

JAN 21 2022

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 currently requires general contractors to
3 disclose the subcontractors they intend to use on a project.
4 The intent of this requirement is to deter bid shopping – the
5 practice of low-bidding general contractors unethically
6 extracting lower prices from subcontractors under the threat of
7 replacement. Although stakeholders agree that the disclosure
8 requirement accomplishes this goal, the legislature notes that
9 the federal government and a vast majority of states do not have
10 a similar disclosure requirement in their procurement processes.

11 The legislature further finds that this disclosure
12 requirement has the unintended consequence of increasing the
13 number and complexity of construction protests. The state
14 procurement office's review of Hawaii procurement laws found
15 that most protests allege technical issues stemming from the
16 subcontractor listing requirement. These technical mistakes
17 include instances where a bidder failed to list a required



1 subcontractor or when a listed subcontractor did not possess the
2 appropriate license and was not qualified to perform the work.

3 Recommendation III-2 of the state procurement office's
4 review of Hawaii procurement laws eliminates the requirement for
5 bidders to disclose the nature and scope of work expected to be
6 performed by a subcontractor. However, the legislature further
7 finds that this issue with the subcontractor listing may be
8 addressed instead by providing prime contractors with additional
9 time to correct immaterial or technical issues with
10 subcontractor listings.

11 Inadvertent errors can occur due to the complexity of the
12 laws regarding contractor licenses under chapter 444, Hawaii
13 Revised Statutes; title 16, Hawaii Administrative Rules; and the
14 judicial, quasi-judicial, and agency interpretations of these
15 laws and rules. Time constraints from when a bidder receives
16 the bids from all of its subcontractors up until the procuring
17 agency's bid submission deadline may also cause inadvertent
18 failures to list a required subcontractor or the listing of
19 erroneous subcontractor license numbers in a bid. The
20 legislature further recognizes that the provision of additional
21 time for prime contractors to correct their subcontractor



1 listings would facilitate the legislature's intent of ensuring
2 that subcontractors are listed properly on the bid submittal and
3 are licensed, while maintaining the integrity of the bid
4 process.

5 The purpose of this Act is to minimize bid challenges,
6 costs, and delays of public works construction projects by:

7 (1) Allowing a bidder of a public works construction
8 project to clarify and correct immaterial or technical
9 issues with subcontractor listings for up to twenty-
10 four hours after the bid submission deadline;

11 (2) Requiring that bids for construction be publicly
12 opened no sooner than twenty-four hours after the bid
13 submission deadline; and

14 (3) Defining "immaterial or technical information".

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

17 **"§103D-302 Competitive sealed bidding.** (a) Contracts
18 shall be awarded by competitive sealed bidding except as
19 otherwise provided in section 103D-301. Awards of contracts by
20 competitive sealed bidding may be made after single or multi-
21 step bidding. Competitive sealed bidding does not include



1 negotiations with bidders after the receipt and opening of bids.
2 Award is based on the criteria set forth in the invitation for
3 bids.

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

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

13 (2) Allow the bidder to clarify or correct immaterial or
14 technical information required by paragraph (1) for up
15 to twenty-four hours after the bid submission
16 deadline; provided that any additions or substitutions
17 of listed joint subcontractors shall be prohibited,
18 including changes to the nature and scope of work as
19 listed.

20 Construction bids that do not comply with this requirement may
21 be accepted if acceptance is in the best interest of the State



1 and the value of the work to be performed by the joint
2 contractor or subcontractor is equal to or less than one per
3 cent of the total bid amount.

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

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

9 (2) What constitutes a reasonable interim between
10 publication and bid opening; and

11 (3) How notice may be published, including publication in
12 a newspaper of general circulation, notice by mail to
13 all persons on any applicable bidders mailing list,
14 publication by any public or private telecommunication
15 information network, or any other method of
16 publication it deems to be effective.

17 (d) Bids shall be opened publicly in the presence of one
18 or more witnesses, at the time and place designated in the
19 invitation for bids~~[-]~~; provided that if the bid is for
20 construction, it shall be opened no sooner than twenty-four
21 hours after the deadline for the submission of the bids. The



1 amount of each bid and other relevant information specified by
2 rule, together with the name of each bidder shall be recorded.
3 The record and each bid shall be open to public inspection.

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

7 (f) Bids shall be evaluated based on the requirements set
8 forth in the invitation for bids. These requirements may
9 include criteria to determine acceptability such as inspection,
10 testing, quality, workmanship, delivery, and suitability for a
11 particular purpose. Those criteria that will affect the bid
12 price and be considered in evaluation for award shall be as
13 objectively measurable as possible, such as discounts,
14 transportation costs, total or life cycle costs, and the
15 bidder's past performance, if available. The invitation for
16 bids shall set forth the evaluation criteria to be used. No
17 criteria may be used in bid evaluation that are not set forth in
18 the invitation for bids.

19 (g) Correction or withdrawal of inadvertently erroneous
20 bids before or after award, or cancellation of invitations for
21 bids, awards, or contracts based on such bid mistakes, shall be



1 permitted in accordance with rules adopted by the policy board.
2 After bid opening no changes in bid prices or other provisions
3 of bids prejudicial to the interest of the public or to fair
4 competition shall be permitted. Except as otherwise provided by
5 rule, all decisions to permit the correction or withdrawal of
6 bids, or to cancel awards or contracts based on bid mistakes,
7 shall be supported by a written determination made by the chief
8 procurement officer or head of a purchasing agency.

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



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

(j) For purposes of this section, "immaterial or technical information" means:

(1) An irregularity or abnormality that, as a matter of form, does not affect substance; or

(2) An inconsequential variation that has no, little, or trivial effect on the procurement process and is not prejudicial to other vendors.

Immaterial or technical information includes a missing signature; typographical errors; an error resulting from an inaccuracy or omission; and a listed subcontractor whose license at bid time had been suspended or forfeited due solely to a



1 ministerial act, pursuant to chapter 444; provided that by the
2 time of the award, the subcontractor's license is reinstated."

3 SECTION 3. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 4. This Act shall take effect on July 1, 2022.

6
INTRODUCED BY:

A handwritten signature in black ink, appearing to be 'J. Min', is written over a horizontal line.

S.B. NO. 2681

Report Title:

Procurement; Immaterial Errors; Technical Corrections

Description:

Allows bidders to clarify or correct immaterial or technical information required as part of a bid submission for up to twenty-four hours after the bid submission deadline. Requires that bids for construction be opened no sooner than twenty-four hours after the deadline for the submission of bids. Defines "immaterial or technical information".

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