

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

WRITTEN COMMENTS
OF
DEAN H. SEKI, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE
ON
WAYS AND MEANS
ON
April 3, 2013

H.B. 1374, H.D. 1

RELATING TO PROCUREMENT

Chair Ige and members of the Committee, thank you for the opportunity to submit written comments on H.B. 1374, H.D. 1.

The Department of Accounting and General Services (DAGS) **opposes** H.B. 1374, H.D.

1. The following reflects our concerns and suggested amendments.

The proposed changes in H.B. 1374, H.D. 1 are not necessary, because criteria such as past performance may be included as criteria under the competitive sealed proposal (CSP) process pursuant to §103D-303, Hawaii Revised Statutes (HRS). The integrity of a truly objective competitive sealed bid (CSB) process under §103D-302, HRS, should be maintained within the procurement code.

Because the basic premise of the procurement code is to always use the CSB process unless it is determined to be "either not practicable or not advantageous to the State to procure by

competitive sealed bidding,” DAGS suggests changes to the HRS to allow agencies to choose a procurement method without having to make the above-referenced determination and that the Procurement Policy Board revise the Hawaii Administrative Rules accordingly. The following are DAGS’ suggested amendments to the HRS:

Amend §103D-301 to read as follows:

“Methods of source selection. Unless otherwise authorized by law, all contracts shall be awarded ~~[by competitive sealed bidding]~~ pursuant to ~~[section 103D-302, except as provided in:]~~ the following sections, as applicable:

(1) Section 103D-302 (Competitive sealed bids);

~~[(1)]~~ (2) Section 103D-303 (Competitive sealed proposals);

~~[(2)]~~ (3) Section 103D-304 (Professional services procurement);

~~[(3)]~~ (4) Section 103D-305 (Small purchases);

~~[(4)]~~ (5) Section 103D-306 (Sole source procurement); and

~~[(5)]~~ (6) Section 103D-307 (Emergency procurements).”

Amend §103D-302(a) to read as follows:

“Competitive sealed bidding. (a) ~~[Contracts shall be awarded by competitive sealed bidding except as otherwise provided in section 103D-301.]~~ Awards of contracts by competitive sealed bidding may be made after single or multi-step bidding. Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is based on the criteria set forth in the invitation for bids.”

Amend §103D-303(a) to read as follows:

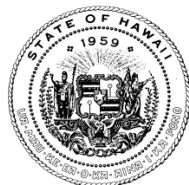
“Competitive sealed proposals. (a) Competitive sealed proposals may be used to procure goods, services, or construction [~~that are either not practicable or not advantageous to the State to procure by competitive sealed bidding~~].”

Because the current language for CSP under §103D-303, HRS, allows for evaluation criteria such as past performance, we do not feel it is necessary to add the proposed language change as it unintentionally imposes a restriction on what factors agencies shall set forth in the request for proposals.

The current language proposed in this bill will add delays to the procurement process, as well as create confusion and controversy to the CSB or low bid process.

We strongly encourage amending the language of H.B. 1374, H.D. 1, as it is critical that the current CSB process be maintained in the procurement code so that all State and County procurements can be evaluated in a consistent, objective, fair, open, and competitive manner and not be confused with a subjective process which exists under the CSP process.

Thank you for the opportunity to submit written comments on this matter.



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

April 3, 2013
10:35 a.m.
State Capitol, Room 211

H.B. 1374, H.D. 1
RELATING TO PROCUREMENT

Senate Committee on Ways and Means

The DOT **supports the intent of** H.B. 1374, H.D. 1 that proposes to factor a bidder's past performance in competitive sealed bidding, competitive sealed proposals and professional services methods of procurement. We share in the interest to improve the procurement system to achieve savings and reduce contracting risk.

The foundation of the procurement code is to encourage economic competition by ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment.

This proposed change of consideration of contractor's prior delays, cost overruns, corrective actions, responses to notices of deficiencies, and assessments of the bidder's prior work may have the appearance of limiting competition. Its impact may lead to a few contractors being awarded a disproportionate number of contracts.

Further, including past performance as an evaluation factor in the procurement code is not necessary as the procurement code already has the requirement under the Competitive Sealed Bid (CSB) method of procurement that contract award be made to the lowest responsible and response bidder whose bid meets the requirements and criteria set forth in the invitation for bids. HRS § 302(3)(h).

Responsible is defined in the procurement code as "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." HRS § 103D-104.

The purchasing agency has the flexibility to include provisions in the specifications that help to determine the responsibility of bidders. For example, the 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."

This bill proposes to factor past performance as a criteria in the evaluation of Competitive Sealed Bids, Competitive Sealed Proposals, and Professional Service Contracts. The current procurement code considers the proposed factors of past performance in Competitive Sealed Proposals and Professional Service Contracts.

A revision to the Competitive Sealed Bid provision in the Procurement Code may limit the opportunity that a new contractor may have when seeking to contract with the state. Its effect could lead to more bid protests. Moreover, bid evaluation may be prolonged as coordination between state agencies to determine whether a contractor's past performance has been satisfactory may affect the timeliness of the DOT project delivery process.

Thank you for the opportunity to provide testimony.





AARON S. FUJIOKA
ADMINISTRATOR



NEIL ABERCROMBIE
GOVERNOR

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COMMENTS
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE
SENATE COMMITTEE
ON
WAYS AND MEANS

April 3, 2013

10:35 a.m.

HB 1374, HD1

RELATING TO PROCUREMENT.

Chair Ige, Vice Kidani, and committee members, thank you for the opportunity to provide comments on HB 1374, HD1. The bill proposes to factor a contractor's past performance in competitive sealed bidding, competitive sealed proposals and professional services methods of procurement for consideration of a contractor's prior project delays, cost overruns, and compliance with project requirements of similar scope for public agencies in awarding contracts.

The Hawaii Public Procurement Code (Code) provides various methods of procurement to purchase goods, services and construction. The Code allows the Procurement Officer (PO) to determine use of the appropriate procurement method to meet the circumstances and particular need or requirement. Each method has its purpose, and past performance may be used as a qualification or evaluation factor, such as review of past project delays, cost overruns, or work deficiencies. The Code is used to procure goods, services, and construction; however, the added language to require consideration of past performance would be applicable to construction contracts, and likely is not appropriate for purchases of goods, and may not be applicable to other services.

SECTION 2 of the bill proposes to include the bidder's past performance on projects of similar scope for public agencies using the competitive sealed bidding (CSB) method. The CSB procurement method is based on the requirements and or specifications set forth in the invitation for bids (IFB); and award is made to the lowest responsive, responsible bidder meeting the IFB qualification criteria. To include criteria in the IFB to evaluate "*the bidder's past performance on projects of similar scope for public agencies, including delays, cost overruns, corrective actions, and responses to notices of deficiencies, and assessments of the bidder's prior work*" means requesting the bidder to submit documents that would essentially disqualify the bidder if any documents includes negative past performance, or the bidder would just not submit a bid knowing would not meet past performance qualification criteria.

The integrity of the CSB process is maintained because objectively measurable qualification criteria and low price is basis for award. The language "...*fair in the eyes of a reasonably objective taxpayer...*" is subjective and not quantifiable in the CSB method, which is intended to be "objectively measurable", to ensure qualification factors are easily determined, and not based on subjectivity which cannot be measured in the CSB method. See Attachment for clarification amendments for your consideration.

SECTION 3 proposes to make mandatory an offeror's past performance on projects of similar scope when conducting the competitive sealed proposals (CSP) method of procurement. The CSP method of procurement requires evaluation of proposals based on criteria set forth in the request for proposals (RFP); and award is made to the responsible offeror whose proposal is the most advantageous based on the evaluation criteria. In the CSP process, evaluation criteria may already include analysis of past performance, for example the number of delays, any prior project cost overruns, history of corrective actions and notices of deficiencies, which the RFP evaluation committee will consider and score accordingly. See Attachment for clarification amendments for your consideration.

SECTION 4 amends the professional services method of procurement which qualifies and ranks applicants on specific criteria based on submitted statements of qualifications. The PO negotiates the scope of work and cost with highest rank provider; and award is made to the highest ranked qualified respondent meeting the determined selection criteria. Similar to CSP, selection criteria may include analysis of past performance such as number of delays, history of corrective actions and notices of deficiencies, assessment of prior professional work, which the selection committee will consider and score accordingly.

SECTION 5 proposes to require the Offeror to submit information and assessments of prior “*work of similar scope for public agencies*”. The purpose of section 103D-310(b) is to ensure potential offerors have the financial ability, resources, skills, capability, and business integrity necessary to perform the work. The requirement to submit information on an offeror’s qualification should be addressed in the specific method of procurement. Section 5 should be deleted.

It is the POs’ responsibility to ensure that the procurement is conducted fairly and allows for broad-based competition. If past performance is an important criteria or factor, the PO may include such qualification or evaluation criteria in the solicitation to ensure consideration of assessments of prior work in awarding of contracts . Thank you.

Attachment

ATTACHMENT
HB 1374, HD 1

SECTION 2. Section 103D-302, Hawaii Revised Statutes, is amended by amending subsection (f) to read as follows:

(f) Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be **objectively measurable**, ~~[objectively measurable,] fair in the eyes of a reasonably objective taxpayer,~~ such as discounts, transportation costs, ~~[and] total or life cycle costs[-], and the bidder's past performance on projects of similar scope for public agencies, including delays, cost overruns, corrective actions, responses to notices of deficiencies, and assessments of the bidder's prior work, as applicable.~~ The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids."

SECTION 3. Section 103D-303, Hawaii Revised Statutes, is amended by amending subsection (g) to read as follows:

"(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals[-], ~~which shall~~ **may** include the offeror's past performance on projects of similar scope for public agencies, including delays, cost overruns, corrective actions, responses to notices of deficiencies, and assessments of the offeror's prior work, **as applicable**. No ~~[other factors or] criteria [shall] may~~ be used in the evaluation[-] ~~that are~~ **is** not set forth in the request for proposals. The contract file shall contain the basis on which the award is made."

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LATE



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol website

April 3, 2013

TO: HONORABLE DAVID IGE, CHAIR, HONORABLE MICHELLE KIDANI,
VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON WAYS
AND MEANS

SUBJECT: **COMMENTS & SUGGESTED AMENDMENTS TO H.B.1374, HD1
RELATING TO PROCUREMENT.** Allows past performance to be factored
into future bid selection of a contractor including a review of delays, cost
overruns, corrective actions, and responses to notices of deficiencies. Effective
January 1, 2020. (HB1374 HD1)

HEARING

DATE: Wednesday, April 3, 2013
TIME: 10:35 a.m.
PLACE: Conference Room 211

Dear Chair Ige, Vice Chair Kidani and Members of the Committee,

The General Contractors Association (GCA) is an organization comprised of over six hundred (600) 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 GCA's 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.

H.B. 1374, HD1 proposes to amend Sections 103D-302, 103D-303, and 103D-310, Hawaii Revised Statutes (HRS), which would allow past performance to be factored into future bid selection of a contractor including a review of delays, cost overruns, and compliance with project requirements.

The GCA respectfully recommends replacing the bill's contents with the suggested amendments to Section 103D-302(i), which will accomplish what the current version of the bill is attempting to do.

- (i) [~~When it is not practicable to initially prepare a purchase description to support an award based on price,] a An invitation for bids, which requests the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation, may be used. If a multi-step sealed bidding process is used, the notice and the invitation for bids shall describe each step to be used in soliciting, evaluating, and selecting unpriced offers.~~

While GCA supports the intent of this measure, it finds that this legislation is unnecessary because such qualification criteria is already permitted under 103D-302(f) under the invitation for bid process. 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.

Thus, while GCA is in support of ensuring that bidders are qualified and meet certain criteria, especially for highly complicated projects, this bill and the proposed changes to certain sections of Chapter 103D are unnecessary.

Thank you for this opportunity to present our views on this measure.



The Senate
The Twenty-Seventh Legislature
Committee on Ways and Means
April 3, 2013, 10:35 a.m.
Conference Room 211

Statement of the Hawaii Regional Council of Carpenters
On HB 1374, HD 1, Relating to Procurement

The Carpenters Union continues to support HB 1374, HD 1, as providing for the best use of taxpayer dollars, and to stop rewarding poor construction practices on public works.

Currently, construction contractors with records of delays, overruns and violations on public works projects may secure further public works awards with no consideration of poor past performance.

Testimony has been submitted that current law allows such factors to be considered, but the practice is to ignore poor past performance as long as the construction contractor is the low bidder. There is a need to, as others have testified, to remove the requirement that considering factors other than “low-bid” must be justified before being considered. Procuring agencies need to develop systems to give weight to contractors’ performance records on public works projects.

In the process of rulemaking, various models can be considered to provide for, as an example, avoiding disputes over post-project evaluations. Point systems, or a system of allowing a contractor to place its statement in the record along with a procurement officer’s evaluation, show that models for implementation exist. A one time problem, or extraordinary project conditions, need not close the door on a contractor’s future bidding.

The solution may not be easy and business-as-usual, but doing nothing is not acceptable.

With the passage of HB 1374, HD 1, implementation models can be sought out, as used in other jurisdictions, including the federal government, to prevent repetitive public works awards to those who have cost the public money, and the timely use of needed facilities.