

DAVID Y. IGE
GOVERNOR



BONNIE KAHAKUI
ACTING ADMINISTRATOR

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STATE PROCUREMENT OFFICE

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
JUDICIARY AND HAWAIIAN AFFAIRS
Thursday, February 11, 2021, 2:00 P.M.

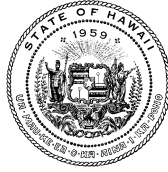
HOUSE BILL 526, HD1
RELATING TO PROCUREMENT

Chair Nakashima, Vice Chair Matayoshi, and members of the committee, thank you for the opportunity to submit testimony on HB526, HD1.

The State Procurement Office (SPO) appreciates that the House Draft 1 of this bill reflects comments we made in previous testimony.

Thank you.

ADAVID 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

WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

THURSDAY, FEBRUARY 11, 2021, 2:00 PM
CONFERENCE ROOM 325, STATE CAPITOL

H.B. 526, H.D. 1

RELATING TO PROCUREMENT

Chair Nakashima, Vice Chair Matayoshi and members of the Committee, thank you for the opportunity to submit testimony on H.B. 526, H.D. 1

The Department of Accounting and General Services (DAGS) opposes the language of H.B. 526, H.D. 1 as written for the reasons noted below, and offers a recommendation to encourage use of the Competitive Sealed Proposal procurement method when deemed appropriate for the procurement; and recommended language to incorporate clear directives to incorporate “past performance” into the HRS 103D-303, Competitive Sealed Proposal procurement method.

Reasons for opposing the current language of H.B. 526, H.D. 1:

- 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. Our 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 also 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.

- H.B. 526, H.D.1 has not provided a cogent argument that this is the best, most effective method of addressing the issue of “poor-performing” contractors.

Among the wide range of solutions are: strengthening the government’s ability to enforce the contract documents, assessing liquidated damages, better evaluating the need for change orders, and documenting facts related to poor performance; improving the suspension and debarment process; etc.

- 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, uniformity in rating systems (including interpretations regarding the evaluation criteria and terminology); 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 determination(s) 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 will result in an increase in the number of protests. This would be especially true for large, high profile projects.

- The utility of a database such as the one proposed for the purported intent is questionable.

For example:

- Item 103D- (b)(1)(F) Whether the project was timely completed or not. This is not a reliable indicator of a poor contractor, because there can be many causes for the delayed completion of a project which are not under the control of the contractor (i.e. bad weather, COVID-related shutdowns, the discovery of unanticipated site conditions which needed to be addressed, etc.).

- Item 103D- (b)(1)(H) The positive or negative difference between the final cost of the project and the project's authorized budget, if any. This is also not a reliable indicator of a poor contractor, because there can be many causes for cost increases on a construction project which are not under the control of the contractor (i.e. additional costs resulting from unanticipated site conditions, work done as a result of a change initiated by the agency or user, etc.). Further, it is always the responsibility of the agency to deny unreasonable or unjustifiable requests on the part of the contractor which would increase the cost of a construction project.

Similarly, there can be many causes of a project being completed under the stated budget (i.e. reduction in scope by the agency, unused variable quantities, etc.).

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

The implementation of past performance legislation of this nature would necessitate more than just the creation of a database. It would require additional staff time and effort to input information into the database as well as to communicate the information to contractors and to go through the process to allow contractors to contest the information contained in the database. This is not feasible given the current economy, budget, and staffing constraints.

Recommendation:

Surprisingly, the HRS §103D-303 – Competitive Sealed Proposals and Hawaii Administrative Rules §3-122-46 – Preparing a Request for Proposal does not mandate past performance as an evaluation factor in awarding a contract although it is typically an evaluation factor, if not always when used by the Department of Accounting and General Services, Public Works Division who procures and administers construction contracts uses the competitive sealed

proposal method of procurement. Therefore, we recommend the following revision to the language of H.B. 526, H.D. 1:

- Delete lines 12 to 16 of page 1 and lines 1 to 2 on page 2 and replace with the following:

“(1). Provide clear legislation to require past performance of contractors’ positive, negative, or lack of previous experience to be considered in the Competitive Sealed Proposal process; and

(2). Encourage use of the competitive sealed proposal procurement method when deemed appropriate and feasible for the project.”

- Delete lines 3 to 21 of page 2, pages 3 to 6 in its entirety and replace with the following:

“SECTION 2. Section §103D-303, Hawaii Revised Statutes, is amended as follows:

1. By amending Section §103D-303(e) to read:

“(e) The request for proposals shall include as an evaluation factor, past performance on projects of similar scope for public agencies or private industry; and shall state the relative importance of price, past performance and other evaluation factors.”

2. By adding to §103D-303(i) the following:

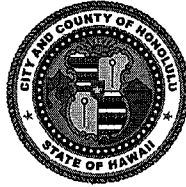
“(4) Past performance on project of similar scope for public agencies or private industry shall be an evaluation factor pre-qualification of offerors.”

Thank you for this opportunity to provide testimony on this matter.

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

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RICK BLANGIARDI
MAYOR



ALEX KOZLOV, P.E.
DIRECTOR DESIGNATE

HAKU MILLES, P.E.
DEPUTY DIRECTOR

February 10, 2021

The Honorable Mark M. Nakashima, Chair
The Honorable Scott Z. Matayoshi, Vice-Chair
and Members of the Committee on Judiciary & Hawaiian Affairs
The House
State Capitol, Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Nakashima, Vice-Chair Matayoshi, and Members:

SUBJECT: House Bill No. 526 HD1
Relating to Procurement

The Department of Design and Construction (DDC) respectfully **opposes** House Bill No. 526 HD1. The purpose of the bill is to "(1) Require the past performance of contractors' positive, negative, or lack of previous experience to be considered in bid selection of a contractor; and (2) Require departments to consider available assessments of previous performance on relevant and recent government and private contracts when making contract awards."

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 improve the existing procurement process.

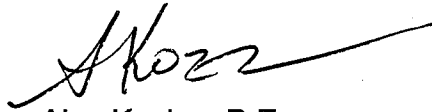
The proposed legislation would burden procurement and contract administration procedures with requirements that consume additional resources and potentially increase bid protests and contracting delays without commensurate benefits. DDC has implemented procedures that incorporate past performance into 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 additional administrative effort that would be mandated by this bill and the potential for additional protests and delays that would need to be addressed.

The Honorable Mark M. Nakashima, Chair
and Members of the Committee on Judiciary & Hawaiian Affairs
February 10, 2021
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Based on the above consideration, DDC respectfully **opposes** House Bill
No. 526 HD1.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Kozlov', with a long horizontal flourish extending to the right.

Alex Kozlov, P.E.
Director

DAVID Y. IGE
GOVERNOR



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
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HONOLULU, HAWAII 96813-5097

February 11, 2021
2:00 P.M.
State Capitol
Conference Room 325
VIA VIDEO CONFERENCE

H.B. 526 H.D. 1
RELATING TO PROCUREMENT

House Committee on Judiciary & Hawaiian Affairs

The Department of Transportation (DOT) **supports** the bill which requires past performance of contractors' positive, negative, or lack of previous experience to be considered in bid selection of a contractor; requires departments to consider available assessments of previous performance on relevant and recent government and private contracts when making contract awards; and appropriates funds.

The implementation of past performance is valuable as it pertains to competitive sealed proposals and professional services and provides information for procurement stakeholders in determining and evaluating the responsibility component of a bidder or offeror during selection and award. Past performance, as another level of consideration and diligence in evaluating responsibility, will provide additional insight to positively impact the award selection to optimally support increased accountability, enhanced quality performance, and efficient and effective utilization of taxpayer dollars in respect to contract awards and the respective deliverables.

Thank you for the opportunity to provide testimony.