

SB 2601

SD-2

**RELATING TO
PROCUREMENT**

A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the procurement
2 process is in need of clear legislative direction to award state
3 contracts to responsible bidders or offerors through the state
4 procurement process, to increase accountability with performance
5 on state contracts, and to more efficiently utilize taxpayer
6 dollars. Some state contracts may currently be awarded to the
7 lowest bidder through the invitation for bid process without
8 regard to poor past performance. Such bidders may be considered
9 qualified despite poor performance on state, federal, or private
10 contracts in the past, which may result in repeated
11 inefficiencies and substandard work.

12 The purpose of this Act is to:

- 13 (1) Require procurement officers to complete periodic
14 performance evaluations of certain contractors;
- 15 (2) Establish factors to be included in any evaluation,
16 consideration, or review of past performance and
17 ratings standards for those factors;



- 1 (3) Require that past performance be considered in future
- 2 bid selection of contractors for sole source contracts
- 3 and any competitive sealed contracts that exceeds the
- 4 small purchase threshold;
- 5 (4) Require procurement officers to consider specific
- 6 factors, including past performance, when making a
- 7 determination of offeror responsibility;
- 8 (5) Allow procurement officers to delegate to contract
- 9 administrators certain duties relating to contract
- 10 administration; and
- 11 (6) Appropriate funds to the state procurement office to
- 12 implement this Act.

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

15 "(f) Bids shall be evaluated based on the requirements set
16 forth in the invitation for bids. These requirements may
17 include criteria to determine acceptability such as inspection,
18 testing, quality, workmanship, delivery, and suitability for a
19 particular purpose. Those criteria that will affect the bid
20 price and be considered in evaluation for award shall be
21 objectively measurable, such as discounts, transportation costs,



1 and total or life cycle costs. Past performance shall be
2 evaluated in all bids expected to meet or exceed the small
3 purchase threshold. The invitation for bids shall set forth the
4 evaluation criteria to be used. No criteria may be used in bid
5 evaluation that are not set forth in the invitation for bids."

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

8 "(e) The request for proposals shall state the relative
9 importance of price and other evaluation factors. Past
10 performance shall be evaluated in all solicitations expected to
11 meet or exceed the small purchase threshold. The currency,
12 relevance, and source of the information, context of the data,
13 and general trends in the contractor's performance shall be
14 considered. This assessment of past performance information
15 shall be separate from the responsibility determination required
16 under section 103D-310. The solicitation shall describe the
17 approach for evaluating past performance, including evaluating
18 offerors with no relevant performance history, and shall provide
19 offerors an opportunity to identify past or current contracts
20 (including federal, state, local government, and private
21 contracts) with requirements that are similar to the



1 solicitation. The solicitation shall also authorize offerors to
2 provide information on problems encountered on the identified
3 contracts and the offeror's corrective actions. The
4 governmental body shall consider this information, as well as
5 information obtained from any other sources, when evaluating the
6 offeror's past performance. The procurement officer shall
7 determine the relevance of similar past performance information.
8 The evaluation shall take into account past performance
9 information regarding predecessor companies, key personnel who
10 have relevant experience, or subcontractors that will perform
11 major or critical aspects of the requirement when the
12 information is relevant to the procurement. In the case of an
13 offeror without a record of relevant past performance or for
14 whom information on past performance is not available, the
15 offeror may not be evaluated favorably or unfavorably on past
16 performance."

17 SECTION 4. Section 103D-306, Hawaii Revised Statutes, is
18 amended by amending subsection (a) to read as follows:

19 "(a) A contract may be awarded for goods, services, or
20 construction without competition when the head of a purchasing
21 agency determines in writing that there is only one source for



1 the required good, service, or construction, the determination
2 is reviewed and approved by the chief procurement officer, the
3 written determination is posted in the manner described in rules
4 adopted by the policy board, a review of past performance has
5 been conducted, and no objection is outstanding. The written
6 determination, any objection, past performance evaluations
7 relied upon, and a written summary of the disposition of any
8 objection shall be included in the contract file."

9 SECTION 5. Section 103D-310, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "§103D-310 **Responsibility of offerors.** (a) Purchases
12 shall be made from, and contracts shall be awarded to,
13 responsible prospective contractors only.

14 (b) No purchase or award shall be made unless the
15 procurement officer makes an affirmative determination of
16 responsibility. In the absence of information clearly
17 indicating that the prospective contractor is responsible, the
18 procurement officer shall make a determination of
19 nonresponsibility.

20 (c) The award of a contract to a prospective contractor
21 based on lowest evaluated price alone can be false economy if



1 there is subsequent default, late deliveries, or other
2 unsatisfactory performance resulting in additional contractual
3 or administrative costs. While it is important that a
4 governmental body's purchases be made at the lowest price, a
5 supplier shall not be awarded a contract solely because that
6 supplier submits the lowest offer. A prospective contractor
7 shall affirmatively demonstrate its responsibility, including,
8 when necessary, the responsibility of its proposed
9 subcontractors. To be determined responsible, a prospective
10 contractor shall:

- 11 (1) Have adequate financial resources to perform the
12 contract, or the ability to obtain the resources;
- 13 (2) Be able to comply with the required or proposed
14 delivery or performance schedule, taking into
15 consideration all existing commercial and governmental
16 business commitments;
- 17 (3) Have a satisfactory performance record. A prospective
18 contractor shall not be determined responsible or
19 nonresponsible solely on the basis of a lack of
20 relevant performance history. A prospective
21 contractor that is or recently has been seriously



1 deficient in contract performance shall be presumed to
2 be nonresponsible, unless the procurement officer
3 determines that the circumstances were properly beyond
4 the contractor's control, or that the contractor has
5 taken appropriate corrective action. Failure to meet
6 the quality requirements of a contract shall be a
7 significant factor to consider in determining
8 satisfactory performance. The procurement officer
9 shall consider the number of contracts involved and
10 the extent of deficient performance in each contract
11 when making this determination;

12 (4) Have a satisfactory record of integrity and business
13 ethics;

14 (5) Have the necessary organization, experience,
15 accounting and operational controls, and technical
16 skills, or the ability to obtain them, including, as
17 appropriate, production control procedures, property
18 control systems, quality assurance measures, and
19 safety programs applicable to materials to be produced
20 or services to be performed by the prospective
21 contractor and subcontractors;



1 (6) Have the necessary production, construction, and
2 technical equipment and facilities, or the ability to
3 obtain them; and

4 (7) Be otherwise qualified and eligible to receive an
5 award under applicable laws and regulations.

6 (d) Unless the policy board, by rules, specifies
7 otherwise, before submitting an offer, a prospective offeror,
8 not less than ten calendar days prior to the day designated for
9 opening offers, shall give written notice of the intention to
10 submit an offer to the procurement officer responsible for that
11 particular procurement.

12 [~~(b)~~] (e) Whether or not an intention to bid is required,
13 the procurement officer shall determine whether the prospective
14 offeror has the financial ability, resources, skills,
15 capability, and business integrity necessary to perform the
16 work. For this purpose, the officer, in the officer's
17 discretion, may require any prospective offeror to submit
18 answers, under oath, to questions contained in a standard form
19 of questionnaire to be prepared by the policy board. Whenever
20 it appears from answers to the questionnaire or otherwise, that
21 the prospective offeror is not fully qualified and able to



1 perform the intended work, a written determination of
2 nonresponsibility of an offeror shall be made by the head of the
3 purchasing agency, in accordance with rules adopted by the
4 policy board. The unreasonable failure of an offeror to
5 promptly supply information in connection with an inquiry with
6 respect to responsibility may be grounds for a determination of
7 nonresponsibility with respect to [~~such~~] the offeror. The
8 decision of the head of the purchasing agency shall be final
9 unless the offeror applies for administrative review pursuant to
10 section 103D-709.

11 [~~e~~] (f) All offerors, upon award of contract, shall
12 comply with all laws governing entities doing business in the
13 State, including chapters 237, 383, 386, 392, and 393. Offerors
14 shall produce documents to the procuring officer to demonstrate
15 compliance with this subsection. Any offeror making a false
16 affirmation or certification under this subsection shall be
17 suspended from further offerings or awards pursuant to section
18 103D-702. The procuring officer shall verify compliance with
19 this subsection for all contracts awarded pursuant to sections
20 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts
21 and procurements of \$2,500 or more awarded pursuant to section



1 103D-305; provided that the attorney general may waive the
2 requirements of this subsection for contracts for legal services
3 if the attorney general certifies in writing that comparable
4 legal services are not available in this State.

5 ~~[(d)]~~ (g) Information furnished by an offeror pursuant to
6 this section shall not be disclosed to any person except to law
7 enforcement agencies as provided by chapter 92F."

8 SECTION 6. Part V of chapter 103D, Hawaii Revised
9 Statutes, is amended to read as follows:

10 "PART V. [~~MODIFICATION AND TERMINATION OF CONTRACTS~~] CONTRACT

11 ADMINISTRATION

12 §103D-A Contract administration office functions. (a)

13 The contract administrator shall perform contract administration
14 functions in accordance with this chapter, associated
15 administrative rules adopted by the procurement policy board,
16 the contract terms, and, unless otherwise agreed to in an
17 interagency agreement, the applicable rules of the procuring
18 agency.

19 (b) The procurement officer may delegate the following
20 contract administration functions to a contract administrator:



- 1 (1) Prepare evaluations of contractor performance in
- 2 accordance with section 103D-B;
- 3 (2) Review the contractor's compensation structure;
- 4 (3) Review the contractor's insurance plans;
- 5 (4) Conduct post-award orientation conferences;
- 6 (5) Determine the allowability of costs suspended or
- 7 disapproved as required, direct the suspension or
- 8 disapproval of costs when there is reason to believe
- 9 they should be suspended or disapproved, and approve
- 10 final payment;
- 11 (6) Issue notices of intent to disallow or not recognize
- 12 costs;
- 13 (7) Attempt to resolve issues in controversy;
- 14 (8) Determine the contractor's compliance with cost
- 15 accounting standards and disclosure statements, if
- 16 applicable;
- 17 (9) Negotiate price adjustments and execute supplemental
- 18 agreements;
- 19 (10) Ensure timely notification by the contractor of any
- 20 anticipated overrun or underrun of the estimated cost
- 21 under cost-reimbursement contracts;



- 1 (11) Monitor the contractor's financial condition and
2 advise the procurement officer, when it jeopardizes
3 contract performance;
- 4 (12) Issue work requests under maintenance, overhaul, and
5 modification contracts;
- 6 (13) Negotiate and assist the procurement officer in
7 executing contractual documents for settlement of
8 partial and complete contract terminations for
9 convenience;
- 10 (14) Negotiate and assist the procurement officer in
11 executing contractual documents settling cancellation
12 charges under multiyear contracts;
- 13 (15) Process and execute novation and change of name
14 agreements;
- 15 (16) Perform property administration;
- 16 (17) Perform necessary screening, redistribution, and
17 disposal of contractor inventory;
- 18 (18) Perform production support, surveillance, and status
19 reporting, including timely reporting of potential and
20 actual slippages in contract delivery schedules;



- 1 (19) Monitor contractor industrial labor relations matters
2 under the contract; apprise the procurement officer
3 and, if designated by the agency, the cognizant labor
4 relations advisor, of actual or potential labor
5 disputes; and coordinate the removal of urgently
6 required material from the strikebound contractor's
7 plant upon instruction from, and authorization of, the
8 procurement officer;
- 9 (20) Ensure contractor compliance with contractual quality
10 assurance requirements;
- 11 (21) Ensure contractor compliance with contractual safety
12 requirements;
- 13 (22) Perform engineering surveillance to assess compliance
14 with contractual terms for schedule, cost, and
15 technical performance in the areas of design,
16 development, and production;
- 17 (23) Evaluate for adequacy and perform surveillance of
18 contractor engineering efforts and management systems
19 that relate to design, development, production,
20 engineering changes, subcontractors, tests, management
21 of engineering resources, reliability and



- 1 maintainability, data control systems, configuration
2 management, and independent research and development;
- 3 (24) Review and evaluate for technical adequacy the
4 contractor's logistics support, maintenance, and
5 modification programs;
- 6 (25) Report to the procurement office any inadequacies
7 noted in specifications;
- 8 (26) Perform analyses of contractor cost proposals;
- 9 (27) Review, analyze, and submit comments and
10 recommendations to the procurement officer regarding
11 engineering and design studies proposed by a
12 contractor, as required;
- 13 (28) Review and submit comments to the procurement officer
14 regarding engineering change proposals for proper
15 classification, and, when required for need, technical
16 adequacy of design, producibility, and impact on
17 quality, reliability, schedule, and cost;
- 18 (29) Assist in evaluating and make recommendations for
19 acceptance or rejection of waivers and deviations;
- 20 (30) Approve the placement of subcontracts;



- 1 (31) Review, evaluate, and approve small business master
2 subcontracting plans, if applicable;
- 3 (32) Assign and perform supporting contract administration;
- 4 (33) Ensure timely submission of required reports;
- 5 (34) Issue administrative changes, correcting errors or
6 omissions in typing, contractor address, facility or
7 activity code, remittance address, computations that
8 do not require additional contract funds, and other
9 similar changes;
- 10 (35) Obtain contractor proposals for any contract price
11 adjustments resulting from amended shipping
12 instructions and review all amended shipping
13 instructions on a periodic, consolidated basis to
14 ensure that adjustments are timely made;
- 15 (36) Accomplish administrative closeout procedures;
- 16 (37) Support the program, product, and project offices
17 regarding program reviews, program status, program
18 performance, and actual or anticipated program
19 problems; and
- 20 (38) Monitor the contractor's environmental practices for
21 adverse impact on contract performance or contract



1 cost, and for compliance with environmental
2 requirements specified in the contract.

3 (c) Any additional contract administration functions not
4 specified in subsection (b), or not otherwise delegated, shall
5 remain the responsibility of the head of the purchasing agency.

6 §103D-B Contract performance information; past performance
7 evaluations. (a) Agencies shall monitor performance of
8 contractors under previously awarded contracts or orders, as
9 provided in this section for future evaluation purposes. An
10 evaluation shall:

11 (1) Include a clear, non-technical description of the
12 principal purpose of the contract or order;

13 (2) Reflect how the contractor performed, including clear
14 relevant information that accurately depicts the
15 contractor's performance, and be based on objective
16 facts supported by program and contract or order
17 performance data; and

18 (3) Be tailored to the contract type, size content, and
19 complexity of the contractual requirements.

20 (b) Evaluation factors for each assessment shall include,
21 at a minimum, the following:



- 1 (1) Technical (quality of product or service);
- 2 (2) Cost control (not applicable for firm-fixed-price or
- 3 fixed-price with economic price adjustment
- 4 arrangements);
- 5 (3) Schedule and timeliness;
- 6 (4) Management or business relations;
- 7 (5) Small business subcontracting, including reduced or
- 8 untimely payments to small business subcontractors
- 9 when the contract requires a subcontracting plan; and
- 10 (6) Other factors, as applicable (e.g., trafficking
- 11 violations, tax delinquency, failure to report in
- 12 accordance with contract terms and conditions,
- 13 defective cost or pricing data, terminations,
- 14 suspensions, and debarments).
- 15 (c) Evaluation factors may include subfactors.
- 16 (d) Each factor and subfactor used shall be evaluated and
- 17 a supporting narrative provided. Each evaluation factor shall
- 18 be rated in accordance with the following five scale rating
- 19 system:
- 20 (1) Exceptional;
- 21 (2) Very good;



- 1 (3) Satisfactory;
2 (4) Marginal; and
3 (5) Unsatisfactory;

4 provided that the ratings and narratives shall reflect the
5 definitions in subsection (n); provided further that plus or
6 minus signs may be used in conjunction with a rating to indicate
7 an improving or worsening trend that is insufficient to change
8 the evaluation status; and provided further that a "N/A" or "not
9 applicable" rating shall be used if the rating is not going to
10 be applied to a particular area for evaluation.

11 (e) Agencies shall monitor their compliance with the past
12 performance evaluation requirements, and measure the quality and
13 timely reporting of past performance information.

14 (f) Past performance evaluations shall be prepared at
15 least annually and at the time the work under a contract or
16 order is completed. Past performance evaluations shall be
17 required for contracts and orders as specified in subsections
18 (i) through (l). These evaluations are generally for the
19 entity, division, or unit that performed the contract or order.
20 Past performance information shall be entered into an evaluation



1 reporting tool for all past performance reports on contracts and
2 orders.

3 (g) Except as provided in subsection (l), agencies shall
4 prepare evaluations of contractor performance for each contract
5 that exceeds the small purchase threshold. Agencies shall also
6 prepare an evaluation if a modification to the contract causes
7 the dollar amount to exceed the small purchase threshold.

8 (h) Past performance evaluations shall be prepared for
9 each architect-engineer services contract of \$25,000 or more,
10 and for each architect-engineer services contract that is
11 terminated for default regardless of contract value. Past
12 performance evaluations may also be prepared for architect-
13 engineer services contracts of less than \$25,000.

14 (i) Past performance evaluations shall include an
15 assessment of a contractor's:

16 (1) Performance against, and efforts to achieve, the goals
17 identified in the contract; and

18 (2) Reduced or untimely payments made to small business
19 subcontractors, if determined by the procurement
20 officer to be unjustified. The procurement officer
21 shall:



- 1 (A) Consider and evaluate a contractor's written
- 2 explanation for a reduced or an untimely payment
- 3 when determining whether the reduced or untimely
- 4 payment is justified; and
- 5 (B) Determine that a history of unjustified reduced
- 6 or untimely payments has occurred when the
- 7 contractor has reported three or more occasions
- 8 of unjustified reduced or untimely payments under
- 9 a single contract within a twelve-month period;
- 10 provided that the following payment or nonpayment
- 11 situations shall not be considered unjustified:
- 12 (i) There is a contract dispute on performance;
- 13 (ii) A partial payment is made for amounts not in
- 14 dispute;
- 15 (iii) A payment is reduced due to past
- 16 overpayments;
- 17 (iv) There is an administrative mistake; or
- 18 (v) Late performance by the subcontractor leads
- 19 to later payment by the prime contractor.
- 20 (j) Agency evaluations of contractor performance,
- 21 including both negative and positive evaluations, shall be



1 provided to the contractor as soon as practicable after
2 completion of the evaluation. The contractor shall receive a
3 notification when an evaluation is ready for comment.
4 Contractors shall be afforded up to fourteen calendar days from
5 the date of notification of availability of the past performance
6 evaluation to submit comments, rebutting statements, or
7 additional information. Agencies shall provide for review at a
8 level above the contract administrator to consider disagreements
9 between the parties regarding the evaluation. The ultimate
10 conclusion on the performance evaluation is a decision of the
11 contracting agency. Copies of the evaluation, contractor
12 response, and review comments, if any, shall be retained as part
13 of the evaluation. The completed evaluation shall not be
14 released to anyone other than government personnel and the
15 contractor whose performance is being evaluated during the
16 period the information may be used to provide source selection
17 information.

18 (k) Evaluations used in determining award or incentive fee
19 payments may also be used to satisfy the requirement of this
20 section.



1 (1) Agencies shall require at least quarterly evaluations
2 of agency compliance with the reporting requirements of this
3 section. The evaluation shall identify delinquent past
4 performance reports and monitor reports for quality control.

5 (m) Agencies shall ensure that information is accurately
6 documented within seven calendar days after a procurement
7 officer:

8 (1) Issues a final determination that a contractor has
9 submitted defective cost or pricing data;

10 (2) Makes a subsequent change to the final determination
11 concerning defective cost or pricing data;

12 (3) Issues a final termination for cause or default
13 notice;

14 (4) Makes a subsequent withdrawal or a conversion of a
15 termination for default to a termination for
16 convenience; or

17 (5) Determines that a contractor has a history of three or
18 more unjustified reduced or untimely payments to small
19 business subcontractors under a single contract within
20 a twelve-month period.

21 (n) For the purpose of this section:



1 "Exceptional" means that performance meets contractual
2 requirements and exceeds many requirements to the government's
3 benefit. The contractual performance of the element or sub-
4 element being evaluated was accomplished with few minor problems
5 for which corrective actions taken by the contractor were highly
6 effective. To justify an exceptional rating, multiple
7 significant events should be identified with a statement of how
8 the events were of benefit to the government; provided that a
9 singular benefit could be of a magnitude that it alone
10 constitutes an exceptional rating; provided further that there
11 should have been no significant weaknesses identified.

12 "Marginal" means that performance does not meet some
13 contractual requirements. The contractual performance of the
14 element or sub-element being evaluated reflects a serious
15 problem for which the contractor has not yet identified
16 corrective actions. The contractor's proposed actions appear
17 only marginally effective or were not fully implemented. To
18 justify marginal performance, identify a significant event in
19 each category that the contractor had trouble overcoming and
20 state how it impacted the government. A marginal rating shall
21 be supported by referencing the management tool that notified



1 the contractor of the contractual deficiency (e.g., management,
2 quality, safety, or environmental deficiency report or letter).

3 "Satisfactory" means that performance meets contractual
4 requirements. The contractual performance of the element or
5 sub-element contains some minor problems for which corrective
6 actions taken by the contractor appear or were satisfactory. To
7 justify a satisfactory rating, there should have been only minor
8 problems, or major problems the contractor recovered from
9 without impact to the contract or order; provided that there
10 should have been no significant weaknesses identified. A
11 fundamental principle of assigning ratings is that contractors
12 shall not be evaluated with a rating lower than satisfactory
13 solely for not performing beyond the requirements of the
14 contract or order.

15 "Unsatisfactory" means that performance does not meet most
16 contractual requirements and recovery is not likely in a timely
17 manner. The contractual performance of the element or sub-
18 element contains a serious problem or problems for which the
19 contractor's corrective actions appear or were ineffective. To
20 justify an unsatisfactory rating, identify multiple significant
21 events in each category that the contractor had trouble



1 overcoming and state how it impacted the government. A singular
2 problem, however, could be of such serious magnitude that it
3 alone constitutes an unsatisfactory rating. An unsatisfactory
4 rating should be supported by referencing the management tools
5 used to notify the contractor of the contractual deficiencies
6 (e.g., management, quality, safety, or environmental deficiency
7 reports, or letters).

8 "Very good" means that performance meets contractual
9 requirements and exceeds some requirements to the government's
10 benefit. The contractual performance of the element or sub-
11 element being evaluated was accomplished with some minor
12 problems for which corrective actions taken by the contractor
13 were effective. To justify a very good rating, a significant
14 event should be identified with a statement of how it was a
15 benefit to the government; provided that there should have been
16 no significant weaknesses identified.

17 ~~§103D-501~~ §103D-C **Contract clauses and their**
18 **administration.** (a) The policy board shall adopt rules
19 requiring the inclusion of contract clauses providing for
20 adjustments in prices, time of performance, or other contract
21 provisions, as appropriate, and covering the following subjects:



- 1 (1) The unilateral right of the governmental body to order
2 in writing:
- 3 (A) Changes in the work within the scope of the
4 contract; and
- 5 (B) Changes in the time of performance of the
6 contract that do not alter the scope of the
7 contract work;
- 8 (2) Variations occurring between estimated quantities of
9 work in a contract and actual quantities;
- 10 (3) Suspension of work ordered by the governmental body;
11 and
- 12 (4) Site conditions differing from those indicated in the
13 contract, or ordinarily encountered, except that
14 differing site conditions clauses established by these
15 rules need not be included in a contract:
- 16 (A) When the contract is negotiated;
- 17 (B) When the contractor provides the site or design;
18 or
- 19 (C) When the parties have otherwise agreed with
20 respect to the risk of differing site conditions.



1 (b) Adjustments in price permitted by rules adopted under
2 subsection (a) shall be computed in one or more of the following
3 ways:

4 (1) By agreement on a fixed price adjustment before
5 commencement of the pertinent performance;

6 (2) By unit prices specified in the contract or
7 subsequently agreed upon before commencement of the
8 pertinent performance;

9 (3) By the costs attributable to the events or situations
10 under such clauses with adjustment of profit or fee,
11 all as specified in the contract or subsequently
12 agreed upon before commencement of the pertinent
13 performance;

14 (4) In any other manner as the contracting parties may
15 mutually agree upon before commencement of the
16 pertinent performance; or

17 (5) In the absence of agreement by the parties:

18 (A) For change orders with value not exceeding
19 \$50,000 by documented actual costs of the work,
20 allowing for twenty per cent of the actual costs
21 for overhead and profit on work done directly by



1 the contractor and ten per cent on any
2 subcontractor's billing to the contractor for the
3 contractor's overhead and profit. There shall be
4 no cap on the total cost of the work if this
5 method is used. A change order shall be issued
6 within fifteen days of submission by the
7 contractor of proper documentation of completed
8 force account work, whether periodic (conforming
9 to the applicable billing cycle) or final. The
10 procurement officer shall return any
11 documentation that is defective to the contractor
12 within fifteen days after receipt, with a
13 statement identifying the defect; or
14 (B) For change orders with value exceeding \$50,000 by
15 a unilateral determination by the governmental
16 body of the costs attributable to the events or
17 situations under clauses with adjustment of
18 profit or fee, all as computed by the
19 governmental body in accordance with applicable
20 sections of the rules adopted under section 103D-
21 601 and subject to the provisions of part VII.



1 When a unilateral determination has been made, a
2 unilateral change order shall be issued within
3 ten days. Costs included in the unilateral
4 change order shall allow for twenty per cent of
5 the actual costs for overhead and profit on work
6 done directly by the contractor and ten per cent
7 on any subcontractor's billing to the contractor
8 for the contractor's overhead and profit. Upon
9 receipt of the unilateral change order, if the
10 contractor does not agree with any of the terms
11 or conditions, or the adjustment or nonadjustment
12 of the contract time or contract price, the
13 contractor shall file a notice of intent to claim
14 within thirty days after the receipt of the
15 written unilateral change order. Failure to file
16 a protest within the time specified shall
17 constitute agreement on the part of the
18 contractor with the terms, conditions, amounts,
19 and adjustment or nonadjustment of the contract
20 time or the contract price set forth in the
21 unilateral change order.



1 A contractor shall be required to submit cost or pricing
2 data if any adjustment in contract price is subject to the
3 provisions of section 103D-312. A fully executed change order
4 or other document permitting billing for the adjustment in price
5 under any method listed in paragraphs (1) through (4) shall be
6 issued within ten days after agreement on the method of
7 adjustment.

8 (c) The policy board shall adopt rules requiring the
9 inclusion in contracts of clauses providing for appropriate
10 remedies and covering the following subjects:

- 11 (1) Liquidated damages as appropriate;
- 12 (2) Specified excuses for delay or nonperformance;
- 13 (3) Termination of the contract for default; and
- 14 (4) Termination of the contract in whole or in part for
15 the convenience of the governmental body.

16 (d) The chief procurement officer or the head of a
17 purchasing agency may vary the clauses that may be required to
18 be included in contracts under the rules adopted under
19 subsections (a) and (c); provided that:



1 (1) Any variations are supported by a written
2 determination that states the circumstances justifying
3 such variations; and

4 (2) Notice of any such material variation be stated in the
5 invitation for bids or request for proposals when the
6 contract is awarded under section 103D-302 or 103D-
7 303."

8 SECTION 7. There is appropriated out of the general
9 revenues of the State of Hawaii the sum of \$ or so
10 much thereof as may be necessary for fiscal year 2018-2019 for
11 the purposes of implementing this Act for executive branch
12 departments and agencies.

13 The sum appropriated shall be expended by the state
14 procurement office for the purposes of this Act.

15 SECTION 8. In codifying the new sections added by section
16 6 of this Act, the revisor of statutes shall substitute
17 appropriate section numbers for the letters used in designating
18 the new sections in this Act.

19 SECTION 9. This Act does not affect rights and duties that
20 matured, penalties that were incurred, and proceedings that were
21 begun before its effective date.



1 SECTION 10. If any provision of this Act, or the
2 application thereof to any person or circumstance, is held
3 invalid, the invalidity does not affect other provisions or
4 applications of the Act that can be given effect without the
5 invalid provision or application, and to this end the provisions
6 of this Act are severable.

7 SECTION 11. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 12. This Act shall take effect on July 1, 2050;
10 provided that section 7 shall take effect on July 1, 2050.



Report Title:

Procurement; Past Performance; Criteria; Source Selection;
Evaluation; Appropriation

Description:

Requires procurement officers to complete periodic performance evaluations of certain contractors. Establishes factors to be included in any evaluation, consideration, or review of past performance, and ratings standards for those factors. Requires past performance to be factored into future bid selection of contractors for certain contracts. Requires past performance to be considered in all sole source procurement and any competitive sealed contracts that exceeds the small purchase threshold. Appropriates funds. Effective 7/1/2050. (SD2)

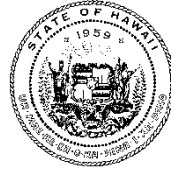
The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



SB 2601

SD-2

TESTIMONY



STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

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

TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
ON
THURSDAY, MARCH 22, 2018
9:15 A.M.
CONFERENCE ROOM 309

S.B. 2601, S.D. 2

RELATING TO PROCUREMENT.

Chair Johanson, Vice Chair Holt, and Members of the Committee, thank you for the opportunity to submit written testimony on S.B. 2601, S.D. 2.

The Department of Accounting and General Services (DAGS) opposes the proposed changes to the Procurement Code because, 1) we have strong concerns about the impact of this measure on the procurement process, and 2) the proposed changes are unnecessary.

Our concerns are as follows:

1. Adding the consideration of past performance to Hawaii Revised Statutes (HRS) Section 103D-302, Competitive Sealed Bidding, would introduce subjectivity to an otherwise objective process.
Section 103D-302(f) already allows for the consideration of objectively measurable criteria. For example, project specifications can be written to include experience requirements such as the number of projects where the specified roofing material was successfully installed as certified by the manufacturer of the roofing material.
2. The proposed changes to Section 103D-303, Competitive Sealed Proposals, are unnecessary because they are already allowed. We have strong concerns that mandating the proposed changes on page 3, line 9 through page 4, line 16 may have unintended impacts on the procurement process.

3. S.B. 2601, S.D. 2 proposes significant changes to the definition of responsibility (HRS Section 103D-310). It should be noted that the definition of responsibility applies to all methods and of procurement for goods and services including construction.

Page 3, lines 1-3 implies that past performance requirements will not apply to the small purchase method of procurement, but this is in direct contradiction to the requirements in Hawaii Administrative Rules (HAR) Section 3-122-75(d).

DAGS has strong concerns that procuring agencies will be able to ensure compliance with the proposed requirements. For example:

- Page 6, lines 13-16 require the evaluation of a company's ability to meet proposed delivery of performance schedules taking into consideration all existing commercial and governmental business commitments. It is not practical for agencies to be expected to do this for all procurements.
- Page 7, lines 14-21 require extensive accounting and business operational knowledge which cannot be attained via procurement training. This would require an audit of the company in question and is not practical to expect agencies to be able to implement such a requirement.

In addition, some of the proposed changes to Section 103D-310 are subjective.

For example, on page 7, lines 9-11 require a judgment call regarding the "extent of deficient performance in each contract".

4. State agencies do not possess the ability and resources necessary to evaluate many of the requirements proposed in Part V, Contract Administration, 103D-B of this measure (page 16, line 6 to page 25, line 16). For example:
 - Page 12, lines 1-3 require the agency to "Monitor the contractor's financial condition and advise the procurement officer, when it jeopardizes contract performance." This is an unreasonable burden to place on procurement staff.

- Page 12, lines 16-17 require an agency to “Perform necessary screening, redistribution, and disposal of contractor inventory.” Both contractors and agencies would consider this to be unreasonable.
- Page 13, lines 17-21 and page 14, lines 1-2 require the performance of surveillance of contractor’s efforts with regard to engineering and management systems. This is impractical for agencies.
- Page 14, lines 3-5 require review and evaluation for technical adequacy of the contractor’s logistics support, maintenance, and modification programs which would require an auditor to perform.

Since agencies do not have a contractual relationship with subcontractors, they should not be required to meet the requirements of page 14, line 20, which requires that agencies “approve the placement of subcontractors” or the requirements of page 15, lines 1-2 which require review, evaluation, and approval of small business master subcontracting plans.

Further, some of the requirements are difficult to understand. One example can be found on page 12, line 15, “Perform property administration”. What does this mean and how is it applicable to all procurements?

5. The requirements of Part V, Contract Administration, 103D-B, are often impractical and subjective. This measure would require agencies to perform extensive annual evaluations of each contractor for each contract to include receipt and address of rebuttal comments at a level above the contract administrator (see page 20, lines 20-21 and page 21, lines 1-9). This would not be possible with current staffing levels.

In addition, subjectivity is inherent, for example on page 17, line 16, “Management or business relations.” More importantly, there is extensive subjectivity and room for interpretation in the evaluation categories on pages 23-25. Words such as “many”, “minor”, “significant”, and “serious” may all be interpreted differently by different procurement officers or their designees.

As noted in our prior testimony, the existing procurement code already contains a mechanism for consideration of past performance. Agencies can choose to procure construction

services using the Competitive Sealed Proposals method of procurement for these projects where past performance should be a selection factor. Therefore, the proposed measure is unnecessary. In addition, HRS Section 103D-310(b) and HAR 3-122-108(b) already provide a mechanism for agencies to determine whether a prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work.

We understand the Legislature's desire to address poor performance on State contracts. However, in addition to the mechanisms which already exist in the State's Procurement Code, there are already mechanisms available to address poor performance in construction contracts.

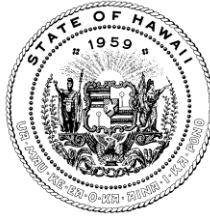
First, government agencies should make every effort to produce good solicitation documents and to ensure that those who are involved in contract administration have a working knowledge of the general conditions applicable to each procurement. Poor contractors are unlikely to bring flaws in solicitation documents to the attention of the procuring agency because they are seeking to take advantage of such flaws during the contract.

Secondly, while projects are under construction, agencies can provide feedback to contractors, assess liquidated damages, enforce the terms of the contract documents, and document facts related to poor performance. Making a solid effort to enforce the terms of the plans, specifications, and general conditions will make it difficult for "bad contractors" to compete for State projects.

Sufficient documentation can be used by agencies when determining the issue of responsibility under HRS Section 103D-310(b) and/or to initiate proceedings for suspension or debasement.

Thank you for the opportunity to testify on this matter.

DAVID Y. IGE
GOVERNOR OF
HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
LABOR & PUBLIC EMPLOYMENT**

**Thursday, March 22, 2018
9:15 A.M.**

State Capitol, Conference Room 309

**In consideration of
SENATE BILL 2601, SENATE DRAFT 2
RELATING TO PROCUREMENT**

Senate Bill 2601, Senate Draft 2 proposes to (1) require procurement officers to complete periodic performance evaluations of certain contractors; (2) establish factors to be included in any evaluation, consideration, or review of past performance, and ratings standards for those factors; (3) require past performance to be factored into future bid selection of contractors for certain contracts; (4) require past performance to be considered in all sole source procurement and any competitive sealed contracts that exceeds the small purchase threshold; and (5) appropriates an unspecified amount of general funds to the State Procurement Office for the purposes of this measure. **The Department of Land and Natural Resources (Department) opposes this bill for the following reasons:**

1. The existing procurement code already contains a mechanism for consideration of past performance. On projects for which a department determines past performance should be a selection criterion, professional or construction services can be procured using the Competitive Sealed Proposal method of procurement.
2. Incorporating criteria such as past performance to the Competitive Sealed Bidding process would add subjectivity to this selection method.
3. With sufficient documentation, filings can be made for suspension or debarment of poor-performing contractors. Section 103D-702, Hawaii Revised Statutes, allows debarment for "a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts."

Thank you for the opportunity to comment on this measure.

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
MARA SMITH
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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Honolulu, Hawaii 96810-0119
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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
LABOR & PUBLIC EMPLOYMENT
March 22, 2018, 9:15 a.m.

SENATE BILL 2601, SD2
RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Holt, and members of the committee, thank you for the opportunity to submit testimony on SB2601, SD2. The State Procurement Office (SPO) supports this bill and provides the following comments.

To implement the purpose of the Act, the state procurement office requires an electronic procurement system, including a contract management component, which will also serve as central depository/database for all contract performance reviews, accessible by all executive department procuring agencies. The electronic procurement system would initially only be required for executive branch departments/agencies to allow the SPO time to develop policies and procedures to implement this Act. A single initial investment of \$4,500,000 is required for an electronic procurement system with no continuing funds requirement. Attachment I explains what an eProcurement system is made up of and why it is important, along with our Return on Investment of 160%.

The SPO notices that some of the edits the SPO suggested have resulted in incorrect numbering in the current version of the bill. Additionally, some of the text could be placed in Hawaii Administrative Rules rather than statute. Therefore, the following changes are recommended.

SECTION 6.

PART V. MODIFICATION AND TERMINATION OF CONTRACTS AND CONTRACT ADMINISTRATION

§103D-501 Contract clauses and their administration. (a) The policy board shall adopt rules requiring the inclusion of contract clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

- (1) The unilateral right of the governmental body to order in writing:
 - (A) Changes in the work within the scope of the contract; and
 - (B) Changes in the time of performance of the contract that do not alter the scope of the contract work;
 - (2) Variations occurring between estimated quantities of work in a contract and actual quantities;
 - (3) Suspension of work ordered by the governmental body; and
 - (4) Site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses established by these rules need not be included in a contract:
 - (A) When the contract is negotiated;
 - (B) When the contractor provides the site or design; or
 - (C) When the parties have otherwise agreed with respect to the risk of differing site conditions.
- (b) Adjustments in price permitted by rules adopted under subsection (a) shall be computed in one or more of the following ways:
- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - (2) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (3) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - (4) In any other manner as the contracting parties may mutually agree upon before commencement of the pertinent performance; or
 - (5) In the absence of agreement by the parties:
 - (A) For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or
 - (B) For change orders with value exceeding \$50,000 by a unilateral determination by the governmental body of the costs attributable to the events or situations under clauses with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the rules adopted under section 103D-601 and subject to the provisions of part VII. When a unilateral determination has been made, a unilateral change order shall be issued within ten days. Costs included in the unilateral change order shall allow for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral change order. Failure to file a protest within the time specified shall constitute agreement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral change order.

A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 103D-312. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraphs (1) through (4) shall be issued within ten days after agreement on the method of adjustment.

(c) The policy board shall adopt rules requiring the inclusion in contracts of clauses providing for appropriate remedies and covering the following subjects:

- (1) Liquidated damages as appropriate;
- (2) Specified excuses for delay or nonperformance;
- (3) Termination of the contract for default; and
- (4) Termination of the contract in whole or in part for the convenience of the governmental body.

(d) The chief procurement officer or the head of a purchasing agency may vary the clauses that may be required to be included in contracts under the rules adopted under subsections (a) and (c); provided that:

(1) Any variations are supported by a written determination that states the circumstances justifying such variations; and

(2) Notice of any such material variation be stated in the invitation for bids or request for proposals when the contract is awarded under section 103D-302 or 103D-303

§103D-502 Contract administration (a) The procurement policy board shall promulgate rules for the administration of contracts. They shall include:

- (1) Functions the procurement officer may delegate to the contract administrator;
- (2) Oversight responsibilities and inherently governmental duties, and
- (3) Contractor performance evaluation procedures and contract performance information

Thank you.

Resounding Gains from eProcurement

State Procurement Office 2018

What's wrong with what we've got?

Disparate Front Ends

Confusion for Vendors on where to look for work & where to post for State Buyers

Reduced outreach to Market

Reduced reach to Competition

Increased Overall costs per market (oligopoly/monopoly)

No Transparency on Spend Analysis

Duplication of effort and redundancy

Failure to leverage economies of scale

No data for decision-making

Increased costs to State Budget

Inconsistency & Incongruent Processes

Increased procurement processing time per requirement

Increased time spent by State Buyers

Reduced efficiency of procuring personnel

Increased confusion and money spend by vendors to adjust to many inconsistent requirements

Return on Investment

Our Gains are 160x what our Costs are!

DEFINITION of 'Return On Investment - ROI'

A performance measure used to **evaluate the efficiency of an investment** or to compare the efficiency of a number of different investments. To calculate ROI, the benefit (return) of an investment is divided by the cost of the investment; the result is expressed as a percentage or a ratio.

The return on investment formula:

$$\text{ROI} = \frac{\text{Gain from Investment} - \text{Cost of Investment}}{\text{Cost of Investment}}$$

Gain from the Investment

- ▶ Gains for the Taxpayers -
 - ▶ cost reductions due to leveraging economies of scale,
 - ▶ saves time taxpayers have to wait for services,
 - ▶ greater transparency into the process
- ▶ Gains for the Vendors -
 - ▶ consistency of system and one stop shop will increase competition and make it easier for vendors to bid.
 - ▶ Decrease time between notice of award and notice to proceed.
 - ▶ Business analytics to show the landscape of small business owners.
- ▶ Gains for the Departments -
 - ▶ dashboards with analytics to give Department Heads real-time information on their contracts to enhance oversight/governance and business decision-making.
- ▶ The SIX-STREAM System

Six Work-streams of eProcurement

Procure- to Pay
Automation

Catalog
Establishment

Vendor
Enablement/
Management

Sourcing
Enablement/
Management

Contract
Management

Spend Analysis

Electronic Procurement Work Streams

Work Steams	Functionality
Procure to Pay Automation	<ul style="list-style-type: none"> • Full Requisition to Order, standard & adaptable to organization • Approvals on-line, Mobile app, Enterprise & org-specific rules • eOrders (email, fax, EDI, cXML) • Receiving & Asset Management data • Real-time integration w/Financials, Inventory, Asset, other systems • eInvoice, 3-way match & payment authorization
Catalog Capability	<ul style="list-style-type: none"> • Hosted & Punchout • Contract – State & Agency; Non-Contract option • Vendor create/maintain tools • Buyer review, approve tools
Vendor/Supplier Enablement	<ul style="list-style-type: none"> • Self-service Registration • All Finance and Procurement data/information • Real-time integration w/Financials & MBE program
Sourcing/Bid Management	<ul style="list-style-type: none"> • On-line Sourcing, all types (Formal, Informal, Reverse Auctions) • Automated public posting and vendor notifications (Transparency) • Secure on-line bidding, evaluation & award • Integrated w/ Requisitioning, Catalogs, Ordering & Contract Management
Contract Management	<ul style="list-style-type: none"> • Contract document authoring (templates, libraries, version control) • Contract administration (Expiration, Renewals, Licenses, Bonds) • Vendor performance management • MBE & Subcontracting Plans and monitoring
Spend Management	<ul style="list-style-type: none"> • Spend Analytics, Contract use/leakage, Enterprise spend; Vendor & MBE • Ad Hoc reporting & dashboards • Public reports (Transparency) • Integrated Reporting with external systems (e.g. Finance, Inventory)

Gains from the Investment

▶ The Numbers

- ▶ A. Increase Accessibility with Cataloging, 10 new catalogs

= \$11.6M in Gain p.a.

- ▶ B. Assess Tangible benefits at 2.25% p.a. supported by actual cost savings

= \$41M in Gain p.a.

- ▶ C. Total Gains over a 15 year life-cycle, using Present Value of Growing Annuity

= \$728M Gain over Life

Cost of the Investment

▶ Initial Cost

- ▶ Typical Cost of full eProc system lies between \$2.5 and \$8M, with \$1M-\$1.5M operating costs per annum.
- ▶ The ASK is for **\$4.5M** for setup over 3.5 years, with no continuing maintenance cost requirements.

▶ Sustainability Strategy

- ▶ Vendor Fee of 1% on Catalog Awards, Starting mid-Yr 3, with full implementation of all work streams from Yr 5. Vendor fee to cover SAAS license fees, upgrades, service desk etc.
 - ▶ 15 Year Life-cycle Costs: PV of Growing Annuity
- ▶ Total Cost for Initial implementation and 15 year life-cycle

= **\$4.5M over life**

Initial Return on Investment (ROI)

$$\text{ROI} = \frac{(\text{Gain from Investment} - \text{Cost of Investment})}{\text{Cost of Investment}}$$

► ROI = $\frac{(\text{Gain from Cataloging: } \$11.5\text{M} + \text{Gain from System Benefits } \$41\text{M}) - \$4.5\text{M}}{\$4.5\text{M}}$

= 160%

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 11TH FLOOR
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KIRK CALDWELL
MAYOR

ROBERT J. KRONING, P.E.
DIRECTOR

MARK YONAMINE, P.E.
DEPUTY DIRECTOR

March 20, 2018

The Honorable Aaron Ling Johanson, Chair
and Members
House Committee on Labor and Public Employment
State Capitol, Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Johanson and Members:

SUBJECT: Senate Bill No. 2601 SD2, Relating to Procurement

The Department of Design and Construction (DDC) respectfully **opposes** Senate Bill No. 2601 SD2, which "(1) Requires procurement officers to complete periodic performance evaluations of certain contractors; (2) Establishes factors to be included in any evaluation, consideration, or review of past performance and ratings standards for those factors; (3) Requires that past performance be considered in future bid selection of contractors for sole source contracts and any competitive sealed contracts that exceeds the small purchase threshold; (4) Requires procurement officers to consider specific factors, including past performance, when making a determination of offeror responsibility; (5) Allows procurement officers to delegate to contract administrators certain duties relating to contract administration; and (6) Appropriates funds to the state procurement office to implement this Act."

DDC primarily administers professional services and construction contracts. Existing law allows past performance to be considered prior to award for these types of contracts, so the proposed legislation would not create new opportunities in the existing procurement process.

DDC's standard procedures include completing performance evaluations for both professional services and construction contracts. Past performance is considered in all selections of professional services contractors, as required by Section 103D-304, Hawaii Revised Statutes.

The Honorable Aaron Ling Johanson, Chair
and Members
March 20, 2018
Page 2

Consideration of past performance in the selection of construction contractors by competitive sealed bidding is allowable under HRS 103D-302. DDC has developed and is continuing to refine procedures that incorporate past performance into qualification of bidders for construction contracts.

The proposed legislation will burden procurement procedures with requirements that consume additional resources and result in additional bid protests and contracting delays without commensurate benefits.

Section 4 (a) of the bill states that, "A contract may be awarded for goods, services, or construction without competition when the head of a purchasing agency determines in writing that there is only one source for the required good, service, or construction, the determination is reviewed and approved by the chief procurement officer, the written determination is posted in the manner described in rules adopted by the policy board, a review of past performance has been conducted, and no objection is outstanding. The written determination, any objection, past performance evaluations relied upon, and a written summary of the disposition of any objection shall be included in the contract file." This section appears to limit an agency's ability to award a sole source contract when the sole source contractor has no past performance evaluations.

Section 5 of the bill indicates that to be determined responsible, a prospective contractor shall, among other requirements:

"(3) Have a satisfactory performance record."

"(4) Have a satisfactory record of integrity and business ethics;" and

"(5) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them, including, as appropriate, production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors;"

There is no indication of how these determinations would be made or what they would be based on, and the determinations would be an open invitation for protests from competing contractors.

Section 6 of the bill, amending Part V of HRS 103D, attempts to mandate by law how contracts are administered and by whom. The detailed requirements in this section would be overly burdensome on contract administrators.

The large majority of competitive sealed contracts administered by DDC result in satisfactory or better performance and would not benefit from the proposed legislation.

The Honorable Aaron Ling Johanson, Chair
and Members
March 20, 2018
Page 3

As indicated above, DDC has implemented and is continuing to improve procedures that incorporate past performance into qualification of bidders for construction contracts. DDC uses these procedures for bid solicitations that are expected to be of interest to contractors that have recently exhibited poor performance on DDC contracts. By doing this, DDC is able to realize the benefits of considering past performance on an as-needed basis without burdening the majority of our solicitations with the excessive additional administrative effort mandated by this bill and the additional protests that would need to be addressed.

Based on the above considerations, DDC respectfully **opposes** Senate Bill No. 2601 SD2.

Thank you for the opportunity to express our concerns.

Very truly yours,



Robert J. Kroning, P.E.
Director

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GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 22, 2018

TO: HONORABLE AARON JOHANSON, CHAIR, HONORABLE DANIEL HOLT,
VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE
ON LABOR AND PUBLIC EMPLOYMENT

SUBJECT: **OPPOSITION & SUGGESTED AMENDMENTS REGARDING S.B. 2601, SD2, RELATING TO PROCUREMENT.** Requires procurement officers to complete periodic performance evaluations of certain contractors. Establishes factors to be included in any evaluation, consideration, or review of past performance, and ratings standards for those factors. Requires past performance to be factored into future bid selection of contractors for certain contracts. Requires past performance to be considered in all sole source procurement and any competitive sealed contracts that exceeds the small purchase threshold. Appropriates funds. Effective 7/1/2050. (SD2)

HEARING

DATE: March 21, 2018
TIME: 9:15 AM
PLACE: Capitol Room 309

Dear Chair Johanson, Vice Chair Holt and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over five hundred 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.

S.B. 2601, SD2, Relating to Procurement proposes to require that past performance of a contractor be factored into future low bid selection and for sole source procurement. Additionally the SD2 version includes additional factors that propose a variety of ratings and standards to assess past performance and it is unknown where these provisions originate from as no input has been requested from the construction industry. **GCA's opposition is related to how this measure relates to construction contracts and how this bill lacks guidance on resolving issues that relate to projects: (1) being on budget; (2) being on time; and (3) delivering good quality work.**

The GCA respectfully requests that the Committee amend this measure and consider HCR 200 in its place which is REQUESTING THE COMPTROLLER TO REESTABLISH THE PROCUREMENT TASK FORCE INITIATED PURSUANT TO SENATE CONCURRENT RESOLUTION NO. 92, S.D. 2 (2013) TO STUDY THE ISSUE OF PAST PERFORMANCE IN THE PROCUREMENT PROCESS. See attached.

GCA is opposed to this measure as it may be premature as state and county agencies along with stakeholders have not had the opportunity to provide input in the most recent bill's draft – of SD2. In 2015 – the industry and affected agencies took initial steps in addressing possible solutions, and should be afforded that opportunity to provide better guidance in addressing how past performance can be used to evaluate contractors; instead of mandating past performance be factored into all public works projects, the better option may be to get feedback from agencies that have initiated a pilot project where they have been able test select projects and may have initiated the administration of past performance requirements on select projects. It is necessary to identify the best approach to factor in past performance to ensure a fair and objective assessment of a contractor's performance and use information for future projects in a precise manner.

2013-2015 History of Past Performance Discussions and Task Forces

From 2013 through part of 2015 the Procurement Task Force was initiated pursuant to [Senate Concurrent Resolution 92 \(2013\)](#) which has been meeting since 2013 through the early part of 2015, and one of the issues discussed included how to address bad performing contractors. Additionally, in 2014 this body passed [House Concurrent Resolution 176 \(2014\)](#), which required a study of past performance of government contractors. These Task Forces together with participating government agencies and private industry stakeholders agreed that this issue needs further discussion before dictating an approach with potential unintended consequences. In 2015, pursuant to [Act 182 \(2015\)](#) the legislature extended the Procurement Task Force to specifically identify and propose amendments, if any, to the procurement code that may better promote economy, efficiency, effectiveness, and impartiality in the procurement of public works construction projects, specifically regarding statewide past performance standards and procedures. Unfortunately, the Act 182 (2015) Task Force never met to discuss these matters as directed by the legislature and there has not been any follow up since.

It is important to note that consideration of past performance in procurement is already permitted under 103D-302(f) under the invitation for bid process, what is commonly known as low bid, however for various reasons agencies choose not to use it. 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 reason for this reluctance on the part of the state agencies to use this section may be due to difficulty to quantify, evaluate, and administer past performance.

The consideration of past performance for low bid contracts raises a number of concerns for GCA, including but not limited to: ensuring objective administration and evaluation processes for agencies in determining qualified past performance criteria, including how the state or county would receive information about private projects; inability for a new contractor to bid public work due to lack of past performance qualifications; agency's lack of resources, including staff and funding for implementation and administration of past performance for low bid contracts – State Procurement Office noted in testimony that a system could cost up to \$4.5 Million to allow a past performance system; procedural due process concerns and appeal procedures; and ensuring efficiency, integrity and transparency in the procurement process of public works construction projects.

Furthermore, adoption of federal past performance criteria may create a system that could lead to less contractors being eligible to bid on state contracts.

In construction, a number of evaluation factors must be taken into consideration, including licensing, subcontractor performance, less than stellar designs, unforeseen conditions, inclement weather, inadequate administration and oversight, untimely and disruptive owner requested change orders, unforeseen hazardous condition discoveries, the need to accommodate user activities that limit noise (such as exam week) or odorous, sometimes toxic activities, that may be reasons why the project does not come in satisfying the 3 noted criteria: (1) On budget; (2) On time; and (3) numerous changes to the original design.

Thank you for considering our comments on this measure and we respectfully request further discussion be had with agencies who may already in the process of implanting past performance criteria in assessing contractors. Furthermore, stakeholder feedback would ensure that a past performance program could be successfully implemented. **At this time, we respectfully request that this measure be amended and replaced with language of HCR 200. Thank you for your consideration.**

HOUSE CONCURRENT RESOLUTION

REQUESTING THE COMPTROLLER TO REESTABLISH THE PROCUREMENT TASK
FORCE INITIATED PURSUANT TO SENATE CONCURRENT RESOLUTION
NO. 92, S.D. 2 (2013) TO STUDY THE ISSUE OF PAST
PERFORMANCE IN THE PROCUREMENT PROCESS.

1 WHEREAS, in an effort to ensure that state contracts are
2 awarded to responsible bidders or offerors through the state
3 procurement process, the Legislature has expressed its interest
4 in increased accountability for performance on state contracts
5 to efficiently utilize taxpayer dollars; and
6

7 WHEREAS, the Hawaii Public Procurement Code currently
8 allows agencies to include past performance requirements in bid
9 proposals under section 103D-302(f), Hawaii Revised Statutes,
10 under the invitation for bids process, which is commonly known
11 as low bid; and
12

13 WHEREAS, under section 103D-302(f), Hawaii Revised
14 Statutes, an invitation for bids may set the requirements to
15 determine qualifications and criteria for a project; in other
16 words, the agency may set the criteria and qualifications for
17 the bidder in its bid specifications, which could include such
18 criteria as past performance, recent project history, and any
19 other qualifications an agency may find necessary; and
20

21 WHEREAS, agencies have been reluctant to incorporate past
22 performance requirements in their bid specifications due to the
23 difficulty of quantifying, evaluating, and administering past
24 performance criteria; and
25

26 WHEREAS, in 2013, the Legislature adopted Senate Concurrent
27 Resolution No. 92, S.D. 2 (2013) establishing the Procurement
28 Task Force; and



1 WHEREAS, the Procurement Task Force convened under the
2 authorization of Senate Concurrent Resolution No. 92, S.D. 2
3 from 2013 through part of 2015 and one of the issues discussed
4 included how to address poorly-performing contractors; and
5

6 WHEREAS, in 2014, the Legislature adopted House Concurrent
7 Resolution No. 176 (2014), which required the State Procurement
8 Office to study past performance of government contractors; and
9

10 WHEREAS, reported in *Report on the Study on Past*
11 *Performance Consideration in Hawaii Contracting*, pursuant to
12 House Concurrent Resolution No. 176 (2014), the State
13 Procurement Office offered suggestions for legislation on this
14 issue, but none were implemented due to problems with the
15 proposed amendments and lack of funding to implement such
16 programs; and
17

18 WHEREAS, after these two initiatives, participating
19 government agencies and private industry stakeholders agreed
20 that the issue of past performance needed further discussion
21 before an approach with potential unintended consequences was
22 codified; and
23

24 WHEREAS, as a result, in 2015, in an effort to continue
25 discussions the Legislature passed Act 182, Session Laws of
26 Hawaii 2015, to extend the Procurement Task Force and request
27 that the Task Force specifically identify and propose amendments
28 to the Hawaii Public Procurement Code, if any, regarding
29 statewide past performance standards and processes in public
30 works projects; and
31

32 WHEREAS, the Comptroller did not convene the Task Force as
33 mandated by Act 182, Session Laws of Hawaii 2015, parties never
34 met to discuss statewide past performance standards and
35 processes in public works projects as directed by the
36 Legislature, and there has not been any follow-up since; and
37

38 WHEREAS, in an effort to promote economy, efficiency,
39 effectiveness, and impartiality in public procurement, it is
40 important to identify whether amendments to the Hawaii Public
41 Procurement Code are necessary to address poorly-performing
42 contractors or whether the current Procurement Code provides



1 adequate tools to assess a contractor's past performance; now,
2 therefore,

3
4 BE IT RESOLVED by the House of Representatives of the
5 Twenty-ninth Legislature of the State of Hawaii, Regular Session
6 of 2018, the Senate concurring, that the Comptroller is
7 requested to reestablish the Procurement Task Force initiated
8 pursuant to Senate Concurrent Resolution No. 92 (2013) to study
9 the issue of past performance in the procurement process; and

10
11 BE IT FURTHER RESOLVED that the Comptroller, or the
12 Comptroller's designee, is requested to serve as chair of the
13 Task Force; and

14
15 BE IT FURTHER RESOLVED that the Comptroller is requested to
16 solicit representatives from the following entities to serve on
17 the Task Force, provided that those persons designated shall be
18 knowledgeable of procurement procedures and issues within their
19 respective organizations:

- 20
21 (1) The State Procurement Office;
22
23 (2) The University of Hawaii;
24
25 (3) The Department of Education;
26
27 (4) The Office of Hawaiian Affairs;
28
29 (5) The Department of Transportation;
30
31 (6) A county procurement department;
32
33 (7) A county board or department of water supply;
34
35 (8) The semi-autonomous public transit agency of the City
36 and County of Honolulu;
37
38 (9) The Subcontractors Association of Hawaii; and
39
40 (10) The General Contractors Association of Hawaii; and



1 BE IT FURTHER RESOLVED that the Task Force is requested to
2 identify proposed amendments, if any, to the Procurement Code
3 that will address poorly-performing contractors through the use
4 of past performance criteria in determining awards for state
5 contracts; and

6
7 BE IT FURTHER RESOLVED that members of the Task Force are
8 requested to serve without compensation; and

9
10 BE IT FURTHER RESOLVED that the Task Force is requested to
11 submit its findings and recommendations, including any proposed
12 legislation, to the Legislature no later than twenty days prior
13 to the convening of the Regular Session of 2020; and

14
15 BE IT FURTHER RESOLVED that the Legislative Reference
16 Bureau is requested to assist the Task Force in drafting
17 proposed legislation; provided that the Task Force submits its
18 request for proposed legislation, if any, to the Legislative
19 Reference Bureau no later than November 1, 2019; and

20
21 BE IT FURTHER RESOLVED that the Task Force shall be
22 dissolved on June 30, 2020; and

23
24 BE IT FURTHER RESOLVED that certified copies of this
25 Concurrent Resolution be transmitted to the Governor, Attorney
26 General, Comptroller, Chief Procurement Officer, Director of
27 Transportation, Superintendent of Education, Administrator of
28 the Office of Hawaiian Affairs, President of the University of
29 Hawaii System, Director of the Legislative Reference Bureau, the
30 Mayor of each county, the board or department of water supply of
31 each county, Subcontractors Association of Hawaii, and General
32 Contractors Association of Hawaii.

33
34
35 OFFERED BY: _____



MAR - 9 2018



Testimony of
Christopher Delaunay, Government Relations Manager
Pacific Resource Partnership

THE HOUSE OF REPRESENTATIVES
The Twenty-Ninth Legislature
Regular Session of 2018

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair

Thursday, March 22, 2018
9:15 A.M.
State Capitol – Room 309

Aloha Chair Johanson, Vice Chair Holt and members of the Committee:

Pacific Resource Partnership supports SB 2601, SD2 which provides clear legislative direction to award state contracts to responsible bidders or offerors through the state procurement process.

It is appropriate and relevant that state departments consider a contractor's past performance as an indicator that he or she will successfully perform a contract awarded through the state procurement process. Currently, the law does not require past performance to be considered in the bid selection of a contractor. Instead, it provides unqualified contractors, with a record of poor performance on state, federal or private contracts, who submit the lowest bids with opportunities to be awarded state contracts.

This measure will require procurement officers to complete periodic performance evaluations of certain contractors prior to awarding state contracts. This requirement will provide procurement officers with the tools needed to ensure that responsible and law-abiding contractors are awarded state contracts. As such, the state and its taxpayers will benefit from this requirement which will improve the overall quality of work and services on state projects and at state facilities.

Thank you for allowing us to share our view and we respectfully ask for your support on SB 2601, SD2.



(Continued From Page 1)

About PRP

Pacific Resource Partnership (PRP) is a not-for-profit organization that represents the Hawaii Regional Council of Carpenters, the largest construction union in the state, and more than 240 of Hawaii's top contractors. Through this unique partnership, PRP has become an influential voice for responsible construction and an advocate for creating a stronger, more sustainable Hawaii in a way that promotes a vibrant economy, creates jobs and enhances the quality of life for all residents.

SB 2601

SD-2

LATE

TESTIMONY



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

Date: 03/22/2018
Time: 09:15 AM
Location: 309
Committee: House Labor & Public
Employment

Department: Education

Person Testifying: Dr. Christina M. Kishimoto, Superintendent of Education

Title of Bill: SB 2601, SD2 RELATING TO PROCUREMENT.

Purpose of Bill: Requires procurement officers to complete periodic performance evaluations of certain contractors. Establishes factors to be included in any evaluation, consideration, or review of past performance, and ratings standards for those factors. Requires past performance to be factored into future bid selection of contractors for certain contracts. Requires past performance to be considered in all sole source procurement and any competitive sealed contracts that exceeds the small purchase threshold. Appropriates funds. Effective 7/1/2050. (SD2)

Department's Position:

The Department of Education (HIDOE) opposes SB 2601 SD2 as it would create an administrative burden without creating a tangible benefit to HIDOE not already provided for under HRS 103D.

Evaluation of bids using past performance is already provided for under HRS 130D, i.e. request for proposals (RFP), and multi-step bid. Furthermore, HIDOE already utilizes a contractor rating system to track performance. Selection of consultant contracts has considered past performance as a criteria for several years now. Multi-step and RFP bidding arrangements have been utilized for a number of construction projects.

Lastly, HIDOE processes hundreds of contracts annually. The requirement to evaluate all projects above the small purchase threshold would create an administrative burden and likely delay the award of contracts.

HIDOE suggests discussion among all Departments to determine the best interest in addressing the concern related to past performance.

The Hawaii State Department of Education seeks to advance the goals of the Strategic Plan

which is focused on student success, staff success, and successful systems of support. This is achieved through targeted work around three impact strategies: school design, student voice, and teacher collaboration. Detailed information is available at www.hawaiipublicschools.org.