



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
KA 'OIHANA PILI KĀLEPA
335 MERCHANT STREET, ROOM 310
P.O. BOX 541
HONOLULU, HAWAII 96809
Phone Number: (808) 586-2850
Fax Number: (808) 586-2856
cca.hawaii.gov

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA

NADINE Y. ANDO
DIRECTOR | KA LUNA HO'OKELE

DEAN I HAZAMA
DEPUTY DIRECTOR | KA HOPE LUNA HO'OKELE

Testimony of the Department of Commerce and Consumer Affairs

Before the
House Committee on Labor & Government Operations
Tuesday, January 31, 2023
9:00 a.m.
Via Videoconference
Conference Room 309

On the following measure:
H.B. 536, RELATING TO PROCUREMENT

Chair Matayoshi and Members of the Committee:

My name is Nadine Ando, and I am the Director of the Department of Commerce and Consumer Affairs' (DCCA or Department). The Department opposes this bill which establishes a bid depository within the DCCA.

The purposes of this bill are to: (1) amend the competitive sealed bidding process for construction projects to require joint contractors and subcontractors to submit their bids to a bid depository established under DCCA; (2) authorize joint contractors and subcontractors to submit different bids to different general contractors bidding on the project; (3) require all bids submitted by joint contractors and subcontractors to be held in the bid depository and withheld from the general contractors until twenty-four hours before the closing of the invitation for bids; (4) require general contractors to use only the bids timely submitted by joint contractors and subcontractors to the bid depository in their construction bid and imposes fines for

violations; and (5) require DCCA to adopt rules specifying how the bid depository shall operate.

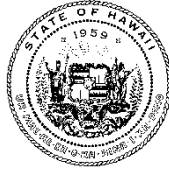
The State Procurement Office (SPO) administers, implements, and ensures compliance with the Hawaii Public Procurement Code (HRS chapter 103D). As such, SPO has the knowledge, expertise, and resources to administer the bid depository and analyze data on the bids to identify collusion trends.

The Department recognizes the importance of preventing bid shopping, bid errors, and change orders which cause additional costs to construction projects; however, establishing and administering a bid depository are outside the jurisdiction of the DCCA, which protects consumers through business registration and professional licensure, monitoring the financial solvency of local financial institutions and insurance companies, and investigating complaints of unfair business practices and license violations. Given the tailored mission of the DCCA, it would not be feasible for the Department to oversee matters relating to procurement for construction projects.

As a special-funded department, the DCCA expects its regulatory divisions to generate sufficient revenue to cover its personnel and operational costs, a contingency reserve, and an equitable share of the Department's administrative expenses. If the bid depository is envisioned as a separate program, the Department is unsure how a general-funded division will be able to contribute to the DCCA's administrative costs.

Thank you for the opportunity to testify on this bill.

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



BONNIE KAHAKUI
ACTING ADMINISTRATOR

STATE OF HAWAI'I | KA MOKU'ĀINA O HAWAI'I
STATE PROCUREMENT OFFICE

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 586-0554
email: state_procurement_office@hawaii.gov
<http://spo.hawaii.gov>

TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
LABOR & GOVERNMENT OPERATIONS
January 31, 2023, 9:00 am

HOUSE BILL 536
RELATING TO PROCUREMENT

Chair Matayoshi, Vice Chair Garrett, and members of the committee, thank you for the opportunity to submit testimony on House Bill 536. The State Procurement Office (SPO) opposes the amendments to Section 103D-302, Hawaii Revised Statutes (HRS), and provides the following comments.

HB 536 amends the competitive sealed bidding process for construction projects to require joint contractors and subcontractors to submit their bids to a bid depository established under the Department of Commerce and Consumer Affairs (DCCA) and the bids are to be withheld from the general contractors until 24 hours before the closing of the invitation for bids. It also requires general contractors to use only the bids timely submitted by joint contractors and subcontractors to the bid depository in their construction bid and imposes fines for violations.

This amendment language adds more complexity to the competitive sealed bidding process for construction projects. It should not involve a third party, DCCA, or any other independent agency for management and oversight of the subcontractor bid depository, which may have unintended consequences, including additional cost and errors if there is a breakdown in communication. It is no unusual for a solicitation to have one or more amendments that changes the bid due date, which the DCCA will have to be aware of at all times.

The bid submission process for construction projects should be managed by the purchasing agency and the general contractors. The purchasing agency of the construction project allows adequate time for the general contractors to submit their bids, based on the complexity of the project. The general contractors can choose to dictate when subcontractors and joint contractors are required to submit their proposal to allow sufficient time to verify licensing requirements and whether or not a subcontractor will be considered for work on the project. It is the general contractors' responsibility to determine who will be listed on their bid. All parties are aware of the deadlines involved and should plan accordingly.

Thank you.



January 31, 2023

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

SUBJECT: **COMMENTS ON H.B. 536, RELATING TO PROCUREMENT.** Amends the competitive sealed bidding process for construction projects to require joint contractors and subcontractors to submit their bids to a bid depository established under DCCA. Authorizes joint contractors and subcontractors to submit different bids to different general contractors bidding on the project. Requires all bids submitted by joint contractors and subcontractors to be held in the bid depository and withheld from the general contractors until twenty-four hours before the closing of the invitation for bids. Requires general contractors to use only the bids timely submitted by joint contractors and subcontractors to the bid depository in their construction bid and imposes fines for violations. Requires DCCA to adopt rules specifying how the bid depository shall operate.

HEARING

DATE: Tuesday, January 31, 2023
TIME: 9:00 a.m.
PLACE: Capitol Room 309

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

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA provides **comments** on H.B. 536, which requires joint contractors and subcontractors to submit their bids to a bid depository established under DCCA.

GCA understands the issue the measure attempts to address is appreciative of this concept. However, GCA has some concerns regarding implementation. GCA respectfully requests that the Procurement Policy Board be the authority to adopt rules specifying how the depository shall operate. The Procurement Policy Board has the expertise to handle rulemaking since their role is to adopt, amend, or repeal administrative rules to carry out and effectuate the purpose and provisions of Chapter 103D (Procurement Code) governing the procurement, management, control, and disposal of any and all goods, services, and construction. This would also ensure that any proposed rules would not conflict with the current rules.



**GENERAL
CONTRACTORS
ASSOCIATION
OF HAWAII**

GCA also has the following questions for consideration:

What if no subcontractor submits a bid?

What if the only subcontractor/s who submits a bid is not qualified or bondable?

Is DCCA the appropriate agency to handle the depository? Should each agency handle their own?

Thank you for the opportunity to provide comments on this measure.

QUALITY PEOPLE. QUALITY PROJECTS



Kevin Schmid
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Chairman

Canaan Shon
Hawaii Geophysical
Services, LLC
Past Chairman

Christine Lanning
Integrated Security
Technologies, Inc.
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Jeff Waiblinger
Consolidated Painting LLC

Christopher Lee
Ayko Group, LLC

January 31, 2023

To: Committee on Labor and Government Operations
Rep. Scot Z. Matayoshi, Chair
Rep. Andrew Takuya Garrett, Vice Chair

RE: Testimony of Associated Builders and Contractors in **OPPOSITION** to HB 536

Chair Matayoshi, Vice Chair Garrett and members of the Committee:

Thank you for the opportunity to testify, my name is Malcolm Barcarse, Jr. I am the Chair of the Legislative Committee of Associated Builders and Contractors, Hawaii Chapter which represents over 150 member companies in the Construction Industry in Hawaii. We also have a State Approved Trade Apprenticeship Program in the trades of Carpentry, Electrical, Painting, Plumbing and Roofing. Our national organization has over 21,000 members across 69 chapters.

The idea of a bid depository is a creative idea to addressing issues surrounding subcontracting issues on competitive sealed bidding. However, we believe that this idea is severely flawed and misguided because if it is put into practice, it would do the opposite of the intention of this bill as it would increase bid errors, lead to increased costs and would not have a measurable effect on change orders. Also, this bill resurrects a system instituted by the private sector which was stopped pursuant to an antitrust lawsuit settlement in 1988.

Establishing a bid depository under DCCA would lead to increased costs in two ways. First, no agency within DCCA has a role in the procurement process until an appeal of an initial bid protest decision which is administered by the Office of Administrative Hearings. Tasking DCCA with a task like this would require a budget to administer this and will probably necessitate creating new positions so that DCCA has adequate staff and experience to administer this. Also, costs would be increased as it would create additional uncertainty as under this system general and subcontractors will not be able to effectively communicate and coordinate with each other 24 hours before the bid as the general contractors will not know who they can subcontract with, and subcontractors will be submitting bids not knowing who they might be working with. This level of uncertainty does not exist in the private sector or in the federal government. General and subcontractors are likely to react to this by either increasing their bid prices to account for this risk or choose not to bid on projects creating less competition.

Creating a second layer to competitive sealed bidding through a bid depository would create additional bid errors and additional protests. By having subcontractors separately submitting bids to a bid depository before general contractors can see them, there is no way to figure out for general contractors and sub-contractors to figure out scope and coordination issues which may lead to parts of a project being missed in a bid or parts of a project being duplicated between generals and subs thereby increasing the price. Also, if parts of a project are missing this will lead to bid protests, in addition by having subcontractors submitting their bids directly to DCCA instead of the general contractors the argument could be made that subcontractors may now having standing to file bid protests themselves which they do not have the ability to under the current system.

We also disagree with the claim that this bill will reduce change orders. Changing the bidding procedure has little to do with change orders as most change orders occur due to unforeseen conditions on the job site or when the customer changes their mind about

ABC Hawaii's Testimony in Opposition to HB 536

something on the plans and specs. Occasionally a few contractors will act in bad faith by low bidding on a project to make it up in change order but that is not most change orders. If anything, this bill may increase change orders due to the lack of coordination prior to the bid may lead to fewer questions being resolved prior to the bid because the generals and the subs are working separately.

On a final note, this bill appears to model a structure that was put into place by the General Contractors Association of Hawaii (GCA) in 1949 to regulate subcontracting. This system was ultimately stopped in 1988 when the Department of Justice filed suit against the GCA preventing them from continuing this depository due to violation of antitrust laws. See *United State of American vs. General Contractors Association of Hawaii*, <https://www.justice.gov/atr/case/us-v-general-contractors-association-hawaii> (D. Hawaii 1988) (See attached.) We contend that it is a bad look for the State to resurrect a system that was stopped for stifling fair and open competition.

We ask that HB 536 be HELD as it will not achieve the objectives that are being laid out in its preamble. Instead, this bill will lead to be more confusion, more protests, more litigation and higher costs. Thank you for the opportunity to testify.

ROBERT J. STAAL
PHILLIP H. WARREN
HOWARD J. PARKER
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, 16th Floor
San Francisco, California 94102
(415) 556-6300

Attorneys for the United States

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

| | | |
|---------------------------------|---|----------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | Filed: June 16, 1987 |
| |) | |
| v. |) | Civil No.: 870462ACK |
| |) | |
| GENERAL CONTRACTORS ASSOCIATION |) | |
| OF HAWAII, |) | ANTITRUST |
| |) | |
| Defendant. |) | |
| <hr/> | | |

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendant to obtain equitable relief and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted by the United States of America under Section 4 of the Sherman

Act, 15 U.S.C. § 4, to prevent and restrain the continuing violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as hereinafter alleged.

2. Defendant has its principal place of business, transacts business, and is found in the District of Hawaii.

II.

DEFINITIONS

3. As used herein, the term:

- (a) "Awarding authority" means any governmental or private entity that contracts for the performance of construction projects;
- (b) "General contractor" means any person who contracts with awarding authorities for the performance of construction projects;
- (c) "Specialty contractor," also known as a subcontractor, means any person who supplies specialty contracting services (e.g., plumbing, electrical, masonry) to general contractors for construction projects;
- (d) "Material supplier" means any person who supplies materials to general or specialty contractors for use on construction projects;
- (e) "Person" means any individual, partnership, firm, association, corporation or other business or legal entity;

- (f) "Prime bid" means an offer to an awarding authority by a general contractor for the purpose of obtaining a contract for a construction project;
- (g) "Sub-bid" means an offer to a general contractor by a specialty contractor to supply specialty contracting services for a construction project, or by a material supplier to supply materials for a construction project;
- (h) "Confirmation bid" means written confirmation of a sub-bid, which confirmation is filed by a specialty contractor or material supplier with a bid depository; and
- (i) "Bid depository" means a facility that gathers sub-bids from specialty contractors and material suppliers and forwards them to general contractors, or that receives confirmation bids filed by specialty contractors and material suppliers.

III.

DEFENDANT

4. General Contractors Association of Hawaii, also known as the Hawaii Chapter of the Associated General Contractors of America, Inc. (hereinafter "GCA"), is made a defendant herein. GCA is a Hawaii corporation with its principal place of business in Honolulu, Hawaii. GCA is recognized as a general

contractors' association, although its membership includes specialty contractors and material suppliers as well as general contractors. GCA operates a bid depository on the Island of Oahu in the State of Hawaii.

IV.

CO-CONSPIRATORS

5. Various persons, not made defendants in this complaint, have participated as co-conspirators in the violation alleged herein and have performed acts and made statements in furtherance thereof.

V.

TRADE AND COMMERCE

6. A substantial number of construction projects in the State of Hawaii are undertaken through solicitation and acceptance by awarding authorities of prime bids from general contractors. In order to prepare such bids and to perform construction projects that they are awarded, general contractors in turn typically solicit and accept sub-bids from specialty contractors and material suppliers.

7. Three general contractor associations in the State of Hawaii operate bid depositories. Since 1949, GCA has operated a bid depository for construction projects on the Island of Oahu. Since 1972, the Hawaii Island Contractors' Association, formerly known as Hilo Contractors Association, has operated a bid depository for construction projects on the Island of Hawaii. Since 1977, the Maui Contractors Association has

operated a bid depository for construction projects on the Island of Maui.

8. Six specialty contractor associations in the State of Hawaii operate bid depositories. These associations are Gypsum Drywall Contractors of Hawaii, Mason Contractors Association of Hawaii, Pacific Electrical Contractors Association, Painting & Decorating Contractors Association of Hawaii, Plumbing & Mechanical Contractors Association of Hawaii, and Sheet Metal Contractors Association.

9. GCA selects a substantial number of construction projects in the State of Hawaii that are being awarded through the solicitation and acceptance of prime bids from general contractors and publishes a list of the selected projects in the GCA Weekly Bid Bulletin (formerly the Builders Industry Digest). GCA selects almost exclusively government construction projects for inclusion in the GCA Weekly Bid Bulletin. All significant construction projects in the State of Hawaii that are awarded by federal, state, or local governmental entities are listed in the GCA Weekly Bid Bulletin.

10. Unless specified otherwise, the submission and acceptance of sub-bids on construction projects listed in the GCA Weekly Bid Bulletin are governed by certain rules and procedures established by the bid depositories operated by the relevant general and specialty contractors' associations. The selection by GCA of construction projects to be governed by bid depositories' rules and procedures occurs without the

authorization and direction of the affected awarding authorities.

11. All significant general contractors operating on the Island of Oahu are members of GCA and abide by the rules and procedures of GCA's bid depository (hereinafter the "GCA bidding procedure") with respect to construction projects on the Island of Oahu that are listed in the GCA Weekly Bid Bulletin, unless that procedure is suspended by GCA due to the appearance on the bidders list of non-Hawaiian non-member prime bidders who may be unwilling to abide by it on a given project. On construction projects to which the GCA bidding procedure applies and is not suspended, in almost all instances the only bids received by awarding authorities from general contractors are bids developed in accordance with that procedure.

12. The GCA bidding procedure provides, among other things, that:

- (a) Confirmation bids for all specialty subcontracts or material supplies must be filed with the GCA bid depository;
- (b) General contractors may award a specialty or material supply subcontract only to bidders who have formally filed bids with the GCA bid depository in compliance with its rules and procedures;

- (c) Filed bids may not be altered or changed after the deadline for their filing;
- (d) A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;
- (e) Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository;
- (f) Prior to the prime bid opening, general contractors may not divulge any information to a specialty contractor or material supplier regarding any sub-bid received; and
- (g) If a construction project is altered in scope, the general contractor must continue to deal with the low filed bidders or parties he used in covering the affected item(s) of work.

13. Substantial amounts of the construction materials that are bid and contracted in accordance with the GCA bidding procedure are shipped from various states of the United States to the State of Hawaii in a continuous and uninterrupted flow of interstate commerce.

14. The activities of the defendant and co-conspirators, which are the subject of the violation hereinafter alleged, are within the flow of, and have a substantial effect on, interstate commerce.

VI.

VIOLATION ALLEGED

15. Beginning at least as early as 1949 and continuing until the date of this complaint, defendant GCA and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for is granted.

16. The aforesaid combination and conspiracy has consisted of an agreement among the defendant and co-conspirators, the substantial terms of which were to:

- (a) Assure that a substantial number of construction projects in the State of Hawaii would be governed by the GCA bidding procedure and other rules and procedures established by bid depositories operated by other associations of contractors in the State of Hawaii;
- (b) Restrain and prohibit the negotiation of sub-bids on construction projects governed by the GCA bidding procedure by, among other things, inhibiting the seeking of lower prices by general contractors or the offering of lower prices by specialty contractors or material suppliers; and

- (c) Restrain and prohibit the receipt of sub-bids from, or the award of subcontracts to, specialty contractors or material suppliers that do not comply with the GCA bidding procedure on construction projects governed by the GCA bidding procedure.

17. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do.

VII.

EFFECTS

18. The aforesaid combination and conspiracy has had the following effects, among others:

- (a) Competition among specialty contractors and material suppliers in the sale of specialty contracting services and materials to general contractors on construction projects governed by the GCA bidding procedure has been unreasonably restrained, suppressed, and eliminated; and
- (b) Competition among general contractors in negotiating sub-bids for specialty contracting services and materials for construction projects governed by the GCA bidding procedure has been unreasonably restrained, suppressed, and eliminated.

PRAYER

WHEREFORE, plaintiff prays that:

1. The Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

2. The defendant, its officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on its behalf be enjoined from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.


3. The defendant be enjoined from maintaining or adopting any and all specific rules, procedures or practices that unreasonably restrain or prohibit the offer, receipt, or negotiation of sub-bids on construction projects.

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4. The plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

5. The plaintiff recover the costs of this action.

Dated:



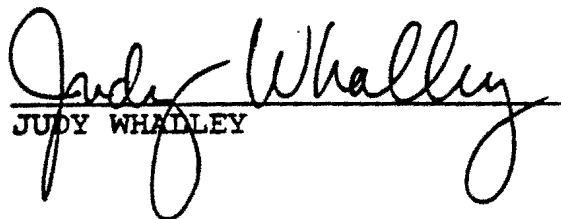
CHARLES F. RULE
Acting Assistant Attorney
General

ROBERT J. STAAL



ROGER B. ANDEWELT

PHILLIP H. WARREN



JUDY WHALLEY

HOWARD J. PARKER
Attorneys, Antitrust Division
U.S. Department of Justice

GARY R. SPRATLING
Attorneys, Antitrust Division
U.S. Department of Justice

DANIEL A. BENT
United States Attorney
District of Hawaii

ROBERT J. STAAL
PHILLIP H. WARREN
HOWARD J. PARKER
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue, 16th Floor
Box 36046
San Francisco, California 94102
Telephone: 415/556-6300

Attorneys for the United States

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

| | | |
|---------------------------------|---|--------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil No. |
| |) | |
| GENERAL CONTRACTORS ASSOCIATION |) | COMPETITIVE IMPACT |
| OF HAWAII, |) | <u>STATEMENT</u> |
| |) | |
| Defendant. |) | |
| _____ |) | |

As required by Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), the United States files this Competitive Impact Statement on the proposed Final Judgment submitted for the Court's approval in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

On June 16, 1987, the United States filed nine related civil antitrust complaints under Section 1 of the Sherman Act, 15 U.S.C. § 1, against nine construction trade associations in

Hawaii. Each complaint alleges that a trade association conspired with its members to restrain competition by adopting and enforcing certain rules that restrict bidding on construction projects in Hawaii. The United States and each of the nine defendants have agreed to Final Judgments in settlement of the cases. The Complaints and proposed Final Judgments in the nine cases are similar.

Defendant General Contractors Association of Hawaii ("GCA") is a Hawaii corporation with its principal place of business in Honolulu, Hawaii. GCA was the first construction trade association in Hawaii to adopt bidding rules, and the other eight defendant associations modeled their rules on GCA's rules.

Plaintiff and defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless plaintiff withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to interpret, modify, enforce, and punish violations of the Final Judgment.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. The Bid Depository System in Hawaii

A bid depository is a system for the collection and dissemination of bids or sub-bids for the performance of construction services. A bid depository collects and compiles bids submitted by a date certain and then disseminates them to bidding authorities or general contractors seeking the bids or sub-bids, respectively. By facilitating the bidding process, bid

depositories can improve the efficiency of the contracting process and thereby promote rather than harm competition. The complaint in this case alleges, however, that the defendant adopted a number of rules governing the operation of its bid depository that restrained competition for subcontracts on construction projects governed by the GCA bidding procedure, by prohibiting and precluding negotiation of sub-bids once they were submitted to the bid depository.

On most major construction projects in Hawaii, including most government projects, the governmental and private entities that contract for construction services (known as "awarding authorities") do so by soliciting and accepting bids from general contractors. In preparing their respective bids, general contractors usually solicit and accept bids from the various specialty contractors (e.g., plumbing, electrical, masonry contractors) and material suppliers whose work will be needed on the project. A bid to a general contractor by a specialty contractor or material supplier to provide services or materials for a construction project is known in the trade as a "sub-bid."

Since 1949, GCA has maintained and enforced rules that regulate bidding by specialty contractors to general contractors on a substantial number of construction projects in Oahu, Hawaii. The rules, known collectively as the "GCA bidding procedure," govern the operation of GCA's bid depository. Two other general contractor associations in Hawaii operate bid depositories: the Hawaii Island Contractors' Association (since 1972) for construction projects on the Island of Hawaii, and the Maui

Contractors Association (since 1977) for construction projects on the Island of Maui.

Six specialty contractor associations operate bid depositories in conjunction with the three general contractor associations in Hawaii. These associations are: Gypsum Drywall Contractors of Hawaii, Pacific Electrical Contractors Association, Painting & Decorating Contractors Association of Hawaii, Plumbing & Mechanical Contractors Association of Hawaii, Sheet Metal Contractors Association, and Mason Contractors Association of Hawaii. All of these bid depositories have rules similar to the GCA bidding procedure.

Under its rules GCA determines which construction projects will be subject to its bid depository rules. If GCA chooses a particular project, then pursuant to the rules of the other associations, that project is also subject to the depository rules of those other associations. Under the controlling GCA rules, the bid depository rules apply to all construction projects that are listed in the GCA Weekly Bid Bulletin. GCA selects the projects to be included in the Bulletin on its own and without the authorization or direction of the affected awarding authorities. In fact, GCA selects almost exclusively government construction projects for inclusion in the GCA Weekly Bid Bulletin and seldom includes any private projects. All significant construction projects in Hawaii that are awarded by federal, state, or local governmental entities are listed in the GCA Weekly Bid Bulletin.

All significant general contractors operating on the Island of Oahu are members of GCA and abide by the bidding procedure for

projects on Oahu that are listed in the GCA Weekly Bid Bulletin. The bidding rules are only suspended by GCA if non-Hawaiian general contractors who may be unwilling to abide by the procedures appear on the bidders list for a project. On construction projects to which the GCA bidding procedure applies, in almost all instances the only bids received by awarding authorities from general contractors are bids developed in accordance with that procedure.

Similarly, the membership of each of the six defendant specialty contractor associations includes all significant specialty contractors in each of the trades in Hawaii, and all association members abide by the rules and procedures of their association's bid depository. Thus, even if a general contractor were not a member of GCA and did not want to go through the bid depository procedures, it generally would be forced to agree to the procedures because, if it did not, the Hawaiian specialty contractors would be precluded by their rules from dealing with that general contractor. Hence, the general contractor would not be able to obtain an adequate number of sub-bids from qualified specialty contractors. Indeed, on construction projects to which the associations' bidding procedures apply, in almost all instances the only bids received by awarding authorities from general contractors are bids based on sub-bids submitted in accordance with those procedures. (In a small number of projects, non-Hawaiian general contractors bring in mainland subcontractors to work on Hawaiian projects.)

The three general contractor and six specialty contractor associations are interrelated. Many specialty contractors are members of both their specialty trade association and a general contractor association. The general contractor associations have virtually identical bid procedures, and they cooperate with one another by transmitting or receiving bids from members of one depository for construction projects on an island under the jurisdiction of another. The six specialty contractor associations have bidding procedures modeled after the General Contractors Association's rules. The general and specialty contractor associations often cooperate in enforcing their bidding procedures.

B. The GCA Bidding Procedure

The Complaint filed against GCA alleges that GCA's bidding procedure provides, among other things, that:

1. Confirmation bids for all specialty subcontracts or material supplies must be filed with the GCA bid depository;
2. General contractors may award a specialty or material supply subcontract only to bidders who have formally filed bids with the GCA bid depository in compliance with its rules and procedures;
3. Filed bids may not be altered or changed after the deadline for their filing;
4. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;

5. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository;
6. Prior to the prime bid opening, general contractors may not divulge any information to a specialty contractor or material supplier regarding any sub-bid received; and
7. If a construction project is altered in scope, the general contractor must continue to deal with the low filed bidders or parties he used in covering the affected item(s) of work.

The Complaint also alleges that beginning at least as early as 1949 and continuing to the present, the defendant engaged in a conspiracy consisting of an agreement, the substantial terms of which were to:

1. Assure that a substantial number of construction projects in the State of Hawaii would be governed by the GCA bidding procedure and other rules and procedures established by bid depositories operated by other associations of contractors in the State of Hawaii;
2. Restrain and prohibit the negotiation of sub-bids on construction projects governed by the GCA bidding procedure by, among other things, inhibiting the seeking of lower prices by general contractors or the offering of lower prices by specialty contractors or material suppliers; and

3. Restrain and prohibit the receipt of sub-bids from, or the award of subcontracts to, specialty contractors or material suppliers that do not comply with the GCA bidding procedure on construction projects governed by the GCA bidding procedure.

In addition, the Complaint alleges that the conspiracy had the following effects:

1. Competition among specialty contractors and material suppliers in the sale of specialty contracting services and materials to general contractors on construction projects governed by the GCA bidding procedure has been unreasonably restrained, suppressed, and eliminated; and
2. Competition among general contractors in negotiating and obtaining sub-bids for specialty contracting services and materials for construction projects governed by the GCA bidding procedure has been unreasonably restrained, suppressed, and eliminated.

The regulation of negotiations between general contractors and subcontractors is not anticompetitive in all situations. Here, however, as explained above, the general contractor associations and the specialty contractor associations each possess market power for construction projects in Hawaii. In addition, the decision to limit negotiations between general contractors and specialty contractors was not the decision of the awarding authority, but rather was the decision of the general contractors acting in concert and the decision of the specialty contractors acting in concert. In this context we concluded that

the association rules were anticompetitive because they unreasonably deprived the awarding authority of free and open competition in negotiations between general contractors and specialty contractors and material suppliers, for the performance of subcontracts on construction projects subject to the bidding procedures.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment enjoins GCA from continuing or renewing the anticompetitive conduct alleged in the Complaint. Specifically, Section IV prohibits GCA from maintaining, directly or indirectly, any written or unwritten rule that has the purpose or effect of:

1. Suppressing, restraining, or discouraging general contractors and specialty contractors or material suppliers from negotiating sub-bids on construction projects;
2. Suppressing, restraining, or discouraging general contractors from receiving sub-bids from, or awarding subcontracts to, specialty contractors or material suppliers that have not complied with the GCA bidding procedure on a construction project; or
3. Stating that negotiation of sub-bids or any failure to comply with the GCA bidding procedure is contrary to any policy of GCA.

Section V orders GCA to eliminate within 60 days all written and unwritten rules that are inconsistent with the Final Judgment,

including provisions in its bidding procedure which provide that:

1. Confirmation bids for all specialty subcontracts or material supplies must be filed with the GCA bid depository;
2. General contractors may award a specialty or material supply subcontract only to bidders who have formally filed bids with the GCA bid depository in compliance with its rules and procedures;
3. Filed bids may not be altered or changed after the deadline for their filing;
4. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;
5. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository;
6. Prior to the prime bid opening, general contractors may not divulge any information to a specialty contractor or material supplier regarding any sub-bid received; and
7. If a construction project is altered in scope, the general contractor must continue to deal with the low filed bidders or parties he used in covering the affected item(s) of work.

Section V.B orders GCA to include in any GCA rules on bidding for contracts on construction projects a statement that no GCA policy prohibits negotiation of sub-bids, or requires that

subcontracts be awarded only on sub-bids filed in accordance with GCA rules.

Section VI.A provides, however, that defendant is not enjoined from complying with any requirement of an awarding authority regarding the procedures general contractors must follow in obtaining sub-bids for the preparation of prime bids. This provision ensures that the proposed Final Judgment does not in any way limit awarding authorities' ability to establish bidding requirements for contractors. If the awarding authority decided that a regulated bidding system which prevented post-filing negotiations between contractors and subcontractors was appropriate, it could insist on it, and the contractors and subcontractors could comply without violating the decree.

Section VI.B further states that defendant is not enjoined from maintaining a facility that gathers sub-bids from specialty contractors and material suppliers and forwards them to general contractors, so long as use of the services it provides is voluntary. This provision ensures that the proposed Final Judgment does not prohibit GCA from operating a bid depository so long as the services provided are voluntary and do not prohibit negotiations between general and specialty contractors.

Sections VII and VIII ensure that full notice of the requirements of the Final Judgment is given to all of GCA's officers, directors, managers, and members.

Section IX requires GCA to establish and implement a plan for monitoring compliance with the terms of the proposed Final Judgment. GCA is also required to file with the Court and the

United States within ninety (90) days after date of entry of the Final Judgment, an affidavit explaining the steps it has taken to comply with the Final Judgment. GCA is required to file similar affidavits each year the Final Judgment is in effect.

Section XII makes the Final Judgment effective for ten (10) years from the date of its entry.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney fees. Entry of the Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The APPA provides that any person wishing to comment on the proposed Final Judgment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. Any person who believes that the proposed Final Judgment should be modified, may submit written comments within the statutory 60-day period to Gary R. Spratling, Chief, San Francisco Office, Antitrust Division, United States Department of

Justice, 450 Golden Gate Avenue, 16th Floor, Box 36046, San Francisco, California 94102 (Telephone: 415/556-6300). These comments and the Department's response to them will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. Further, Section XI provides that the Court retains jurisdiction over this action and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Antitrust Division was a full trial on the merits and on relief. The Division considers the proposed Final Judgment to be of sufficient scope and effectiveness to make a trial unnecessary, since it provides appropriate relief against the violations alleged in the Complaint.

The effect of the proposed Final Judgment should be to eliminate entirely the alleged restraints on competition that are set forth in the Complaint. In particular, under the proposed Final Judgment, general contractors and specialty contractors and material suppliers can no longer agree to limit negotiations on the terms of sub-bids with each other. General contractors will be able freely to consider bids from any and all capable specialty contractors and material suppliers. Price competition among

general contractors and among specialty contractors and material suppliers will be facilitated, to the benefit of awarding authorities and, indirectly, to the benefit of federal and state taxpayers. The proposed Final Judgment adequately redresses all aspects of the government's Complaint in this case.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

The United States considered no materials or documents to be determinative in formulating this proposed Final Judgment. Accordingly, none are being filed pursuant to the APPA, 15 U.S.C. § 16(b).

Dated:

Respectfully submitted,

ROBERT J. STAAL

PHILLIP H. WARREN

HOWARD J. PARKER

Attorneys, Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, 16th Floor
San Francisco, California 94102
Telephone: 415/556-6300

ORDERED, ADJUDGED, AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The Complaint states a claim upon which relief may be granted against the defendant under Section 1 of the Sherman Act (15 U.S.C. § 1).

II.

DEFINITIONS

As used in this Final Judgment:

- A. "Awarding authority" means any governmental or private entity that contracts for the performance of construction projects;
- B. "General contractor" means any person who contracts with awarding authorities for the performance of construction projects;
- C. "Specialty contractor," also known as a subcontractor, means any person who supplies specialty contracting services (e.g., plumbing, electrical, masonry) to general contractors for construction projects;
- D. "Material supplier" means any person who supplies materials to general or specialty contractors for use on construction projects;
- E. "Person" means any individual, partnership, firm, association, corporation, or other business or legal entity;

- F. "Prime bid" means an offer to an awarding authority by a general contractor for the purpose of obtaining a contract for a construction project;
- G. "Sub-bid" means an offer to a general contractor by a specialty contractor to supply specialty contracting services for a construction project, or by a material supplier to supply materials for a construction project;
- H. "Confirmation bid" means written confirmation of a sub-bid, which confirmation is filed by a specialty contractor or material supplier with a bid depository; and
- I. "Bid depository" means a facility that gathers sub-bids from specialty contractors and material suppliers and forwards them to general contractors, or that receives confirmation bids filed by specialty contractors and material suppliers.

III.

This Final Judgment applies to the defendant General Contractors Association of Hawaii ("GCA") and to each of its subsidiaries, successors, and assigns, and to each of its officers, directors, agents, managers and other employees, and to all other persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

Defendant is enjoined and restrained from directly or indirectly continuing, maintaining, initiating, adopting, ratifying, entering into, carrying out, furthering, disseminating, publishing, or enforcing any bidding procedure, plan, program, course of action, statement of principle or policy, resolution, rule, by-law, standard, or collective statement that has the purpose or effect of:

- A. Suppressing, restraining, or discouraging general contractors and specialty contractors or material suppliers from negotiating at any time sub-bids on construction projects;
- B. Suppressing, restraining, or discouraging general contractors from receiving sub-bids from, or awarding subcontracts to, specialty contractors or material suppliers; or
- C. Stating that negotiation of sub-bids is contrary to any policy of GCA.

V.

A. Defendant is ordered and directed to cancel and rescind within sixty (60) days of the date of entry of this Final Judgment, and is prohibited from directly or indirectly reinstating, every plan, program, course of action, statement of principle or policy, resolution, rule, by-law, standard, or collective statement that is inconsistent with this Final Judgment, including provisions in its bidding procedure which provide that:

1. Confirmation bids for all specialty subcontracts or material supplies must be filed with the GCA bid depository;
2. General contractors may award a specialty or material supply subcontract only to bidders who have formally filed bids with the GCA bid depository in compliance with its rules and procedures;
3. Filed bids may not be altered or changed after the deadline for their filing;
4. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;
5. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository;
6. Prior to the prime bid opening, general contractors may not divulge any information to a specialty contractor or material supplier regarding any sub-bid received; and
7. If a construction project is altered in scope, the general contractor must continue to deal with the low filed bidders or parties he used in covering the affected item(s) of work.

B. Defendant is ordered and directed to include in any GCA rules concerning bidding for contracts on construction projects a statement that no GCA rule or policy prohibits negotiation of sub-bids, or requires that subcontracts be awarded only on sub-bids filed in accordance with GCA rules.

VI.

Nothing in Sections IV and V of this Final Judgment shall prohibit defendant from:

A. Complying with any requirement of an awarding authority regarding the procedures general contractors must follow in obtaining sub-bids for the preparation of prime bids; or

B. Maintaining a facility that gathers sub-bids from specialty contractors and material suppliers and forwards them to general contractors, so long as use of the facility by any contractor is voluntary.

VII.

Defendant is ordered and directed to:

A. Furnish a copy of this Final Judgment to each of its officers, directors, agents, and managers within thirty (30) days after the date of the entry of this Final Judgment;

B. Furnish a copy of this Final Judgment to any successors to its officers, directors, agents, and managers within thirty (30) days after each successor becomes associated with the defendant;

C. Obtain from each of its officers, directors, agents, and managers, and their successors, who have been provided a copy of

this Final Judgment, a signed receipt therefor, which receipt shall be retained in the defendant's files;

D. Attach to each copy of this Final Judgment furnished to its officers, directors, agents, and managers, and their successors, a statement in the form set forth in Appendix A attached hereto, with the following sentence added to the last paragraph of the letter: "Sections IV and V of the Final Judgment apply to you. If you violate these provisions, you may subject GCA to a fine, and you may also subject yourself to a fine and imprisonment."; and

E. Hold, within seventy-five (75) days after the date of entry of this Final Judgment, a meeting of its officers, directors, agents, and managers, at which meeting such persons shall be instructed concerning the defendant's and their obligations under this Final Judgment. Similar meetings shall be held at least once a year during the term of this Final Judgment; provided, however, that no meeting must be held during any calendar year in which defendant has had no bidding procedure, plan, program, course of action, statement of principle or policy, resolution, rule, by-law, standard, or collective statement concerning any aspect of bidding for contracts on construction projects.

VIII.

Defendant is ordered and directed to:

A. Furnish a copy of this Final Judgment together with a letter on the letterhead of GCA, in the form set forth in

Appendix A attached hereto, to each of its members within thirty (30) days after the date of entry of this Final Judgment;

B. Furnish a copy of this Final Judgment together with a letter on the letterhead of GCA, in the form set forth in Appendix A attached hereto, to each new member within thirty (30) days after the member joins GCA; and

C. Publish in the GCA Weekly Bid Bulletin, or in the event GCA ceases publication of its Weekly Bid Bulletin in a comparable construction trade publication, the notice attached hereto as Appendix B.

IX.

Defendant is ordered and directed to:

A. Establish and implement a plan for monitoring compliance by its officers, directors, agents, and managers and other employees with the terms of the Final Judgment;

B. File with this Court and serve upon the plaintiff, within ninety (90) days after the date of entry of this Final Judgment, an affidavit as to the fact and manner of its compliance with this Final Judgment; and

C. File with this Court and serve upon the plaintiff annually on each anniversary date during the term of this Final Judgment an affidavit setting forth all steps it has taken during the preceding year to discharge its obligations under this Final Judgment.

X.

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted:

1. Access during the office hours of the defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and
2. Subject to the reasonable convenience of the defendant and without restraint or interference from it, to interview officers, directors, agents, and managers and other employees of the defendant, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to the defendant's principal office, the defendant shall submit such non-privileged written reports, under oath if

requested, with respect to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by the defendant to plaintiff, the defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to the defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which the defendant is not a party.

XI.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying

out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

XII.

This Final Judgment will expire ten (10) years from its date of entry.

XIII.

Entry of this Final Judgment is in the public interest.

/s/ ALAN C. KAY

Dated:

UNITED STATES DISTRICT JUDGE

United States v. General Contractors Association of Hawaii
Civil No.
Final Judgment