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

14           Furthermore, inadvertent errors occur due to the complexity  
15 of the laws regarding contractor licenses under chapter 444,  
16 Hawaii Revised Statutes; title 16, Hawaii Administrative Rules;  
17 and judicial, quasi-judicial, and agency interpretations of



1 these laws and rules. Oftentimes, technical mistakes in a low  
2 bidder's proposal result in a bid challenge, thus delaying the  
3 execution and delivery of public works projects. As a result of  
4 bid challenges, projects are also delayed, funding lapses, and  
5 the final project cost may increase.

6 While subcontractor listing is meant to deter bid shopping  
7 and bid peddling, providing prime contractors with additional  
8 time to correct minor technical issues with subcontractor  
9 listings would facilitate the legislature's intent of ensuring  
10 that subcontractors are listed properly on the bid submittal and  
11 are licensed and qualified in the scope and nature of the work  
12 to be performed, while maintaining the integrity of the bid  
13 process.

14 However, the legislature finds that the unscrupulous  
15 practices of bid shopping and bid peddling still plague Hawaii's  
16 construction industry. The state of Washington prohibits bid  
17 shopping and bid peddling and affords subcontractors affected by  
18 those practices a means of legal redress. The legislature finds  
19 that enacting similar legislation will curtail bid shopping and  
20 bid peddling in the State.

21 The purpose of this Act is to:



- 1           (1) Minimize bid challenges, costs, and delays of public  
2           works construction projects by allowing a bidder of a  
3           public works construction project to clarify and  
4           correct minor technical issues with subcontractor  
5           listings for up to two hours after the closing of a  
6           bid;
- 7           (2) Further curb undesirable bid shopping and bid peddling  
8           practices in public works by affording subcontractors  
9           affected by those practices a means of legal redress;  
10          and
- 11          (3) Require the listing of joint contractors and  
12          subcontractors for construction contracts with a total  
13          value of more than \$           ; provided that a  
14          construction bid that does not comply with this  
15          requirement may be accepted if it is in the best  
16          interest of the State and the value of the work to be  
17          performed by a subcontractor is equal to or less than  
18          per cent of the total bid amount.

19 This Act is not intended to change in any way the statutory  
20 requirement to use licensed subcontractors under chapter 444,  
21 Hawaii Revised Statutes.



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

3 **"§103D-302 Competitive sealed bidding.** (a) Contracts  
4 shall be awarded by competitive sealed bidding except as  
5 otherwise provided in section 103D-301. Awards of contracts by  
6 competitive sealed bidding may be made after single or multi-  
7 step bidding. Competitive sealed bidding does not include  
8 negotiations with bidders after the receipt and opening of bids.  
9 Award is based on the criteria set forth in the invitation for  
10 bids.

11 (b) An invitation for bids shall be issued, and shall  
12 include a purchase description and all contractual terms and  
13 conditions applicable to the procurement. If the invitation for  
14 bids is for construction~~[ ]~~ with a total estimated contract  
15 value of more than \$ \_\_\_\_\_, it shall [specify]:

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



1        (2) Allow the bidder to provide clarity and correction of  
2        the subcontractor information required by paragraph  
3        (1) for up to two hours after the closing of the  
4        invitation for bids.

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

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

- 14           (1) The form that the notice is to take;
- 15           (2) What constitutes a reasonable interim between  
16           publication and bid opening; and
- 17           (3) How notice may be published, including publication in  
18           a newspaper of general circulation, notice by mail to  
19           all persons on any applicable bidders mailing list,  
20           publication by any public or private telecommunication



1 information network, or any other method of  
2 publication it deems to be effective.

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

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

14 (f) Bids shall be evaluated based on the requirements set  
15 forth in the invitation for bids. These requirements may  
16 include criteria to determine acceptability, such as inspection,  
17 testing, quality, workmanship, delivery, and suitability for a  
18 particular purpose. Those criteria that will affect the bid  
19 price and be considered in evaluation for award shall be  
20 objectively measurable, such as discounts, transportation costs,  
21 and total or life cycle costs. The invitation for bids shall



1 set forth the evaluation criteria to be used. No criteria may  
2 be used in bid evaluation that are not set forth in the  
3 invitation for bids.

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

15 (h) The substitution of a listed subcontractor in  
16 furtherance of bid shopping or bid peddling before or after the  
17 award of the prime contract shall be prohibited, and the  
18 originally listed subcontractor may recover monetary damages  
19 against the prime contractor who executed a contract with the  
20 governmental body and the substituted subcontractor, but shall  
21 not be entitled to monetary damages from the governmental body



1 that issued the invitation for bids. The substitution of an  
2 originally listed subcontractor who has a valid and appropriate  
3 contractor's license from the time of bid through the time of  
4 award may be made by the prime contractor for the following  
5 reasons:

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

15 As used in this subsection:

16 "Bid peddling" means attempts by a subcontractor to  
17 undercut known bids submitted to the prime contractor to procure  
18 a job.

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



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

13           ~~[(i)]~~ (j) When it is not practicable to initially prepare  
14 a purchase description to support an award based on price, an  
15 invitation for bids, which requests the submission of unpriced  
16 offers to be followed by an invitation for bids limited to those  
17 bidders whose offers have been qualified under the criteria set  
18 forth in the first solicitation, may be used. If a multi-step  
19 sealed bidding process is used, the notice and the invitation  
20 for bids shall describe each step to be used in soliciting,  
21 evaluating, and selecting unpriced offers."



H.B. NO. 1214

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

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

6 SECTION 5. This Act shall take effect on July 1, 2021;  
7 provided that on July 1, 2023, section 2 of this Act shall be  
8 repealed and section 103D-302, Hawaii Revised Statutes, shall be  
9 reenacted in the form in which it read on the day before the  
10 effective date of this Act.

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INTRODUCED BY:

  
\_\_\_\_\_

JAN 26 2021



# H.B. NO. 1214

**Report Title:**

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

**Description:**

Allows a bidder of a public works construction project to clarify and correct certain information regarding subcontractors for up to two hours after bid closing. Mandates a two hour waiting period after bid closing before construction bids can be opened. Prohibits bid shopping and bid peddling for the competitive sealed bidding process. Requires public procurement construction bids to list subcontractors and joint contractors only for contracts with an unspecified total value; provided that bids lacking this list may be accepted if in the State's best interest and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than an unspecified percent of the total bid amount. Repeals 7/1/2023.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

