



**STATE OF HAWAII  
STATE PROCUREMENT OFFICE**

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TESTIMONY  
OF  
BONNIE KAHAKUI, ACTING ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE  
ON  
CONSUMER PROTECTION & COMMERCE

MARCH 24, 2021, 2:00 P.M.

SENATE BILL 788, SD2, HD1  
RELATING TO PROCUREMENT

Chair Johanson, Vice Chair Kitagawa, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 788, SD2 HD1. The State Procurement Office (SPO) offers the following comments and recommendations.

**Comments:**

The current language allowing a 24-hour period for bidders to correct their subcontractor listing artificially extends the bid deadline to allow bidders to make corrections versus being disciplined in the formation of their bids. In HAR §3-122-31, Mistakes in Bids, the Procurement Policy Board desired to permit relief for certain mistakes made in the calculation and submission of bids to allow the government to take advantage of what it knows, or should know, is an error by the bidder and to avoid depriving the government of an advantageous offer solely because the bidder made a mistake. However, to allow the bidder to rectify this failure by obtaining a subcontractor after bid opening violates the provisions of Chapter 103D, Hawaii Revised Statutes, Hawaii Public Procurement Code, which is designed to treat all bidders fairly and equitably in their dealings with the government procurement system and increase public confidence in the integrity of the government procurement. Additionally, if a bidder is unable to submit accurate bids by the original deadline, it raises concerns in the bidder's ability to perform and meet deadlines.

If the committee decides to pass this bill, Section 14, page 16, lines 18-21, should be revised to have a clear definition of "non-material" and "technical" information. The proposed language, as is, may lead to further complaints and protests. One of the primary purposes of the listing requirement is to prevent bid shopping and bid peddling. The listing requirement was based in part on the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other potential

subcontractors. The Code seeks to guard against bid shopping and bid peddling by forcing the contractor to commit, when it submits the bid, to utilizing a specified subcontractor. The SPO has also identified multiple bills with past performance language, and prefers the language in House Bill 526, HD1. HB526, HD1, 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.

As important and valuable as this measure is, it must provide the resources necessary for a project of this scope and magnitude. In fact, this project will be an extensive undertaking, requiring expertise, staffing, and funding resources in order to develop any new processes, procedures, templates, contract terms and conditions, and reporting requirements compliant with the Hawaii Code, which will require resources the SPO does not have.

**Recommendation:**

Create 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. Time is required to verify and implement rules, begin creating the database, develop training, and coordinate and execute the training. The SPO is requesting one-time initial funding of \$164,000 pretax to develop and implement the guidance and related implementation training to cover at least the first two years, and annual maintenance funding of \$13,500 to develop the following tools:

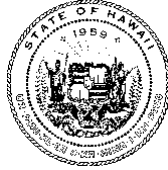
	Delivery	Funding Request
1	Past Performance Guide	\$15,000
	Prepare a past performance implementation guide that provides information for Hawaii contracting officers with more user-friendly detailed instructions on how to effectively implement the Administrative Rules into practice. The implementation 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	\$46,500
	<b>Total One Time Funding</b>	<b>\$150,500</b>
7	Annual Database Maintenance (est. at 27% of cost of \$50,000)	13,500
	<b>Total Funding Recurring Annually</b>	<b>13,500</b>

The SPO is committed to working with the State Legislature and Agencies to develop the best policy and procedures for procurement that allow for streamlining, efficiencies, innovation, cost control, and fair and equal contracting opportunities across the State of Hawaii, and recognizes the benefits of a past performance database system. Therefore, the cost of implementing a successful past performance database is estimated to start at a minimum of \$164,000 for fiscal year 2021-2022.

The SPO also recommends removing Section 5 on pages 5 and 6, in its entirety, as efforts have already begun to address past performance in competitive sealed bidding in the HAR 3-122, Subchapter 5.

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

WRITTEN TESTIMONY  
OF  
CURT T. OTAGURO, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
COMMITTEE ON CONSUMER PROTECTION & COMMERCE

WEDNESDAY, MARCH 24, 2021, 2:00 P.M.  
CONFERENCE ROOM 329, STATE CAPITOL

S.B. 788, S.D. 2, H.D. 1

RELATING TO PROCUREMENT.

Chair Johanson, Vice Chair Kitagawa, and members of the Committee, thank you for the opportunity to submit testimony supporting the intent of S.B. 788, S.D. 2, H.D. 1, with comments.

The Department of Accounting and General Services (DAGS) supports the intent of improving procurement practices, but has very strong concerns about the requirements of this legislative bill.

S.B. 788, S.D. 2, H.D. 1, reduces the transparency of the procurement process, increases subjectivity, and reduces the responsiveness and responsibility expectations of bidders, thereby increasing the likelihood of protests and causing delays in the procurement process.

**Part III - Past Performance Database and the Mandate to Consider Past**

**Performance.** In summary, this legislation is highly inadvisable for the following reasons:

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

- There are other practices and tools available that can achieve the same goal without the associated negative impacts.
- There is already a process within the procurement code to address “poor performing” contractors and provide this information to all State and County agencies.
- The consideration of past performance introduces an element of subjectivity to the construction procurement process. The consideration of past performance is, by nature, subjective due to the lack of objective criteria, lack of uniformity in rating systems (including interpretations regarding the evaluation criteria and terminology), the lack of uniformity of 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), as well as the subjectivity inherent in determining what information should be considered (i.e. recent, relevant, etc.).
- Increased subjectivity reduces the transparency and perceived fairness of the procurement process. DAGS has strong concerns that this will increase the potential for protests and project delays. These negative impacts will be most pronounced for large, critical, high profile projects where the cost and other public impacts may be the greatest.
- Lack of resources (staffing, time, and funding) to properly implement the proposed measure. The additional costs of implementation are not limited to the creation of a database. This legislation will have substantial impacts on the resources of all agencies who conduct construction procurements.

**Part IV – Negotiation with the lowest responsive and responsible bid where that bid significantly differs from the State’s estimate.**

This legislation is inadvisable for the following reasons:

- It exceeds its stated intent by allowing negotiations to include an increase in the bid price submitted by the lowest responsive, responsible bidder (ref. page 13, lines 6-10).
  - This practice creates a bidding arena that allows for gaming bids. If bidders all underbid in hopes of being chosen to negotiate a better price for the scope, it is not clear the State would be selecting responsive, responsible bidders who are competent to perform the work.
  - As a result, it would be contradictory to allow an increase in the bid price of the supposed lowest responsive, responsible bidder simply because the bid is below the State’s estimate. Instead, the burden rests upon the lowest responsive, responsible bidder to ensure they are able to deliver the expected results as proposed without such expectation. Increasing the project cost under this basis does not benefit the state.
- It is unnecessary. The stated intent for this part of the legislation is to allow negotiations to occur for construction bids when the winning bid is higher than the price the government believes it should be based on its internal estimate. There are already mechanisms in place to allow this:
  - If all bids for a construction project exceed available funds, the current procurement code already provides for a process to allow for the reduction of

scope to bring the bid of the lowest responsible, responsible bidder within budget to facilitate award.

- The code also provides for an SPO-approved alternative procurement method, which may include negotiations with the lowest bidder, to make award in such circumstances. This process gives SPO review and approval rights which would be absent in the proposed legislation.

**PART V - 24 Hour Period after the bid submission deadline to ‘clarify or correct non-material or technical information’ in the subcontractor listing, provided that any additions or substitutions of listed joint subcontractors shall be prohibited.**

This requirement is inadvisable because:

- It artificially extends the bid deadline to allow bidders to make corrections, rather than the current process which expects bidders to be disciplined in the formation of their bids.
- It instead shifts the responsibility of facilitating corrections to the State and significantly increases the State’s administrative burden for the following reasons:
  - The submission deadline no longer coincides with the bid opening; and
  - Allowing bidders to submit corrections for a twenty-four hour period after the submission deadline requires the State to keep track of such submittals to ensure that the most recently submitted version of the subcontractor listing is included with the bid package before the package can be opened; and
  - It requires the State to now compare the original version of the subcontractor listing with the version last submitted by each bidder to ensure that any changes

made to the subcontractor listing are, in fact, “non-material or technical information”.

- Rather than reducing the chance for protests over the subcontractor listing, it creates additional problems by:
  - Introducing the possibility of collation errors;
  - Introducing subjectivity to the process by requiring procurement personnel to make subjective decisions about whether the changes made are “non-material or technical”; and
  - Reducing the transparency and perceived fairness of the process, because it makes part of the process opaque.
- This legislation, by enabling the practice of submitting inaccurate bids by the original deadline, may attract bidders who may not be able to perform and meet deadlines if the contract is awarded to them.

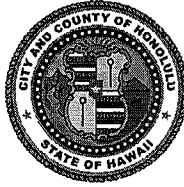
Thank you for the opportunity to submit testimony on this matter.



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  
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RICK BLANGIARDI  
MAYOR



ALEX KOZLOV, P.E.  
DIRECTOR

HAKU MILLES, P.E.  
DEPUTY DIRECTOR

March 23, 2021

The Honorable Aaron Ling Johanson, Chair  
The Honorable Lisa Kitagawa, Vice-Chair  
and Members of the Committee on Consumer Protection & Commerce  
The House  
State Capitol, Conference Room 329  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Johanson, Vice-Chair Kitagawa, and Members:

SUBJECT: Senate Bill No. 788 SD2 HD1  
Relating to the Procurement

The Department of Design and Construction (DDC) respectfully **opposes** Section 9 of Senate Bill No. 788 SD2 HD1. Section 9 proposes to amend Hawaii Revised Statutes (HRS), Section 103D-310, subsection (b) to read, "...For the purpose of making a responsibility determination, the procurement officer shall possess or obtain available information sufficient to be satisfied that a prospective offeror meets the applicable standards, including consideration of past performance as it applies to a responsibility determination for the current solicitation..."

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 revision to HRS, Section 103D-310, subsection (b) 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

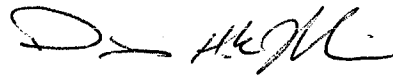
The Honorable Aaron Ling Johanson, Chair  
and Members of the Committee on Consumer Protection & Commerce  
March 23, 2021  
Page 2

with the additional administrative effort that would be mandated by this proposed amendment and the potential for additional protests and delays that would need to be addressed.

Based on the above consideration, DDC respectfully **opposes** Section 9 of Senate Bill No. 788 SD2 HD1.

Thank you for the opportunity to express our opposition to Section 9 of this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Alex Kozlov". The signature is fluid and cursive, with a large initial "A" and "K".

*AK* Alex Kozlov, P.E.  
Director

~~LATE~~ \*Testimony submitted late may not be considered by the Committee for decision making purposes.\*  
***SAH - Subcontractors Association of Hawaii***  
***1188 Bishop St., Ste. 1003\*\*Honolulu, Hawaii 96813-2938***  
***Phone: (808) 537-5619 ✦ Fax: (808) 533-2739***

March 24, 2021

Testimony To: House Committee on Consumer Protection & Commerce  
Representative Aaron Ling Johanson, Chair

Presented By: Tim Lyons, President

Subject: S.B. 788, SD 2, HD 1 – RELATING TO PROCUREMENT

Chair Johanson 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 AND AIR CONDITIONING NATIONAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We can generally support this bill but respectfully request clarification.

The gist of this bill comes out of recommendations by a third party consultant hired by the State to study the procurement system.

The amended version of this bill is supportable by us conditioned by no further amendments to Part V, Section 14 (b) (1) and (2). This is a huge compromise on our part and that we are willing to accept on a trial basis.

Secondly, we are also concerned with the intent and application of the new language proposed in Part IV, Section 12 103D-302(2)(h)(2) regarding instances when the lowest bid differs from the State estimate. The language appears to allow negotiations with the low bidder to align with the State's estimate.

Our translation of this results in advise to "dive on the job" and negotiate right up to under the #2 bid, and you will get the job. That does not sound like a reasonable way to conduct procurement.

Thank you.



March 15, 2021

Representative Aaron Ling Johanson, Chair  
Representative Lisa Kitagawa, Vice Chair  
House Committee on Consumer Protection and Commerce

Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

**SUBJECT: SB788 SD2 HD1 RELATING TO PROCUREMENT**

My name is Gregg Serikaku, Executive Director for the Plumbing and Mechanical Contractors Association of Hawaii, and we are the State's largest association representing plumbing, air conditioning, refrigeration, steamfitter, and fire sprinkler contractors in Hawaii.

We support the position of the Subcontractors Association of Hawaii which clarifies the extent of the proposed allowances to correct non-material or technical information of the listed joint contractors or subcontractors. Such allowances should not include any additions, substitutions, and/or changes to the nature and scope of work of the joint subcontractors listed at the time of bid, as these are the exact types of changes that would significantly increase the practice of bid shopping.

Bid shopping reduces quality on the job, discourages competition, artificially inflates prices, and promotes unfair and unethical practices, therefore we strongly encourage this committee to adopt the recommended language.

Thank you for this opportunity to provide our testimony.

Respectfully yours,

A handwritten signature in black ink that reads "Gregg S. Serikaku". The signature is written in a cursive style.

Gregg S. Serikaku  
Executive Director

Painting Industry of Hawaii Labor Management Cooperation Trust Fund

Hawaii Tapers Market Recovery Trust Fund

Hawaii Glaziers, Architectural Metal Glassworkers Local Union 1889  
AFL-CIO Stabilization Trust Fund

Carpet, Linoleum and Soft Tile Local Union 1926 Market Recovery Trust Fund

March 23, 2021

Representative Aaron Johanson  
House Committee on Consumer Protection & Commerce  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: Senate Bill 788, SD2, HD1 (Relating To Procurement)  
Hearing date: March 24, 2021  
Time: 2:00 p.m.

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Chair Johanson and Members of the Committee:

Thank you for this opportunity to submit testimony on behalf of the Painting Industry of Hawaii Labor Management Cooperation Trust Fund, Hawaii Tapers Market Recovery Trust Fund, Hawaii Glaziers, Architectural Metal Glassworkers Local Union 1889 AFL-CIO Stabilization Trust Fund, and Carpet, Linoleum and Soft Tile Local Union 1926 Market Recovery Trust Fund **in opposition** to Senate Bill 788, SD2, HD1. The aforesaid organizations are labor management cooperation funds between the Painters Union, Tapers Union, Glaziers Union, and Carpet and Soft Tile Layers Union and their signatory contractors.

We are in **strong opposition** to certain parts of Senate Bill 788, SD2, HD1. The parts we oppose would: 1) allow the government procurement agency to negotiate increases or decreases in the bid amount of the lowest bidder as a routine matter (Part IV of the Bill); 2) allow a bidder on a public construction project up to twenty-four hours after the submission of bids to "clarify and correct" non-material or technical information regarding its listing of subcontractors (Part V); and 3) changes the statute to mandate acceptance of non-compliant bids if the amount of the bid is less than 1% of the total bid amount (Part V).

First, allowing a procuring agency to negotiate the low bid price after opening of bids under vaguely defined circumstances (Part IV of this Bill), instead of only in one very specific and limited circumstance, could raise serious transparency issues. Such a process could encourage unscrupulous bidders to submit unrealistically low figures in the hope that it will win the award, then try to cure any actual price deficiency through the negotiation process. Our public procurement process should not encourage such gamesmanship.

The second reason for our opposition to this measure is that amending the Procurement Code to allow clarification or correction of non-material or technical information in a bid (Part V of this Bill) is entirely unnecessary, because such corrections are already expressly allowed under Hawaii Revised Statutes §103D-302(g). That section provides in pertinent part:

Correction or withdrawal of inadvertently erroneous bids before or after the award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes **shall be permitted** in accordance with rules adopted by the policy board.

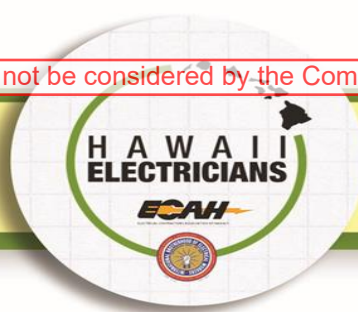
[Emphasis added]. Since the Procurement Code already expressly allows pre-award bid corrections as a matter of law, there is absolutely no need for Part V of this Bill. Enacting Part V of this Bill would only lead to more confusion and increased bid protests.

Finally, Part V of this measure also changes the existing law, which gives the procuring agency the discretion to accept a non-conforming bid if doing so is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount. Under this bill, a non-compliant bid must be accepted if the value of the work to be performed by the

joint contractor or subcontractor is equal to or less than one per cent of the total bid amount. Especially for large public projects, this drastic change will allow a general contractor to bid shop subcontractors in the smaller specialty trades trades, such as ours, on every project where the value of work may not equal or exceed 1% of the total amount of a bid.

For all of these reasons, we respectfully ask that the Committee defer this Bill or, at the very least, delete Parts IV and V of this Bill. We take no position regarding those provisions of this Bill involving design professionals and those provisions which establish and mandate the use of a past performance database.

Thank you again for this opportunity to share with you our **opposition** to this measure.



1935 HAU STREET, ROOM 300 • HONOLULU, HAWAII 96819 • PHONE (808) 841-6169 • FAX (808) 847-4596

March 24, 2021

TO: HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE  
Hearing on Wednesday, March 24, 2021, at 2:00p.m., Conference Room 329 and VIA  
VIDEOCONFERENCE

RE: Testimony OPPOSED to SB 788 SD2 HD1

Honorable Chair Aaron Ling Johanson, Vice Chair Lisa Kitagawa, and Committee Members:

The Hawaii Electricians Market Enhancement Program (HEMEMP) is a labor-management cooperation between IBEW Local 1186 and its 3,400 members, the Electrical Contractors Association of Hawaii, and over 120 signatory Electrical Contractors seeking to make fair contracting and law compliant behavior the norm in the State of Hawaii electrical industry.

HEMEMP must **OPPOSE** SB 788 SD2HD1 unless *critical amendments* are made to this bill. Specifically, Part IV, Section 12, 103D-302(h)(2), seeks to allow a purchasing agency to negotiate with a low bidder to INCREASE their bid to align with the State's estimate.

This action appears to reward, or at the very least fails to prevent, bids that may be irresponsible or submitted in such a way to "dive the bid". Bidding in this manor could expose the agency, and the taxpayers, to unscrupulous contractors and inadvertently open the door to corruption. *This proposed language should be completely removed from the bill or the whole bill tabled.*

HEMEMP also OPPOSES Part V, Section 14, 103D-302(b), which changes language that states an agency may accept a bid, to shall accept the bid if the subcontractor is not listed for work that is valued at equal to or less than one percent of the total bid. Complete and total transparency is vital for successful public works projects, and an agency should maintain the prerogative to require subcontractors be listed even if the work is small. *These proposed amendments should not be accepted.*

Mahalo to the Committee for allowing HEMEMP to testify on this measure.

Sincerely,

Ryan Takahashi  
Director of Compliance



1065 Ahua Street  
Honolulu, HI 96819  
Phone: 808-833-1681 FAX: 839-4167  
Email: [info@gcahawaii.org](mailto:info@gcahawaii.org)  
Website: [www.gcahawaii.org](http://www.gcahawaii.org)



# GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

March 23, 2021

TO: HONORABLE AARON LING JOHANSON, CHAIR, HONORABLE LISA KITAGAWA, VICE CHAIR, COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

SUBJECT: **PROVIDING COMMENTS ON S.B. 788 S.D.2 H.D.1, RELATING TO PROCUREMENT.** Allows selection committees for procurement of professional services to weigh the selection criteria in the order of importance relevant to their agency and project. Beginning 12/31/2022, requires the state procurement office to develop a vendor past performance information system. Gives the head of a purchasing agency the option to negotiate an adjustment of a bid for construction procurements to more closely align with an internal project price estimation. Allows a bidder of a public works construction project to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline. Requires bids for construction to be publicly opened no sooner than twenty-four hours after the bid submission deadline..

#### HEARING

DATE: Wednesday, March 24, 2021  
TIME: 2:00 p.m.  
PLACE: Capitol Room 329

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

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA is providing **comments** and suggested amendments to S.B. 788 S.D.2 H.D.1.

GCA is in opposition to part III of this measure and believes that the language could have the unintended consequence of increasing administrative costs, creating additional bureaucracy, and increasing the number of protests. Past performance introduces a considerable amount of subjectivity that will result in increased protests. GCA agrees with DAGS testimony on past performance (See SB1017 and HB526).

Additionally, GCA has concerns regarding part IV of the measure. This provision could have the unintended consequence of encouraging low bids to negotiate a higher amount later. It also opens the door for more protests and delays.

GCA is in strong support with amendments of part V which seeks to reduce the risks of protests due to the subcontractor listing requirements of the Procurement Code. The subcontractor listing requirement has become a way in which bidders attack the responsiveness of a proposal, resulting in awards to non-low bidders, increased costs to the state and taxpayers, and delayed projects due to a technicality in the submitted subcontractor list. As a result, not only does the lowest bidder and their listed subcontractors get disqualified from the project, but the state could end up paying more for the project.

Under this part, the procurement officer would close the bidding in the usual manner, but would not open the bids until twenty-four hours after the closing. Each bidder shall have twenty-four hours after the bid closing to clarify and correct minor technical issues with the subcontractors list requirements under Section 103D-302, HRS. The proposed change will permit the bidder to ensure that all subcontractors who have submitted bids to the general contractor have met all of the requirements to perform work on state and county projects, including meeting all licensing, bonding and insurance requirements, as applicable. The additional time is necessary because in most cases the general contractor does not receive bid prices from the various subcontractors until shortly before the bid must be submitted to the state agency. This means that the general contractor does not have time to check whether the subcontractors who have submitted bids meet the requirements to work on the job, especially the proper licenses issued by the Contractors License Board. Given the large number of "C" (currently over 100 issued and growing), it becomes increasingly difficult for the general contractor to ascertain licenses and verify whether every subcontractor has the proper license to perform the work he has submitted a bid to do.

This legislation is not an attempt to give general contractors an advantage in submitting bids, nor is it, as some may argue, an opportunity to bid-shop. Instead, this legislation is increasing efficiency in the procurement process by allowing contractors to verify the information that subcontractors provide. The bill does not permit the contractor to change its proposed bid amount. The twenty-four hours will permit the bidder to ensure the subcontractor/joint contractor list is complete and listed subcontractors/joint contractors are properly licensed, are bondable (where applicable), and have all the required insurance coverage. This will reduce the likelihood of errors and result in reducing the number of bid protests which often delay public works projects and, in some cases, increase the cost of public works project for the state. This will result in more complete and accurate bid submittals and reduce the number of potential bid protests.

This would be very similar to California's process and was included as an unofficial suggestion in the independent report submitted by the State Procurement Office. The report can be found here: [https://spo.hawaii.gov/wp-content/uploads/2020/01/CPFR-Report\\_HR142-SLHL-2016-FINAL\\_01-13-20.pdf](https://spo.hawaii.gov/wp-content/uploads/2020/01/CPFR-Report_HR142-SLHL-2016-FINAL_01-13-20.pdf)

The relevant portion starts on page 111 and the suggestion to adopt a variation of California's model, which allows a 24 hour period to correct errors appears at the bottom of page 114 of the report. Further, the report specifies that in 2018, subcontractor listing accounts for over 60% of all construction related bid protests and that 45% of all protests the State received (including all protests related to non-construction) alleged a defect in the listing of subcontractors for a construction project.

GCA asks that the language read:

SECTION 14. Section 103D-302, Hawaii Revised Statutes, is amended by amending subsections (b), (c), and (d) to read as follows:

"(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall [specify]:

(1) Specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each[.]; and

(2) Allow the bidder to clarify or correct non-material or technical information required by paragraph (1) for up to twenty-four hours after the bid submission deadline; provided that any additions or substitutions of listed joint contractors or subcontractors shall be prohibited, including changes to the nature and scope of work listed, unless the criteria in subparagraph (A) are met.

(A) The substitution of a listed joint contractor or subcontractor shall only be permissible when:

(1) The listed joint contractor or subcontractor provides written notice verifying that they agree to the substitution; and

(2) The General Contractor provides a written declaration that the replacement joint contractor or subcontractor will not be paid less than the replaced joint contractor or subcontractor."

This language should reduce the number of bid protests while guarding against bid shopping. Thank you for this opportunity to provide comments on this measure.

**SB-788-HD-1**

Submitted on: 3/24/2021 1:25:41 PM

Testimony for CPC on 3/24/2021 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Janice Marsters	Hart Crowser	Oppose	No

Comments:

Dear Representatives,

My apologies for the late testimony. I just became aware of this bill and have deep concerns about unintentional consequences and potential damage to transparent and fair procurement of design professional services provided by 103D-304. I urge you to remove that section of the bill until the design professional community and public agencies have had more time to discuss the findings of the State Procurement Office report and to find an appropriate solution that safeguards the public interest.

Thank you,

Janice Marsters



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March 24, 2021

**House Committee on Consumer Protection & Commerce**  
**Hearing Date: Wednesday, March 24, 2021, 2:00 p.m.**

Honorable Representatives Aaron Ling Johanson, Chair; Lisa Kitagawa, Vice Chair; and Members of the House Committee on Consumer Protection and Commerce

Subject: **SB 788 SD2 HD1, Relating to Procurement**  
**TESTIMONY IN OPPOSITION, with recommendations for revised language**

Dear Chair Johanson, Vice Chair Kitagawa, and Committee Members:

The American Council of Engineering Companies of Hawaii (ACECH) represents more than 70 member firms with over 1,500 employees throughout Hawaii. ACECH member firm projects directly affect the quality of the water we drink and the food we eat; the safety of our buildings, highways, bridges, and infrastructure; and the quality of the environment in which we work and play.

We understand that the subject bill is intended to implement some of the recommendations that are described in a procurement review report prepared by a private consultant to the State Procurement Office (the Ikaso Consulting Report, dated December 18, 2019).

We are deeply concerned with the unintended consequences associated with implementing "recommendation I-2" of the Ikaso Consulting Report, which is what Part II of this bill is about. Although the intent of "recommendation I-2" and the current language in Part II of this bill is to align section 103D-304(e) of the Hawaii Revised Statutes (HRS) with Section 306.602-1 of the Federal Acquisition Regulations (FAR), it does not.

We propose that if the committee wishes to align HRS section 103D-304(e) with the Federal procurement code, that it do verbatim but using the same language as FAR Section 306.602-1, which we can provide. We would also be willing to meet and assist with revised language.

Our chief concern is that merely deleting the phrase "in descending order of importance" from the current language in HRS section 103D-304(e) will reinstate the loopholes in the procurement system that HRS §103D-304 was designed to protect against – a system that was rife with abuse and corruption,

We appreciate the opportunity to provide testimony on this matter. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,  
AMERICAN COUNCIL OF ENGINEERING COMPANIES OF HAWAII

A handwritten signature in black ink that reads "Garret A. Masuda".

Garret Masuda, P.E.  
President