Y. Moriwaki, Chair

Presented By: Tim Lyons, President

Subject: S.B. 1017 – RELATING TO PROCUREMENT

Chair Moriwaki and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct contracting trade organizations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL AND AIR CONDITIONING NATIONAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

Our biggest problem with this bill is Part 5 and this involves suggested changes to the Subcontractor Listing Clause.

First, we would like to note that sometimes it is nice to have an outside contractor do the evaluation and study of the system in the hopes that they can look at it with a "fresh eye". The disadvantage is that they come with recommendations that are only half thought through or whose implementation is impractical. Unfortunately too many studies like this one do a great job of researching the facts but then offer solutions without sounding those solutions out with the parties so the solutions can be evaluated.

In order to appreciate this area, you have to go back to the very beginning of the Subcontractor Listing Clause. Chiseling and bid-shopping are prevalent, even with the system that we have today, although it is minimized. Subcontractors are in an economically disadvantaged position from general contractors. It is the general contractor who awards them work, whether it is a state job or a private job. It is the general contractor who receives the payment, so the sub is totally dependent on the general's processing of that payment in order to get paid. Generals that provide \$2,000,000.00, \$4,000,000.00 and \$20,000,000.00 worth of work to a particular sub have a great deal of leverage over them. This is not to say that every general is a bad guy. Unfortunately, however, there are too many of them that do exist which is why the Subcontractor Listing Law is in our statutes and as this bill points out, and everyone agrees, that it certainly does its job in helping to mitigate those kinds of situations AS IT IS WRITTEN.

Below you will find a chart with two (2) examples. One with the current information that generals must provide and the other with what the bill provides.

CURRENT

Joint Contractors or Subcontractors List

(BIDDER'S INSTRUCTIONS: Refer to SECTION 00210 - INSTRUCTIONS TO BIDDERS for detailed instruction to fill out this list. Write in the complete firm name and nature of work to be performed by the required joint contractor or subcontractor.)

| COMPLETE FIRM NAME JOINT CONTRACTOR OR SUBCONTRACTOR | NATURE OF WORK TO BE PERFORMED |
|--|--|
| Harris Rebar South Pacific Inc | Reinforcing Steel ^{RPB} |
| West Maui Construction | CMU Masonry * |
| Viking Construction | Drywall/Metal Stud Framing ^{DB} |
| Beachside Roofing | Roofing TPO * |
| CML Security | Detention Equipment * |
| CML Security | Security Electronics * |
| Darvin D. Leis | Plumbing * |
| Darvin D. Leis | HVAC * |
| Darvin D. Leis | Fire Sprinkler ↓ |
| Beachside Roofing | Sheet Metal * |
| ELCCO | Electrical * |
| Maui Kupono Builders | Sitework |
| IG Steel | Structural Steel |
| Jade Painting | Painting |
| Beachside Roofing | Roofing Standing Seam Metal Roofing |
| Kahului Carpet | Flooring |
| V+C Drywall Contractors, Inc. | Drywall/Acoustical ceiling/Insulation |
| CMC dba Associated Steel Works | Reinforcing Steel |
| Bowman Termite | Termite Control |

PROPOSED

Joint Contractors or Subcontractors List

(BIDDER'S INSTRUCTIONS: Refer to SECTION 00210 - INSTRUCTIONS TO BIDDERS for detailed instruction to fill out this list. Write in the complete firm name and nature of work to be performed by the required joint contractor or subcontractor.)

| COMPLETE FIRM NAME JOINT CONTRACTOR OR SUBCONTRACTOR | NATURE OF WORK TO BE PERFORMED |
|--|--------------------------------|
| Harris Rebar South Pacific Inc | |
| West Maui Construction | |
| Viking Construction | |
| Beachside Roofing | |
| CML Security | |
| CML Security | |
| Darvin D. Leis | |
| Darvin D. Leis | |
| Darvin D. Leis | |
| Beachside Roofing | |
| ELCCO | |
| Maui Kupono Builders | |
| IG Steel | |
| Jade Painting | |
| Beachside Roofing | |
| Kahului Carpet | |
| V+C Drywall Contractors, Inc. | |
| CMC dba Associated Steel Works | |
| Bowman Termite | |

As you can see from this, the chart on the right tells you very little, so to that extent, the consultant's recommendation is true: If you don't provide enough information then nobody knows what's going on and no one can protest it!

As the Section 3 summary points out, "all agree the statute is effective at deterring bid-shopping..." "...full repeal of the statute is not a recommendation". Please note and remember that any savings achieved as a result of subcontractor substitution goes directly to the general's pocket. Not to the state or the taxpayers.

So the study recommends to eliminate what the subcontractor is going to do. As we pointed out, the statute's intention is to eliminate or mitigate bid-shopping. Example: On the Subcontractor Listing

form, if you have one sub listed and the general knows that this bid is for the entire roof assembly, (in other words, the flat roof, the steep roof and the metal roof), but the other subcontractor that is listed has submitted a price to the general contractor for only the metal roof, then you have a situation that is ripe for bid-shopping as the general plays between roofer number one and roofer number two.

We appreciate the intent of the consultants in trying to determine a solution to this problem. All the parties have worked on various proposed solutions over the past 5 or 6 years. What it comes down to is that some have the goal for flat out elimination of the clause and short of that, eliminating segments of it so that it is rendered ineffective and useless.

Based on the above, we cannot recommend inclusion of Part 5 (Section 13) of this bill.

Thank you.

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Website: www.gcawhawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 2, 2021

TO: HONORABLE SHAORN MORIWAKI, CHAIR, HONORABLE DONOVAN DELA CRUZ, VICE CHAIR, COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: **PROVIDING COMMENTS ON S.B. 1017, RELATING TO PROCUREMENT.** Implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016. Requires the state procurement office to submit a report to the legislature regarding its progress in implementing the procurement policy review recommendations

HEARING

DATE: Thursday, February 4, 2021
TIME: 3:00 p.m.
PLACE: Capitol Room 016

Dear Chair Moriwaki, Vice Chair Taniguchi and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA is providing comments and suggested amendments to S.B. 1017, which implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016. Requires the state procurement office to submit a report to the legislature regarding its progress in implementing the procurement policy review recommendations.

The intent of this measure is to adopt recommendations from an independent review to closer align the state procurement process to the federal procurement process.

GCA believes that parts III and IV of this measure could have the unintended consequence of increasing administrative costs and creating additional bureaucracy.

GCA is in support of part V which seeks to reduce the risks of protests due to the subcontractor listing requirements of the Procurement Code. The subcontractor listing requirement has become a way in which bidders attack the responsiveness of a proposal, resulting in awards to non-low bidders, increased costs to the state and taxpayers, and delayed projects due to a technicality in the

submitted subcontractor list. As a result, not only does the lowest bidder and their listed subcontractors get disqualified from the project, but the state could end up paying more for the project. **GCA would like to offer the following suggested amendments** to further reduce the risks of having technical mistakes result in a bid challenge by allowing a bidder of a public works construction project to clarify and correct minor technical issues with subcontractor listings for up to twenty-four hours after the closing of the submission of the bids.

Under this proposed change, the procurement officer would close the bidding in the usual manner, but would not open the bids until twenty-four hours after the closing. Each bidder shall have twenty-four hours after the bid closing to clarify and correct minor technical issues with the subcontractors list requirements under Section 103D-302, HRS. The proposed change will permit the bidder to ensure that all subcontractors who have submitted bids to the general contractor have met all of the requirements to perform work on state and county projects, including meeting all licensing, bonding and insurance requirements, as applicable. The additional time is necessary because in most cases the general contractor does not receive bid prices from the various subcontractors until shortly before the bid must be submitted to the state agency. This means that the general contractor does not have time to check whether the subcontractors who have submitted bids meet the requirements to work on the job, especially the proper licenses issued by the Contractors License Board. Given the large number of "C" (currently over 100 issued and growing), it becomes increasingly difficult for the general contractor to ascertain licenses and verify whether every subcontractor has the proper license to perform the work he has submitted a bid to do.

This legislation is not an attempt to give general contractors an advantage in submitting bids, nor is it, as some may argue, an opportunity to bid-shop. Instead this legislation is increasing efficiency in the procurement process, by allowing contractors to verify the information that subcontractors provide. The proposed legislation does not permit the contractor to change its proposed bid amount. The twenty-four hours will permit the bidder to ensure the subcontractor/joint contractor list is complete and listed subcontractors/joint contractors are properly licensed, are bondable (where applicable), and have all the required insurance coverage. This will reduce the likelihood of errors and result in reducing the number of bid protests which often delay public works projects and, in some cases, increase the cost of public works project for the state. This proposed amendment will result in more complete and accurate bid submittals and reduce the number of potential bid protests. For these reasons, we request the Committee adopt the following amendments.

PART V

SECTION 13. The legislature finds that the Hawaii public procurement code currently requires general contractors to disclose the subcontractors they intend to use on a project. The intent of this requirement is to deter bid shopping (the practice of low-bidding general contractors unethically extracting lower prices from subcontractors under threat of

replacement). Although stakeholders agree that the disclosure requirement accomplishes this goal, the legislature notes that the federal government and a vast majority of states do not have a similar disclosure requirement in their procurement processes.

The legislature also finds that this disclosure requirement has the unintended consequence of increasing the number and complexity of construction protests. The state procurement office's review of Hawaii procurement laws found that most protests allege issues stemming from the subcontractor listing requirement. The review recommended that the State amend its disclosure requirement to require disclosure of only the name of a subcontractor and not repeal the requirement that the bid disclose what a subcontractor will do. This change would substantially reduce the risk of protests while continuing to protect subcontractors from the undesirable practice of bid shopping.

The legislature also finds that many recent bid protests have been based on subcontractor listing and licensing issues, including where a bidder has failed to list a required subcontractor or when a listed subcontractor did not possess the appropriate license and was not qualified to perform the work. Time constraints between the time a bidder receives all subcontractor bids and the bid submission deadline can cause inadvertent failure to list a required subcontractor or the

listing of an improperly licensed subcontractor in a bid, resulting in a bid protest.

Furthermore, inadvertent errors occur due to the complexity of the laws regarding contractor licenses under chapter 444, Hawaii Revised Statutes; title 16, Hawaii Administrative Rules; and judicial, quasi-judicial, and agency interpretations of these laws and rules. Oftentimes, technical mistakes in a low bidder's proposal result in a bid challenge, thus delaying the execution and delivery of public works projects. As a result of bid challenges, projects are also delayed, funding lapses, and the final project cost may increase.

While subcontractor listing is meant to deter bid shopping and bid peddling, providing prime contractors with additional time to correct minor technical issues with subcontractor listings would facilitate the legislature's intent of ensuring that subcontractors are listed properly on the bid submittal and are licensed, while maintaining the integrity of the bid process.

The purpose of this part is to:

- (1) Implement recommendation III-2 of the state procurement office's review of Hawaii procurement laws by eliminating the requirement that bidders disclose the nature and scope of work expected to be performed by a subcontractor; and

- (2) Minimize bid challenges, costs, and delays of public works construction projects by allowing a bidder of a public works construction project to clarify and correct minor technical issues with subcontractor listings for up to twenty-four hours after the closing of a bid.

SECTION 14. Section 103D-302, Hawaii Revised Statutes, is amended by amending subsections (b), (c), and (d) to read as follows:

"(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify:

- (1) Specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract ~~[and the nature and scope of the work to be performed by each.];~~ and

(2) Allow the bidder to provide clarity and correction of the subcontractor information required by paragraph (1) for up to twenty-four hours after the closing of the submission of the bids.

Construction bids that do not comply with this ~~[requirement may]~~ subsection shall be accepted if ~~[acceptance is in the best interest of the State and]~~ the value of the work to be performed

by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

(c) Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids. The policy board shall adopt rules [~~which~~] that specify:

- (1) The form that the notice is to take;
- (2) What constitutes a reasonable interim between publication and bid opening; and
- (3) How notice may be published, including publication in a newspaper of general circulation, notice by mail to all persons on any applicable bidders mailing list, publication by any public or private telecommunication information network, or any other method of publication it deems to be effective.

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids[~~-~~]; provided that if the bid is for construction, it shall be opened no sooner than twenty-four hours after the closing of the submission of the bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection."

Thank you for this opportunity to provide comments on this measure.



ELECTRICAL CONTRACTOR'S ASSOCIATION OF HAWAI'I

NECA Hawai'i Chapter

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February 2, 2021

To: Senate Committee on Government Operations
Honorable Chairperson Sharon Moriwaki & Vice Chair Donovan
Dela Cruz

From: Al Itamoto, Executive Director
Electrical Contractors Association of Hawaii
National Electrical Contractors Association, Hawaii Chapter

Subject: SB 1017, Relating to Procurement

Notice of Hearing

Date: Friday, February 4, 2021
Time: 3:00 PM
Place: Conference Room 016
State Capitol
415 South Beretania Street

Dear Chairperson Moriwaki, Vice Chairperson Dela Cruz and Committee members:

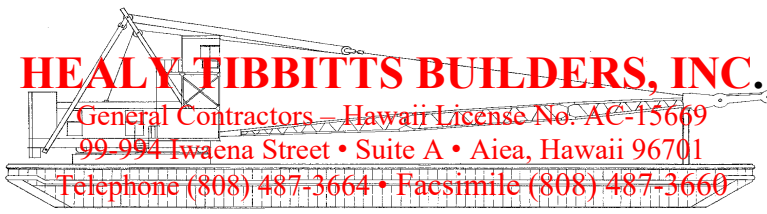
The Electrical Contractors Association of Hawaii (ECAH) is a non-profit association representing over 100 electrical contractors doing business in the State of Hawaii. ECAH is the Hawaii Chapter of the National

Contractors Association (NECA). ECAH submits comments on this measure on procurement policy. While we understand the efforts of this legislature to find effective and efficient policies of procuring construction projects by instituting policies that will substantially reduce bid protests, the recommendation to eliminate the nature and scope to be performed by a subcontractor does not achieve its intended objective without unintended consequences. The nature and scope of work to be perform and the requirement to include a subcontractor listing, go hand in hand in order to have a transparent and equitable policy. The elimination of the nature and scope of each subcontractor will conceal the specific work performed by each contractor. One of the principles of the subcontractor listing law is to provide to the public what they are paying for and who will be paid. Eliminating the nature and scope of the project will also result in not knowing what license classifications are required to perform the work in addition to not knowing who is performing the work. Secondly, in the January 2020 SPO report by the third party consultant, there's no evidence that this proposal provides for transparency and integrity in the policy. The report states that eliminating the nature and scope simply reduces the amount of information required that will probably result in a reduction of bid protest. This is not good policy.

The current State procurement procedures standardizes the process for all departments and agencies that allows for the most equitable and even playing field in securing services and contracts from vendors and contractors. This is particularly true for the construction industry. Electrical contractors among other subtrade contractors are primarily subcontractors in the procurement process and requires the full protections that HRS, Chapter 103D provides including but not limited to including the nature and scope of work to be performed by each subcontractor.

For those reasons, we ask that this committee **do not** eliminate the nature and scope of work as proposed in SB 1017.

Thank you for the opportunity to provide testimony on this issue.



LATE

February 3, 2021

TO: HONORABLE SHARON MORIWAKI, HONORABLE DONOVAN DELA CRUZ,
AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT
OPERATIONS

SUBJECT: **COMMENTS ON S.B. 1017, SD1, RELATING TO PROCUREMENT.** Implements
certain recommendations of the procurement policy review conducted pursuant to
House Resolution No. 142, Regular Session of 2016. Requires the state
procurement office to submit a report to the legislature regarding its progress in
implementing the procurement policy review recommendations.

HEARING

DATE: February 4, 2021
TIME: 3:00 p.m.
PLACE: Conference Room 016

Dear Chair Moriwaki, Vice Chair Dela Cruz and Members of the Committee,

Healy Tibbitts Builders, Inc. (HTBI) is a general contractor in the State of Hawaii and has been actively engaged in construction work in Hawaii since the early 1960's. In addition to being a general contractor, HTBI also performs work as a subcontractor for foundation and waterfront construction work.

HTBI provides **COMMENTS ON S.B. 1017, Relating to Procurement**, which Implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016 and requires the state procurement office to submit a report to the legislature regarding its progress in implementing the procurement policy review recommendations.

HTBI believes that parts III and IV of this measure could have the unintended consequence of increasing administrative costs and creating additional bureaucracy.

HTBI is in support of part V which seeks to reduce the risks of protests due to the subcontractor listing requirements of the Procurement Code. The subcontractor listing requirement has become a way in which bidders attack the responsiveness of a proposal, resulting in awards to non-low bidders, increased costs to the state and taxpayers, and delayed projects due to a technicality in the submitted subcontractor list. As a result, not only does the lowest bidder and their listed subcontractors get disqualified from the project, but the state could end up paying more for the project. **We would like to offer the following suggested amendments** to further reduce the risks of having technical mistakes result in a bid challenge by allowing a bidder of a public works construction project to clarify and correct minor technical issues with subcontractor listings for up to twenty-four hours after the closing of the submission of the bids.

Under this proposed change, the procurement officer would close the bidding in the usual manner, but would not open the bids until twenty-four hours after the closing. Each bidder shall have twenty-four hours after the bid closing to clarify and correct minor technical issues with the subcontractors list requirements under Section 103D-302, HRS. The proposed change will permit the bidder to ensure that all subcontractors who have submitted bids to the general contractor have met all of the requirements to perform work on state and county projects, including meeting all licensing, bonding and insurance requirements, as applicable. The additional time is necessary because in most cases the general contractor does not receive bid prices from the various subcontractors until shortly before the bid must be submitted to the state agency. This means that the general contractor does not have time to check whether the subcontractors who have submitted bids meet the requirements to work on the job, especially the proper licenses issued by the Contractors License Board. Given the large number of "C" licenses (currently over 100 issued and growing), it becomes increasingly difficult for the general contractor to ascertain licenses and verify whether every subcontractor has the proper license to perform the work it has submitted a bid to do.

This legislation is not an attempt to give general contractors an advantage in submitting bids, nor is it, as some may argue, an opportunity to bid-shop. Instead, this legislation is increasing efficiency in the procurement process, by allowing contractors to verify the information that subcontractors provide. The proposed legislation does not permit the contractor to change its proposed bid amount. The twenty-four hours will permit the bidder to ensure the subcontractor/joint contractor list is complete and listed subcontractors/joint contractors are properly licensed, are bondable (where applicable), and have all the required insurance coverage. This will reduce the likelihood of errors and result in reducing the number of bid protests which often delay public works projects and, in most cases, increase the cost of public works projects for the state. This proposed amendment will result in more complete and accurate bid submittals and reduce the number of potential bid protests. For these reasons, we request the Committee adopt the following amendments.

PART V

SECTION 13. The legislature finds that the Hawaii public procurement code currently requires general contractors to disclose the subcontractors they intend to use on a project. The intent of this requirement is to deter bid shopping (the practice of low-bidding general contractors unethically extracting lower prices from subcontractors under threat of replacement). Although stakeholders agree that the disclosure requirement accomplishes this goal, the legislature notes that

the federal government and a vast majority of states do not have a similar disclosure requirement in their procurement processes.

The legislature also finds that this disclosure requirement has the unintended consequence of increasing the number and complexity of construction protests. The state procurement office's review of Hawaii procurement laws found that most protests allege issues stemming from the subcontractor listing requirement. The review recommended that the State amend its disclosure requirement to require disclosure of only the name of a subcontractor and not repeal the requirement that the bid disclose what a subcontractor will do. This change would substantially reduce the risk of protests while continuing to protect subcontractors from the undesirable practice of bid shopping.

The legislature also finds that many recent bid protests have been based on subcontractor listing and licensing issues, including where a bidder has failed to list a required subcontractor or when a listed subcontractor did not possess the appropriate license and was not qualified to perform the work. Time constraints between the time a bidder receives all subcontractor bids and the bid submission deadline can cause inadvertent failure to list a required subcontractor or the listing of an improperly licensed subcontractor in a bid, resulting in a bid protest.

Furthermore, inadvertent errors occur due to the complexity of the laws regarding contractor licenses under chapter 444,

Hawaii Revised Statutes; title 16, Hawaii Administrative Rules; and judicial, quasi-judicial, and agency interpretations of these laws and rules. Oftentimes, technical mistakes in a low bidder's proposal result in a bid challenge, thus delaying the execution and delivery of public works projects. As a result of bid challenges, projects are also delayed, funding lapses, and the final project cost may increase.

While subcontractor listing is meant to deter bid shopping and bid peddling, providing prime contractors with additional time to correct minor technical issues with subcontractor listings would facilitate the legislature's intent of ensuring that subcontractors are listed properly on the bid submittal and are licensed, while maintaining the integrity of the bid process.

The purpose of this part is to:

- (1) Implement recommendation III-2 of the state procurement office's review of Hawaii procurement laws by eliminating the requirement that bidders disclose the nature and scope of work expected to be performed by a subcontractor; and
- (2) Minimize bid challenges, costs, and delays of public works construction projects by allowing a bidder of a public works construction project to clarify and correct minor technical issues with subcontractor listings for up to twenty-four hours after the closing of a bid.

Healy Tibbitts Builders, Inc.

SECTION 14. Section 103D-302, Hawaii Revised Statutes, is amended by amending subsections (b), (c), and (d) to read as follows:

"(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall [specify]:

(1) Specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract ~~[and the nature and scope of the work to be performed by each.];~~ and

(2) Allow the bidder to provide clarity and correction of the subcontractor information required by paragraph (1) for up to twenty-four hours after the closing of the submission of the bids.

Construction bids that do not comply with this ~~[requirement may]~~ subsection shall be accepted if ~~[acceptance is in the best interest of the State and]~~ the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

(c) Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids. The policy board shall adopt rules ~~[which]~~ that specify:

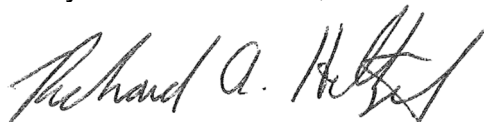
(1) The form that the notice is to take;

- (2) What constitutes a reasonable interim between publication and bid opening; and
- (3) How notice may be published, including publication in a newspaper of general circulation, notice by mail to all persons on any applicable bidders mailing list, publication by any public or private telecommunication information network, or any other method of publication it deems to be effective.

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids[-]; provided that if the bid is for construction, it shall be opened no sooner than twenty-four hours after the closing of the submission of the bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection."

Thank you for this opportunity to provide comments on this measure.

Very truly yours,
Healy Tibbitts Builders, Inc.



Richard A. Heltzel
President