
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

1 SECTION 1. The legislature finds that the Hawaii Public
2 Procurement Code requires bid proposals to include the name and
3 scope of work of subcontractors and joint contractors that will
4 be used on a public works project. Time constraints between the
5 time a bidder receives all subcontractor bids and the bid
6 submission deadline, as well as the complexity of licensing
7 requirements, can cause inadvertent failure by a bidder to list
8 a required subcontractor or cause a bidder to list an improperly
9 licensed subcontractor in a bid. Oftentimes these technical
10 mistakes in a low bidder's proposal results in a bid challenge,
11 thus delaying the execution and delivery of public works
12 projects. Some bid challenges have been made for failure to
13 list subcontractors appropriately. As a result of bid
14 challenges, projects are delayed, funding lapses, and the final
15 project cost may increase.

16 The legislature further finds that the contractors license
17 board recognizes over one hundred different specialty contractor



1 licenses that a prime bidder must sort through to determine the
2 appropriate subcontractor specialty to be listed on a bid. The
3 legislature additionally finds that in comparison, the federal
4 government does not require the listing of subcontractors on any
5 bid proposal and the 2000 American Bar Association's Model
6 Procurement Code, the model for the Hawaii Public Procurement
7 Code, does not include a subcontractor listing requirement.
8 Twenty states and the federal government do not even require a
9 general contractor's license to bid on or perform construction
10 work. While subcontractor listing proponents cite legislative
11 intent and the deterrent of bid shopping and bid peddling in
12 support of the listing requirement, providing prime contractors
13 with additional time to correct minor technical issues with
14 subcontractor listings would facilitate the legislature's intent
15 of ensuring that subcontractors are listed properly on the bid
16 submittal and are licensed and qualified in the scope and nature
17 of the work to be performed, while maintaining the integrity of
18 the bid process.

19 However, the legislature finds that the unscrupulous
20 practices of bid shopping and bid peddling still plague Hawaii's
21 construction industry. The state of Washington prohibits bid
22 shopping and bid peddling and affords subcontractors affected by



1 those practices a means of legal redress. The legislature finds
2 that enacting similar legislation will curtail bid shopping and
3 bid peddling in the State.

4 The purpose of this Act is to:

- 5 (1) Minimize bid challenges, costs, and delays of public
6 works construction projects by providing a bidder of a
7 public works construction project with two hours after
8 the closing of a bid to clarify and correct minor
9 technical issues with subcontractor listings; and
10 (2) Further curb undesirable bid shopping and bid peddling
11 practices in public works by affording subcontractors
12 affected by those practices a means of legal redress.

13 SECTION 2. Section 103D-302, Hawaii Revised Statutes, is
14 amended to read as follows:

15 **"§103D-302 Competitive sealed bidding.** (a) Contracts
16 shall be awarded by competitive sealed bidding except as
17 otherwise provided in section 103D-301. Awards of contracts by
18 competitive sealed bidding may be made after single or multi-
19 step bidding. Competitive sealed bidding does not include
20 negotiations with bidders after the receipt and opening of bids.
21 Award is based on the criteria set forth in the invitation for
22 bids.



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

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

10 (2) Allow the bidder two hours after the closing of the
11 invitation for bids to provide clarity and correction
12 of the subcontractor information required by paragraph

13 (1).

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

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



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

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

18 (e) Bids shall be unconditionally accepted without
19 alteration or correction, except as authorized in this chapter
20 or by rules adopted by the policy board.

21 (f) Bids shall be evaluated based on the requirements set
22 forth in the invitation for bids. These requirements may



1 include criteria to determine acceptability, such as inspection,
2 testing, quality, workmanship, delivery, and suitability for a
3 particular purpose. Those criteria that will affect the bid
4 price and be considered in evaluation for award shall be
5 objectively measurable, such as discounts, transportation costs,
6 and total or life cycle costs. The invitation for bids shall
7 set forth the evaluation criteria to be used. No criteria may
8 be used in bid evaluation that are not set forth in the
9 invitation for bids.

10 (g) Correction or withdrawal of inadvertently erroneous
11 bids before or after award, or cancellation of invitations for
12 bids, awards, or contracts based on such bid mistakes, shall be
13 permitted in accordance with rules adopted by the policy board.
14 After bid opening, no changes in bid prices or other provisions
15 of bids prejudicial to the interest of the public or to fair
16 competition shall be permitted. Except as otherwise provided by
17 rule, all decisions to permit the correction or withdrawal of
18 bids, or to cancel awards or contracts based on bid mistakes,
19 shall be supported by a written determination made by the chief
20 procurement officer or head of a purchasing agency.

21 (h) The substitution of a listed subcontractor in
22 furtherance of bid shopping or bid peddling before or after the



1 award of the prime contract shall be prohibited, and the
2 originally listed subcontractor may recover monetary damages
3 against the prime contractor who executed a contract with the
4 governmental body and the substituted subcontractor, but shall
5 not be entitled to monetary damages from the governmental body
6 that issued the invitation for bids. The substitution of an
7 originally listed subcontractor who has a valid and appropriate
8 contractor's license from the time of bid through the time of
9 award may be made by the prime contractor for the following
10 reasons:

- 11 (1) Refusal of the originally listed subcontractor to sign
12 a contract with the prime contractor;
13 (2) Bankruptcy or insolvency of the originally listed
14 subcontractor; or
15 (3) Inability of the originally listed subcontractor to
16 perform the contractual requirements of the proposed
17 contract or the project consistent with the terms and
18 written understandings of the parties at the time of
19 bid.

20 As used in this subsection:



1 "Bid peddling" means attempts by a subcontractor to
2 undercut known bids submitted to the prime contractor to procure
3 a job.

4 "Bid shopping" means the use of a low bid already received
5 by the prime contractor to pressure other subcontractors into
6 submitting even lower bids.

7 ~~[(h)]~~ (i) The contract shall be awarded with reasonable
8 promptness by written notice to the lowest responsible and
9 responsive bidder whose bid meets the requirements and criteria
10 set forth in the invitation for bids. In the event all bids
11 exceed available funds as certified by the appropriate fiscal
12 officer, the head of the purchasing agency responsible for the
13 procurement in question is authorized in situations where time
14 or economic considerations preclude resolicitation of work of a
15 reduced scope to negotiate an adjustment of the bid price,
16 including changes in the bid requirements, with the low
17 responsible and responsive bidder, in order to bring the bid
18 within the amount of available funds.

19 ~~[(i)]~~ (j) When it is not practicable to initially prepare
20 a purchase description to support an award based on price, an
21 invitation for bids, which requests the submission of unpriced
22 offers to be followed by an invitation for bids limited to those



1 bidders whose offers have been qualified under the criteria set
2 forth in the first solicitation, may be used. If a multi-step
3 sealed bidding process is used, the notice and the invitation
4 for bids shall describe each step to be used in soliciting,
5 evaluating, and selecting unpriced offers."

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

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

11 SECTION 5. This Act shall take effect on July 1, 2055;
12 provided that on July 1, 2019, section 2 of this Act shall be
13 repealed and section 103D-302, Hawaii Revised Statutes, shall be
14 reenacted in the form in which it read on the day before the
15 effective date of this Act.

16



Report Title:

Procurement; Competitive Sealed Bidding; Subcontractor; Public Works Construction Project; Bid Shopping; Bid Peddling

Description:

Provides a bidder of a public works construction project with two hours after the closing of bids to clarify and correct certain information regarding subcontractors. Prohibits bid shopping and bid peddling for the competitive sealed bidding process. Effective 7/1/2055. Sunsets on 7/1/2019. (SD2)

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