

# HB1374 HD1

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)



**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

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TESTIMONY  
OF  
AARON S. FUJIOKA  
ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE  
SENATE COMMITTEE  
ON  
ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS  
AND HOUSING

March 11, 2013

2:45 p.m.

HB 1374, HD1

RELATING TO PROCUREMENT.

Chair Dela Cruz, Vice Chair Slom, and committee members, thank you for the opportunity to testify on HB 1374, HD1. The State Procurement Office (SPO) opposes this bill that 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 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, such as years of experience or references from prior projects within the past x years, as evidence of past performance. Additionally, to limit review to "*projects of similar scope for public agencies*" restricts competition and penalizes companies who have only done work in the private sector. A potential bidder may have done similar work in the private sector and meet the qualification requirements, but would be disqualified as not having any projects of similar scope for a public agency.

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.

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 scored accordingly.

Similar to the prior section, language to limit review to "*projects of similar scope for public agencies*" restricts competition and penalizes companies who have done work only in the private sector. A potential bidder may have done similar work in the private sector and meet the qualification requirements, but would be scored less as not having any projects of similar scope for a public agency.

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 scored accordingly.

HB 1374, HD1 Testimony  
Senate Committee on Economic Development,  
Government Operations and Housing  
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SECTION 5 proposes to require the Offeror to submit information and assessments of prior "*work of similar scope for public agencies*". As stated above, this requirement is unfair and restricts competition. A potential bidder may have done similar work in the private sector and meet the qualification requirements, but would be scored less as not having any projects of similar scope for a public agency. 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.

The SPO opposes this bill. It is the POs' responsibility to ensure that the procurement is conducted fairly and allows for broad-based competition, and if past performance is an important criteria or factor, it should be included in the solicitation. Thank you.



STATE OF HAWAII  
DEPARTMENT OF ACCOUNTING  
AND GENERAL SERVICES  
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HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY  
OF  
DEAN H. SEKI, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
HOUSE COMMITTEE  
ON  
FINANCE  
ON  
February 25, 2013  
H.B. 1374, H.D. 1

RELATING TO PROCUREMENT

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

The Department of Accounting and General Services (DAGS) supports the intent of H.B. 1374, H.D. 1, and offers the following comments and 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 for agencies to choose a procurement method without having to make the 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~~].”

In addition, 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.

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

NEIL ABERCROMBIE  
GOVERNOR



KATHRYN S. MATAYOSHI  
SUPERINTENDENT

STATE OF HAWAII  
DEPARTMENT OF EDUCATION  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

**Date:** 03/11/2013

**Committee:** Senate Economic Development,  
Government Operations and Housing

**Department:** Education

**Person Testifying:** Kathryn S. Matayoshi, Superintendent of Education

**Title of Bill:** HB 1374,HD1(hscr811) RELATING TO PROCUREMENT.

**Purpose of Bill:** Allows past performance to be factored into future bid selection of a contractor including a review of delays, cost overruns, and compliance with project requirements.

**Department's Position:**

The Department of Education, (DOE) supports this bill. However, the DOE believes that the best avenue of improving the procurement system without jeopardizing existing protections is to remove the preference for the bid source selection method in HRS § 103D-301. This would remove the preference for the low bid process in the state procurement code and would achieve the intent of this bill without incurring problems of subjectivity.

Allowing purchasing agencies to use competitive sealed proposals and other options already in the procurement code equally without requiring justification to deviate from the preferred method of low bid would effectuate this.

Another option would be to establish an evaluation process as proposed in this legislation within HRS § 103D-310 Responsibility of Offerors which would expressly allow the procuring agency to disqualify a potential bidder based on poor past performance, would better achieve the intent of this bill.

Thank you for this opportunity to provide testimony.



NEIL ABERCROMBIE  
GOVERNOR



Testimony of  
GLENN M. OKIMOTO  
DIRECTOR

Deputy Directors  
JADE BUTAY  
FORD N. FUCHIGAMI  
RANDY GRUNE  
JADINE URASAKI

IN REPLY REFER TO:  
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STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

March 11, 2013  
2:45 p.m.  
State Capitol, Room 16

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

Senate Committee on Economic Development, Government Operations, and Housing

The DOT **opposes** H.B. 1374, H.D. 1, as we believe it is not necessary.

The proposed changes to the Competitive Sealed Bids (CSB) method of procurement contradicts the basic premise of the procurement code which is to always use the CSB process unless it is determine to be either not practicable or not advantageous to the State to procure by competitive sealed bidding.

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.





**Testimony to the Senate Committee on Economic Development,  
Government Operations and Housing  
Monday, March 11, 2013  
2:45 pm  
State Capitol – Room 16**

**RE: HOUSE BILL NO. 1374, HD1 RELATING TO PROCUREMENT**

Chair Dela Cruz and Vice Chair Slom, and members of the committee:

The Chamber of Commerce of Hawaii **supports the intent of H.B. 1374 H.D. 1**, which allows 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 Chamber is the largest business organization in Hawaii, representing more than 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 its members, which employ more than 200,000 individuals, to improve the state’s economic climate and to foster positive action on issues of common concern.

The Chamber agrees that this measure will help ensure that the State is able to select the most appropriate contractor at the best value. However, we believe 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).

We also suggest that some terms being proposed might be more specific. As an example, “. . .fair in the eyes of a reasonable objective taxpayer . . .” is too ambiguous. Perhaps language such as, “award shall be fair and competitive” might be more appropriate.

Thank you for the opportunity to express to you our views.



Testimony of  
The Pacific Resource Partnership

Senate Committee on Economic Development, Government Operations and Housing  
Senator Donovan M. Dela Cruz, Chair  
Senator Sam Slom, Vice Chair

HB 1374, HD1 – Relating to Procurement  
Monday, March 11, 2013  
2:45 pm  
Conference Room 016

Aloha Chair Dela Cruz, Vice Chair Slom and Members of the Committee:

The Pacific Resource Partnership (PRP) is a labor-management consortium representing over 240 signatory contractors and the Hawaii Regional Council of Carpenters.

PRP **strongly supports** HB 1374, HD1 Relating to Procurement, which allows past performance to be factored into future bid selection of a contractor including a review of delays, cost overruns, and compliance with project requirements. This measure would also include in each bid evaluation a review of assessments from past work from a potential contractor, and allow departments to consider the assessments when making contract awards.

PRP applauds the efforts of the legislature fulfill its fiduciary duty to the taxpayer as stewards of taxpayer money to make sure that the State, and the taxpayer get what they pay for by addressing the selection of qualified public works contractors.

PRP in its capacity as construction industry “watch dogs” have monitored multiple private as well as public works projects over the recent years. We feel that is a great “first step”, the “weeding out” of unqualified contractors helps to ensure the probability that the right contractor is chosen for public works contracts, but legislation such as this only makes it less likely that a the wrong contractor is chosen. There are many other issues that need to be addressed before the State can fully ensure that the taxpayers gets exactly what they pay for when awarding a public works contract.

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Testimony Supporting HB 1374, HD1 – Relating to Procurement

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We look forward to more proactive legislation such as this in the future regarding other issues regarding pertaining to the execution of public works contracts by contractors.

For these reasons, we respectfully ask for your support on HB 1374, HD1. Thank you for the opportunity to share our views on this important initiative with you.

The Senate  
The Twenty-Seventh Legislature  
Committee on Economic Development,  
Government Operations and Housing  
March 11, 2013, 2:45 p.m.  
Conference Room 16

Statement of the Hawaii Regional Council of Carpenters on HB 1374, HD 1

The evaluation of the Carpenters Union of HB 1374 is that it provides needed and positive requirements for more efficient use of taxpayer dollars. 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.

While testimony has been submitted saying that current law allows such factors to be considered, 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 to justify considering factors other than "low-bid", and to have procuring agencies 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 solutions for implementation are possible. 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 by the Committee, 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 timely use of needed facilities.

# **BIA-HAWAII**

**BUILDING INDUSTRY ASSOCIATION**

*"Building Better Communities"*

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Complete Construction Services Corp.

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Pacific Rim Partners

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Castle & Cooke Homes Hawaii, Inc.

## **Testimony to the Senate Committee on Economic Development, Government Operations, and Housing**

**Monday, March 11, 2013**

**2:45 p.m.**

**State Capitol - Conference Room 016**

**RE: H.B. 1374 H.D.1, RELATING TO PROCUREMENT**

Chair Dela Cruz, Vice-Chair Slom, and members of the Committee:

My name is Gladys Marrone, Government Relations Director 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, affiliated with the National Association of Home Builders.

BIA-Hawaii **supports the intent** of H.B. 1374 H.D. 1, which allows past performance to be factored into future bid selection of a contractor including a review of delays, cost overruns, and compliance with project requirements.

BIA-Hawaii agrees that this measure may help ensure that the State is able to select the most appropriate contractor at the best value. However, we believe consideration of criteria such as past performance is already included under the competitive sealed proposal (CSP) process pursuant to §103D-303, Hawaii Revised Statutes (HRS).

We also suggest that some terms being proposed might be more specific. As an example, ". . . fair in the eyes of a reasonable objective taxpayer . . ." is too ambiguous. Perhaps language such as, "award shall be fair and competitive" might be more appropriate.

Thank you for the opportunity to express to you our views.