



STATE OF HAWAII
STATE PROCUREMENT OFFICE

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
GOVERNMENT OPERATIONS
FEBRUARY 4, 2021, 3:00 P.M.

SENATE BILL 788
RELATING TO PROCUREMENT

Chair Moriwaki, Vice Chair Dela Cruz, and members of the committee, thank you for the opportunity to submit testimony on SB788. The State Procurement Office (SPO) appreciates the intent of this bill and offers the following comments and recommendations.

Comments:

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

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

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

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

Recommendation:

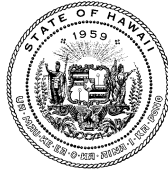
Creating the tools and infrastructure for buyers to adopt a new policy is essential for successful implementation. In order to continue this work, the SPO is requesting time and funding. Time is required to verify and implement rules, begin creating the database, develop training, and

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 published.	\$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

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 OPERATIONS

THURSDAY, FEBRUARY 4, 2021, 3:00 PM
CONFERENCE ROOM 016, STATE CAPITOL

S.B. 788

RELATING TO PROCUREMENT

Chair Moriwaki, Vice Chair Dela Cruz, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 788.

The Department of Accounting and General Services (DAGS) strongly opposes legislation mandating the consideration of past performance for the following reasons:

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

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

Even in the context of a Sealed Bid (Invitation for Bid, aka "low bid") procurement, the procurement code allows an agency to use its own past experience with a bidder to disqualify its

bid. The DAGS Interim General Conditions for Construction, as amended, Item 2.12.3, states that a bidder's proposal may be rejected due to a "Lack of responsibility and cooperation as shown by past work such as failing to complete all of the requirements to close the project within a reasonable time or engaging in a pattern of unreasonable or frivolous claims for extra compensation." In order to use this as a basis, the department would require a fact-based record/log supporting this assertion for past projects. Based on past testimony by the City and County of Honolulu, it appears this methodology is put into practice for its projects.

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

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

- DAGS does not believe that this is the best, most effective method of addressing the issue of "poor-performing" contractors.

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

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

There will always be an element of subjectivity to the consideration of past performance due to the lack of objective criteria; lack of uniformity in rating systems, including interpretations regarding the evaluation criteria and terminology; lack of uniformity in data used to make decisions on responsibility, which is compounded when an entity is forced to use the data of others without direct experience; and the subjectivity inherent in determining what information should be considered (i.e. recent, relevant, etc.).

If past performance is to be implemented, there must be a reliable third party to review all evaluations to be used by the agencies and to make determinations regarding the quality and consistency of the information and its impact on the issue of responsibility for each contractor.

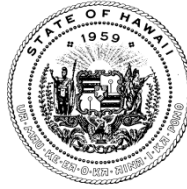
DAGS has strong concerns that the increased degree of subjectivity introduced by the mandate to consider past performance within methods of procurement that are primarily an objective process will result in an increase in the number of protests. This increased potential for protests and project delays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

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

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

In summary: This legislation is not necessary because the current procurement code already allows for the consideration of past performance and already contains mechanisms and processes which may be used to address the issue of “poor performing” contractors. Enacting legislation mandating the consideration of past performance without careful study of the problem in relation to existing and alternative means and methods of addressing it may lead to expending large amounts of funds to unsuccessfully address a complex problem and may further negatively impact the procurement process with a substantial increase in the number of protests.

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



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

February 4, 2021
3:00 P.M.
State Capitol
Conference Room 016
VIA VIDEO CONFERENCE

S.B. 788
RELATING TO PROCUREMENT

Senate Committee on Government Operations

The Department of Transportation (DOT) **supports** the bill which requires past performance be considered in the bid selection of contractors for certain contracts; requires procurement officers to consider past performance and conduct past performance evaluations and maintain the record of the evaluations.

Past performance adds another level of consideration and diligence in evaluating responsibility and provides additional insight to positively impact the award selection and optimally support increased accountability, enhanced quality performance, and efficient and effective utilization of taxpayer dollars in respect to contract awards and respective deliverables.

The requirement to conduct past performance evaluations, at least annually and at the time the work under a contract or order is completed and maintained in the department's file will provide consistent and valuable information for procurement stakeholders during selection and award on future contracts.

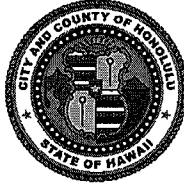
Thank you for the opportunity to provide testimony.

DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU

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LATE

RICK BLANGIARDI
MAYOR



ALEX KOZLOV, P.E.
DIRECTOR DESIGNATE

HAKU MILLES, P.E.
DEPUTY DIRECTOR

February 3, 2021

The Honorable Sharon Y. Moriwaki, Chair
The Honorable Donovan M. Dela Cruz, Vice-Chair
and Members of the Committee on Government Operations
The Senate
State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Moriwaki, Vice-Chair Dela Cruz, and Members:

SUBJECT: Senate Bill No. 788
Relating to the Procurement

The Department of Design and Construction (DDC) respectfully **opposes** Senate Bill No. 788. The purpose of the bill is to "(1) Require that past performance be considered in future bid selection of contractors for sole source contracts and any competitive sealed bid or proposal contracts that meet or exceed the small purchase threshold; (2) Require procurement officers to consider specific factors, including past performance, when making a determination of offeror responsibility; and (3) Require procurement officers to conduct past performance evaluations, at least annually and at the time the work under a contract or order is completed, and maintain the evaluations in the department's files."

DDC primarily administers professional services and construction contracts. Existing law allows past performance to be considered prior to award for these types of contracts, so the proposed legislation would not improve the existing procurement process.

The proposed legislation would burden procurement and contract administration procedures with requirements that consume additional resources and potentially increase bid protests and contracting delays without commensurate benefits. DDC has implemented procedures that incorporate past performance into qualification of bidders for construction contracts. DDC uses these procedures for bid solicitations that are expected to be of interest to contractors that have recently exhibited poor performance on DDC contracts. By doing this, DDC is able to realize the benefits of considering past performance on an as-needed basis without burdening the majority of our solicitations

The Honorable Sharon Y. Moriwaki, Chair
and Members of the Committee on Government Operations
February 3, 2021
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with the additional administrative effort that would be mandated by this bill and the potential for additional protests and delays that would need to be addressed.

Based on the above consideration, DDC respectfully **opposes** Senate Bill No. 788.

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

Sincerely,

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

Alex Kozlov, P.E.
Director

SAH - Subcontractors Association of Hawaii

1188 Bishop St., Ste. 1003**Honolulu, Hawaii 96813-2938

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February 4, 2021

Testimony To: Senate Committee on Government Operations
Senator Sharon Y. Moriwaki, Chair

Presented By: Tim Lyons, President

Subject: S.B. 788 – RELATING TO PROCUREMENT

Chair Moriwaki 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 support this bill.

We have long concurred with the concept of utilizing past performance because it only makes sense to use contractors who can perform versus those who either cheat or leave jobs and subcontractors incomplete. The main concern over past performance has always been that we have objective information on which to determine past performance. To that extent, we believe that in Section 5 of the bill, regarding Section 103D-____(b)(1), a statement that in the information that is to be included regarding the positive or negative difference between the final cost of the project and the projects authorized budget, the provision should be made for the contractor to offer reasons for those differences. We see no reason to wait for Subsection 2 and 3 to kick in, putting the burden on the contractor to contest the information. Why not ask, right up front, if there are any legitimate reasons as to why there is a negative or positive difference?

The only other comment that we have in that regard is that there obviously needs to be a very long lead time for the past performance system and evaluation to take effect so that contractors who either have done work and have not been evaluated or contractors who are beginning work with the government and have not been evaluated are allowed to do so and have their data completed and available for review.

Thank you.