



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
WAYS AND MEANS
FEBRUARY 26, 2016; 9:45 AM

SB2501 SD1
RELATING TO PROCUREMENT

Chair Tokuda, Vice-Chair Dela Cruz and members of the committee, thank you for the opportunity to submit testimony on SB2501 SD1.

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.
- b. In respect of Competitive Sealed Bidding, the bill states that evaluation criteria should include: "bidder's past performance on projects of similar scope for public agencies, including but not limited to notices of deficiencies, legal actions, failure to complete a procurement contract, and assessments of the bidder's prior work."

It is imperative that the State create a record of past performance that is based on truth and fairness, and can be validated by formal documentation collected throughout the contract period that clearly shows the onus is on the contractor alone. In addition, it is also critical to develop this information as

to what positive areas the contractor has been able to achieve, i.e., ahead of schedule, in or under budget. The collection of past performance is to develop a record of responsible contractors and to encourage contractors to constantly be looking to improve performance.

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, attached)
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.

Lastly, in section 2, page 2, Line 6 the definition of past performance includes past performance of a contractor on "state, federal, or private contracts". In Section 3, page 3, line 8 and Section 4, page 3 line 21 the reference is to evaluating past performance on similar contracts for "public agencies." The contradiction makes it unclear as to what past performance is to be based upon.

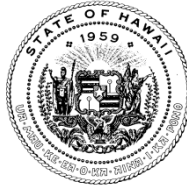
Thank you.

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)



Testimony by:
FORD N. FUCHIGAMI
DIRECTOR

Deputy Directors
JADE T. BUTAY
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:

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

February 26, 2016
9:45 a.m.
State Capitol, Room 211

SB 2501, S.D. 1
RELATING TO PROCUREMENT

Senate Committee on Ways and Means

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.” The proposed revisions to HRS § 103D-310 is consistent.

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

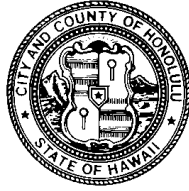
However, including past performance as an evaluation factor in the HRS § 103D-303, Competitive Sealed Proposal (CSP), and HRS §103D-306, Sole Source methods of procurement is not necessary as the procurement code already includes the inclusion of past performance for these methods of procurement.

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.”

DEPARTMENT OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
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KIRK CALDWELL
MAYOR



NELSON H. KOYANAGI, JR.
DIRECTOR

GARY T. KUROKAWA
DEPUTY DIRECTOR

TESTIMONY OF NELSON H. KOYANAGI, JR.
DIRECTOR OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
BEFORE THE SENATE COMMITTEE ON WAYS AND MEANS
9:45 a.m., February 26, 2016, Conference Room 211

Senate Bill No. 2501 SD1 "Relating to Procurement"

Position: IN OPPOSITION

TO: The Honorable Senator Jill N. Tokuda, Chair
and Members of the Committee on Ways and Means

The Department of Budget and Fiscal Services, City and County of Honolulu, **opposes** Senate Bill No. 2501 SD1, Relating to Procurement.

The bill is unnecessary since the State's procurement code already allows Procurement Officers to consider past performance in its award determinations under Hawaii Revised Statutes ("HRS") §103D-303 Competitive sealed proposals, §103D-304 Procurement of professional services and §103D-310 Responsibility of offerors.

The competitive sealed bid procurement method under HRS 103D-302 should remain a simple and objective procurement method where awards may be made expeditiously to the lowest bidder that meets requirements. Adding the mandate for an evaluation of past performance will complicate the process by adding subjectivity, which will lead to delays and bid protests.

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 bfs purchasing@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

February 24, 2016

The Honorable Jill N. Tokuda, Chair
and Members
Senate Committee on Ways and Means
State Capitol, Room 207
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Tokuda and Members:

SUBJECT: Senate Bill No. 2501 SD1, Relating to Procurement

The Department of Design and Construction (DDC) respectfully provides the following comments on Senate Bill No. 2501 SD1, 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 necessarily improve the existing procurement process.
 - a. Consideration of past performance in selection of professional services providers is encoded 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 Jill N. Tokuda
and Members
February 24, 2016
Page 2

2. The bill does not allow consideration of past performance on projects for private owners, which can be particularly relevant for contractors with no past performance record on projects for public agencies.
3. 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 SD1 to be unnecessary and potentially detrimental to efficient contracting procedures.

Thank you for the opportunity to testify.

Very truly yours,


Robert J. Kroening, P.E.
Director

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GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

Uploaded via Capitol Website

February 25, 2016

TO: HONORABLE JILL TOKUDA, CHAIR, HONORABLE DONOVAN DELA CRUZ,
VICE CHAIR, SENATE COMMITTEE ON WAYS AND MEANS

SUBJECT: **COMMENTS TO S.B. 2501, SD1 RELATING TO PROCUREMENT.**

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. Effective January 1, 2017. (SD1)

HEARING

DATE: Friday, February 26, 2016
TIME: 9:45 a.m.
PLACE: Capitol Room 211

Dear Chair Tokuda, Vice Chair Dela Cruz and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over five hundred seventy 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.

S.B. 2501, HD1, Relating to Procurement proposes to require that past performance of a contractor be factored into future low bid selection and for sole source procurement. **GCA's comments are limited to how this measure relates to construction contracts only as it appears the areas of concern in construction include: (1) being on budget; (2) being on time; and (3) the delivery of good quality work.**

2013-2015 History of Past Performance Discussions and Task Forces

From 2013 through part of 2015 the Procurement Task Force was initiated pursuant to [Senate Concurrent Resolution 92 \(2013\)](#) which has been meeting since 2013 through the early part of 2015, and one of the issues discussed included how to address bad performing contractors. Additionally, in 2014 this body passed [House Concurrent Resolution 176 \(2014\)](#), which required a study of past performance of government contractors. These Task Forces together with participating government agencies and private industry stakeholders agreed that this issue needs further discussion before dictating an approach with potential unintended consequences. Last year, pursuant to [Act 182 \(2015\)](#) this body extended the Procurement Task Force to specifically identify and propose amendments, if any, to the procurement code that may better promote economy, efficiency, effectiveness, and impartiality in the procurement of public works construction projects, specifically regarding statewide past performance standards and

procedures. Unfortunately, the Act 182 (2015) Task Force did not meet during the interim to address these issues, but it has initiated meeting last month to address this very issue.

It is important to note that consideration of past performance in procurement is already permitted under 103D-302(f) under the invitation for bid process, what is commonly known as low bid, however for various reasons agencies choose not to use it. 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. The reason for this reluctance on the part of the state agencies to use this section may be due to difficulty to quantify, evaluate, and administer past performance.

The consideration of past performance for low bid contracts raises a number of concerns for GCA, including but not limited to: ensuring objective administration and evaluation processes for agencies in determining qualified past performance criteria, including how the state or county would receive information about private projects; inability for a new contractor to bid public work due to lack of past performance qualifications; agency's lack of resources, including staff and funding for implementation and administration of past performance for low bid contracts; procedural due process concerns and appeal procedures; and ensuring efficiency, integrity and transparency in the procurement process of public works construction projects. In construction, a number of evaluation factors must be taken into consideration, including licensing, subcontractor performance, less than stellar designs, unforeseen conditions, inclement weather, inadequate administration and oversight, untimely and disruptive owner requested change orders, unforeseen hazardous condition discoveries, the need to accommodate user activities that limit noise (such as exam week) or odorous, sometimes toxic activities, that 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, GCA believes this bill is premature as state and county agencies along with stakeholders have made initial steps in addressing possible solutions, thus may be able to provide better guidance in addressing how past performance can be used to evaluate contractors. **Instead, the better option is to provide the Task Force another opportunity to identify what the best approach would be to factor in past performance in a fair and objective assessment of a contractor's performance.**

Thank you for considering our comments on this measure.

SAH - Subcontractors Association of Hawaii

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

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

February 26, 2016

Testimony To: Senate Committee on Ways and Means
Senator Jill N. Tokuda, Chair

Presented By: Tim Lyons, President

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

Chair Tokuda 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.

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: LaurieHo1@hawaiiantel.net
Subject: Submitted testimony for SB2501 on Feb 26, 2016 09:45AM
Date: Thursday, February 25, 2016 2:37:46 PM

SB2501

Submitted on: 2/25/2016

Testimony for WAM on Feb 26, 2016 09:45AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Laurie Ho	Individual	Support	No

Comments: Aloha and thank you for the opportunity to submit my testimony in writing. I wish to urge you and your committee members to **STRONGLY SUPPORT HB 2501**. Please make your timetable reflect the realities of the process being proposed. Please extend your "holdover period" beyond the one(1) year timeline and just say, "holdover is authorized until water rights are finally resolved." Mahalo for your time and attention. No Water ~ no Agriculture. No Agriculture ~ NO Food.

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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From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: stephmanera@gmail.com
Subject: *Submitted testimony for SB2501 on Feb 26, 2016 09:45AM*
Date: Wednesday, February 24, 2016 1:52:37 PM

SB2501

Submitted on: 2/24/2016

Testimony for WAM on Feb 26, 2016 09:45AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Stephanie Manera	Individual	Oppose	No

Comments:

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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