

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)

NEIL ABERCROMBIE
GOVERNOR



Dean H. Seki
Comptroller

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Deputy Comptroller

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES
P.O. BOX 119
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WRITTEN TESTIMONY
OF
DEAN H. SEKI, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE
ON
ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING
ON
March 20, 2013

H.B. 1374, H.D. 1

RELATING TO PROCUREMENT

Chair Dela Cruz 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) **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 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: 03/20/2013

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.



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

March 20, 2013
2:50 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 that proposes to factor a bidder's past performance in competitive sealed bidding, competitive sealed proposals and professional services methods of procurement.

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.





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 Proposed SD1 – Relating to Procurement
Wednesday, March 20, 2013
2:50 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 continues to **support** 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 also supports the addition of the proposed SD 1, as a meaningful clarification of the designation of agency procurement officers.

Previous testimony has been submitted noting that current law already allows such factors to be considered, however, construction contractors with records of delays, overruns and violations on public works projects are still securing public works awards with no consideration of poor past performance. The common practice is to ignore poor past performance provided the construction contractor is the low bidder. Procuring agencies need to develop systems to give weight to contractors' performance records on public works projects.

Various models can be considered during the process of rulemaking, for example, point-systems, or some kind of system allowing a contractor to place its statement in record, along with a procurement officer's evaluation, and show that models for implementation exist. An isolated problem or extraordinary project conditions does not need to exclude the contractor from future bidding.

March 20, 2013

Testimony Supporting HB 1374, HD1, Proposed SD1 -- Relating to Procurement

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PRP, in its capacity as construction industry “watch dogs”, has monitored multiple private as well as public works projects over the recent years. We feel this is a great first step in “weeding out” unqualified contractors; this helps ensure the probability that the right contractor is chosen for public works contracts. Legislation such as this only makes it less likely that the wrong contractor is chosen.

For the reasons mentioned above, we respectfully ask for your support on HB 1374, HD1, Proposed SD1. Thank you for the opportunity to share our views with you.

The Senate
The Twenty-Seventh Legislature
Committee on Economic Development,
Government Operations and Housing
March 20, 2013, 2:50 p.m.
Conference Room 16

Statement of the Hawaii Regional Council of Carpenters
On HB 1374, HD 1 and Proposed SD 1

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.

We have no objection to adding the content of the proposed SD 1, as a meaningful clarification of the designation of agency procurement officers.

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 done. 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 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 the timely use of needed facilities.

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol website

March 20, 2013

TO: HONORABLE DONOVAN DELA CRUZ, CHAIR, HONORABLE SAM SLOM, VICE CHAIR MEMBERS OF THE SENATE COMMITTEE ON ECONOMIC DEVELOPMENT AND HOUSING

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: Monday, March 20, 2013
TIME: 2:50 p.m.
PLACE: Conference Room 016

Dear Chair Dela Cruz, Vice Chair Slom 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.

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.

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,]~~ aAn 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.

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.