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PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
REGULATED INDUSTRIES COMPLAINTS OFFICE

TO THE HOUSE COMMITTEE
ON
LABOR AND PUBLIC EMPLOYMENT

AND

TO THE HOUSE COMMITTEE
ON
ECONOMIC DEVELOPMENT AND BUSINESS

TWENTY-NINTH STATE LEGISLATURE
REGULAR SESSION, 2017

THURSDAY, FEBRUARY 2, 2017
11:30 A.M.

TESTIMONY ON HOUSE BILL NO. 573
RELATING TO PROCUREMENT

TO THE HONORABLE AARON LING JOHANSON, CHAIR,
TO THE HONORABLE MARK M. NAKASHIMA, CHAIR,
AND TO THE HONORABLE DANIEL HOLT, VICE CHAIR,
AND TO THE HONORABLE JARRETT KEOHOKALOLE, VICE CHAIR,
AND MEMBERS OF THE COMMITTEES

The Department of Commerce and Consumer Affairs ("Department")
appreciates the opportunity to testify on House Bill No. 573, Relating to
Procurement. My name is Daria Loy-Goto and I am the Complaints and

Enforcement Officer for the Department's Regulated Industries Complaints Office ("RICO"). RICO offers comments on this bill.

House Bill No. 573 prohibits the substitution of a listed subcontractor in furtherance of bid shopping or bid peddling, but allows for the substitution of a listed subcontractor for the following reasons: (1) refusal of a listed subcontractor to sign a contract; (2) bankruptcy or insolvency of a listed subcontractor; (3) inability of the listed subcontractor to perform the proposed contract; (4) inability of the listed subcontractor to obtain necessary license, bonding, insurance, or other statutory requirements; and (5) where a listed subcontractor is barred from participating in the project by court order or summary judgement.

House Bill No. 573 contradicts the Contractors License Board's ("Board") longstanding interpretation and policy that a person must be licensed as a contractor at the time of a bid submission and that the license must be current and appropriate for the type of work the contractor is to perform. As the enforcement arm for the Board and in deference to the Board's policy, RICO expresses serious concerns that authorizing subcontractors to submit bids without a current, active, and appropriate license undermines the Board's authority and allows unlicensed contractors to engage in licensed contracting activity.

RICO currently investigates and prosecutes general and subcontractors who submit bid proposals without an appropriate or current license and believes House Bill No. 573 undermines those enforcement efforts by allowing subcontractors to participate in the bid process without either a necessary license or the ability to perform the contract.

Testimony on House Bill No. 573

February 2, 2017

Page 3

Thank you for the opportunity to testify on House Bill No. 573. I will be happy to answer any questions the Committees may have.

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
MARA SMITH
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEES
ON
LABOR AND PUBLIC EMPLOYMENT AND
ECONOMIC DEVELOPMENT AND BUSINESS
February 2, 2017 11:30 AM

HB 573
PROCUREMENT; BID SHOPPING; BID PEDDLING
RELATING TO PROCUREMENT

Chairs Johanson and Nakashima, Vice-Chairs Holt and Keohokalole, and members of the committees, thank you for the opportunity to submit testimony on HB 573. The State Procurement Office's (SPO) comments are as follows:

There are two reasons why the expected effect of the implementation of this bill may not be achieved: First, there are other ways to procure beside competitive sealed bidding, which will continue to be at risk for bid peddling, as well as several public bodies and agencies that are completely exempt from the law. Second, based on our review of the culture within the construction industry, it may be rare to receive a complaint in this area, as subcontractors would have to weigh the consequences from within the market, ultimately leaving no way to conduct oversight over this issue.

Thank you.



ELECTRICAL CONTRACTOR'S ASSOCIATION OF HAWAII

NECA Hawai'i Chapter
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January 31, 2017

To: House Labor & Public Employment Committee
Honorable Chairman Johanson & Vice Chairman Holt

House Committee on Economic Development & Business
Honorable Chairman Nakashima & Vice Chair Keohokaole

From: Al Itamoto, Executive Director
Electrical Contractors Association of Hawaii
National Electrical Contractors Association, Hawaii Chapter

Subject: HB 573 Relating to Procurement

Notice of Hearing

Date: Thursday, February 2, 2017
Time: 11:30 AM
Place: Conference Room 309
State Capitol
415 South Beretania Street

Dear Chairs Johanson, Nakashima and Committee members:

The Electrical Contractors Association of Hawaii (ECAH) is a non-profit association representing over 100 electrical contractors doing business in the State of Hawaii. ECAH **opposes** the intent and purpose of HB 573 that prohibits bid shopping and bid peddling for the competitive sealed bid process as written. While we oppose bid shopping and bid peddling in concept, we don't feel that this bill properly addresses a resolution. First it would be difficult to prove by a preponderance of evidence that bid shopping or peddling did not occur by either the contractor or the subcontractor. It would cause delays and be costly for either party to prove. In addition, this proposal allows for additional reasons to file a bid protest and the bidding contractor could cite frivolous reasons to disqualify subcontractors and allow bid shopping to occur after the bid submittals are closed. We are trying to eliminate all avenues that would allow bid shopping and bid peddling. The monitoring and compliance of the State Procurement staff would be burdened with additional responsibilities or would require additional staff to handle.

Based on the above, ECAH **opposes** the passage of HB 573 as written.

Thank you for the opportunity to provide testimony on this issue.

**PRESENTATION OF THE
CONTRACTORS LICENSE BOARD**

TO THE HOUSE COMMITTEE ON
LABOR & PUBLIC EMPLOYMENT

AND

TO THE HOUSE COMMITTEE ON
ECONOMIC DEVELOPMENT & BUSINESS

TWENTY-NINTH LEGISLATURE
Regular Session of 2017

Thursday, February 2, 2017
11:30 a.m.

TESTIMONY ON HOUSE BILL NO. 573, RELATING TO PROCUREMENT.

TO THE HONORABLE AARON LING JOHANSON, CHAIR,
TO THE HONORABLE MARK M. NAKASHIMA, CHAIR,
AND MEMBERS OF THE COMMITTEES:

My name is Peter H.M. Lee, Chairperson of the Contractors License Board ("Board") Legislative Committee. Thank you for the opportunity to testify on House Bill No. 573, which proposes to prohibit bid shopping and bid peddling for the competitive sealed bidding process.

The Board has not established an official position on this bill and will be discussing this measure at its next meeting on February 17, 2017. This bill proposes to prohibit the prime contractor from substituting a listed subcontractor; and allows substitution of a listed subcontractor by the prime contractor for reasons which include: the inability of the listed subcontractor to perform the requirements of the proposed contract or the project; and the inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract.

By allowing the substitution of a listed subcontractor for the inability to perform the requirements of the project implies that a subcontractor without the appropriate license classification may bid on a construction project. This is in conflict with Hawaii Revised Statutes section 444-23 which prohibits a contractor from contracting outside the appropriate scope of classification for which the contractor is licensed.

In addition, allowing the substitution of a listed subcontractor for the inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract indicates that this proposed amendment allows unlicensed individuals to bid on a construction project. The Board believes that this conflicts with the requirements of HRS chapter 444 and the Board's longstanding interpretation that a person must be licensed as a contractor at the time of submitting a proposal or bid on a construction project. The Board has consistently taken the position that a contractor's license is required when a person submits a bid on a construction project to another person, entity, or government agency. That is because the person who is submitting the bid is acting, advertising, or holding the person's self out as a contractor and must therefore be licensed at that time.

Thank you for the opportunity to provide comments on House Bill No. 573.

LABtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Monday, January 30, 2017 5:18 PM
To: LABtestimony
Cc: mendezj@hawaii.edu
Subject: *Submitted testimony for HB573 on Feb 2, 2017 11:30AM*

HB573

Submitted on: 1/30/2017

Testimony for LAB/EDB on Feb 2, 2017 11:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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SAH - Subcontractors Association of Hawaii

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February 2, 2017

Testimony To: House Committee on Labor & Public Employment
Representative Aaron Ling Johanson, Chair

House Committee on Economic Development & Business
Representative Mark M. Nakashima, Chair

Presented By: Tim Lyons, President

Subject: H.B. 573 – RELATING TO PROCUREMENT

Chair Johanson, Chair Nakashima and Members of the Joint 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

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We do not support this bill as written.

You would think that as subcontractors we would support this bill inasmuch as the subject matter is to prohibit bid shopping which subcontractors find distasteful and extremely unethical.

Unfortunately, we find this bill to be the "wolf in sheep's clothing". At the outset, the bill talks about a prohibition however then in Subsection h it goes on to list the reasons when a substitution of a subcontractor can be made by the prime contractor.

The preamble to this bill (Section 1) talks about a statute that exists in the State of Washington. Our contacts with our counterparts in the State of Washington revealed an overall lack of knowledge of this prohibition or the statute and no knowledge whatsoever of anyone who had ever utilized it. The reason is simple, it is unworkable.

Any "originally" listed subcontractor who would attempt to go after the prime contractor to recover monetary damages is committing absolute suicide. The only time that might work is if the prime contractor is on his way out of business, and then, why bother? Certainly the subcontractor who institutes some sort of action cannot expect any future business transactions with that prime contractor and in fact, word in the construction industry would likely travel rather quickly and other prime contractors would be shy about utilizing that subcontractor. Additionally, we're not sure how one would prove, even only by a preponderance of the evidence that bid shopping or bid peddling did or did not occur. How does one prove that? What kind of evidence would you need in order to show it?

Again, while this bill is supposedly directed at helping subcontractors stop the problem of bid shopping, we find that in fact it will hurt subcontractors by allowing bid shopping and providing no realistic remedy at all.

Lastly, we are not sure why (Subsection h) (4) a prime contractor would have listed a subcontractor who did not have "the necessary license, bonding, insurance or other statutory requirements to perform work". Part of the general contractor's job is to select legal subcontractors. If the subcontractor does not have the necessary license, bonding and insurance they shouldn't have bid the job in the first place and secondly, the prime contractor should not have accepted the bid from this unlicensed contractor.

Based on the above we cannot support this bill as written.

Thank you.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

LATE

1 via

LATE

February 2, 2017

TO: HONORABLE AARON JOHANSON, CHAIR, HONORABLE DANIEL HOLT,
VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON LABOR
AND PUBLIC EMPLOYMENT

SUBJECT: **SUGGESTED AMENDMENTS AND SUPPORT OF H.B. 573, RELATING
TO PROCUREMENT** Prohibits bid shopping and bid peddling for the
competitive sealed bidding process.

HEARING

DATE: Thursday, February 2, 2017
TIME: 11:30 a.m.
PLACE: Conference Room 309

Dear Chair Johanson, Chair Nakashima and Vice Chair Holt, Vice Chair Keohokalole and
Members of the Committees,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over five
hundred general contractors, subcontractors, and construction related firms. The GCA was
established in 1932 and is the largest construction association in the State of Hawaii. GCA's
mission is to represent its members in all matters related to the construction industry, while
improving the quality of construction and protecting the public interest.

GCA **supports** H.B. 573, Relating to Procurement, which defines bid-shopping and bid-peddling
and prohibits such practice, while also allowing for the substitution of subcontractors for reasons
connected to the subcontractor's ability to perform the work. Current law under HRS, Section
103D-302(b) requires the bidding contractor to list all subcontractors and joint contractors and
their scope of work to be employed on public works projects unless the prime contractor has the
required specialty license or will do the work themselves. Legislative history indicates that the
purpose for the subcontractor listing is to deter bid-shopping and bid-peddling, however the
subcontractor listing requirement has become a tool for bidders to find flaws in another bidder's
submission to find them non-responsive.

Background of the Subcontractor Listing Requirement

In the last decade, the subcontractor listing requirement has been used beyond its legislative
intent by many non-low bidders to identify errors of the bidders who either fail to list a
subcontractor or inadvertently commits a listing error in the haste to submit a bid by the
deadline. As a result of the subcontractor listing requirement, the failure to list such
subcontractor altogether or a subcontractor whose work would total more than one percent of the
total contract could trigger an inquiry which could lead to a formal bid protest whereby a higher
bidder could replace the apparent lowest bidder from being awarded the contract. These protests
have historically resulted in delays in contract awards and in the event the low bidder is
disqualified, there is additional cost to the agency and taxpayers if the contract is awarded to the
higher bidder.

Some may argue that further training of procurement officers or review of contractor licensing laws could fix the subcontractor listing problems; however, GCA disagrees. Due to the controversial 2002 decision of the *Okada Trucking* case by the Hawaii Supreme Court and its erroneous interpretation of the general contractor's scope of work, the subcontractor listing requirement will continue to be problematic, unless some amendment to procurement requirement is made.

More recently, **the subcontractor listing has been one of the main reasons why public works projects are being awarded to non-low bidders.** Further the subcontractor listing requirement has led to administratively filed bid protests, resulting in increased cost of public projects, delay of contract award and further administrative burden for affected agencies. One agency reported that the listing law and subsequent awards to non-low bidders have cost over eleven million dollars (\$11 million) since 2005 alone.

GCA's Proposed Amendment

In an attempt to address the ongoing issues with the subcontractor listing GCA requests consideration of adoption of Section 1 of Revised Code of Washington's 39.30.060 which provides some possible amendments to Hawaii's Subcontractor listing law with regard to its applicability. The Washington State Code requires Subcontractor listing for projects over \$1M; allows the subcontractor list to be turned in one hour after the bid is submitted; Limits which subcontractors are required to be listed – Washington State Code required three – HVAC, Electrical and Plumbing. The Proposed HD1 suggests including what Hawaii often refers to as the five sacred trades: electrical, plumbing, boilermaker, asbestos and elevator – these were the original trades that has required either individuals to perform such work or the county to issue permits as to such work due to health and safety.

The Proposed HD1 Draft would result in more accurate bid submittals and reduce the number of potential bid protests. For these reasons, we respectfully request your consideration of the proposed amendments and request passage of this measure.

Proposed HD1 to H.B. 573, Relating to Procurement – Amend the bill as follows:

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

(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction that is expected to cost one million dollars or more, it shall specify that all bids include as part of the bid, or within _____ hours after the bid submittal time, the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract for performance of the work of: ~~[of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each]~~ electrical work as described in HRS Chapter 448E, plumbing work as described in HRS Chapter 448E, elevator work as described in HRS Chapter 397, boilermaker work as described in HRS Chapter 397, or asbestos related work as described in HRS Chapter 444. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the subcontractor is equal to or less than one per cent of the total bid amount. The bidder shall not list more than one subcontractor for each scope of work identified, unless subcontractors vary with bid alternates, in which case the bidder must indicate which subcontractor will be used for which alternate. Failure of the prime contractor bidder to submit as part of the bid the names of such subcontractors or the naming of two or more subcontractors to perform the same work shall render the bidder's bid nonresponsive and therefore, void.

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

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

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection.

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

(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria

that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(g) 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. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the chief procurement officer or head of a purchasing agency.

(h) The substitution of a listed subcontractor in furtherance of bid shopping or bid peddling before or after the award of the prime contract shall be prohibited, and the originally listed subcontractor may recover monetary damages from the prime contractor who executed a contract with the public entity and the substituted subcontractor, but not from the public entity inviting the bid. It is the original subcontractor's burden to prove by a preponderance of the evidence that bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the bidder for the following reasons:

- (1) Refusal of the listed subcontractor to sign a contract with the prime contractor;
- (2) Bankruptcy or insolvency of the listed subcontractor;
- (3) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;
- (4) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract; or
- (5) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.

As used in this subsection:

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

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

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

[~~(i)~~] (j) 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."

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

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

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

RCW 39.30.060**Bids on public works—Identification, substitution of subcontractors.**

(1) Every invitation to bid on a public contract that is expected to cost one million dollars or more for the construction, alteration, or repair of any public building or public work of the state or a state agency or municipality as defined under RCW 39.04.010 or an institution of higher education as defined under RCW 28B.10.016 shall require each prime contract bidder to submit as part of the bid, or within one hour after the published bid submittal time, the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract for performance of the work of: HVAC (heating, ventilation, and air conditioning); plumbing as described in chapter 18.106 RCW; and electrical as described in chapter 19.28 RCW, or to name itself for the work. The prime contract bidder shall not list more than one subcontractor for each category of work identified, unless subcontractors vary with bid alternates, in which case the prime contract bidder must indicate which subcontractor will be used for which alternate. Failure of the prime contract bidder to submit as part of the bid the names of such subcontractors or to name itself to perform such work or the naming of two or more subcontractors to perform the same work shall render the prime contract bidder's bid nonresponsive and, therefore, void.

(2) Substitution of a listed subcontractor in furtherance of bid shopping or bid peddling before or after the award of the prime contract is prohibited and the originally listed subcontractor is entitled to recover monetary damages from the prime contract bidder who executed a contract with the public entity and the substituted subcontractor but not from the public entity inviting the bid. It is the original subcontractor's burden to prove by a preponderance of the evidence that bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the prime contractor for the following reasons:

- (a) Refusal of the listed subcontractor to sign a contract with the prime contractor;
- (b) Bankruptcy or insolvency of the listed subcontractor;
- (c) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;
- (d) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract; or
- (e) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.

(3) The requirement of this section to name the prime contract bidder's proposed HVAC, plumbing, and electrical subcontractors applies only to proposed HVAC, plumbing, and electrical subcontractors who will contract directly with the prime contract bidder submitting the bid to the public entity.

(4) This section does not apply to job order contract requests for proposals under *RCW 39.10.130.

[2003 c 301 § 5; 2002 c 163 § 2; 1999 c 109 § 1; 1995 c 94 § 1; 1994 c 91 § 1; 1993 c 378 § 1.]

NOTES:

*Reviser's note: RCW 39.10.130 was recodified as RCW 39.10.420 pursuant to 2007 c 494 § 511, effective July 1, 2007.

Intent—2002 c 163: "This act is intended to discourage bid shopping and bid peddling on Washington state public building and works projects." [2002 c 163 § 1.]

Application—1994 c 91: "This act applies prospectively only and not retroactively. It applies only to invitations to bid issued on or after June 9, 1994." [1994 c 91 § 2.]

Application—1993 c 378: "This act applies prospectively only and not retroactively. It applies only to invitations to bid issued on or after July 25, 1993." [1993 c 378 § 2.]



HAWAII LABORERS-EMPLOYERS COOPERATION AND EDUCATION TRUST
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TESTIMONY OF HAWAII LECET
CLYDE T. HAYASHI - DIRECTOR

LATE

HOUSE OF REPRESENTATIVES
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair

LATE

COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS

Rep. Mark M. Nakashima, Chair
Rep. Jarrett Keohokalole, Vice Chair

LATE

NOTICE OF HEARING

DATE: Thursday, February 2, 2017
TIME: 11:30 AM
PLACE: Conference Room 309

TESTIMONY ON HOUSE BILL NO. 573, RELATING TO PROCUREMENT.

ALOHA COMMITTEE CHAIR AARON JOHANSON, COMMITTEE VICE CHAIR DANIEL HOLT, AND MEMBERS OF THE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT:

ALOHA COMMITTEE CHAIR MARK NAKASHIMA, COMMITTEE VICE CHAIR JARRETT KEOHOKALOOLE, AND MEMBERS OF THE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS:

My name is Clyde T. Hayashi, and I am the Director of Hawaii LECET. Hawaii LECET is a labor-management partnership between the Hawaii Laborers Union, Local 368, and its unionized contractors.

Mahalo for the opportunity to testify **SUPPORTING THE INTENT of House Bill No. 573, and offer a few amendments.** This bill proposes prohibits bid shopping and bid peddling for the competitive sealed bidding process.

Hawaii LECET recommends the following amendments...

On page 5, item (4), we recommend amending the word "obtain" with the word "retain". The word "obtain" asserts that the subcontractor was unlicensed at the time it submitted a bid proposal to the bidder. Under HRS444-1, it defines a "Contractor" to mean "...any person who by oneself or through others offers to undertake, or holds oneself out as being able to undertake, or does undertake to alter, add to, subtract from, improve, enhance, or beautify any realty or construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation, or other structure, project, development, or improvement, or do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

On page 5, item (5), we recommend amending this section to include: any debarments from any purchasing or enforcement agency.



HAWAII LABORERS-EMPLOYERS COOPERATION AND EDUCATION TRUST
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TESTIMONY OF HAWAII LECET
CLYDE T. HAYASHI - DIRECTOR
Page 2

We would also like to amend this bill by adding an item (6) to read... "The listed subcontractor is unable or refuses to meet the contractual requirements or agreements of the bidder". This will allow a bidder bound by contract (ie: a collective bargaining agreement, etc...), to replace an inadvertently listed subcontractor with another subcontractor who can meet the requirements or agreements of the bidder.

For these reasons, we support the intent of House Bill No. 573 with a few friendly amendments.

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 unscrupulous
2 practices of bid shopping and bid peddling still plague Hawaii's
3 construction industry. The state of Washington prohibits bid
4 shopping and bid peddling and affords subcontractors affected by
5 those practices a legal means of redress. To further curb
6 undesirable bid shopping and bid peddling practices in public
7 works, the purpose of this Act is to incorporate the Washington
8 state model into Hawaii law.

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

11 "**§103D-302 Competitive sealed bidding.** (a) Contracts
12 shall be awarded by competitive sealed bidding except as
13 otherwise provided in section 103D-301. Awards of contracts by
14 competitive sealed bidding may be made after single or multi-
15 step bidding. Competitive sealed bidding does not include
16 negotiations with bidders after the receipt and opening of bids.



1 Award is based on the criteria set forth in the invitation for
2 bids.

3 (b) An invitation for bids shall be issued, and shall
4 include a purchase description and all contractual terms and
5 conditions applicable to the procurement. If the invitation for
6 bids is for construction, it shall specify that all bids include
7 the name of each person or firm to be engaged by the bidder as a
8 joint contractor or subcontractor in the performance of the
9 contract and the nature and scope of the work to be performed by
10 each. Construction bids that do not comply with this
11 requirement may be accepted if acceptance is in the best
12 interest of the State and the value of the work to be performed
13 by the joint contractor or subcontractor is equal to or less
14 than one per cent of the total bid amount.

15 (c) Adequate public notice of the invitation for bids
16 shall be given a reasonable time before the date set forth in
17 the invitation for the opening of bids. The policy board shall
18 adopt rules which specify:

- 19 (1) The form that the notice is to take;
20 (2) What constitutes a reasonable interim between
21 publication and bid opening; and



1 (3) How notice may be published, including publication in
2 a newspaper of general circulation, notice by mail to
3 all persons on any applicable bidders mailing list,
4 publication by any public or private telecommunication
5 information network, or any other method of
6 publication it deems to be effective.

7 (d) Bids shall be opened publicly in the presence of one
8 or more witnesses, at the time and place designated in the
9 invitation for bids. The amount of each bid and other relevant
10 information specified by rule, together with the name of each
11 bidder shall be recorded. The record and each bid shall be open
12 to public inspection.

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

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



1 and total or life cycle costs. The invitation for bids shall
2 set forth the evaluation criteria to be used. No criteria may
3 be used in bid evaluation that are not set forth in the
4 invitation for bids.

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

16 (h) The substitution of a listed subcontractor in
17 furtherance of bid shopping or bid peddling before or after the
18 award of the ~~prime~~ contract shall be prohibited, and the
19 originally listed subcontractor may recover monetary damages
20 from the ~~prime-contractor~~ who executed a contract with the
21 ~~public-entity~~ and the substituted subcontractor, but not from
22 the ~~public-entity~~ inviting the bid. It is the ~~prime-contractor~~



1 or substituted subcontractor's burden to prove by a
 2 preponderance of the evidence that bid shopping or bid peddling
 3 did not occur. Substitution of a listed subcontractor may be
 4 made by the ~~prime-contractor~~ **bidder** for the following reasons:

- 5 (1) Refusal of the listed subcontractor to sign a contract
 6 with the ~~prime-contractor~~ **bidder**;
 7 (2) Bankruptcy or insolvency of the listed subcontractor;
 8 (3) Inability of the listed subcontractor to perform the
 9 requirements of the proposed contract or the project;
 10 (4) Inability of the listed subcontractor to ~~obtain~~ **retain** the
 11 necessary license, bonding, insurance, or other
 12 statutory requirements to perform the work detailed in
 13 the contract; ~~or~~
 14 (5) The listed subcontractor is barred from participating
 15 in the project as a result of a court order or summary
 16 judgment, **including debarment from a purchasing or**
 17 **enforcement agency; or (6) The listed subcontractor**
 18 **is unable or refuse to meet the**
 19 **contractual requirements or agreements of the bidder.**
 20 "Bid peddling" means attempts by a subcontractor to
bidder
undercut known bids submitted to the ~~prime-contractor~~ to procure
a job.



1 "Bid shopping" means the use of a low bid already received
2 bidder
3 by the prime-contractor to pressure other subcontractors into
4 submitting even lower bids.

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

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



H.B. NO. 513

1 for bids shall describe each step to be used in soliciting,
2 evaluating, and selecting unpriced offers."

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

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

8 SECTION 6. This Act shall take effect upon its approval.
9

INTRODUCED BY:

[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]
[Signature]



H.B. NO. 513

Report Title:

Procurement; Bid Shopping; Bid Peddling

Description:

Prohibits bid shopping and bid peddling for 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.



LATE

LATE

LATE

DAVID Y. IGE
GOVERNOR



RODERICK K. BECKER
Comptroller

AUDREY HIDANO
Deputy Comptroller

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

TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEES ON LABOR & PUBLIC EMPLOYMENT
AND
ECONOMIC DEVELOPMENT & BUSINESS
ON
THURSDAY, FEBRUARY 2, 2017
11:30 A.M.
CONFERENCE ROOM 309

H.B. 573

RELATING TO PROCUREMENT.

Chairs Johanson and Nakashima, Vice Chairs Holt and Keohokalole, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 573.

The Department of Accounting and General Services appreciates the intent of the bill. This bill appears to disallow subcontractors from recovering damages from the State for violations relating to subcontractor listings.

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

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LABtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 1, 2017 7:49 PM
To: LABtestimony
Cc: jmas808@gmail.com
Subject: *Submitted testimony for HB573 on Feb 2, 2017 11:30AM*

Follow Up Flag: Follow up
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HB573

Submitted on: 2/1/2017

Testimony for LAB/EDB on Feb 2, 2017 11:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Jeffrey Masatsugu	Painting Industry of Hawaii Labor Management Cooperation Trust Fund; Hawaii Tapers Market Recovery T	Oppose	Yes

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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LABtestimony

From: mailinglist@capitol.hawaii.gov
 Sent: Thursday, February 2, 2017 9:44 AM
 To: LABtestimony
 Cc: stab625@yahoo.com
 Subject: Submitted testimony for HB573 on Feb 2, 2017 11:30AM

HB573

Submitted on: 2/2/2017

Testimony for LAB/EDB on Feb 2, 2017 11:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Arnold	Ironworkers Stabilization	Support	Yes

Comments: We are in strong support of HB 573, Relating to Procurement; that prohibits bid shopping and bid peddling. The purpose of this bill strongly supports HRS Section 103D that the legislature has passed and the State of Hawaii has used to provide a fair and open process to bidding for public funded projects. We believe that it is in the best interest of the public that they know all the subcontractors and joint contractors for any jobs. Additionally this bill will stop the general contractor to get a lower price from his subcontractor or get a new one. These savings are not going to go to the State, but give the general contractor a greater profit margin. Consequently, we believe to modify the procurement law will jeopardize the integrity of the process. We strongly support this measure for the working men and women of Hawaii. Thank you for your time and consideration.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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