

STAND. COM. REP. NO.

357

Honolulu, Hawaii

FEB 18 2021

RE: S.B. No. 788

S.D. 1

Honorable Ronald D. Kouchi
President of the Senate
Thirty-First State Legislature
Regular Session of 2021
State of Hawaii

Sir:

Your Committee on Government Operations, to which was referred S.B. No. 788 entitled:

"A BILL FOR AN ACT RELATING TO PROCUREMENT,"

begs leave to report as follows:

The purpose and intent of this measure is to improve the efficiency and cost-effectiveness of the State's procurement of goods, services, and construction by:

- (1) Requiring that past performance be considered in the bid selection of contractors for certain contracts;
- (2) Requiring procurement officers to consider past performance and conduct past performance evaluations and maintain the record of the evaluations; and
- (3) Repealing the requirement that an offeror give notice of their intention to submit a bid ten calendar days before the date of opening offers.

Your Committee received testimony in support of this measure from the Department of Transportation and Subcontractors Association of Hawaii. Your Committee received testimony in opposition to this measure from the Department of Accounting and General Services and City and County of Honolulu Department of



Design and Construction. Your Committee received comments on this measure from the State Procurement Office.

Your Committee finds that this measure is intended to decrease repeated inefficiencies, substandard work, and other forms of poor performance on state contracts by requiring the evaluation of past performance in the bid selection of contractors for certain projects. However, according to testimony received by your Committee, the State Procurement Code currently allows procuring agencies to consider past performance, when appropriate. In addition, multiple testifiers expressed concerns on mandating the evaluation of past performance on all state bids and solicitations, citing potential increases in administrative burden, bid protests, and delays in project award, execution, and delivery, all which could lead to lapsed funding or increased final costs. The Department of Accounting and General Services also indicated that this measure may add undesirable subjectivity to the bid selection process.

Your Committee understands these concerns and notes that S.B. No. 1017 (Regular Session of 2021), is a substantially similar measure that has inclusive language containing the necessary steps to implement past performance criteria in a bid or offer for a public works project. S.B. No. 1017 implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016. Your Committee notes that these recommendations were made to increase economy, efficiency, effectiveness, and impartiality in public procurement by aligning the state procurement process to the federal procurement process, while safeguarding against the possibility of subjectivity in the bid selection process. Your Committee further notes that the language of S.B. No. 1017 is preferable because it not only addresses the issue of poor performance in public procurement, but also addresses procurement issues such as bid shopping while allowing state agencies the flexibility to weigh selection criteria when procuring services from design professionals and to negotiate price adjustments on the successful bid for construction as their federal counterparts.

According to multiple testimonies received by your Committee, the repeal of the requirement to disclose the scope and nature of work to be performed by subcontractors, although intended to decrease the amount of bid protests on technical mistakes and



unintentional errors, would, in fact, increase the practice of bid-shopping as there would be no way for the State Procurement Office, listed subcontractor, other bidders, and stakeholders to verify the portion of work a subcontractor is to perform. Your Committee further finds that bid shopping reduces the quality of work, discourages competition, inflates prices, and promotes unethical and unfair business practices.

Accordingly, your Committee has amended this measure by:

- (1) Deleting its contents and inserting the contents of S.B. No. 1017, a similar measure, which implements certain recommendations made by the State Procurement Office's review of Hawaii procurement laws conducted pursuant to House Resolution No. 142, Regular Session of 2016, by:
 - (A) Allowing selection committees for the procurement of professional services the same flexibility afforded to their federal counterparts to weigh the selection criteria in the order of importance relevant to their agency and project;
 - (B) Requiring the State Procurement Office to develop a statewide vendor performance information system;
 - (C) Allowing the head of a purchasing agency the option to negotiate an adjustment of an otherwise successful bid for construction procurements to closer align with an internal project price estimate;
 - (D) Eliminating the requirement that bidders disclose the nature and scope of work expected to be performed by subcontractors; and
 - (E) Requiring the State Procurement Office to submit a report to the Legislature no later than twenty days prior to the convening of the Regular Session of 2022 regarding the progress it has made toward adopting the recommendations in this measure, and to include any proposed legislation necessary to facilitate those recommendations;



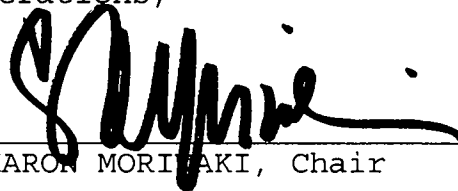
- (2) Requiring that the past performance database include the reason for any positive or negative difference between the final cost of the project and the project's authorized budget;
- (3) Removing language that would have required the evaluation of past performance for the award of competitive sealed proposals;
- (4) Inserting language requiring the written past performance evaluations for all procurements under the small purchase threshold to be maintained in the procuring department's files and the past performance database;
- (5) Maintaining current statutory language that requires bidders to disclose the nature and scope of work expected to be performed by subcontractors;
- (6) Inserting language that allows a bidder to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline;
- (7) Removing language that would have required the State Procurement Office to submit a report to the Legislature on the progress of implementing the recommendations;
- (8) Amending the purpose sections of Parts I and V to reflect their amended purpose;
- (9) Providing an effective date of July 1, 2021; provided that the effective date for Part III, regarding the development of a statewide vendor performance information system is December 31, 2022; and
- (10) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Government Operations that is attached to this report, your Committee is in accord with the intent and purpose of



S.B. No. 788, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 788, S.D. 1, and be referred to your Committee on Ways and Means.

Respectfully submitted on
behalf of the members of the
Committee on Government
Operations,



SHARON MORIYAKI, Chair



The Senate
Thirty-First Legislature
State of Hawai'i

Record of Votes
Committee on Government Operations
GVO

Bill / Resolution No.:* SB 788	Committee Referral: GVO, WAM	Date: 2/9/21		
<input type="checkbox"/> The Committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
MORIWAKI, Sharon Y. (C)	/			
DELA CRUZ, Donovan M. (VC)	/			
CHANG, Stanley	/			
GABBARD, Mike	/			
FEVELLA, Kurt	/			
TOTAL	5			
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes