

SB-788-SD-2

Submitted on: 3/16/2021 8:03:09 AM

Testimony for GVR on 3/17/2021 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Christine Kinimaka	DAGS	Support	No

Comments:

I am available for comments.



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 586-0554
email: state.procurement.office@hawaii.gov
<http://spo.hawaii.gov>

**TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE HOUSE COMMITTEE
ON
GOVERNMENT REFORM**

MARCH 17, 2021, 10:00 A.M.

**SENATE BILL 788, SD2
RELATING TO PROCUREMENT**

Chair McKelvey, Vice Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 788, SD2. 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 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:

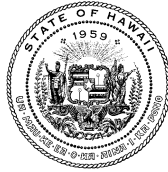
	Delivery	Funding Request
1	Past Performance Guide	\$15,000
	Prepare a past performance implementation guide that provides information for Hawaii contracting officers with more user-friendly detailed instructions on how to effectively implement the Administrative Rules into practice. The implementation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

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 GOVERNMENT REFORM

WEDESDAY, MARCH 17, 2021, 10:00 A.M.
CONFERENCE ROOM 309, STATE CAPITOL

S.B. 788, S.D. 2

RELATING TO PROCUREMENT.

Chair McKelvey, Vice Chair Wildberger, and members of the Committee, thank you for the opportunity to submit testimony supporting the intent of S.B. 788, S.D. 2, 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, 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;
and

- 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; and
- 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:

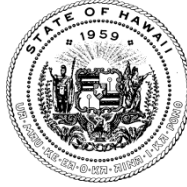
- It artificially extends the bid deadline to allow bidders to make corrections, rather than the current process which expects bidders to be disciplined in the formation of their bids.
- It instead shifts the responsibility of facilitating corrections to the State and significantly increases the State’s 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.

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
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 17, 2021
10:00 A.M.
State Capitol
Conference Room 309
VIA VIDEOCONFERENCE

**S.B. 788, S.D. 2
RELATING TO PROCUREMENT**

House Committee on Government Reform

The Department of Transportation (DOT) **supports the intent** of the bill for the overall purpose of increasing economy, efficiency, effectiveness, and impartiality in public procurement.

DOT supports the intent of maintaining the current selection criteria for professional services procurements as outlined, however, allowing the respective selection committees the flexibility to weigh the selection criteria in the order of importance relevant to their agency and project.

DOT supports the intent of past performance as a valuable and appropriate factor for evaluation in competitive sealed proposals and professional services methods of procurement. Past performance may be used to provide relevant and pertinent information for procurement stakeholders in determining and evaluating the responsibility component of an offeror during selection and award. Past performance, as another level of consideration and diligence in evaluating responsibility, may 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.

DOT supports the intent of allowing the head of the purchasing agency the option to negotiate a reduction in scope adjustment of an otherwise successful bid for construction procurements to closer align with not only available funds, but internal project estimation. In the competitive sealed bidding method, bidders are responding to the complete specifications and plans, as developed, vetted, and advertised by the State in response to the agency's procurement need and respective budget. In the event a bidder submits a reasonable and realistic bid less than the estimated project estimate, the State has received an acceptable bid, subject to evaluation, with no further negotiation required for award.

DOT offers strong comments of concern (opposition), specifically regarding the proposed amendment to allow bidders of public works construction projects to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline and requiring bids for construction be publicly opened no sooner than twenty-four hours after the bid submission deadline.

The competitive sealed bidding or IFB method of procurement, as the default method, is structured with the intent to ensure fair, ethical, and open bidding opportunities with award to the lowest responsive and responsible bidder. The procurement requirements outline reasonable timelines for advertising, amendments by means of addenda, pre-bid conferences for added clarification and information, and a designated date and time for public bid opening. These guidelines serve to optimally create a procurement environment for fair and ethical competition and bids are evaluated through an objective and measurable process.

Bidders respond to publicly advertised solicitation(s) freely, mindfully, and intentionally. Further, when a bidder responds to an advertised solicitation, the bidder has committed to and bears the responsibility of fulfilling the bidding requirements of the solicitation, to include adherence to bid specifications and provisions with respective timelines. Given the designated date and time explicitly outlined in the bid documents for public reading or electronic opening, it is the bidder's sole responsibility to adequately and diligently prepare their bids for submission by the designated deadline.

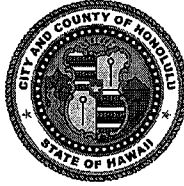
The proposed twenty-four hour extension of the public bid opening of sealed bids after the bid submission deadline for purposes of clarifying and correcting bid issues creates the potential of issues like bid shopping for subcontractor listing and dilutes the responsibility factor of the bidder in preparing an acceptable bid by the designated deadline.

Thank you for the opportunity to provide testimony.

**DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU**

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

RICK BLANGIARDI
MAYOR



ALEX KOZLOV, P.E.
DIRECTOR

HAKU MILLES, P.E.
DEPUTY DIRECTOR

March 15, 2021

The Honorable Angus L.K. McKelvey, Chair
The Honorable Tina Wildberger, Vice-Chair
and Members of the Committee on Government Reform
The House
State Capitol, Conference Room 309
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair McKelvey, Vice-Chair Wildberger, and Members:

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

The Department of Design and Construction (DDC) respectfully **opposes** Section 9 of Senate Bill No. 788 SD2. 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

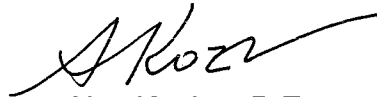
The Honorable Angus L.K. McKelvey, Chair
and Members of the Committee on Government Reform
March 15, 2021
Page 2

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.

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 'A Kozlov', with a long horizontal flourish extending to the right.

Alex Kozlov, 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

March 17, 2021

Testimony To: House Committee on Government Reform
Representative Angus L.K. McKelvey, Chair

Presented By: Tim Lyons, President

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

Chair McKelvey 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 an amendment.

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

This bill offers a change purportedly to address the area of protests. It is felt that general contractors are too busy prior to submittal of their bids to check and verify the information required to list their subcontractors (we disagree). By statute this information is specified as the name of the company and the nature and scope of their work. This bill allows the general contractors two (2) two hours after bid submittal to make corrections to their sub list.

We are fearful that this will open the way for possible bid shopping and bid chiseling, a practice all have condemned. The language in SD 1 needs additional clarification to limit the game playing that may occur.

In that light, we recommend that on page 16, line 19 we add the underscored:

(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 and/or substitutions of listed joint subcontractors are strictly prohibited including changes to the nature and scope of work as listed.

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 for considering our amendment to add nature and scope prohibition language.



1088 BISHOP STREET #408
HONOLULU, HI 96813
PH: (808) 597-1216

GREGG S. SERIKAKU
EXECUTIVE DIRECTOR

March 15, 2021

Representative Angus L.K. McKelvey, Chair
Representative Tina Wildberger, Vice Chair
House Committee on Government Reform

Chair McKelvey, Vice Chair Wildberger, and Members of the Committee:

SUBJECT: SB788 SD1 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.

While we do understand the intent of the proposed allowance to correct non-material or technical information as a means to avoid frivolous protests, we do believe that additional language is needed to clarify the extent of these allowances. In this regard, our Association would like to recommend a revision to Part V, Section 14(b)(2) as follows:

(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, substitutions, **and/or changes to the nature and scope of work of the joint subcontractors listed at the time of bid** shall be prohibited.

This added language clarifies that any changes to the nature and scope of work of listed subcontractors should not be allowed, 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".

Gregg S. Serikaku
Executive Director



Founded 1889

PLUMBERS AND FITTERS LOCAL 675 UNITED ASSOCIATION



March 16, 2021

Representative Angus McKelvey, Chair
Representative Tina Wildberger, Vice Chair
House Committee on Government Reform
State Capitol, 415 South Beretania Street, Video Conference
Honolulu, Hawaii 96813

Re: SB788 SD2 Relating To Procurement
Wednesday, March 17, 2021 at 10:00 am

Aloha Chair, Vice-Chair, and Committee Members;

Chartered in 1919, the Plumbers and Fitters UA, Local 675 is one of the oldest organized labor unions in Hawai'i and one of three 'licensed' skilled-construction trades, steeped in a rich history as one of Hawai'i's construction-industry pioneers.

The Plumbers and Fitters UA Local 675, supports the intent of Senate Bill 788 SD2 as amended, however respectfully suggests additional amendments to section 12 of the measure.

Section 12 allows that if the lowest responsible and responsive bid for a construction procurement significantly differs from the amount estimated by the State for that project, the head of the purchasing agency may engage in negotiations with the lowest bidder...which may include the reduction or increase of the bid amount to align with the State's estimate.

We believe that allowing for an increase to the lowest bid amount would not only increase costs to the State and to the taxpayer's but encourage possible manipulation of the procurement process and allow for intentional unfair and unrealistic low bids with the intent to negotiate up to the State's estimate.

As such, we support the intent to allow for negotiations that reduce the bid amount to align with the State's estimate, but respectfully request provisions that allow for the increase of bids to be removed from the measure.

Mahalo for the opportunity to testify.



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 16, 2021

Representative Angus L.K. McKelvey
House Committee on Government Reform
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Senate Bill 788, SD2 (Relating To Procurement)
Hearing date: March 17, 2021
Time: 10:00 a.m.

Chair McKelvey 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. 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. 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); and 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).

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.

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 our **opposition** to this measure.

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcawhawaii.org
Website: www.gcawhawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 23, 2021

TO: HONORABLE ANGUS MCKELVEY, CHAIR, HONORABLE TINA WILDBERGER, VICE CHAIR, COMMITTEE ON GOVERNMENT REFORM

SUBJECT: **PROVIDING COMMENTS ON S.B. 788 S.D.2, RELATING TO PROCUREMENT.** Implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016. Allows a bidder for a construction contract to clarify and correct non-material or technical issues with subcontractor listings for up to 24 hours after the bid submission deadline; provided that the bidder is prohibited from adding or substituting listed joint subcontractors. Requires that bids for construction be publicly opened no sooner than 24 hours after the bid submission deadline.

HEARING

DATE: Wednesday, March 17, 2021
TIME: 10:00 a.m.
PLACE: Capitol Room 309

Dear Chair McKelvey, Vice Chair Wildberger 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, which implements certain recommendations of the procurement policy review conducted pursuant to House Resolution No. 142, Regular Session of 2016, including allowing a bidder to clarify and correct non-material or technical issues with subcontractor listings for up to twenty-four hours after the bid submission deadline and requires that bids for construction be publicly opened no sooner than twenty-four hours after the bid submission deadline.

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

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 the addition or substitution of a listed joint subcontractor shall only be permitted when it is determined that the subcontractor does not meet the required licensing, bonding, or insurance requirements."

Thank you for this opportunity to provide comments on this measure.