



**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

P.O. Box 119  
Honolulu, Hawaii 96810-0119  
Tel: (808) 586-0554  
email: [state.procurement.office@hawaii.gov](mailto:state.procurement.office@hawaii.gov)  
<http://spo.hawaii.gov>  
Twitter: [@hawaiispo](https://twitter.com/hawaiispo)

**TESTIMONY  
OF  
SARAH ALLEN, ADMINISTRATOR  
STATE PROCUREMENT OFFICE**

**TO THE HOUSE COMMITTEE  
ON  
FINANCE**

February 27, 2019, 11:00 A.M.

**HB1146 HD 1  
RELATING TO PROCUREMENT**

Chair Luke, Vice Chair Cullen, and members of the committee, thank you for the opportunity to submit testimony on HB1146 HD 1. The State Procurement Office (SPO) supports this bill and amendments made in HD1 and offers the following comments:

1. The SPOs recommend adding the language used in SB 1333 SD 1, particularly Section 7 and 8 for the establishment of an initial procurement working group and its mission.
2. What are the benefits of a past performance state-wide system?
  - It gives those contractors who are performing well, a historic reference record, which will support future work across that State
  - It gives those same contractors accumulated past performance to submit for Federal contracts.
  - It gives the government buyer confidence the contractor will offer successful services, thereby safeguarding taxpayers' monies
  - It creates a requirement for adequate, documented, government oversight and encourages a more robust post-award contract management
3. Will it stop "Change Order Artists" – contractors that submit low bids with the expectation that they'll make it up with change orders?  
No it will not, specifically.

Just because a contract has multiple change orders, does not, in of itself, equate to a contractor that is manipulating the system. There are many reasons for change orders, many of which, are often from new government decisions and new information that has entered into the equation.

If we are looking to avoid those contractors that are really playing the system, and I suspect that is a minority statistic, the best way to do this is to mandate adequate, documented, government oversight and encourage a more robust post-award contract management.

Documentation of disputed changes orders may or may not be acknowledged as poor performance, and that is why it is important to understand that this might continue to be an issue with or without a past performance program.

Establishing a work group, as defined in SB1333 SD1 to study past performance is possibly a best first step. The most challenging area of past performance evaluation is the competitive sealed bid procurement method. It has the requirement to include only objective criteria. SPO recommends including a requirement for the work group to develop a recommendation prior to the sunrise of the mandate to implement past performance evaluations for competitive sealed bidding.

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  
COMMITTEE ON FINANCE  
ON  
FEBRUARY 27, 2019, 11:00 A.M.  
CONFERENCE ROOM 308, STATE CAPITOL

H.B. 1146 H.D. 1  
RELATING TO PROCUREMENT

Chair Luke, Vice Chair Cullen, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 1146 H.D. 1.

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.

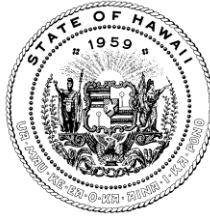
SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

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.

DAVID Y. IGE  
GOVERNOR OF  
HAWAII



**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  
FINANCE**

**Wednesday, February 27, 2019  
11:00 A.M.  
State Capitol, Conference Room 308**

**In consideration of  
HOUSE BILL 1146, HOUSE DRAFT 1  
RELATING TO PROCUREMENT**

House Bill 1146, House Draft 1 proposes to (1) require 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; (2) require procurement officers to consider past performance when making a determination of offeror responsibility; and (3) appropriate an unspecified amount of general funds to the State Procurement Office for the purposes of this measure. **The Department of Land and Natural Resources offers the following comments:**

1. The existing procurement code already contains a mechanism for consideration of past performance.
2. A conflict is created with procurement code when use of past performance as a selection criterion is optional.
3. Incorporating criteria such as past performance to the Competitive Sealed Bidding process would add subjectivity to this selection method. If this measure is enacted, implementation should be subject to the State Procurement Office enacting rules to clearly define and provide standards for evaluating past performance.
4. 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.

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

**ROBERT K. MASUDA**  
FIRST DEPUTY

**M. KALEO MANUEL**  
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



DEPARTMENT OF DESIGN AND CONSTRUCTION  
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 11<sup>TH</sup> FLOOR  
HONOLULU, HAWAII 96813  
Phone: (808) 768-8480 • Fax: (808) 768-4567  
Web site: [www.honolulu.gov](http://www.honolulu.gov)

KIRK CALDWELL  
MAYOR



ROBERT J. KRONING, P.E.  
DIRECTOR

MARK YONAMINE, P.E.  
DEPUTY DIRECTOR

February 25, 2019

The Honorable Sylvia Luke, Chair  
The Honorable Ty J.K. Cullen, Vice Chair  
and Members of the Committee on Finance

House  
State Capitol, Room 308  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Luke, Vice Chair Cullen, 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; (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. Past performance is considered in all selections of professional services contractors, as required by Section 103D-304, Hawaii Revised Statutes.

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 Honorable Sylvia Luke, Chair  
and Members  
February 25, 2019  
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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.

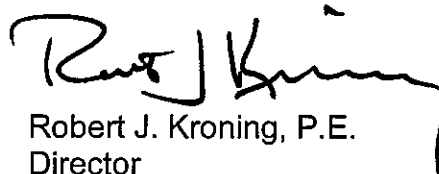
Section 4 (a) of the bill appears to limit an agency's ability to award a sole source contract when the sole source contractor has no past performance evaluations. This section states that, "A contract may be awarded for goods, services, or construction without competition when the head of a purchasing 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

# ***SAH - Subcontractors Association of Hawaii***

***1188 Bishop St., Ste. 1003\*\*Honolulu, Hawaii 96813-2938***

***Phone: (808) 537-5619 ✦ Fax: (808) 533-2739***

February 27, 2019

Testimony To: House Committee on Finance  
Representative Sylvia Luke, Chair

Presented By: Tim Lyons, President

Subject: H.B. 1146, HD 1 – RELATNG TO PROCUREMENT.

Chair Luke and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct contracting trade organizations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We are in general support of this bill.

The subject of using past performance in consideration of awarding contracts for State jobs has been discussed in prior legislatures.

In the past our only caveat has been what the specific criteria might be for determining past performance; whether that is the annual evaluation or a specific job evaluation. We are concerned as to whether contracting officers will have sufficient staff and time in order to determine when a particular phase of a project was not completed on time, if it was a result of a contractor not performing properly or if it was a result of a supplier not delivering material on time or, if it was a result of a manufacturer not completing the manufacturing process on time and, therefore, the supplier not being able to deliver those products on time. In other words, there are always a variety of factors involved in non-performance and we just want to be sure that past performance, including good and bad performance, is properly evaluated and we know that is going to take the proper staff and resources to do so.

Additionally, it would seem to us that a past performance system is useless unless the system is also able to dispel performers. It may not be enough to give them poor marks; it may take more negative action such as debarment. To our knowledge, state government has only taken this action once which, in consideration of some of the poor examples our members have reported, is outrageous.

Past performance is a good concept but it is not a stand-alone cure-all.

Thank you.