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**STATE OF HAWAII**  
**DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES**


P.O. BOX 119, HONOLULU, HAWAII 96810

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MEMORANDUM

TO: Senator Sharon Y. Moriwaki, Chair  
Senate Special Committee on Procurement (SCP)

FROM: Christine L. Kinimaka, Public Works Administrator 

SUBJECT: Senate Special Accountability Committee on Procurement Informational Briefing  
Follow-Up Questions

Thank you for reaching out to Comptroller Otaguro to continue this exchange of information and ideas. I am responding on his behalf to the Public Works Division questions from your August 13, 2021, memorandum requesting additional information. Your questions and our responses follow.

3. *Public Works Division (PWD)*: It has been noticed that contractors bid for the amount appropriated for a project or a few dollars below the appropriation. To avoid contracts based on the appropriation rather than on the contractor's assessment of the work required and cost, it is requested that the department research other jurisdictions to find a better solution for the state, e.g., lump sum appropriations so the dollar amount appropriated for a project is masked. This would allow for a fairer assessment and bids based on the work to be performed. Or, if there is a problem in lump sum appropriation, what can your in-house staff do to clearly identify the scope of work of the consultants so both the consultants and in-house professional staff carefully review the scope and/or requirements to satisfy any client before the project goes out to bid. This would avoid discrepancies and possibly generate fewer change orders. What is your department doing to address the above concerns? Please provide suggestions to address them.

**While the bid notices published by DAGS do not provide information as to project budgets, for project-specific appropriations, contractors are able to access the bill texts published on the legislature's website.**

**That said, based on our past bid results, we have not seen a pattern where contractors have been bidding a few dollars below the appropriation amount. If that is indeed happening in other Departments, that would be unfortunate because that would mean that collusion may be occurring. We are interested to see the records that support this theory and hope that they are being investigated and prosecuted, if applicable.**

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**We do support lump sum appropriations for the purpose of allowing us more flexibility in developing the scope and budget for individual projects. However, lump sum appropriations should not be used expressly for the purpose of preventing collusion.**

**Many of our CIP projects are now being funded through lump sum appropriations (i.e., appropriations that are not project-specific), including projects from other departments, so that the project budget is not readily discernable. For all projects, we work closely with the program, our staff, and consultants to be as thorough as feasibly possible to complete due diligence for development of project bid documents. The challenge for achieving the “perfect” bid package is three-fold:**

- A. The effect of short-fused project appropriations combined with loss of staff and staff shortages affecting both client programs and our own team impact our ability to carry increasing workloads while providing the oversight necessary to administer projects in time with project budget deadlines. Corporate knowledge of program needs and history are also increasingly prevalent handicaps, and for many of our clients, DAGS staff and records provide what continuity that remains. Many resources – time, money, manpower – are drained in this effort, often leading to user-requested construction phase change orders or worse, unfinished projects. This last negative impact is summarized in our Salmon Ladder discussion on slides 48 and 49, attached.**
- B. The existence of accurate “as-built” drawings is increasingly rare, particularly for the State’s aging facilities and infrastructure. In order to keep construction projects flowing, the industry relies on contractors to record actual installation departures from contract documents. We cannot afford to have scribes follow every installation throughout the life of the construction phase for every project. Our own Construction Management staff and consultants, who are not usually contracted to inspect construction activities, can only spot-check the work progress on each of their projects. Contractor submitted field variations from design plans are officially recorded at the time of construction completion. By then, the most critical information – hidden conditions – are difficult to validate as correctly recorded. Who do we place the responsibility and liability on when as-builts are not accurate, particularly years and decades later, when so many unrecorded changes may have been made? For construction under contract, the answer is the contractor: Contractors are obligated to redline daily field changes from contract plans and specs. Within the construction industry, the responsibility of the contractor to prepare accurate as-built documents is a common contractual requirement. Given this, PWD has been improving our as-builts collection efforts. Under the current general conditions, DAGS will not release final payment until the contractor submits acceptable as-builts.**
- C. In practice, there is a balance between how much pre-bid due diligence and investigative work is feasible and practical. There are tremendous time and cost impacts associated with the level of effort required to “account for all conditions**

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during design.” Hidden conditions especially require testing and analysis to illuminate. This can be achieved using non-destructive and destructive investigation methods. Both require time, manpower, and money. To the extent possible and feasible, we use practical, non-destructive investigative measures. Where essential, we include destructive testing, such as coring through building materials, spot excavation, or partial demolition of building/site components. These methods, however, can only provide certainty for the specific location at which each actual test is conducted. Varying conditions may exist elsewhere, but spot testing may not indicate their existence. In addition, these methods may require short- or long-term relocation of building occupants and furnishings, as well as partial repair/restoration to keep the facility functional and safe until the project is completed. How much investigation is enough? How

much time and effort do we expend to achieve 100% accuracy? Where will funding for the destructive testing and repair come from? How much time is available to implement these measures (especially given the relatively short timeframes associated with the lapsing of appropriated funds)? All of these considerations must be weighed to best address the risks of unforeseen conditions.

To quote a local mentor: “There are some who fear that the plates will shift and the island will slip into the ocean. Does that mean that we start drilling anchors to prevent that from happening? Some say that an asteroid will eventually hit the earth and obliterate all life. Does that mean we start building some kind of barrier to protect us from it? The point is that, yes there are many things that are possible, but we plan for what is probable.” This also holds true for what we do in DAGS. There aren’t enough resources to plan for anything and everything that could possibly be encountered on a construction project. That would be unfeasible, take an unreasonably large amount of time, and would be a waste of precious tax dollars. What we do is we plan on what is probable and do our best to make a reasonable effort to mitigate risk during design, and if something unusual is discovered later during construction we will address it at that time via the mechanism called the change order.

And finally, it has long been recognized as fact that there is no such thing as 100% accurate plans and specifications. Therefore, the big challenge is determining how these risks are addressed by either the State or the contractor. Owners must provide the information gleaned from as much pre-bid due diligence as possible and feasible; contractors must do their own due diligence to ensure their bids are as complete as possible to deliver an acceptable project. But we must remember that, under the Spearin Doctrine, the owner bears ultimate responsibility for the costs of conditions not set forth in the construction documents, whether or not those conditions are hidden or otherwise unforeseen.

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4. The PWD administrator indicated that there are many areas in which new laws are not needed, but rather, increased enforcement and implementation of current laws should be the primary focus. Please identify these areas where enforcement/implementation of the current law is needed; and what your department is doing to enforce these laws. Enforcement would also be helpful if the state's licensed engineers and/or architects know and understand the laws to make decisions to enforce when necessary. Do you ensure that they do? If you do, provide the procedures you follow. And, if not, why not; and provide a proposal on how to more effectively enforce the procurement law.

**The main function of all DAGS staff is to implement and enforce the procurement law.**

**All DAGS staff (including licensed and unlicensed) are trained to implement and enforce procurement law as required by the procurement code and the State Procurement Office. DAGS has internal policies and procedures which implement procurement law.**

**Still, there are some measures in the procurement codes that the State may not be utilizing to the fullest extent to achieve optimal outcomes using taxpayer dollars. The current procurement codes provide both the structure and flexibility needed to achieve many of the goals being sought in recent legislative bills:**

- A. Minimizing award of projects to non-performing contractors: HRS 103D-702 provides for the SPO to suspend or debar persons who are negligent in the performance of awarded construction projects. The City and County of Honolulu has demonstrated the debarment of at least one non-performing contractor in recent years. While substantial time and cost resources are necessary to suspend or debar a non-performing contractor, state and local government agencies should take better advantage of HRS 103D-702 so that contractors realize the importance of performance. Overall, we believe this will be the more practical approach to addressing non-performing contractors within use of available resources and avoid offerors/bidders protesting the bid awards based on statewide past performance.**
- B. Full evaluation of qualifications and past performance on more complex or selected projects can already be implemented utilizing HRS 103D-302 – Multi-Step Competitive Sealed Bids or HRS 103D-303 - Competitive Sealed Proposals process. Most agencies already have internal evaluations of contractors' past performance that may be utilized to supplement evaluation of proposals for award. We do not support creation of a statewide past performance database, which will require full-time maintenance with additional resources, and which may limit evaluation criteria for specialty work specific to each agency. We anticipate this may significantly increase the potential for bid protests on construction awards.**
- C. HRS 103D Part VII Legal and Contractual Remedies also provides a solid foundation for addressing procurement issues.**

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5. The PWD administrator indicated that DAGS/PWD uses a timeline template that leads to consistent and fair application of the procurement laws. Please provide. If the deadlines using this template are not met by contractor/consultant, who on your staff is responsible for enforcing and what are the consequences of non- or late- performance?

**Our table B-1 is meant to be used as a guideline for overall project implementation and scheduling to ensure compliance with all key codes and regulations, including environmental, ADAAG, SHPD, building permits, etc., in addition to the procurement code. This template is only a guideline to forecast the probable date of project completion but is not used to enforce timely completion by consultants or contractors. All projects are unique, and this template is a starting point for consideration. Instead, Contractors and consultants are bound by schedules established by each project's unique requirements and/or constraints established as projects go through the various phases of project implementation. Once a project's requirements and/or constraints are established in a contract, our staff Project Coordinators and Area Architect/Engineers assigned to the projects, supported by our PWD team, are responsible for enforcement of the terms of contracts. Both consultant and construction contracts have consequences for non-performance and/or late performance ranging from non-payment to assessment of damages or more serious legal measures, including termination of contract or calling on performance bonds for construction contracts. For consultant contacts, in addition to non-payment, assessment of damages, and termination of contracts, the main "enforcement tool" is the consideration for future contracts with DAGS. Consultants are aware that they are evaluated for each of their projects, and poor performance will impede consideration for award of future projects.**

6. In reviewing the scope and cost/timeline of the department's contracts, we notice that contracts are hundreds of thousands of dollars over budget. How does the PWD accommodate for these cost overruns?

**The development of project scopes, budgets, and schedules includes consideration for cost contingencies at each project phase to the extent possible. The amount of contingency set-aside within the project budget is dependent upon the type of project (e.g. renovation vs. build new) as well as the complexity of the project and the urgency of its schedule. In those cases where the set-aside contingencies are insufficient, we confer with the owner to identify alternative courses of action and means for supplemental funding, if possible.**

7. On large construction jobs there should be a limit on the number and cost of change orders. Can the department research other jurisdictions on how they curtail unnecessary change orders? Would limiting the number and cost of change orders to no more than 5%, unless both the state and contractor agree that the request was unforeseen, be a solution?

**While the PWD team strives to reduce change order potentials, limiting the number of change orders is not practicable, as that metric is not meaningful when administering a project. More effective would be managing the increase in cost. National and local**

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**experience shows that the value of change orders on typical construction projects, whether public or private, should be expected to range from 10% to 20%; thus, imposition of a 5% limit would be unreasonable and unachievable. The most common metric in practice is to limit project increases to 10% without administrative review (i.e. head of procurement agency), with a ceiling of 20% overall. Above 20% would require review and/or approval at a higher administrative level. Our own experience is that the mandatory 20% threshold for administrative review/approval is not necessary, as a project approaching that level of change should already be put on the administrative radar for coordination and overall policy/guidance input. We should already be talking to the Governor, Directors, possibly legal counsel, and possibly the Legislature to ensure we have a clear path forward.**

8. How do we hold the consultants (and our state professionals) accountable for change orders that are mostly “unforeseen” but in reality, are not truly “unforeseen” and perhaps even a change in scope of the project? How and when do you “back charge” consultants where they clearly/completely miss details in either the drawings and/or the scope of work? How are our state professional staff held accountable?

**When a change order is deemed to be a design error, consultants’ professional liability insurance coverage comes into play. In general, consultants may be charged up to 10% of additional costs due to any gross error or omission for work that would have been included had the design been completed correctly. The consultants may also be held responsible to pay for all the costs of rework – work that was already installed and had to be demolished and rebuilt – due to a gross error or omission. State professional staff who act in good faith are educated and actions corrected to minimize repeat occurrence of the actions that led to such conditions. Repeated errors of the same nature may be cause for an employee rating of “does not meet expectations” on their performance review and evaluation, which in turn could potentially result in separation from service. In addition, there are legal and criminal penalties for staff who knowingly perform acts of negligence.**

9. In the cradle to grave discussion, the PWD administrator stated that several staff from the planning, design and construction branches are assigned to a project. However, they appear to still work in silos of their branches. Who has the ultimate responsibility over the contract when there are problems in performance or in approving change orders on a project?

#### **The Public Works Administrator.**

Who is responsible for the inspection of a project and how do they relate to the “cradle to grave team”?

**Our Construction Management Branch administers the construction phase of our CIP projects on Oahu. Within this branch, Inspectors are assigned for project inspection. The Inspectors, in turn, report to their supervisor, and work with the Area Engineers for construction quality issues. For neighbor island projects, the District Offices provide these same services. All of these members coordinate with their respective counterparts in the other branches (Planning, Project Management, and Technical Services) as necessary when**

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**the need arises. When issues of interpretation of construction documents arise, or when change orders are required during the construction phase, Project Management Branch and, if necessary, Planning Branch staff are involved in the discussion, for example, with regard to preparation of post-contract drawings, responses to RFIs, and similar activities, when necessary. In addition, our design consultant is also typically contracted for certain services during construction to provide continuity. Thus, the perceived use of silos is not actually the case – project-assigned staff coordinate and communicate throughout the lives of their projects. In addition, we conduct weekly Branch Managers meetings, so all branches are aware of, and can provide input and assistance on, significant issues on projects as they arise.**

Please provide a list of engineers assigned to inspect projects for the past two years and to whom they report.

**Please see the attached CMB Inspectors Hierarchy.**

10. Due to the cost of consultant services which appear to be duplicative of your licensed architects and licensed engineers on staff, please submit information on the scope of work of professional staff for each branch and the scope of work of the consultant working on the same project(s). Provide a matrix of criteria to determine the type/scope of projects that require contracting out for services and those that can be conducted by professional architects and engineers on staff.

**For any given project, consultant services are not duplicative of our professional staff duties. Our staff provide management and administrative oversight of projects, while our consultants provide the actual work products necessary at each phase of the project. This includes research, testing, analysis, technical project coordination, design, submittal reviews, specialty inspections, responses to requests for information, etc. We no longer have the capacity to do in-house design since we transferred our Design Branch to the DOE as part of Act 51, SLH 2004. Our administrative duties do require technical background and understanding for effective project management (e.g., for technical reviews of consultant-prepared design documents), however, the specific technical details and recommendations are provided by our consultants. Note that PWD does not hire consultants to administer/manage our projects, hence there is no overlap. In those few cases where we hire consultants to provide construction management services, the consultants are responsible for the bulk of field observations and reporting and general contract paperwork, but the actions and contract administration approving authority is still directly supervised and performed by PWD staff. Please see the attached Position Descriptions for Engineers/Architects in our Planning, Project Management, and Construction Management Branches. We are not providing a matrix because very few projects are done in-house.**

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11. Discussion on the professional staff work of your in-house engineers was unclear and did not provide the justification for licensed engineers on staff if their work is primarily project management. Provide the scope of work required and the competencies needed; and justification on whether a professional license is needed for project management.

**All of PWD's positions are civil service, subject to DHRD position descriptions. Please see the attached Position Descriptions as referenced in item 10, above. Where positions are in the Architectural/Engineer classes, it has been determined that a working level of Architect V/Engineer V expertise is commensurate with the level of knowledge, skills, and capabilities necessary to work independently on assigned work. The V level for Architects and Engineers also requires staff to be licensed. This is a solid baseline metric with which we may discern an applicant's capabilities to manage work at the level we require, as staff oversee licensed consultants in their day to day work. We have found that licensure is extremely useful for the peer-to-peer communications required for the majority of our projects; is necessary for our in-house technical reviews and critiques of consultant-prepared design drawings; and is also useful for enforcement of construction contracts for which the contractors raise questions of interpretation of the design documents.**

**There are no doubt exceptions to capabilities on an individual level. DAGS does employ a few unlicensed engineers and architects, one of whom just recently achieved licensure. Our unlicensed professional staff have the educational background required to equip them to be productive employees in their assigned lesser roles. Given the State's lack of recruitment tools (e.g., competitive compensation and benefits packages) to attract highly experienced and licensed professionals, we will likely have to continue to recruit unlicensed staff depending on the quality of the candidate and the particular job function. In some cases, an individual may be a licensed engineer or architect, just not in the State of Hawaii and therefore, do not meet our requirements to be "licensed." They may have the necessary knowledge and experience to perform the job, though they can only be compensated at the pay grade of the highest unlicensed engineer or architect. Overall, though, professional licensure remains a consistent, measurable, transparent metric with which to fairly evaluate applicants for hire.**

**Perhaps, at a later time we can discuss ideas on how the State may consider establishing co-op programs between the University of Hawaii and local consultant firms to provide the "gap" training necessary to satisfy both the need for hands-on training to equip students/recent graduates with necessary professional skills while also providing staff for State employment.**

12. Is the Comptroller or PWD administrator pursuing establishment of a project manager class? If not, please explain why this position would not be helpful or is not needed. If it is being pursued with the Department of Human Resources Development, what is the status? Please provide the draft position description and qualifications required.



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**DHRD has already finalized the Project Manager I class and is working on the Project Manager II class. Please see the attached position description and minimum qualifications. You may also view this information at this URL address:**

**<https://www.governmentjobs.com/careers/hawaii/classspecs?keywords=project%20manager>**

13. Many projects go on for years, way beyond the original contract completion date set at the time of bid. Why does this occur?

**There many reasons why a project goes beyond its projected or expected completion date which is different from the original contract completion date.**

Provide suggestions on better monitoring and getting projects completed on time. Are “liquidated damages” assessed to the contractor? Please provide statistics for the past 5 years on projects that have not been completed for over 2 years. Also provide for the past 5 years, the projects and number of liquidated damages assessed to the contractors.

**Liquidated damages are generally assessed only when a contractor fails to complete a project within the contract completion deadline due to the contractor’s own causes. Note that the contract completion date may be extended from the time of initial award due to legitimate reasons that are reviewed and approved in accordance with procurement rules. Within the past 5 years, we have only one project that was delayed over 2 years: the security detention system project at the Halawa Correctional Facility. In this case, the contractor was not able to complete the work, they then defaulted under the contract, which entitled the State to collect liquidated damages. This project is not included in the attached compilation, as we are still in legal proceedings on the take-over agreement. Instead, the list includes all projects delayed and assessed liquidated damages regardless of the length of delay.**

**The reasons for contract extensions vary, with the most common being unforeseen conditions, user requested changes, and delays beyond the control of the contractor (e.g. building permit delays, COVID-19, worker strikes, supply shortages for construction materials, unusual/excessive weather delays, etc.). One cause for delay we are focusing aggressively on is permitting. While project schedules often require us to bid out projects before permitting is complete in order to meet lapsing fund deadlines, we are also working with each of the counties to identify ways to clarify and expedite the drawn-out process for permitting, which often takes 6 months to a year or more. Our staff are also working closely with our legal counsel to discern legitimate delay claims vs. delays the contractor will be held accountable for, and possibly assessed liquidated damages, at the final completion of the project.**

14. There are also problems with the long delays in closing out projects which results in retention monies not being paid to vendors. What is your close-out procedure and why does it take so long to close the project? Please provide an explanation and suggestions for addressing how we might have more timely close outs.

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**For construction projects, occasionally a late user request or design improvement, such as comments arising from Honolulu Fire Department inspections, would be justified for incorporation into the project and subsequently could delay the final completion. There are also occasions where contractors do not timely and satisfactorily submit all required closing documents for a project which also delays release of retention and closing of the project. PWD releases retention when a contract completion notice is issued upon satisfactory correction of the final punchlist as well as acceptance of all close out documents. We do acknowledge that PWD has long been plagued with chronic delays in closing out projects in the past. Our staff is more closely monitoring our contracts status and diligently working hard to eliminate the backlog while also ensuring on-going projects are closed out as quickly as is appropriate to ensure all contractual issues are complete prior to closure. This is an active work in progress that is hampered by a lack of adequate staffing and the defunding of authorized positions.**

We look forward to continued dialogue and collaboration with you to help improve our procurement industry to the benefit of Hawaii's people. Should you have any further questions, please contact the Comptroller at 586-0400 or [curt.t.otaguro@hawaii.gov](mailto:curt.t.otaguro@hawaii.gov), or have your staff contact me at 586-0526 or [chris.kinimaka@hawaii.gov](mailto:chris.kinimaka@hawaii.gov).

#### Attachments

Cc: Senator Donovan M. Dela Cruz  
Senator Michelle N. Kidani  
Senator Donna Mercado Kim  
Senator Kurt Fevella  
Curt T. Otaguro, Comptroller  
Audrey Hidano, Deputy Comptroller  
Christine L. Kinimaka, Public Works Administrator  
Bonnie A. Kahakui, State Procurement Office Acting Administrator

## Attachments

1. DAGS SCP Follow-Up Questions 08.13.21
2. PDs PB
3. PDs PMB
4. PDs CMB
5. CMB Inspectors Hierarchy
6. DAGS-PWD Delayed Construction Projects Assessed Liquidated Damages: 2016 - 2021