

HB-844

Submitted on: 1/31/2021 1:01:31 PM

Testimony for GVR on 2/3/2021 8:30:00 AM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Susan Pcola_Davis | Individual | Support | No |

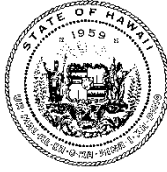
Comments:

Strongly support.

I realize that sole source contracts sometimes need to be pursued. Using past performance data provides the contracting officer insight into the performance and integrity of the bidder.

In light of the definition of sole source, it would be difficult to find another contractor to fulfill the purpose of the contract.

In addition, the procurement office is beholden to review past performance in order to be able to acknowledge positive and/or negative past performance. The contracting officer will be able to use the information in building a request for proposal and inclusionary clauses into the contract to avoid poor performance in areas of known weakness.



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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
GOVERNMENT REFORM
FEBRUARY 3, 2021, 8:30 A.M.

HOUSE BILL 844
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on HB844. The State Procurement Office (SPO) appreciates the intent of this bill and offers the following comments and recommendations.

Comments:

The State Procurement Office has identified multiple bills with similar language and prefers HB526. HB526 has a more inclusive statement to include necessary steps to implement the use of Past Performance.

The State finds that, per its adoption of the ABA Model Procurement Code, that past performance is already allowable inside of the procurement statute. What is missing is the guidance that is found as supplemental Rules. Thus, on May 28, 2019, the Procurement Policy Board voted to approve to development of past performance Rules.

In 2019, the SPO contracted the services of a consultant to review the Comptroller Construction Task Force Report of 2015, analyze the current environment, assist in the development of past performance rules, and make recommendations for the creation of a database. The SPO is currently reviewing the consultant's report and recommendations, along with feedback from CPO jurisdictions and the contractor community, to determine how best to incorporate the information when amending the Rules.

The Rules will cover how to incorporate past performance criteria in a bid or offer, how to evaluate past performance, how to evaluate performance post-award, and how to collect and share that information across siloed agencies through the use of a central state-wide database.

Recommendation:

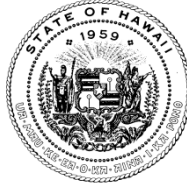
Creating the tools and infrastructure for buyers to adopt a new policy is essential for successful implementation. In order to continue this work, the SPO is requesting time and funding.

Adequate time is required to verify and implement rules, create the database, develop training, then and coordinate and execute the training. The SPO is requesting one-time initial funding of approximately \$164,000 pre-tax, to develop and implement the guidance and related implementation training to cover at least the first 2 years, and annual maintenance funding of \$13,500 to develop the following tools:

| | Delivery | Pre-tax Funding Request |
|---|--|-------------------------|
| 1 | Past Performance Guide | \$15,000 |
| | Prepare a past performance implementation guide that provides information for Hawaii contracting officers with more user-friendly detailed instructions on how to effectively implement the Administrative Rules into practice. The implementation guide will include detailed explanations on how to evaluate past performance, examples of quality past performance narratives, and explanations regarding recording negative performance without using the past performance evaluation as a punitive tool outside of due process. | |
| 2 | Past Performance Database Functional Requirements Document | \$30,000 |
| | Prepare a Past Performance Database Functional Requirements Document (FRD). The FRD will describe the Database's functional requirements. Our FRD will explain the objectives of the Past Performance Database, the forms and data to be entered, workflow of a performance evaluation, users and roles, system outputs, and applicable regulatory requirements, etc. An FRD is solution independent. It is a statement of what the database is to do - not how it functions technically. The FRD does not commit the Database developers to a design. The SPO will be able to include the FRD in a solicitation for design and delivery of the Past Performance Database. | |
| 3 | Create Past Performance Database | \$50,000 |
| 4 | Preparation and Publication of Rules | \$5,000 |
| 5 | Rules must be prepared, surveys sent, facilitated discussions and the publication fee | \$4,000 |
| 6 | Training (in-person) | 46,500 |
| | Total One Time Funding | \$150,500 |
| 6 | Annual Database Maintenance (est. at 27% of cost x \$50,000) | \$13,500 |
| | Total Funding Recurring Annually | \$13,500 |

Thank you.

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
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February 3, 2021
8:30 A.M.
State Capitol
Conference Room 309
VIA VIDEO CONFERENCE

H.B. 0844
RELATING TO PROCUREMENT

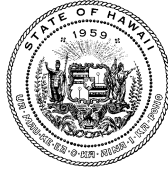
House Committee on Government Reform

The Department of Transportation (DOT) **supports** the bill which requires past performance be considered in future bid selection of contractors for sole source contracts and any competitive sealed bid or proposal contracts that exceed the small purchase threshold; requires procurement officers to consider specific factors, including past performance, when making a determination of offeror responsibility.

Past performance, as another level of consideration and diligence in evaluating responsibility, will provide additional insight to positively impact the award selection and optimally support increased accountability, enhanced quality performance, and efficient and effective utilization of taxpayer dollars in respect to contract awards and respective deliverables.

Thank you for the opportunity to provide testimony.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
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WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
COMMITTEE ON GOVERNMENT REFORM

WEDNESDAY, FEBRUARY 3, 2021, 8:30 A.M.
CONFERENCE ROOM 309, STATE CAPITOL

H.B. 844

RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 844.

The Department of Accounting and General Services (DAGS) strongly opposes legislation mandating the consideration of past performance for the following reasons:

- The current procurement code already allows for the consideration of past performance.

The Competitive Sealed Proposals method of procurement facilitates the consideration of past performance, and may be used whenever a department determines that factors other than price (including past performance) should be a selection factor. This determination must be made on a case-by-case basis, taking into consideration time and funding constraints, need, resources, and other project-specific details. DAGS has chosen to use this method to procure both equipment and services when it has deemed it appropriate to do so.

Even in the context of a Sealed Bid (Invitation for Bid, aka "low bid") procurement, the procurement code allows an agency to use its own past experience with a bidder to disqualify its

bid. Our Interim General Conditions for Construction, as amended, Item 2.12.3, states that a bidder's proposal may be rejected due to a "Lack of responsibility and cooperation as shown by past work such as failing to complete all of the requirements to close the project within a reasonable time or engaging in a pattern of unreasonable or frivolous claims for extra compensation." In order to use this as a basis, the department would require a fact-based record/log supporting this assertion for past projects. Based on past testimony by the City and County of Honolulu, it appears this methodology is put into practice for its projects.

- There is already a process within the procurement code to address "poor-performing" contractors and providing this information to all State and County agencies.

Any agency who has had a "poor-performing" contractor on a project can, with sufficient factual documentation, look to the State Procurement Office to undertake proceedings to suspend and/or debar the contractor. When a contractor is suspended pending investigation or debarred, it is announced to all agencies via a Procurement Circular.

- The legislature has not provided a cogent argument that this is the best, most effective method of addressing the issue of "poor-performing" contractors.

Among the wide range of solutions are: strengthening the government's ability to enforce the contract documents, assessing liquidated damages, better evaluating the need for change orders, and documenting facts related to poor performance; improving the suspension and debarment process; etc..

- The consideration of past performance introduces an element of subjectivity to the construction procurement process, which is increased when an agency is forced to rely on an indirect assessment.

There will always be an element of subjectivity to the consideration of past performance, due to the lack of objective criteria, uniformity in rating systems (including interpretations regarding the evaluation criteria and terminology); lack of uniformity in data used to make decisions on responsibility (this problem is compounded when an entity is forced to use the data of others without direct experience); and the subjectivity inherent in determining what information should be considered (i.e. recent, relevant, etc.).

If past performance is to be implemented, there must be a reliable third party to review all evaluations to be used by the agencies and to make determination(s) regarding the quality and consistency of the information and its impact on the issue of responsibility for each contractor.

DAGS has strong concerns that the increased degree of subjectivity introduced by the mandate to consider past performance will result in an increase in the number of protests. This would be especially true for large, high profile projects.

In summary: This legislation is not necessary because the current procurement code already allows for the consideration of past performance and already contains mechanisms and processes which can be used to address the issue of “poor performing” contractors. Enacting legislation mandating the consideration of past performance without careful study of the problem in relation to existing and alternative means and methods of addressing it may lead to expending large amounts of funds to unsuccessfully address a complex problem, and may further negatively impact the procurement process with a substantial increase in the number of protests.

Thank you for this opportunity to provide testimony on this matter.