



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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**TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE HOUSE COMMITTEE
ON
LABOR AND PUBLIC EMPLOYMENT
March 14, 2019, 9:00 A.M.**

**SB1333 SD 2
RELATING TO PROCUREMENT**

Chair Johanson, Vice Chair Eli, and members of the committee, thank you for the opportunity to submit testimony on SB1333 SD2. The State Procurement Office (SPO) supports this bill and amendments made in SD1 and offers the following comments:

1. What are the benefits of a past performance state-wide system?
 - It gives those contractors who are performing well, a historic reference record, which will support future work across that State
 - It gives those same contractors accumulated past performance to submit for Federal contracts.
 - It gives the government buyer confidence the contractor will offer successful services, thereby safeguarding taxpayers' monies
 - It creates a requirement for adequate, documented, government oversight and encourages a more robust post-award contract management

2. Will it stop "Change Order Artists" – contractors that submit low bids with the expectation that they'll make it up with change orders?
No it will not, specifically.

Just because a contract has multiple change orders, does not, in of itself, equate to a contractor that is manipulating the system. There are many reasons for change orders, many of which, are often from new government decisions and new information that has entered into the equation.

If we are looking to avoid those contractors that are really playing the system, and I suspect that is a minority statistic, the best way to do this is to mandate adequate, documented, government oversight and encourage a more robust post-award contract management. Documentation of disputed changes orders may or may not be acknowledged as poor performance, and that is why it is important to understand that this might continue to be an issue with or without a past performance program.

Establishing a work group to study past performance is possibly a best first step. The most challenging area of past performance evaluation is the competitive sealed bid procurement method. It has the requirement to include only objective criteria. SPO thanks the committee for including wording in the bill for the work group to develop a recommendation prior to the sunrise of the mandate to implement past performance evaluations for competitive sealed bidding.

Thank you.

c/DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

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

TESTIMONY OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
ON
MARCH 14, 2019, 9:00 A.M.
CONFERENCE ROOM 309, STATE CAPITOL

S.B. 1333, S.D. 2
RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Eli, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 1333, S.D. 2.

The Department of Accounting and General Services (DAGS) supports the intent of the proposed changes to the Procurement Code with the following comments:

1. The existing Procurement Code contains a mechanism for the consideration of past performance. On projects for which a Department determines past performance should be a selection factor, construction services can be procured using the Competitive Sealed Proposals method of Procurement.
2. As proposed, this bill would reduce the transparency and objectivity of the procurement process, and would introduce subjectivity to those processes for the following reasons:
 - a. Lack of objective criteria; and
 - b. Lack of uniformity in rating systems; and

- c. Lack of uniformity in the data used to make decisions on the responsibility of a bidder; and
 - d. Inherent subjectivity when determining what information should be considered (i.e. recent, relevant, etc.).
- 3. It is likely the introduction of subjectivity will result in an increase in the volume and frequency of protests.
- 4. There are existing mechanisms in place to address poor performance in construction contracts.
 - a. While projects are under construction, Departments can provide feedback to contractors, assess liquidated damages, enforce the terms of the contract documents, evaluate the need for change orders, and document facts related to poor performance.
 - b. With sufficient documentation, filings can be made for suspension or debarment of poor-performing contractors in accordance with Hawaii Revised Statutes §103D-702. The State Procurement Office publishes a list (via Procurement Circular) which contains the names of persons or firms debarred or suspended from consideration for award of all public contracts and from performance on any public contract. This list is referenced prior to making award.
 - c. In addition, the Department of Labor and Industrial Relations publishes a list of contractors who are suspended or debarred for violation of Hawaii Revised Statutes Chapter 104; this list is also referenced prior to making award.

5. In its current format, there are conflicts in the requirements. Sections 1-6, and 9 mandate the consideration of past performance to solve the issue stated in Section 1; while Sections 7 and 8 make provisions for a working group to study the problem and make considered recommendations for implementation.
6. This legislation appears to be premised on the idea that making the proposed change to the procurement code (to mandate the consideration of past performance) is the most effective way to use taxpayer money to address the problem of 'repeat poor-performing contractors' and poor performance on State and County projects without an effort to first study the problem, the existing mechanisms, and possible solutions before deciding upon the most appropriate course(s) of action to implement.

We propose that a working group be established to: 1) study the problem of poor performance on State contracts (including the issue of repeated poor-performers), 2) consider possible solutions (to include, but not be limited to, the consideration of past performance), and 3) develop recommendations to most efficiently focus the State's efforts and resources to address it.

To achieve this, we recommend that the bill be completely revised as follows:

"SECTION 1. The legislature finds a need to improve performance on State contracts (including the issue of repeated poor-performers), to increase accountability with performance on state contracts, and to more efficiently utilize taxpayer dollars.

SECTION 2. The purpose of this Act is to form an initial procurement working group to study the problem, consider possible solutions (to include, but not be limited to, the

consideration of past performance) and make recommendations to address the problem.

SECTION 3. (a) There is established the initial procurement working group, which shall be made up of procurement representatives from the state and county. The working group shall:

- (1) Collect data to determine the magnitude of the problem; and
- (2) Document existing practices and processes including, but not limited to, procurement methods, preparation of solicitation documents, evaluation and basis of award (including the consideration of past performance when deemed appropriate), post-award contract administration, suspension, and debarment; and
- (3) Identify lessons learned from case studies of projects identified as having bad contractors or subcontractors; and
- (4) Identify shortfalls, needs, gaps, or challenges in the laws and rules, processes, knowledge, and resources; and
- (5) Find potential methods or mechanisms available to address the problems identified including, but not limited to, the use of a past performance database, by:
 - a. Examining the pros and cons of each potential method or mechanism; and
 - b. Determining the most promising methods or mechanisms to determine requirements for implementation including, but not limited to, time, costs, and resources; and
 - c. Obtaining industry feedback; and

d. Prioritizing for purposes of recommendations.

(b) The initial procurement working group will consist of the following members or their designees:

- (1) State procurement administrator;
- (2) Comptroller;
- (3) Attorney General;
- (4) Chief information officer;
- (5) University of Hawaii chief procurement officer;
- (6) Department of Education chief procurement officer;
- (7) Department of Transportation head of procurement authority;
- (8) County of Hawaii chief procurement officer;
- (9) County of Maui chief procurement officer;
- (10) County of Kauai chief procurement officer; and
- (11) City and County of Honolulu chief procurement officer.

(c) The initial procurement working group shall bring together the construction and information technology industry leaders and organizations to review and discuss any gaps or problems with the proposed recommendations prior to finalization of the working group's recommendations to the legislature.

(d) The working group shall provide recommendations to the legislature for its 2021 Session.

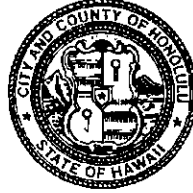
SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 5. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. This Act shall take effect on July 1, 2019.”

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

KIRK CALDWELL
MAYOR



NELSON H. KOYANAGI, JR.
DIRECTOR

MANUEL T. VALBUENA
DEPUTY DIRECTOR

TESTIMONY OF NELSON H. KOYANAGI, JR.
DIRECTOR OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
BEFORE THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
March 14, 2019, 9:00 AM, Conference Room 309

TO: The Honorable Aaron Ling Johanson, Chair
and Members of the Committee on Labor & Public Employment

RE: OPPOSITION OF SENATE BILL 1333, RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **opposes** Senate Bill No. 1333, Relating To Procurement.

Current procurement law allows entities to consider past performance as an evaluating criterion to determine an offeror's responsibility. Requiring past performance for every project exceeding the small purchase threshold will cause delays in the overall procurement process. Delays would stem from the evaluation process and protests due to determinations made by the evaluation. Delays will increase costs to the procurement.

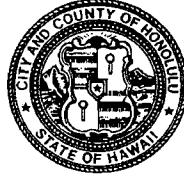
For the reasons stated above, the City respectfully requests that this bill be opposed.

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.

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



ROBERT J. KRONING, P.E.
DIRECTOR

MARK YONAMINE, P.E.
DEPUTY DIRECTOR

March 12, 2019

The Honorable Aaron Ling Johanson, Chair
The Honorable Stacelynn K.M. Eli, Vice Chair
and Members of the Committee on Labor & Public Employment

The House
State Capitol, Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Johanson, Vice Chair Eli, and Members:

SUBJECT: Senate Bill No. 1333 SD2, Relating to Procurement

The Department of Design and Construction (DDC) respectfully **opposes** Senate Bill No. 1333 SD2. The purpose of Part I of the bill is to "(1) Require that past performance be considered in future bid selection of contractors for sole source contracts and any competitive sealed bid or proposal contracts that exceeds the small purchase threshold; (2) Require procurement officers to consider specific factors, including past performance, when making a determination of offeror responsibility; and (3) Require procurement officers to conduct past performance evaluations at least annually and at the time the work under a contract or order is completed, and maintain the evaluations in the department's files."

DDC primarily administers professional services and construction contracts. Existing law allows past performance to be considered prior to award for these types of contracts, so the proposed legislation would not create new opportunities in the existing procurement process. DDC's standard procedures include completing and filing performance evaluations for both professional services and construction contracts.

The Honorable Aaron Ling Johanson, Chair
and Members
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Consideration of past performance in the selection of construction contractors by competitive sealed bidding is allowable under HRS 103D-302. DDC has developed and is continuing to refine procedures that incorporate past performance into qualification of bidders for construction contracts.

The proposed legislation will burden procurement and contract administration procedures with requirements that consume additional resources. The proposed legislation would also result in additional bid protests and contracting delays without commensurate benefits.

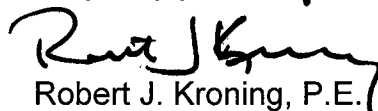
Additionally, language amending subsection 103D-306(a), HRS contained in SECTION 4 of the bill appears to limit an agency's ability to award a sole source contract when the sole source contractor has no past performance evaluations. This language states that, "A contract may be awarded for goods, services, or construction without competition when the head of a purchasing agency determines in writing that there is only one source for the required good, service, or construction, the determination is reviewed and approved by the chief procurement officer, the written determination is posted in the manner described in rules adopted by the policy board, a review of past performance has been conducted, and no objection is outstanding. The written determination, any objection, past performance evaluations relied upon, and a written summary of the disposition of any objection shall be included in the contract file."

The large majority of competitive sealed contracts administered by DDC result in satisfactory or better performance and would not benefit from consideration of contractor past performance. As indicated above, DDC has implemented and is continuing to improve procedures that incorporate past performance into qualification of bidders for construction contracts. DDC uses these procedures for bid solicitations that are expected to be of interest to contractors that have recently exhibited poor performance on DDC contracts. By doing this, DDC is able to realize the benefits of considering past performance on an as-needed basis without burdening the majority of our solicitations with the excessive additional administrative effort mandated by this bill and the additional protests that would need to be addressed.

Based on the above considerations, DDC respectfully **opposes** Senate Bill No. 1333 SD2.

Thank you for the opportunity to express our opposition to this bill.

Very truly yours,


Robert J. Kroning, P.E.
Director

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

LATE

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March 14, 2019

TO: HONORABLE REP. AARON LING JOHANSON, CHAIR, REP. STACELYNN K.M. ELI, VICE CHAIR, AND THE MEMBERS OF THE HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

SUBJECT: TESTIMONY IN OPPOSITION TO SB1333: RELATING TO PROCUREMENT.

Hearing

DATE: Thursday, March 14, 2019
TIME: 9:00 a.m.
PLACE: Conference Room 309
Hawaii State Capitol

Dear, Rep. Aaron Ling Johanson, Chair, Rep. Stacelynn K.M. Eli, Vice Chair, and the members of the House Committee on Labor and Public Employment:

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. The 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. To that end, we have deep concerns relating to SB1333.

The consideration of past performance for low bid contracts and the development and implementation of a past performance database raises a number of concerns for GCA, including but not limited to: ensuring an objective evaluation process for agencies in determining qualified past performance criteria; how the state or county would receive information about private projects; the inability for a new contractor to bid public work due to lack of past performance qualifications; an agency's lack of resources, including staff and funding for implementation and administration of past performance for low bid contracts; the lack of a procedural due process and appeal procedure for the evaluation and the ensuring of efficiency, integrity and transparency in the procurement process of public works construction projects.

The consideration of past performance in procurement is important and can already be permitted under 103D-302(f) under the invitation for bid process, what is commonly known as low bid. Under Section 103D-302(f), HRS an "invitation for bid may set the requirements to determine qualifications and criteria for a project." In other words, the agency may set the criteria and qualifications for the bidder in its bid specifications, which could include such criteria as past performance, recent project history and any other qualifications an agency may find necessary. Currently, there is a reluctance on the part of state agencies to use this section to include past performance due to the difficulty to quantify, evaluate, and administer past performance qualification in a fair and objective manner.

In construction, a number of evaluation factors must be taken into consideration when rating past performance, including licensing, subcontractor performance, inadequate designs, unforeseen conditions, inclement weather, untimely and disruptive owner requested change orders, unforeseen hazardous condition discoveries, the need to accommodate user activities that limit noise or odorous activities. Objectively evaluating a contractor's past performance in lieu of these challenges is difficult.

We respectfully request further discussion be had with agencies who may already in the process of implanting past performance criteria in assessing contractors. Furthermore, stakeholder feedback would ensure that an objective past performance program could be successfully implemented. At this time, we respectfully request that this measure be deferred to allow further discussion on this matter.

GCA opposes SB1333. Thank you for the opportunity to share our opposition.