



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

Date: 03/19/2019

Time: 02:45 PM

Location: 225

Committee: Senate Government Operations

Department: Education

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

Title of Bill: HB 1146, HD1 RELATING TO PROCUREMENT.

Purpose of Bill: Requires consideration of past performance in future bid selection of contractors for sole source contracts and any competitive sealed bid or proposal contracts that exceed the small purchase threshold. Requires procurement officers to consider past performance when making a determination of offeror responsibility. Appropriates funds. (HB1146 HD1)

Department's Position:

The Department of Education (Department) takes no position on HB 1146, HD1, but respectfully provides comments and information for the committee's consideration.

Current Procurement Code Already Allows for the Consideration of Past Performance

Evaluation of offers using past performance is already provided for under the Competitive Sealed Proposals method and under the Multi-Step Competitive Sealed Bidding method.

Contract Management

Contract management is an inherent part of the procurement lifecycle. All contracts must be managed; however, the degree of contract management depends on factors such as the type of good or service as well as the complexity and risk of the contract.

As part of contract management, evaluation of a contractor's performance occurs during the period of performance. For example, this includes: ensuring milestone and/or delivery dates are met; roles and responsibilities are fulfilled; and instances of non-compliance are resolved before payments are made.

The requirements of this measure would create additional administrative burden and likely delay the award of contracts.

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

Thank you for the opportunity to provide testimony on this measure.

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.

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
BONNIE KAHAKUI
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS

March 19, 2019, 2:45 P.M.

HB889, HD1
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

Chair Thielen, Vice-Chair Inouye, and members of the committee, thank you for the opportunity to submit testimony on HB889, HD1. The State Procurement Office (SPO) supports the intent of this bill that will create an office of public-private partnership, who will develop educational and advisory programs that enhance the public-private partnership procurement process. This bill also proposes to add public-private partnership methods to the procurement code.

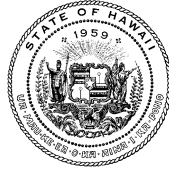
The SPO supports the intent of bill because it identifies the need to clarify options and procurement guidance for public infrastructure projects. However, it also proposes to amend sections in the procurement code (code), specifically competitive sealed proposals which is typically the method used to contract for Public-Private Partnerships (P3). The code does not preclude the use of innovative project delivery models, including design-build-finance-operate-maintain contracts.

The SPO recommends the creation of a task force as proposed in SB1003, SD1 relating to project delivery task guidelines. It would be in the best interest of the state to conduct research and develop institutional framework and tools to support state agencies in identifying, implementing and overseeing innovative project delivery arrangements such as P3.

As part of the task force, SPO recommends an additional \$150,000 to engage a subject matter expert to help facilitate the task force in developing guidance and collecting the information. In addition, SPO recommends funding of \$3,000 per task force member for P3 training and education. It behooves task force members to understand the intricacies of this complex method before developing Rules, which the PPB must approve, with no real P3 experience.

Thank you.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

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

TESTIMONY OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE ON GOVERNMENT OPERATIONS
ON
MARCH 19, 2019, 2:45 P.M.
CONFERENCE ROOM 225, STATE CAPITOL

H.B. 1146, HD 1
RELATING TO PROCUREMENT

Chair Thielen, Vice Chair Inouye, and Members of the Committee, thank you for the opportunity to submit testimony on H.B. 1146, HD1.

The Department of Accounting and General Services (DAGS) appreciates the intent of the proposed changes to the Procurement Code but opposes for the following reasons:

1. The existing Procurement Code contains a mechanism for the consideration of past performance. On projects for which a Department determines past performance should be a selection factor, construction services can be procured using the Competitive Sealed Proposals method of Procurement.
2. As proposed, this bill would reduce the transparency and objectivity of the procurement process, and would introduce subjectivity to those processes for the following reasons:
 - a. Lack of objective criteria; and
 - b. Lack of uniformity in rating systems; and

- c. Lack of uniformity in the data used to make decisions on the responsibility of a bidder; and
 - d. Inherent subjectivity when determining what information should be considered (i.e. recent, relevant, etc).
 3. It is likely the introduction of subjectivity will result in an increase in the volume and frequency of protests.
 4. There are existing mechanisms in place to address poor performance in construction contracts.
 - a. While projects are under construction, Departments can provide feedback to contractors, assess liquidated damages, enforce the terms of the contract documents, evaluate the need for change orders, and document facts related to poor performance.
 - b. With sufficient documentation, filings can be made for suspension or debarment of poor-performing contractors.
 - c. The Department of Labor and Industrial Relations publishes a list of contractors who are suspended or debarred for violation of Hawaii Revised Statutes Chapter 104 which is referenced prior to making award.
 5. This legislation appears to be premised on the idea that making the proposed change to the procurement code (to mandate the consideration of past performance) is the most effective way to use taxpayer money to address the problem of 'repeat poor-performing contractors' and poor performance on State and County projects without an effort to study the problem, the existing mechanisms, and possible solutions before deciding upon the most promising course(s) of action.

We propose that a working group be established to study the problem of poor performance on State contracts (including the issue of repeated poor-performers), consider possible solutions (to include, but not be limited to, the consideration of past performance) and develop recommendations to address the problem.

To achieve this, we recommend that the bill be completely revised as follows:

“SECTION 1. The legislature finds a need to improve performance on State contracts (including the issue of repeated poor-performers), to increase accountability with performance on State contracts, and to more efficiently utilize taxpayer dollars.

SECTION 2. The purpose of this Act is to form an initial procurement working group to study the problem, consider possible solutions (to include, but not be limited to, the consideration of past performance), and make recommendations to address the problem.

SECTION 3. (a) There is established the initial procurement working group, which shall be made up of procurement representatives from the State and County. The working group shall:

- (1) Collect data to determine the magnitude of the problem; and
- (2) Document existing practices and processes including, but not limited to, procurement methods, preparation of solicitation documents, evaluation and basis of award (including the consideration of past performance when deemed appropriate), post-award contract administration, suspension, and debarment; and
- (3) Identify lessons learned from case studies of projects identified as having bad contractors or subcontractors; and

(4) Identify shortfalls, needs, gaps, or challenges in the laws and rules, processes, knowledge, and resources; and

(5) Find potential methods or mechanisms available to address the problems identified including, but not limited to, the use of a past performance database, by:

- a. Examining the pros and cons of each potential method or mechanism; and
- b. Determining the most promising methods or mechanisms to determine requirements for implementation including, but not limited to, time, costs, and resources; and
- c. Obtaining industry feedback; and
- d. Prioritizing for purposes of recommendations.

(b) The initial procurement working group will consist of the following members or their designees:

- (1) State Procurement Administrator;
- (2) Comptroller;
- (3) Attorney General;
- (4) Chief Information Officer;
- (5) University of Hawaii Chief Procurement Officer;
- (6) Department of Education Chief Procurement Officer;
- (7) Department of Transportation Head of Procurement Authority;
- (8) County of Hawaii Chief Procurement Officer;

(9) County of Maui Chief Procurement Officer;

(10) County of Kauai Chief Procurement Officer; and

(11) City and County of Honolulu Chief Procurement Officer.

(c) The initial procurement working group shall bring together the construction and information technology industry leaders and organizations to review and discuss any gaps or problems with the proposed recommendations prior to finalization of the working group's recommendations to the legislature.

(d) The working group shall provide recommendations to the legislature for its 2021 Session.

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

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

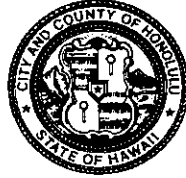
SECTION 6. This Act shall take effect on July 1, 2019."

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

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



ROBERT J. KRONING, P.E.
DIRECTOR

MARK YONAMINE, P.E.
DEPUTY DIRECTOR

March 18, 2019

The Honorable Laura H. Thielen, Chair
The Honorable Lorraine R. Inouye, Vice Chair
and Members of the Committee on Government Operations

The Senate
State Capitol, Room 225
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Thielen, Vice Chair Inouye, and Members:

SUBJECT: House Bill No. 1146 HD1, Relating to Procurement

The Department of Design and Construction (DDC) respectfully **opposes** House Bill No. 1146 HD1, the purpose of which is to "(1) Require that past performance be considered in future bid selection of contractors for sole source contracts and any competitive sealed bid or proposal contracts that exceeds the small purchase threshold; and (2) Require procurement officers to consider specific factors, including past performance, when making a determination of offeror responsibility."

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.

Consideration of past performance in the selection of construction contractors by competitive sealed bidding is allowed 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 Honorable Laura H. Thielen, Chair
and Members
March 18, 2019
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The proposed legislation will burden procurement and contract administration procedures with requirements that consume additional resources and result in additional bid protests and contracting delays without commensurate benefits.

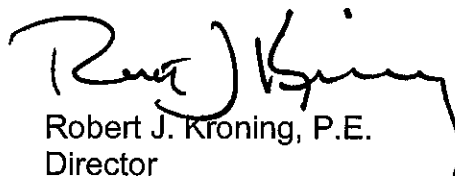
Additionally, language amending subsection 103D-306(a), HRS contained in SECTION 4 of the bill appears to limit an agency's ability to award a sole source contract when the sole source contractor has no past performance evaluations. This section states that, "A contract may be awarded for goods, services, 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."

The large majority of competitive sealed contracts administered by DDC result in satisfactory or better performance and would not benefit from consideration of contractor past performance. 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** House Bill No. 1146 HD1.

Thank you for the opportunity to express our opposition to this bill.

Very truly yours,



Robert J. Kroning, P.E.
Director

HB-1146-HD-1

Submitted on: 3/16/2019 6:43:31 PM

Testimony for GVO on 3/19/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Brodie Lockard	Individual	Support	No

Comments: