

**Committee on Government Reform
Wednesday February 3, 8:30 am**

**TESTIMONY FROM Jim Shon
RE: HB 526 RELATING TO PROCUREMENT.**

SUPPORT WITH AMENDMENT

Mr. Chairman, Members of the Committee

Hawaii's Procurement Code was enacted with good intentions. However, there is plenty of evidence it has evolved to inflate costs to the State in several areas. Recently, the desire to cool public school classrooms was "costing" approximately \$100,000 per classroom (not counting rewiring electrical systems). At the same time, reports from our charter schools indicated the ability to purchase many items and services at much lower costs. Charters are exempt from the Code but must adopt their own versions. One charter was able to air condition classrooms at \$3,000 per room. That is a \$97,000 difference! Similar reports can be found regarding purchase of classroom and school equipment, such as desks, chairs, etc.

In a past life, I assisted a number of nonprofits in preparing applications for Grants in Aid. For CIP projects, one is required to state not only the elements of a project for which funds are sought, but the entire project. This means costs per square foot. What we found was that it was far cheaper for a nonprofit to build something than for the State.

One project was assisting a charter in developing a new campus for 300 students. The total cost of the project was about \$25-30 million. On the same island, our HDOE decided to compete and build a new school, under the procurement code. Cost: \$500 million!!!

We have plenty of information on proposed GIA CIP cost estimates.

REQUEST. Require the Procurement Officer to prepare an annual analysis of the difference in costs between a proposed GIA CIP project and the likely cost comparison if done under the Procurement Code. And for State projects, to compare major costs with what the private sector would pay for the same development.

This, hopefully could lead to a revision of the Code to retain Good Government features, while tempering the tendency of bids to exceed private sector costs.

Mahalo for considering this proposal.

HB-526

Submitted on: 1/31/2021 12:47:19 PM

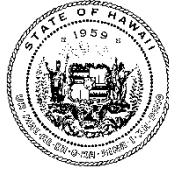
Testimony for GVR on 2/3/2021 8:30:00 AM

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

Comments:

I strongly support this measure. There are a few examples of poor performing contractors that come immediately to mind; Aloha Stadium and The Rail. From bidding, through modifications to contracts, to completion, it is astounding to hear the incompetence of the procurement process.

In my experience with the Federal Government procurement process, I find it hard to believe that this hasn't ALWAYS been part of the procurement process for requests for proposals and awarding contracts.



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 586-0554
email: state.procurement.office@hawaii.gov
<http://spo.hawaii.gov>

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 526
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on HB526. The State Procurement Office (SPO) appreciates the intent of this bill and offers the following comments and recommendations.

Comments:

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.

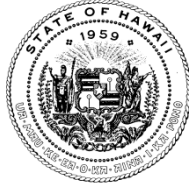
Recommendation:

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. Time is required to verify and implement rules, begin creating the database, develop training, and coordinate and execute the training. The SPO is requesting one-time initial funding of \$164,000 pre-tax to develop and implement the guidance and related implementation training to cover at least the first two 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	\$46,500
	Total One Time Funding	\$150,500
6	Annual Database Maintenance (estimated at 27% of cost of \$50,000)	\$13,500
	Total Funding Recurring Annually	\$13,500

Therefore, the SPO recommends removing Section 2, pages 1 and 2, in its entirety, as efforts have already begun to address past performance in competitive sealed bidding in the HAR 3-122, Subchapter 5.

Thank you.



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

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

February 3, 2021
8:30 A.M.
State Capitol
Conference Room 309
VIA VIDEO CONFERENCE

H.B. 0526
RELATING TO PROCUREMENT

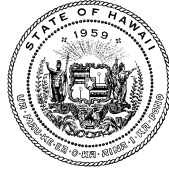
House Committee on Government Reform

The Department of Transportation (DOT) **supports** the bill which requires the State Procurement Office (SPO) to establish a past performance database; requires the determination of certain contract awards through the procurement process consider a contractor's past performance; appropriates funds for the design and implementation of a past performance database; requires past performance of contractors' positive, negative, or lack of previous experience be considered in bid selection; and requires consideration of available assessments of previous performance on relevant and recent government and private contracts when making contract awards.

The implementation of a past performance database would provide consistent and valuable information for procurement stakeholders statewide in determining and evaluating, not only the responsiveness factor of a bid or offer, but the responsibility component of a bidder or offeror during selection and award. Past performance, as another level of consideration and diligence in evaluating responsibility, will provide additional insight to positively impact the award selection to optimally support increased accountability, enhanced quality performance, and efficient and effective utilization of taxpayer dollars in respect to contract awards and the 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

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

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. 526

RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 526.

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

H.B. 526

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 also 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.

- The utility of a database such as the one proposed for the purported intent is questionable.

For example:

- Item 103D- (b)(1)(F) Whether the project was timely completed or not. This is not a reliable indicator of a poor contractor, because there can be many causes for the delayed completion of a project which are not under the control of the contractor (i.e. bad weather, COVID-related shutdowns, the discovery of unanticipated site conditions which needed to be addressed, etc.).
- Item 103D- (b)(1)(H) The positive or negative difference between the final cost of the project and the project's authorized budget, if any. This is also not a reliable indicator of a poor contractor, because there can be many causes for cost increases on a construction project which are not under the control of the

contractor (i.e. additional costs resulting from unanticipated site conditions, work done as a result of a change initiated by the agency or user, etc.). Further, it is always the responsibility of the agency to deny unreasonable or unjustifiable requests on the part of the contractor which would increase the cost of a construction project.

Similarly, there can be many causes of a project being completed under the stated budget (i.e. reduction in scope by the agency, unused variable quantities, etc.).

- Lack of staffing and time to properly implement the proposed measure.

The implementation of past performance legislation of this nature would necessitate more than just the creation of a database. It would require additional staff time and effort to input information into the database as well as to communicate the information to contractors and to go through the process to allow contractors to contest the information contained in the database. This is not feasible given the current economy, budget, and staffing constraints.

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.