



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
JANUARY 27, 2022, 3:00 PM

SENATE BILL 2335
RELATING TO PROCUREMENT

Chair Moriwaki, Vice-Chair Dela Cruz, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 2335. The State Procurement Office (SPO) opposes the bill in its entirety and provides the following comments.

The language proposed in SB2335 is almost identical to §103D-302, Hawaii Revised Statutes (HRS), which already addresses the competitive sealed bidding process with the difference in reference to the "second lowest bidder". The SPO does not see value-added to awarding a competitive sealed bid to the second lowest bidder, if the apparent lowest bidder is deemed responsive and responsible based on the criteria set forth in the solicitation. Additionally, SB2335 does not offer any explanation when it is appropriate to accept the "second lowest bidder." This could easily lead to protests or other legal consequences.

If it is not practicable to initially prepare a purchase description to support an award based on price, as stated in Section 1, page 5, lines 1-3, the SPO recommends that the agency conduct a Request for Information, pursuant to Hawaii Administrative Rules (HAR) Section 3-122-9.02. Multi-step invitation for bids, pursuant to HAR Subchapter 6.5, may also be used when it is not practical to initially prepare a definitive purchase description.

HRS Chapter 103D, the Hawaii Public Procurement Code, is the single source of public procurement policy to be applied equally and uniformly while providing fairness, open competition, a level playing field, government disclosure, and transparency in the procurement and contracting process vital to good government.

Pursuant to HRS §103D-302(h) 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. Furthermore, bids are evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening, and no criteria may be used in bid evaluation that is not set forth in the solicitation.

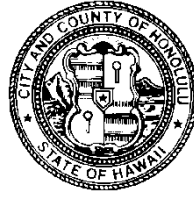
Act 188, SLH 2021 amended HRS §103D-302, Competitive sealed bidding, (f) by requiring procurement officers to also consider past performance, if available, as part of the criteria that will affect the bid price and be considered in evaluation for award. The SPO is currently working on a past performance database and administrative rules to enforce this Act.

The SPO opposes the language of SB2335, in its entirety, as it does not address why a competitive sealed bidding award should be made to the second lowest bidder.

Each year new procurement laws are applied to state agencies causing state agency contracts to become more complex and costly. It is difficult to justify a new method of procurement titled, "Competitive sealed bidding to the second lowest bidder" after HRS §103D-302, Competitive sealed bidding was already amended to include other criteria such as past performance.

Thank you

RICK BLANGIARDI
MAYOR



ANDREW T. KAWANO
DIRECTOR DESIGNATE

CARRIE CASTLE
DEPUTY DIRECTOR

TESTIMONY OF ANDREW T. KAWANO
DIRECTOR OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
BEFORE THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS
January 27, 2022, 3:00 PM, Conference Room 016 and Videoconference

TO: The Honorable Sharon Y. Moriwaki, Chair
and Members of the Senate Committee on Government Operations

RE: OPPOSITION OF SENATE BILL 2335, RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **opposes** Senate Bill (SB) 2335, Relating to Procurement.

The current rules and regulations under Hawaii Revised Statutes (“HRS”) §103D-302, Competitive sealed bidding, allows an agency to award to the lowest bidder. The bill does not provide enough information as to why the second lowest bidder method is appropriate. Proposing a second lowest bidder method creates an ambiguous process of awarding a contract, will lead to more protests and challenges the requirements of ethical public procurement pursuant to HRS 103D-101.

If other criteria need to be considered where the lowest, responsive, responsible bidder is not awarded a contract, other methods of procurement or remedies are already available in accordance with the Hawaii Public Procurement Code.

For the reasons stated above, the City respectfully opposes Senate Bill 2335.

Mahalo for the opportunity to testify on this bill. Should you have any questions or concerns, please feel free to contact the Department of Budget & Fiscal Services' Division of Purchasing at 808-768-5535 or bfspurchasing@honolulu.gov.



January 27, 2022

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To: Committee on Government Operations
Sen. Sharon Y. Moriwaki, Chair
Sen. Donovan M. Dela Cruz, Vice Chair

From: Malcolm Barcarse, Jr. ABC Hawaii Legislative Committee Chair.

Associated Builders and Contractors Hawaii Chapter's Testimony in **OPPOSITION** to SB 2335.

Chair Moriwaki, Vice Chair Dela Cruz, and members of the Committee:

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

ABC Hawaii acknowledges that there are many problems with our current procurement system. Among those problems are non-responsible and/or non-responsive contractors who take advantage of the low-bidder system under the procurement code. While it is tempting to seek alternatives to the low bidder system, we feel that this bill creates more problems than it solves and therefore we are opposing it.

Based on our reading of this bill, we believe that it will give contracting officer's the power to whether to seek a low bidder or the second low bidder. This is concerning because it will give too much discretion to the contracting officer to select contractors arbitrarily without any metrics as to what bid method would be appropriate. We feel that it would be more appropriate to hold the agencies accountable for ensuring that proposals that they receive are responsive and responsible. Therefore, we ask that this bill be held in committee.

Thank you for the opportunity to testify.

ABC Hawaii Staff

Jeffrey Durham – President/CEO Renee Rosehill – Operations Manager
Shannon Richardson – Education Director Justin Ou – CEF Service Coordinator



ELECTRICAL CONTRACTOR'S ASSOCIATION OF HAWAII

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January 26, 2022

To: Senate Committee on Government Operations
Honorable Chairperson Senator Sharon Moriwaki
Vice Chairman Senator Donovan Dela Cruz

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

Subject: SB 2335 Relating to Procurement

Notice of Hearing

Date: Thursday, January 27, 2022
Time: 3:00 PM
Place: Conference Room 016 and Videoconference
State Capitol
415 South Beretania Street

Dear Chair Moriwaki 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 2335 awarding the competitive bid to the second low bid. While the electrical contractors understand the purpose of this measure, the second low bid does not always resolve the problem of obtaining a responsible and responsive bid. Too often, the second low and the lowest bid are very close in dollar amounts. An alternative method is to award the bid to the median bid among all bidders. If there is an even number of bidders, then the lower of the two median bids would be awarded. The selection of the median bid would eliminate most low-ball bids and result in receiving bids that are accurately estimated to true job costs. After reviewing jobs after completion, experience shows that the final cost is closer to the median bid than the initial low or second low bid. The result of using the median bid will be the bid with the best value and a responsible and responsive bid.

Based on the above, ECAH **opposes** the passage of SB 2335 as is and would however, support amending the bill to accept the median bid.

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

Al Itamoto

SAH - Subcontractors Association of Hawaii

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

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

January 27, 2022

Testimony To: Senate Committee on Government Operations
Senator Sharon Y. Moriwaki, Chair

Presented By: Tim Lyons, President

Subject: S.B. 2335 – RELATING TO PROCUREMENT

Chair Moriwaki and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct contracting trade organizations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL AND AIR CONDITIONING NATIONAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We are in support of some version of this bill.

It has long been said that "low bid gets you low quality". We are not sure that is entirely true, assuming that the specifications of the job and jobsite monitoring are fulfilled. Nevertheless, our members have often talked about an alternate system to low bid including utilizing the second lowest bid or other schemes including the third lowest bid, averaging the median bids and others.

Whatever the case, we believe that the concept has merit and we would be happy to participate in conversations that might envision an alternate system.

Thank you.

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

Carpet, Linoleum and Soft Tile Local Union 1926 Market Recovery Trust Fund

LATE

Re: The Senate Committee on Government Operations
Hearing on Senate Bill 2335 Relating To Procurement
Hearing Date : January 27, 2022
Time : 3:00 p.m.

Chair Moriwaki 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 voicing our concerns about and **comments** on Senate Bill 2335. The aforesaid organizations are labor management cooperation funds between the Painters Union, Tapers Union, Glaziers Union, and Carpet and Soft Tile Layers Union and their signatory contractors.

Senate Bill 2335 creates a completely new method of procurement allowable under the Procurement Code. Under this new method, the second lowest responsible and responsive bidder must be awarded the contract.

We understand that there may be certain advantages in mandating the contract award to the second low bid instead of the lowest bid, such as weeding out irresponsible bids and/or bidders. We note a few potential concerns with this approach, however. First, the advantage above may well be realized in a situation where there are only a few bidders. The more bidders there are for a contract, however, the less useful this method will be in weeding out irresponsible bids and/or bidders, because of the increased likelihood of irresponsible bids and/or bidders. Thus, for example, while this approach might be useful if there are only three bidders, it may not be of much use if there are three dozen bidders, since there is likely a greater chance of the second lowest bid being just as irresponsible as the low bid.

Also, there is no guidance in the proposed language or anywhere in the existing statute to indicate when a construction project should use the second low bid method instead of the low bid method. The choice of which method to use itself could thus become a contested issue. Moreover, the number of bid protests may actually increase under the second low bid method. Normally, the second low bid is the party challenging the contract award to the low bid. Under the second low bid method, both the low bid and the third low bid would have incentive to challenge the award, thus doubling the potential for a protest.

Finally, it is not clear how automatically mandating the selection of the second lowest bid is better than allowing the procuring agency to decide for itself whether the second lowest bid actually is the best option for the public as is currently allowed under the procurement code.

Again, we understand that there may be desirable advantages to the second low bid approach, but there are also potential disadvantages that do not appear to be addressed by this measure. We respectfully request that the committee take the time to inquire as to how the concerns above could be addressed and amend the bill as appropriate. Thank you again for this opportunity to share our concerns and comments on this Bill.

Jeffrey S. Masatsugu

LATE

SB-2335

Submitted on: 1/26/2022 6:38:55 PM

Testimony for GVO on 1/27/2022 3:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Riki Fujitani	Individual	Support	No

Comments:

HRS 103D-302 determines the winning bidder for construction projects based solely on lowest price. This encourages construction contractors to submit unreasonable low bids to win government construction contracts. Thereafter, a series of change orders during the course of construction significantly increase the profits of the contractor.

As a result, typical government construction contracts average 10+ change orders that significantly increase the cost of construction projects and costs to the government.

This bill gives government agencies the option of taking the 2nd lowest bid submitted. This would eliminate the gamesmanship by contractors to submit unreasonable low bids to win the contract. Contractors would have to submit fair and accurate bids knowing that the lowest bidder would not be selected.

Other jurisdictions have adopted similar 2nd low bid laws. Another iteration of this concept is closest to the average bid or closest to the median bid laws.

Overall, government needs to provide improvements to Hawaii procurement law to prevent the practice of contractors submitting unreasonable low bids to win construction contracts.