

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 SENATE COMMITTEE  
ON  
GOVERNMENT OPERATIONS  
February 2, 2017, 2:45 PM

SB 1070  
PROCUREMENT; BID SHOPPING; BID PEDDLING  
RELATING TO PROCUREMENT

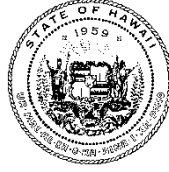
Chair Kim, Vice-Chair Ruderman, and members of the committee, thank you for the opportunity to submit testimony on SB 1070.

The SPO submits the following comments on this bill.

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.

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  
SENATE COMMITTEE ON GOVERNMENT OPERATIONS  
ON  
THURSDAY, FEBRUARY 2, 2017  
2:45 P.M.  
CONFERENCE ROOM 414

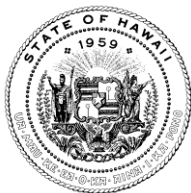
S.B. 1070

RELATING TO PROCUREMENT.

Chair Kim, Vice Chair Ruderman, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 1070.

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.



DAVID Y. IGE  
GOVERNOR  
SHAN S. TSUTSUI  
LT. GOVERNOR

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

TO THE SENATE COMMITTEE  
ON  
GOVERNMENT OPERATIONS

TWENTY-NINTH STATE LEGISLATURE  
REGULAR SESSION, 2017

THURSDAY, FEBRUARY 2, 2017  
2:45 P.M.

TESTIMONY ON SENATE BILL NO. 1070  
RELATING TO PROCUREMENT

TO THE HONORABLE DONNA MERCADO KIM, CHAIR,  
AND TO THE HONORABLE RUSSELL E. RUDERMAN, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on Senate Bill No. 1070, 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.

Senate Bill No. 1070 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.

Senate Bill No. 1070 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 Senate Bill No. 1070 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.

Thank you for the opportunity to testify on Senate Bill No. 1070. I will be happy to answer any questions the Committee may have.

**PRESENTATION OF THE  
CONTRACTORS LICENSE BOARD**

TO THE SENATE COMMITTEE ON  
GOVERNMENT OPERATIONS

TWENTY-NINTH LEGISLATURE  
Regular Session of 2017

Thursday, February 2, 2017  
2:45 p.m.

**TESTIMONY ON SENATE BILL NO. 1070, RELATING TO PROCUREMENT.**

TO THE HONORABLE DONNA MERCADO KIM, CHAIR,  
AND MEMBERS OF THE COMMITTEE:

My name is Peter H.M. Lee, Chairperson of the Contractors License Board (“Board”) Legislative Committee. Thank you for the opportunity to testify on Senate Bill No. 1070, 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 Senate Bill No. 1070.

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# GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 2, 2017

TO: HONORABLE DONNA MERCADO KIM, CHAIR, HONORABLE RUSSELL RUDERMAN, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

SUBJECT: **SUGGESTED AMENDMENTS AND SUPPORT OF S.B. 1070, RELATING TO PROCUREMENT** Prohibits bid shopping and bid peddling for the competitive sealed bidding process.

#### HEARING

DATE: Thursday, February 2, 2017  
TIME: 2:45 PM  
PLACE: Conference Room 309

Dear Chair Mercado Kim and Vice Chair Ruderman and Members of the Committee,

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** S.B. 1070, 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 SD1 suggests including what Hawaii often refers to as the five sacred trades: electrical, plumbing, boilermaker, asbestos and elevator – these were the original trades that's required either individuals to perform such work or the county to issue permits as to such work b/c they dealt with health and safety.

For these reasons, we respectfully request your consideration of the proposed amendments and request passage of this measure.



**Proposed SD1 to SB 1070, 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.]



ELECTRICAL CONTRACTOR'S ASSOCIATION OF HAWAII

**NECA Hawai'i Chapter**  
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January 31, 2017

To: Senate Committee on Government Operations  
Honorable Chairperson Kim & Vice Chairman Ruderman

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

Subject: SB 1070 Relating to Procurement

Notice of Hearing

Date: Thursday, February 2, 2017  
Time: 2:45 PM  
Place: Conference Room 414  
State Capitol  
415 South Beretania Street

Dear Chair Kim 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 SB 1070 that prohibits bid shopping and bid peddling for the competitive sealed bidding 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 bid peddling did not occur by either the contractor or the subcontractor. It would cause delays and be costly to 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 and bid peddling. The monitoring and compliance would also be a burden to the State Procurement staff with additional responsibilities or require additional staff to handle.

Based on the above, ECAH **opposes** the passage of SB 1070 and encourage this committee to kill this bill.

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

# IRONWORKERS STABILIZATION FUND

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February 2, 2017

Donna Mercado Kim, Chair  
Committee on Government Operations  
State Senate  
State Capitol  
415 S. Beretania Street  
Honolulu, Hawaii 96813

Dear Honorable Chair Kim and Members of the Committee on Government Operations:

Re: Strong Support for SB 1070 – Relating to Procurement

We are in strong support of SB 1070, 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.

# ***SAH - Subcontractors Association of Hawaii***

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

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

February 2, 2017

Testimony To: Senate Committee on Government Operations  
Senator Donna Mercado Kim, Chair

Presented By: Tim Lyons, President

Subject: S.B. 1070 - RELATING TO PROCUREMENT

Chair Kim and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii and we do not support this bill. 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

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. This is one of the reasons specified in Subsection h (4). 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.

## HEARING BEFORE THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

### Senate Bill 1070 Relating To Procurement

Chair Kim, 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 Senate Bill 1070, which seeks to statutorily prohibit bid shopping by creating a legal cause of action for an aggrieved subcontractor.

State law requiring the listing of subcontractors in public projects is the primary protection for subcontractors from predatory bid shopping and/or bid peddling practices. While we agree with the findings of fact section of this bill denouncing the practice of bid shopping and peddling, we note that currently the law is working well and that no changes are necessary.

Moreover, though it purports to aid subcontractors, this bill does not actually provide timely or effective protection for the subcontractor. The current law provides effective preventive protection to the subcontractor - no action is necessary to protect itself. By contrast, this bill requires the subcontractor to sue the general contractor and/or the substitute subcontractor to make itself whole. No subcontractor wants to incur the time and costs of litigation given an uncertain outcome and the enmity that litigation will surely create between the subcontractor and the general contractor. Because of these problems, a subcontractor is highly unlikely to ever avail itself of this illusory form of protection.

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



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

THE SENATE  
THE TWENTY-NINTH LEGISLATURE  
REGULAR SESSION OF 2017

COMMITTEE ON GOVERNMENT OPERATIONS

Senator Donna Mercado Kim, Chair  
Senator Russell E. Ruderman, Vice Chair

NOTICE OF HEARING

DATE: Thursday, February 2, 2017  
TIME: 2:45 P.M.  
PLACE: Conference Room 414

**TESTIMONY ON SENATE BILL NO. 1070, RELATING TO PROCUREMENT.**

ALOHA COMMITTEE CHAIR DONNA MERCADO KIM, COMMITTEE VICE CHAIR RUSSELL RUDERMAN, AND MEMBERS OF THE COMMITTEE ON GOVERNMENT OPERATIONS:

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 Senate Bill No. 1070, 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.

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 Senate Bill No. 1070 with a few friendly amendments**.

JAN 25 2017

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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 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 As used in this subsection: **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



# S.B. NO. 1070

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

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# S.B. NO. 1070

**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.*

