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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
FINANCE
MARCH 30, 2016; 3:00 PM

SB2501 HD1
RELATING TO PROCUREMENT

Chair Luke, Vice-Chair Nishimoto and members of the committee, thank you for the opportunity to submit testimony on SB2501 HD1.

The SPO supports the intent of past performance consideration when awarding contracts and submits additional comments in regards to this measure.

SPO submitted a full report to Legislature in January 2015 denoting the challenges to the past performance issue as well as a recommended set of phases for implementation (REF: Report on the Study on Past Performance Consideration in Hawaii Contracting)

- a. In Phase I of SPO's recommendations for implementation of a past performance system, a responsibility determination be made on all procurements prior to the award of any contract and that contractor past performance be assessed as part of that responsibility determination. At first, in regards to competitive sealed bidding, this determination would be made on the basis of references and additional documentation that the proposer includes in their bid/proposal. It is SPO's belief that no matter what criteria you might choose to evaluate a bidder, ultimately, the bidder must be responsible in order to do business with the State.

Two major logistical challenges exist.

1. There is no past performance database that Procurement Officers can access. In our Past Performance Report, SPO recommends this as Phase II of the implementation process. We surmise a stand-alone State-wide past performance database could cost as much as \$4 million not including at least a 23% per year maintenance fee. Another option is to fund the \$2.5 million implementation of a robust eProcurement system that would be mandated for the Executive Branch, but also be available to any Agency across the State. This system would include the ability to collect information on contract performance, and give much needed transparency and consistency to the manner in which procurements are conducted. This is a self-funded model, and so no continuing maintenance fees would be required after initial implementation (REF: State Procurement Office Strategic Plan)

2. Second, there is no formal, available assessment of a bidder's prior work. Agencies and Departments typically assess a contractor's performance in varying ways, with differing policies, procedures and forms. Any assessment conducted may or may not be kept in the contract files. Certainly, these assessments are not readily available outside of the originator's division. Post-award contract management is an area where many States and Commercial companies struggle and a series of areas needs to be addressed such as training, consistency in forms and policy, and a database for collection. Here to, an eProcurement system would be most helpful as it would have the capability to search for construction contracts, and the visibility to see the contract information.

Act 182 was passed at the last Legislative Session (2015) extending the Procurement Task Force to continue its work. It was tasked "specifically to examine and recommend past performance standards and statewide processes in order to promote economy, efficiency, effectiveness, and impartiality in procurement for state and county government." Those findings should be reviewed.

There are many areas of policy, procedure, infrastructure and logistical issues to be considered in implementing past performance. These can be addressed in Hawaii Administrative Rules. Resources will be required such as staffing to develop definitions, policies and procedures. This will entail meeting with stakeholders including, procurement personnel, vendors, departments and members of the community. Infrastructure must be created whereby each contracting unit may have access to enter and view performance data. There must also be a procedure for due process for vendors to respond to evaluations of their performance. Resources will also be needed for change management and training for personnel involved in procurement and contract administration as well as for vendors. For strong and robust implementation of Phase I, funds of at least \$130,000 would be required.

The issue of Past Performance covers ALL types of contracts and not just construction contracts. Thus the SPO must consider this verbiage to accommodate the entire plethora of procurements across the State of Hawaii.

The SPO respectfully offers the following recommendations to the Bill:

1. Page 2, Section 2, Para 1, Lines 5-9: Suggest omitting the phrase: "including but not limited to legal action", and replace with: "including but not limited to considerations of HRS 103D-702(b)." Legal action could mean any court case that the offeror is involved in. This unfairly allows offerors to be penalized solely based on the action and not the final decision. Only decided cases should effect the consideration of past performance. The HRS reference shown above refers to the causes for debarment or suspension which includes conviction in a legal action (vice just being sued). This makes it very clear that if the contractor has anything in the debarment / suspension section, then it should definitely go towards evaluating their past performance.
2. Page 3, Section 3, Lines 6-10: The verbiage states: "bidder's past performance.... Including but not limited to..." and then again at the end: "... and assessments of the bidder's prior work." This verbiage is very clear that the bidder's performance is what will be evaluated here. Any additional verbiage is unnecessary and duplicative.
3. Page 3, Section 3, Lines 7-8 **and** Page 3, Section 4, Lines 19-21: The phrase: "similar scope for public agencies," does not align with the original definition of past performance on page 2 which also includes state, federal or private contracts. Suggest deleting: "for public agencies" as the definition will hold for all procurement types and does not need to be repeated each time.

4. Page 3, Section 3, Line 9 **and** Page 4, Section 4, Line 1: The phrase: "...legal actions," per the above argument in Para. (1) above, should be deleted in lieu that it is not a decided legal action and thus will not add any value to the performance evaluation.

5. Page 5, Section 6, Lines 2-4: It is unproductive to add this verbiage. Responsibility determinations are already being conducted every day on procurements across the State. If you say, 'pursuant to the rules adopted by the policy board', you are in essence telling state agencies to stop doing this and wait, possibly two years or more before checking responsibility in performance again. Recommend deleting this added verbiage in its entirety.

6. Page 5, Section 6, Lines 7-13: This verbiage halts an already instituted process by having procurement officers collect information that 'meets the applicable standards of the policy board'. These two sets of statements would have a very negative effect on responsibility determinations across the state. Recommend deleting: "set forth by the policy board".

7. Page 6, Section 7, Lines 11 & 14-17: This statement belongs in contract management, not in retention of procurement records. It is likely that this requirement could be missed because of this awkward placement. Recommend deleting in entirety. The process for maintaining evaluations in contract files should fall within Rules. Once the Legislature passes the bill that effectively grants a green light to past performance, the Procurement Policy Board will feel comfortable in promulgating good Rules to guide the State procurement officers.

Thank you.

Attachment: SPO Initiatives

Links:

[Past Performance Report](http://spo.hawaii.gov/wp-content/uploads/2015/01/SPO-Past-Performance-Legislative-Report-submitted.pdf) (http://spo.hawaii.gov/wp-content/uploads/2015/01/SPO-Past-Performance-Legislative-Report-submitted.pdf)

[Past Performance Report Appendices](http://spo.hawaii.gov/wp-content/uploads/2015/01/Appendices-for-Past-Performance-Report.pdf) (http://spo.hawaii.gov/wp-content/uploads/2015/01/Appendices-for-Past-Performance-Report.pdf)

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KIRK CALDWELL
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ROBERT J. KRONING, P.E.
DIRECTOR

MARK YONAMINE, P.E.
DEPUTY DIRECTOR

March 28, 2016

The Honorable Sylvia Luke, Chair
and Members
House Committee on Finance
State Capitol, Room 306
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Luke and Members:

SUBJECT: Senate Bill No. 2501 SD2 HD1, Relating to Procurement

The Department of Design and Construction (DDC) respectfully provides the following comments on Senate Bill No. 2501 SD2 HD1, which "(1) Requires past performance to be considered in future bid selection of a contractor; and (2) Requires departments to consider available assessments of previous performance on relevant and recent government contracts when making contract awards."

1. 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.
 - a. Consideration of past performance in selection of professional services providers is codified in Hawaii Revised Statutes (HRS) 103D-304. DDC's procedures include completing performance evaluations of professional services providers and considering past evaluations when selecting consultants for future professional services contracts.
 - b. Consideration of past performance in selection of construction contractors by competitive sealed bidding is allowable under HRS 103D-302. DDC's procedures include completing performance evaluations of construction contractors. Also, DDC has piloted and is continuing to develop procedures to incorporate consideration of past performance in qualification of offerors for construction contracts.

The Honorable Sylvia Luke
and Members
March 28, 2016
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2. The proposed legislation could burden procurement procedures with requirements that consume additional resources and result in additional contracting delays without commensurate benefits.

Based on the above considerations, DDC considers Senate Bill No. 2501 SD2 HD1 to be unnecessary and potentially detrimental to efficient contracting procedures.

Thank you for the opportunity to testify.

Very truly yours,



Robert J. Kroning, P.E.
Director

SAH - Subcontractors Association of Hawaii

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

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

March 30, 2016

Testimony To: House Committee on Finance
Representative Sylvia Luke, Chair

Presented By: Tim Lyons, President

Subject: S.B. 2501, SD 2, HD 1 - RELATING TO PROCUREMENT

Chair Luke 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

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

The concept that this bill puts forward is overdue. The mechanics of how it will be done are less clear to us so we reserve judgement on this bill. There is no doubt that those contractors that do not have a good past performance should not be entitled to receive additional contracts potentially costing the state and the counties more money for remedial work and/or liability exposure for faulty work.

Our concern however, is based on how one judges these items. As is noted in the bill, the kinds of things that past performance will be judged on are deficiencies, legal actions, failure to complete and "assessments" of prior work. The problem is the subjective judgment that will be required in order to determine these items. Was it a supplier/manufacturer that could not deliver materials on time to the contractor who then caused a failure to complete the project? Was a change order a result of architectural deficiencies not the fault of the contractor or, was the contract in litigation because of actions of the general but all contractors on the project were enjoined in a lawsuit? While it is important to know if there was a delay, it is more important to why there was a delay and how to judge who is at fault.

In summary, we are not opposed to the usage of past performance however, this Committee may remember the creation of the PIP Program under a past Administration which caused an uproar in the construction industry because it was seen as so subjective that contractors felt they were being denied an opportunity to participate while others were being favored. Its centerpiece was past performance. We would like not to see a repeat of that fiasco.

Based on the above then, we are not opposed to the concept offered in this bill; however we would like to reserve judgement until we can see additional details.

Thank you.



**Testimony to the House Committee on Finance
Wednesday, March 30, 2016 at 3:00 P.M.
Conference Room 308, State Capitol**

RE: SENATE BILL 2501 SD2 HD1 RELATING TO PROCUREMENT

Chair Luke, Vice Chair Nishimoto, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **supports** SB 2501 SD2 HD1, which requires past performance to be factored into future bid selection of a contractor. Defines past performance. Requires past performance to be considered in sole source procurement. Requires that upon completion of a procurement contract, the department that issued the request for proposal shall evaluate the work and performance of the respective contractors and maintain the evaluations in the department's files. Appropriates funds.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The procurement process is in need of improvement. Business and the public want an open, competitive, and transparent, procurement process. The procurement process must also be timely in the selection and payment for goods and services. In addition, the State is looking for the best value, not necessarily the lowest price.

SB 2501 SD2 HD1 will increase accountability with state contract performance to bidders. Collection of past performance will develop a record and encourage responsible contractors and bidders to continue to improve performance.

We appreciate the opportunity to express our support for SB 2501 SD2 HD1.

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

THE VOICE OF THE CONSTRUCTION INDUSTRY

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Testimony to the House Committee on Finance Wednesday, March 30, 2016 3:00 pm State Capitol - Conference Room 308

RE: S.B. 2501 S.D. 2 H.D 1, Relating to Procurement.

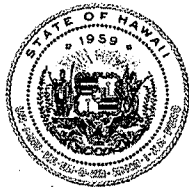
Dear Chair Luke, Vice-Chair Nishimoto, and members of the Committee:

My name is Gladys Marrone, Chief Executive Officer for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii has concerns regarding S.B. 2501 S.D. 2 H.D. 1. The consideration of past performance for low bid contracts raises a number of concerns. In construction, a number of evaluation factors must be taken into consideration, including but not limited to licensing, subcontractor performance, design, unforeseen conditions, inadequate administration, oversight, unforeseen changes, and hazardous condition discoveries. These may be reasons why the project does not come in satisfying the 3 noted criteria: (1) On budget; (2) On time; and (3) numerous changes to the original design.

Therefore, we believe this bill is premature. Instead, the better option may be to provide an opportunity for agencies to initiate a pilot project where they can test select projects and administer past performance requirements upon them. This may promote better fairness and efficiency.

Thank you for the opportunity to express our views on this matter.



LATE

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 30, 2016
3:00 p.m.
State Capitol, Room 308

**SB 2501, S.D. 2, H.D. 1
RELATING TO PROCUREMENT**

The DOT **supports** the intent of SB 2501 that proposes to consider past performance in future bid selection of a contractor under the Competitive Sealed Bid (CSB) provisions of the Procurement Code, HRS § 103D-302.

The proposed definition of past performance includes consideration of past performance as a responsibility determination. The determination of contractor responsibility has always been a requirement under the Procurement Code, and is consistent with the definition of the responsible bidder, "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance."

The purchasing agency has the flexibility to include provisions in the specifications that help to determine the responsibility of bidders. For example, a specification proviso, "contractor shall have performed similar work for at least two years prior to the bid date. Failure to meet this requirement shall be cause of disqualification." During bid evaluation, certain items are verified. If, during bid evaluation, the purchasing agency has any doubts on the responsibility of the bidder, the purchasing agency may, under HRS § 103D-310, "inquire whether the bidder has the financial ability, resources, skills, capability, and business integrity necessary to perform the work...the purchasing agency may require the bidder to submit answers, under oath, to questions contained in a standard form of questionnaire...whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the purchasing agency."

However, the proposed revision to HRS 103D-310, page 5 lines 10 through 15 which includes, "the procurement officer shall possess or obtain available information sufficient to be satisfied that a prospective offeror meets the applicable standards set forth by the policy board." Should not be part of this bill. While applicable standards may be written, the many unknown variables may result in challenges.

This proposed revision of consideration of contractor's notices of deficiencies, legal actions, failure to complete a procurement contract, and assessments of the bidder's prior work is rooted in the intent of the purchasing agency's underlying ethical duties under the Procurement Code.¹

However, including past performance as an evaluation factor in the HRS § 103D-303, Competitive Sealed Proposal (CSP), and HRS §103D-306, Sole Source methods of procurement is not necessary as the procurement code already includes the inclusion of past performance for these methods of procurement.

Thank you for the opportunity to provide testimony.

¹ § 103D-101 "(1) as fiduciary and trustee of public moneys;...(3) [a]ct only in the public interest;...(5)[i]dentify and maximize efficiencies in the public procurement process."

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 30, 2016 7:16 AM
To: FINTestimony
Cc: shannon@gcahawaii.org
Subject: Submitted testimony for SB2501 on Mar 30, 2016 15:00PM



SB2501

Submitted on: 3/30/2016

Testimony for FIN on Mar 30, 2016 15:00PM in Conference Room 308

Submitted By	Organization	Testifier Position	Present at Hearing
Shannon Alivado	General Contractors Association of Hawaii	Comments Only	Yes

Comments: See attached.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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