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STATE PROCUREMENT OFFICE

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**TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE HOUSE COMMITTEE
ON
LABOR & GOVERNMENT OPERATIONS
FEBRUARY 7, 2023, 9:00 AM**

**HOUSE BILL 542
RELATING TO PROCUREMENT**

Chair Matayoshi, Vice Chair Garrett, and members of the committee, thank you for the opportunity to submit testimony on House Bill 542. The State Procurement Office (SPO) opposes the bill and provides comments.

HB 542 amends Section 103D-302 Competitive sealed bidding to allow 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, in addition to the time for correction or withdrawal of inadvertently erroneous bids before or after the award as permitted by rules adopted by the procurement policy board. It also requires that bids for construction be opened no sooner than twenty-four hours after the deadline for the submission of bids and defines "immaterial or technical information."

Comments: HB542 is not necessary as the mistakes are already addressed in statute and rules. If there is a mistake in bid, Section 103D-302(g), Hawaii Revised Statutes, already states that correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes, shall be permitted in accordance with rules adopted by the policy board. Furthermore, Section 3-122-31(c), Hawaii Administrative Rules, addresses mistakes in bids, such as missing signatures or typographical errors, that are discovered after the deadline for receipt of bids but prior to award. Additionally, the procurement officer may correct or waive obvious mistakes that if allowed to be corrected or waived is in the best interest of the purchasing agency and is fair to other bidders, without a specific time limit.

It is not necessary to allow a bidder of a construction project to clarify and correct information up to twenty-four hours after bid closing and mandate a twenty-four hour waiting period after bid closing before construction bids can be opened. It is the contractors' and subcontractors' responsibility to ensure the bid responses are accurate and conforms to the requirements of the solicitation. This added language adds complexity and delays to the procurement process.

Thank you.

JOSH GREEN, M.D.
GOVERNOR



KEITH A. REGAN
COMPTROLLER
MEOH-LENG SILLIMAN
DEPUTY COMPTROLLER

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

WRITTEN TESTIMONY
OF
KEITH A. REGAN, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

FEBRUARY 7, 2023, 9:00 AM
CONFERENCE ROOM 309 & VIDEO CONFERENCE

H.B. 542

RELATING TO PROCUREMENT

Chair Matayoshi, Vice Chair Garrett, and Members of the Committee, thank you for the opportunity to submit testimony opposing House Bill (H.B.) 542, which would allow a 24-hour period after the bid submission deadline to provide additional time for the correction of immaterial and technical information contained in the subcontractor listing for a five-year period.

The department opposes this bill and strongly recommends that the procurement code not be altered in this manner, because: 1) the procurement code already allows for the correction of some errors in the subcontractor listing; and 2) this bill has several negative unintended consequences.

- The procurement code already allows for the correction of certain types of errors in a subcontractor listing.

- Section 3-122-31(c)(1) of the Hawaii Administrative Rules already allows for the correction of some mistakes in bids and allows the procurement officer to waive other mistakes in the best interest of the purchasing agency, provided that such waivers are fair to other bidders.
- In addition, §103D-302(b) already allows bids which do not comply with the sub-list requirements to be accepted if acceptance is in the best interest of the state and the value of the work to be performed is equal to or less than one percent of the total bid amount.

The proposed changes have the following unintended negative consequences:

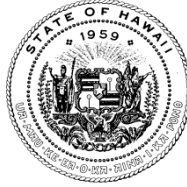
- The proposed measures are unfair to bidders who submit accurate, timely responses.
- This proposal increases the complexity of the procurement process for construction as well as the administrative burden on procurement agencies. It adds an additional step in the procurement process and requires collation of bids and corrections during the bid opening process.
- The proposed changes will provide additional reasons to protest subcontractor listings because:
 - It increases the complexity of the procurement process and reduces its transparency.
 - The definition of “immaterial or technical information” contained in lines 8 – 19 on page 9 of the bill creates additional areas subject to interpretation. For example, the wording of (j)(2) “An inconsequential variation that has no, little,

or trivial effect on the procurement process and is not prejudicial to other vendors” is problematic because it increases the subjectivity of the process (by adding terminology which is open to wide differences in interpretation). It also begs the question of whether (and under what circumstances) an error which affects the procurement process can be deemed fair to other bidders.

- This legislation is contrary to the legislative goal of improving the quality of contractors on its construction projects.
 - It assumes that it is impossible for bidders to problem-solve and adjust their bidding practices to allow for the provision of timely, accurate subcontractor listings. However, not all subcontractor listings contain errors. DAGS believes that good problem-solving skills are desirable in contractors working on public works projects because it is not uncommon for unanticipated problems to arise during construction. When problems arise, it is always to the state’s advantage to have a contractor who is able to help by suggesting well-considered alternative actions to help the project move forward while meeting the needs of the agency.
 - DAGS believes contractors’ demonstration of their capacity to perform well on a construction contract begins with assembling their bids in a manner which ensures timely, complete, and accurate submittal information by the bid opening deadline.

Thank you for the opportunity to submit testimony on this measure.

JOSH GREEN, M.D.
GOVERNOR



TESTIMONY BY:
EDWIN H. SNIFFEN
DIRECTOR

Deputy Directors
DREANALEE K. KALILI
TAMMY L. LEE
ROBIN K. SHISHIDO
JAMES KUNANE TOKIOKA

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

Tuesday, February 7, 2023
9:00 A.M.
State Capitol
VIA VIDEOCONFERENCE
Conference Room 309

H.B. 542
RELATING TO PROCUREMENT

House Committee on Labor & Government Operations

The Department of Transportation (DOT) provides **comments** on this measure which proposes to allow 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, in addition to the time for correction or withdrawal of inadvertently erroneous bids before or after the award as permitted by rules adopted by the procurement policy board. 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.” This measure would be repealed on June 30, 2028.

While the DOT receives many bid protests on the subcontractor listing requirement, adding twenty-four hours for the general contractor to revise its bid to clarify or correct immaterial or technical information is not needed as the procurement code allows for the correction of an obvious mistake as well as waiver provisions for inadvertent non-material mistakes.

In practice, a twenty-four-hour period between the bid deadline and the opening of construction bids would appear to merely prolong the bid opening by twenty-four hours as provisions in the procurement code already allow for immaterial and technical corrections.

Thank you for the opportunity to provide testimony.

SAH - Subcontractors Association of Hawaii

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

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

February 7, 2023

Testimony To: House Committee on Labor & Government Operations
Representative Scot Z. Matayoshi, Chair

Presented By: Tim Lyons, President

Subject: H.B. 542 – RELATING TO PROCUREMENT

Chair Matayoshi 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

We support the intent of this bill.

This Committee may be aware that the subject of subcontractor listing has been one that has been around for several years and both sides are fairly set in their positions. The language in this bill tends to work towards a solution of what general contractors say is insufficient time as they put their bids together in order to check over the information and be sure they have not made an error. We are not sure that we would subscribe to that theory because we think that anytime a company is submitting a bid, it needs to be sure of the accuracy contained in it including the listing of subcontractors. However, with the parameters that are specified in this bill and in the "spirit of cooperation", we can support the intent.

We do ask however that there be one (1) minor stylistic change on page 4 in the underlined portions of (b)(2) and it should read as follows:

"(2) Allow the bidder to clarify or correct immaterial or technical information required by paragraph (1) for up to twenty-four (24) hours after the bid submission deadline; provided that any changes to the nature and scope of work as listed and any additions or substitutions of listed joint subcontractors shall be prohibited.

Our wording just attempts to make it clear that the prohibition applies not only to substitutions but also to any changes in the nature and scope of work as listed.

We would further respectfully ask the Committee to consider a two (2) year sunset clause instead of the stated five (5) years. This is an extremely important area to the financial health of subcontractors and while we hope it satisfies the generals, we respectfully request a trial run and to that extent, please modify the sunset clause. We ask that the Committee not indulge any other

changes that might alter this specificity of this particular version inasmuch as the versions have been worked on for several years and a deviation from that, we believe would be in bad faith.

Thank you.

Painting Industry of Hawaii Labor Management Cooperation Trust Fund

Hawaii Tapers Market Recovery Trust Fund

Hawaii Glaziers, Architectural Metal Glassworkers Local Union 1889
AFL-CIO Stabilization Trust Fund

and

Carpet, Linoleum and Soft Tile Local Union 1926 Market Recovery Trust Fund

February 6, 2023

Representative Scot Matayoshi, Chair
Representative Andrew Garrett, Vice-Chair
House Committee on Labor & Government Operations
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill 542 (Relating To Procurement)
Hearing date: February 7, 2023
Time: 9:00 a.m.

Dear Chair Matayoshi, Vice Chair Garrett and Members of the Committee:

Thank you for this opportunity to submit testimony on behalf of the Painting Industry of Hawaii Labor Management Cooperation Trust Fund, Hawaii Tapers Market Recovery Trust Fund, Hawaii Glaziers, Architectural Metal Glassworkers Local Union 1889 AFL-CIO Stabilization Trust Fund, and Carpet, Linoleum and Soft Tile Local Union 1926 Market Recovery Trust Fund in **opposition** to House Bill 542. The aforesaid organizations are labor management cooperation funds between the Painters Union, Tapers Union, Glaziers Union, and Carpet and Soft Tile Layers Union and their signatory contractors.

As an initial matter, we strongly disagree with statements in Section 1 of the Bill finding that the subcontractor listing requirement of the procurement laws, "has the unintended consequence of increasing the number and complexity of construction protests." The foregoing language implies that the subcontractor listing requirement is a significant problem causing delays and increased cost for public construction projects. This could not be further from the truth. A task force convened pursuant to Senate Concurrent Resolution 92, S.D.2 (2013) to study the issue of bid protests related to subcontractor listing, among other things. This Task Force included participation by all relevant stakeholders, including the General Contractors of Hawaii, the Subcontractors Association of Hawaii, the Office of the Comptroller, the Department of Accounting and General Services, Department of Education, Department of Transportation, City and County of Honolulu and all relevant procurement offices. The resulting 16 page report and 91 pages of attachments which contain supporting documentation produced by the Task Force can be found online at the Department of Accounting and General Services' website at:

<https://ags.hawaii.gov/wp-content/uploads/2012/09/ProcurementTaskForceReportLS2013.pdf>

In the report, the Task Force found that, in general, bid protests did **not** result in any significant delays or increased costs. See Task Force Report at 8-9. The work of the Task Force revealed that protests related to the subcontractor listing requirement increased costs to the State by 0.06% in FY2013 and 0.34% in FY2014. See id. at 13. The Task Force, which included the Comptroller, the Department of Accounting and General Services, the State Procurement Office and other procurement agencies as participants, recommended **no changes be made to Chapter 103D with respect to the subcontractor listing requirement.** See id. at 10-11. We strongly suggest that this Committee take the time to read the report, especially the section on subcontractor listing.

Because Section 1 of the Bill is deceptive and contrary to documented findings by a comprehensive study conducted by the procurement agencies and the affected stakeholders themselves, this section should not be made law by its including in this measure.

The main reason for our opposition to this measure is that amending the Procurement Code to allow clarification or correction of non-material or technical information contained in or information omitted from a bid is entirely unnecessary, because such corrections are already expressly allowed under Hawaii Revised Statutes ("HRS") §103D-302(g). That section provides in pertinent part:

Correction or withdrawal of inadvertently erroneous bids before or after the award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes **shall be permitted** in accordance with rules adopted by the policy board.

[Emphasis added]. Because the Procurement Code already expressly permits bid corrections, there is absolutely no need for this Bill, and we ask the Committee to recognize this Bill for what it is: an attempt to allow general contractors to bid shop specialty contractors.

Enacting this Bill, which creates entirely new terms and procedures which are vague and ambiguous and not currently used in the Procurement Code, will only lead to more confusion in the procurement process. This vague and ambiguous language is contained in the proposed new subsections (j)(1) and (2). Potentially, this confusion could actually result in an increase in the number of bid protests.

To the extent that general contractors desire specific language indicating the exact circumstances under which a correction must be allowed (see p. 9 at lines 13-19), they should pursue such change by seeking the amendment of the Hawaii Administrative Regulations interpreting HRS §103D-302, not by changing the Hawaii Revised Statutes. It is well recognized that as the executive departments implementing the Hawaii Revised Statutes generally have a better understanding of and expertise with such nuances, they and not the Legislature should be the ones to adopt such language.

For all of these reasons, we respectfully ask that the Committee defer this Bill indefinitely. Thank you again for this opportunity to share our **opposition** to this measure.

Jeffrey S. Masatsugu



February 7, 2023

TO: HONORABLE SCOT MATAYOSHI, CHAIR, HONORABLE ANDREW GARRETT, VICE CHAIR, COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT OF H.B. 542, RELATING TO PROCUREMENT.** 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, in addition to the time for correction or withdrawal of inadvertently erroneous bids before or after the award as permitted by rules adopted by the procurement policy board. 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". Repeals 6/30/2028.

HEARING

DATE: Tuesday, February 7, 2023
TIME: 9:00 a.m.
PLACE: Capitol Room 309

Dear Chair Matayoshi, Vice Chair Garrett 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 supports H.B. 542, which 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, in addition to the time for correction or withdrawal of inadvertently erroneous bids before or after the award as permitted by rules adopted by the procurement policy board. 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". Repeals 6/30/2028.

This measure 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.

Under this part, 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



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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 bill 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 will result in more complete and accurate bid submittals and reduce the number of potential bid protests.

This would be very similar to California’s process and was included as an unofficial suggestion in the independent report submitted by the State Procurement Office. The report can be found here:

https://spo.hawaii.gov/wp-content/uploads/2020/01/CPPR-Report_HR142-SLHL-2016-FINAL_01-13-20.pdf

The relevant portion starts on page 111 and the suggestion to adopt a variation of California’s model, which allows a 24-hour period to correct errors appears at the bottom of page 114 of the report. Further, the report specifies that in 2018, subcontractor listing accounts for over 60% of all construction related bid protests and that 45% of all protests the State received (including all protests related to non-construction) alleged a defect in the listing of subcontractors for a construction project.

The definition of “immaterial or technical information” is modeled after Utah’s Procurement Code. They define the term “immaterial error”:

https://le.utah.gov/xcode/Title63g/Chapter6a/C63G-6a_1800010118000101.pdf



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For these reasons we ask that the Committee pass this measure.

Thank you for the opportunity to testify in support of this measure.

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