



STATE OF HAWAII
STATE PROCUREMENT OFFICE

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
GOVERNMENT REFORM
FEBRUARY 5, 2021, 9:00 A.M.

HOUSE BILL 1210
RELATING TO PROCUREMENT

Chair McKelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on HB1210. The State Procurement Office (SPO) offers the following comments and recommendations.

Comments:

The State Procurement Office has identified multiple bills with similar language and prefers HB526. HB526 has a more inclusive statement to include necessary steps to implement the use of Past Performance.

The State finds that, per its adoption of the ABA Model Procurement Code, that past performance is already allowable inside of the procurement statute. What is missing is the guidance that is found as supplemental Rules. Thus, on May 28, 2019, the Procurement Policy Board voted to approve to development of past performance Rules.

In 2019, the SPO contracted the services of a consultant to review the Comptroller Construction Task Force Report of 2015, analyze the current environment, assist in the development of past performance rules, and make recommendations for the creation of a database. The SPO is currently reviewing the consultant's report and recommendations, along with feedback from CPO jurisdictions and the contractor community, to determine how best to incorporate the information when amending the Rules.

The Rules will cover how to incorporate past performance criteria in a bid or offer, how to evaluate past performance, how to evaluate performance post-award, and how to collect and share that information across siloed agencies through the use of a central state-wide database.

Recommendation:

Creating the tools and infrastructure for buyers to adopt a new policy is essential for successful implementation. In order to continue this work, the SPO is requesting time and funding.

Adequate time is required to verify and implement rules, create the database, develop training, then and coordinate and execute the training. The SPO is requesting one-time initial funding of approximately \$164,000 pre-tax, to develop and implement the guidance and related implementation training to cover at least the first 2 years, and annual maintenance funding of \$13,500 to develop the following tools:

	Delivery	Pre-tax Funding Request
1	Past Performance Guide	\$15,000
	Prepare a past performance implementation guide that provides information for Hawaii contracting officers with more user-friendly detailed instructions on how to effectively implement the Administrative Rules into practice. The implementation guide will include detailed explanations on how to evaluate past performance, examples of quality past performance narratives, and explanations regarding recording negative performance without using the past performance evaluation as a punitive tool outside of due process.	
2	Past Performance Database Functional Requirements Document	\$30,000
	Prepare a Past Performance Database Functional Requirements Document (FRD). The FRD will describe the Database's functional requirements. Our FRD will explain the objectives of the Past Performance Database, the forms and data to be entered, workflow of a performance evaluation, users and roles, system outputs, and applicable regulatory requirements, etc. An FRD is solution independent. It is a statement of what the database is to do - not how it functions technically. The FRD does not commit the Database developers to a design. The SPO will be able to include the FRD in a solicitation for design and delivery of the Past Performance Database.	
3	Create Past Performance Database	\$50,000
4	Preparation and Publication of Rules	\$5,000
5	Rules must be prepared, surveys sent, facilitated discussions and the publication fee	\$4,000
6	Training (in-person)	\$46,500
	Total One Time Funding	\$150,500
7	Annual Database Maintenance (est. at 27% of cost x \$50,000)	\$13,500
	Total Funding Recurring Annually	\$13,500

Thank you.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
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WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE ON
GOVERNMENT REFORM

FRIDAY, FEBRUARY 5, 2021, 9:00 A.M.
CONFERENCE ROOM 309, STATE CAPITOL

H.B. 1210

RELATING TO PROCUREMENT.

Chair McKelvey, Vice Chair Wildberger, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 1210.

The Department of Accounting and General Services (DAGS) appreciates the intent of legislation mandating the consideration of past performance and we offer the following concerns:

- The current procurement code already allows for the consideration of past performance.

The Competitive Sealed Proposals method of procurement facilitates the consideration of past performance, and may be used whenever a department determines that factors other than price (including past performance) should be a selection factor. This determination must be made on a case-by-case basis, taking into consideration time and funding constraints, need, resources, and other project-specific details. DAGS has chosen to use this method to procure both equipment and services when it has deemed it appropriate to do so.

Even in the context of a Sealed Bid (Invitation for Bid, aka “low bid”) procurement, the procurement code allows an agency to use its own past experience with a bidder to disqualify its bid. The DAGS Interim General Conditions for Construction, as amended, Item 2.12.3, states that a bidder’s proposal may be rejected due to a “Lack of responsibility and cooperation as shown by past work such as failing to complete all of the requirements to close the project within a reasonable time or engaging in a pattern of unreasonable or frivolous claims for extra compensation.” In order to use this as a basis, the department would require a fact-based record/log supporting this assertion for past projects. Based on past testimony by the City and County of Honolulu, it appears this methodology is put into practice for its projects.

- There is already a process within the procurement code to address “poor-performing” contractors and providing this information to all State and County agencies.

Any agency who has had a “poor-performing” contractor on a project can, with sufficient factual documentation, look to the State Procurement Office to undertake proceedings to suspend and/or debar the contractor. When a contractor is suspended pending investigation or debarred, it is announced to all agencies via a Procurement Circular.

- The consideration of past performance introduces an element of subjectivity to the construction procurement process, which is increased when an agency is forced to rely on an indirect assessment.

There will always be an element of subjectivity to the consideration of past performance due to the lack of objective criteria, the lack of uniformity in rating systems (including interpretations regarding the evaluation criteria and terminology), the lack of uniformity

in data used to make decisions on responsibility (this problem is compounded when an entity is forced to use the data of others without direct experience), and the subjectivity inherent in determining what information should be considered (i.e. recent, relevant, etc.). If past performance is to be implemented, there must be a reliable third party to review all evaluations to be used by the agencies and to make determinations regarding the quality and consistency of the information and its impact on the issue of responsibility for each contractor.

DAGS has strong concerns that the increased degree of subjectivity introduced by the mandate to consider past performance within methods of procurement that are primarily an objective process will result in an increase in the number of protests. This increased potential for protests and project delays would negatively impact all construction projects. These negative impacts will be most pronounced for large, critical, high profile projects where the cost and other public impacts may be greatest.

- Lack of staffing, time, and funding to properly implement the proposed measure.

The implementation of past performance legislation of this nature would necessitate more than just the costs associated with the creation of a database. It would require additional staff time and effort to: sift through the information in the database; make determinations of what data is “recent,” “relevant,” and “of similar nature;” review all of the information to be considered; perform annual, end-of-project, and quarterly performance reviews; communicate the information to contractors; resolve disagreements with contractors contesting their evaluations; and input information into the database. This is not feasible given current State staffing levels, the current economy, and budget constraints.

- DAGS does not believe that mandating consideration of past performance is the best, most effective method of addressing the issue of “poor-performing” contractors

for two reasons: 1) a “poor-performing” contractor could simply change its name or begin bidding in Hawaii for the first time and still get jobs here because they would have no record of adverse past performance; and 2) this type of solution focuses on keeping “poor-performing” contractors from getting State and County work (i.e. make the wall high enough, or the moat deep enough, to protect us because we are weak).

We ask that you consider that the attitude that State and County governments are weak attracts “poor-performing” contractors and does nothing to resolve our own internal issues. If “poor-performing” contractors knew that the State and County’s construction contract administrators would not approve unwarranted change orders, assess liquidated damages for taking longer than they should to complete a job, force them to correct work not in compliance with the contract specifications, and make claims on the construction bonds as required, State and County construction projects would become unattractive to them.

Instead, the legislature could take actions which would strengthen the ability of State and County government agencies to produce better bid documents and administer construction contracts in a way which holds their contractors accountable. For example: help agencies improve their quality control over bid documents; strengthen their ability to enforce the contract documents; make training on critical path analysis available in an effort to eliminate the approval of requests for unnecessary time extensions; facilitate their ability to assess liquidated damages when appropriate; improve the ability of construction managers to better evaluate the need for change orders (so unnecessary ones can be identified and not be approved); documenting facts related to poor performance; improve the suspension and debarment process; and provide both technology and

resources required to provide good bid documents and excellent construction management.

In summary: 1) legislation mandating the consideration of past performance is not necessary because the current procurement code already allows for the consideration of past performance and already contains mechanisms and processes which can be used to address the issue of “poor performing” contractors; 2) the proposed legislation will lead to large fund expenditures due to the increased volume of work and staffing requirements placed on agencies in the areas of procurement and construction management; 3) enacting legislation mandating the consideration of past performance without careful study of the problem in relation to existing and alternative means and methods of addressing it may not cure the problem and is likely to further negatively impact the procurement process with a substantial increase in the number of protests; and 4) if this legislation does not fix the problem, or has negative impacts on the construction procurement process, the law could not be amended until after the next legislative session.

DAGS would be happy to discuss this further to provide more information on our concerns.

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