

JAN 23 2015

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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 public works  
2 projects are often delayed and cost more than budgeted because  
3 of bid protests by bidders challenging technical mistakes in the  
4 lowest bidder's proposal. Many recent bid protests have been  
5 based solely on subcontractor listing and licensing issues.  
6 Specifically, section 103D-302, Hawaii Revised Statutes,  
7 requires bidders to list all subcontractors or joint contractors  
8 to be used on a public works project, along with their proposed  
9 scope of work. Protesting bidders often allege that the winning  
10 bidder failed to list a required subcontractor or that the  
11 listed subcontractor did not possess the appropriate license and  
12 was not qualified to perform the work.

13           The legislature also finds that the contractors license  
14 board currently recognizes over one hundred different specialty  
15 contractor licenses that a prime bidder must sort through to  
16 determine the appropriate subcontractor specialty to be listed  
17 on a bid. The short period of time between when a bidder



1 receives all subcontractor bids and when the bidder must submit  
2 the bid can result in the inadvertent failure to list a required  
3 subcontractor or listing of an improperly licensed  
4 subcontractor, giving rise to a bid protest. In addition, due  
5 to the complexity of the laws and administrative rules regarding  
6 contractor licenses and judicial, quasi-judicial, and agency  
7 interpretations of these laws and rules, bidders and  
8 subcontractors sometimes misunderstand the licensing  
9 requirements.

10 In addition to project delays, bid protests based on  
11 violation of subcontractor listing requirements in public works  
12 projects have resulted in funding lapses and inflation increases  
13 final project costs. Since 2005, one state agency estimates  
14 that the State has paid an extra \$11,000,000 because of delays  
15 and other issues associated with the subcontractor listing  
16 requirement.

17 The legislature further finds that neither the federal  
18 government nor the 2000 American Bar Association Model  
19 Procurement Code, on which Hawaii's procurement code is based,  
20 require a bid to list subcontractors. Furthermore, the  
21 Procurement Task Force convened pursuant to Senate Concurrent



1 Resolution 92, S.D. 2, (2013), initially voted in favor of  
2 repealing the subcontractor listing.

3 Subcontractor listing proponents contend that the  
4 legislative intent behind the listing requirement was to deter  
5 prime contractors from bid shopping and subcontractors from bid  
6 peddling. However, it is evident from the number of awards to  
7 non-low bidders and the increased price of construction due to  
8 the subcontractor listing discrepancies, that the listing  
9 requirement is being used, instead, to exclude qualified low  
10 bidders due to a technicality. A more efficient and effective  
11 way to ensure that bid shopping and bid peddling does not occur  
12 in public works is to prohibit these practices, as does the  
13 state of Washington, which includes a prohibition in their  
14 subcontractor listing law. This prohibition places the burden  
15 of preventing bid shopping and bid peddling on the affected  
16 subcontractor, rather than relying on a subcontractor listing  
17 requirement that places the burden on taxpayers to pay the  
18 increased costs of projects delayed by technical objections to  
19 the lowest bid.



1           The purpose of this Act is to ensure efficiency in the  
2 procurement of public works construction projects and deter bid  
3 shopping or bid peddling by:

4           (1) Repealing the subcontractor listing requirement in the  
5 competitive sealed bidding process for public works  
6 construction projects; and

7           (2) Prohibiting the practice of bid shopping and bid  
8 peddling.

9           SECTION 2. Section 103D-104, Hawaii Revised Statutes, is  
10 amended by adding two new definitions to be appropriately  
11 inserted and to read as follows:

12           "Bid shopping" means the use by a prime contractor of a  
13 low bid submitted by a subcontractor to pressure other  
14 subcontractors into submitting even lower bids.

15           "Bid peddling" means attempts by a subcontractor to procure  
16 a job with the prime contractor by undercutting the bids known  
17 to have been submitted to the prime contractor by other  
18 subcontractors."

19           SECTION 3. Section 103D-302, Hawaii Revised Statutes, is  
20 amended as follows:

21           1. By amending subsection (b) to read:



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  
4 for bids is for construction, it shall specify that all bids  
5 include the name of each person or firm to be engaged by the  
6 bidder as a joint contractor or subcontractor in the performance  
7 of the contract and the nature and scope of the work to be  
8 performed by each. Construction bids that do not comply with  
9 this requirement may be accepted if acceptance is in the best  
10 interest of the State and the value of the work to be performed  
11 by the joint contractor or subcontractor is equal to or less  
12 than one per cent of the total bid amount.]"~~

13           2. By amending subsection (g) to read:

14           "(g) Correction or withdrawal of inadvertently erroneous  
15 bids before or after award, or cancellation of invitations for  
16 bids, awards, or contracts based on ~~[such]~~ bid mistakes, shall  
17 be permitted in accordance with rules adopted by the policy  
18 board. After bid opening no changes in bid prices or other  
19 provisions of bids prejudicial to the interest of the public or  
20 to fair competition shall be permitted. The practice of bid  
21 shopping or bid peddling before or after the award of the prime



1 contract shall be prohibited. A subcontractor shall be entitled  
2 to recover monetary damages from either the prime contractor who  
3 is awarded the contract or a subcontractor of the prime  
4 contractor who is awarded the contract; provided that no  
5 monetary damages shall be allowed against the agency awarding  
6 the contract. The burden of proof shall fall on the  
7 subcontractor to prove by a preponderance of the evidence that  
8 the prime contractor engaged in bid shopping or that the  
9 subcontractor or the prime contractor engaged in bid peddling.  
10 Except as otherwise provided by rule, all decisions to permit  
11 the correction or withdrawal of bids, or to cancel awards or  
12 contracts based on bid mistakes, shall be supported by a written  
13 determination made by the chief procurement officer or head of a  
14 purchasing agency."

15 SECTION 4. This Act does not affect rights and duties that  
16 matured, penalties that were incurred, and proceedings that were  
17 begun before its effective date.

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



1 SECTION 6. This Act shall take effect upon its approval.

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INTRODUCED BY: *Gregory H. Bahr*



# S.B. NO. 726

**Report Title:**

Procurement; Subcontractors; Listing; Practices

**Description:**

Prohibits bid shopping and bid peddling for the competitive sealed bidding process. Repeals the subcontractor listing requirement for construction bids made under the competitive sealed bidding process.

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

