

JAN 26 2022

A BILL FOR AN ACT

RELATING TO JOINT CONTRACTOR OR SUBCONTRACTOR LISTING.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the State's
2 procurement process requires clear legislative direction to
3 award contracts to responsible bidders and to minimize protests
4 on bids due to the subcontractor listing requirement under
5 section 103D-302(b), Hawaii Revised Statutes.

6 SECTION 2. Section 103D-302, Hawaii Revised Statutes, is
7 amended by amending subsection (b) to read as follows:

8 "(b) An invitation for bids shall be issued, and shall
9 include a purchase description and all contractual terms and
10 conditions applicable to the procurement. If the invitation for
11 bids is for construction, it shall specify that all bids that
12 include the engagement of a joint contractor or subcontractor in
13 the performance of the contract shall include the name of each
14 person or firm to be engaged by the bidder as a joint contractor
15 or subcontractor [~~in the performance of the contract~~] and the
16 nature and scope of the work to be performed by each[-];
17 provided that the name and information of the joint contractor


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1 or subcontractor who is not required to be licensed under
2 chapter 444 in the performance of the contract are not to be
3 required to be included in bids. Construction bids that do not
4 comply with this requirement may be accepted if acceptance is in
5 the best interest of the State and the value of the work to be
6 performed by the joint contractor or subcontractor is equal to
7 or less than one per cent of the total bid amount. "

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 Statutory material to be repealed is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

10 SECTION 4. This Act shall take effect upon its approval.

11
12
13 INTRODUCED BY: _____



14 BY REQUEST
15

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Report Title:

Procurement, Joint Contractor or Subcontractor Listing

Description:

Clarifies the listing of joint contractors and subcontractors required for construction bids under section 103D-302, Hawaii Revised Statutes.

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

JUSTIFICATION SHEET

SB. NO. 3034

DEPARTMENT: Accounting and General Services

TITLE: A BILL FOR AN ACT RELATING TO JOINT
CONTRACTOR OR SUBCONTRACTOR LISTING.

PURPOSE: To clarify the listing of joint contractors
and subcontractors required for bids for
construction under section 103D-302(b),
Hawaii Revised Statutes (HRS) and to
facilitate the implementation of competitive
sealed bidding procurements.

MEANS: Amend section 103D-302(b), HRS.

JUSTIFICATION: Section 103D-302(b), HRS, requires a bidder
for a construction contract under section
103D-302, HRS, to identify the joint
contractors and subcontractors to be engaged
by the bidder should the bidder be awarded
the contract.

Historically, bidders listed only those
joint contractors and subcontractors who
were required to be licensed under chapter
444, HRS, in order to perform their
respective specialty work. Since the
enactment of chapter 103D, HRS, there have
been numerous protests challenging the
listing of subcontractors. Most of the
protests alleged that a bidder failed to
list a particular subcontractor necessary to
perform work that the bidder itself was not
licensed to perform. The volume of protests
was exacerbated because the scope of work of
the various specialty contractor
classifications as provided in Exhibit A of
the Hawaii Administrative Rules, title 16,
chapter 77, that are attendant to chapter
444, HRS, often seemingly overlap, making it
difficult to determine which specialty
license is required for a particular
component of work.

Notwithstanding the confusion inherent in applying Exhibit A, the bidders understood that only the joint contractors and subcontractors subject to being licensed under chapter 444, HRS, were required to be listed by section 103D-302(b), HRS. Recently, protests have been filed concerning bids that failed to list subcontractors who are not required to be licensed under chapter 444, HRS, such as truckers. The issue came to a head in the matter of Grace Pacific, LLC v. Dep't of Transportation, State of Hawaii, CAAP No. 21-0000343 (Haw. App. 2021), a protest that was appealed to the circuit court and to the Intermediate Court of Appeals (ICA) before the parties agreed to dismiss the appeal before the ICA. The primary issue in the case was whether section 103D-302(b), HRS, required bidders to list truckers in their subcontractor listings. This was a departure in the long-standing interpretation by the construction industry and the procuring agencies, to only list subcontractors licensed under chapter 444, HRS. Truckers are not subject to licensing under chapter 444, HRS. The administrative hearings officer ruled in favor of the protesting bidder, finding that truckers were required to be listed notwithstanding the departure from past and current practice. The hearings officer concluded that listing joint contractor(s) or subcontractor(s) is not limited to those contractors or specialty contractors licensed under chapter 444, HRS. The hearings officer's decision was appealed to the circuit court and overturned by the court. While the case involved other issues and is more complex than can be summarized in this brief justification, it has become abundantly clear, by the fact that the hearings officer and the circuit court came to opposite interpretations, that clarification of the requirements of section 103D-302(b), HRS, is necessary to prevent further confusion as to its meaning.

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This bill clarifies that section 103D-302(b) requires only those persons or firms that are required to be licensed under chapter 444, HRS, in the performance of the contract to be listed as joint contractors or subcontractors.

Impact on the public: The bill will clarify the requirements of section 103D-302(b), HRS, for bidders and procuring departments and agencies, reduce or possibly eliminate protests of this nature, and thereby avoid related delays to the procurement process and added costs to the government.

Impact on the department and other agencies:
Same as impact on the public.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: AGS221

OTHER AFFECTED
AGENCIES: All agencies procuring construction using
103D-302(b), HRS.

EFFECTIVE DATE: Upon approval.