



JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

STATE OF HAWAII'Ī | KA MOKU'ĀINA O HAWAII'Ī
PROCUREMENT POLICY BOARD

P.O. Box 119
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**PROCUREMENT POLICY
BOARD**
RICHARD HELTZEL
LANCE INOUE
LISA MARUYAMA
DIANE NAKAGAWA
KEITH REGAN

Procurement Policy Board Meeting
Thursday, May 18, 2023, 1:30 pm – 3:30 pm HST

Virtual Meeting Using Interactive Conference Technology – Zoom

<https://hawaii-gov.zoom.us/j/2070656735?pwd=bGNmdDVPMXVPYmRGYVUzQlZROHM5dz09>

Meeting: 207 065 6735

Passcode: 014729

One tap mobile

+12532158782,,2070656735#,,,,,0#,,014729# US (Tacoma)

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+1 564 217 2000 US

+1 646 558 8656 US (New York)

+1 646 931 3860 US

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Meeting: 207 065 6735

Passcode: 014729

Find your local number: <https://hawaii-gov.zoom.us/u/adLvuCsTbG>

Join by SIP

[2070656735@zoomcrc.com](https://hawaii-gov.zoom.us/j/2070656735@zoomcrc.com)

Join by H.323

162.255.37.11 (US West)

162.255.36.11 (US East)

Meeting: 207 065 6735

Passcode: 014729

Physical Location

Kalanimoku Building, 1151 Punchbowl Street, Room 410, Honolulu, is available to the public and is guaranteed to be connected to the remote virtual meeting.

In the event that audiovisual communication cannot be maintained by all participating board members and quorum is lost, the meeting will automatically be recessed for 30 minutes, during which time an attempt to restore audiovisual communication will be made. If such attempt to restore is unsuccessful within said 30 minutes, all board members, members of the public, staff and other interested individuals shall log on again to the Zoom link on this Notice, whereby audio communication will be established for all participants and the meeting will continue. If reconvening the meeting is not possible because audio and visual communication cannot be re-established, the meeting will be terminated.

Written Testimony

Written testimony may be submitted by one of the methods listed below:

- By email to: procurement.policy.board@hawaii.gov
- By United States Postal Mail to: 1151 Punchbowl Street, Room 416, Honolulu, HI 96813
- By facsimile to: (808) 587-4703

Written testimony will only be accepted for the items listed on the meeting agenda. Written public testimony submitted to the Procurement Policy Board will be treated as public record and any information contained therein may be available for public inspection and copying.

Please include the word “Testimony” and the subject matter following the address line.

Copies of the Board Packet will be available on-line for review at <https://spo.hawaii.gov/procurement-policy-board/procurement-policy-board-meeting-agenda-minutes/>. An electronic draft of the minutes for this meeting will also be made available at the same location when completed.

Procurement Policy Board Meeting
Agenda
Thursday, May 18, 2023, 1:30 pm – 3:30 pm

- I. Call to Order, Public Notice**
- II. Approval of Minutes – [Meeting of April 20, 2023](#)**
- III. Roll Call, Quorum**
- IV. Proposed Amendments to Hawaii Administrative Rules HAR §3-122 - Source Selection and Contract Formation**
 - i. Subchapter 1 – Definitions
 - ii. §3-122-33 – Bid evaluation and award
 - iii. NEW: Subchapter 13.5 – Contractor Past Performance Assessment

V. Announcements

Future Meeting Date/Time: Monday, June 5, 2023, 1:30 pm

VI. Executive Session: Discussion of personnel matters in the recruitment for Administrator, State Procurement Office

The Procurement Policy Board anticipates the need to meet in executive session pursuant to Section 92-5(a)(2) and (4), Hawaii Revised Statutes, to discuss personnel matters and to consult with the Board's attorney on questions and issues pertaining to the Board's powers and duties.

VII. Adjournment

If you need an auxiliary aid/service or other accommodation due to a disability, contact Ruth Baker at (808) 587-4701 or at ruth.a.baker@hawaii.gov as soon as possible, preferably by COB May 15, 2023. Requests made as early as possible have a greater likelihood of being fulfilled.

Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

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Procurement Policy Board

Minutes of Meeting

Date/Time: Thursday, April 20, 2023, 1:30 p.m.

Location: Comptroller's Conference Room
Kalanimoku Building, Room 410
1151 Punchbowl Street
Honolulu, Hawaii 96813

Virtual Meeting Using Interactive Conference Technology – Zoom

Members Present: Rick Heltzel
Lance Inouye
Lisa Maruyama
Diane Nakagawa
Keith Regan

Department of
the Attorney General: Stella Kam, Deputy Attorney General

State Procurement
Office Staff: Bonnie Kahakui, Acting Administrator
Christopher Amandi
Ruth Baker
Matthew Chow
Stacey Kauleinamoku
Jittima Laurita
Shannon Ota
Mei Phillips
Carey Ann Sasaki
Donn Tsuruda-Kashiwabara
Kevin Takaesu

Other State Staff: Chris Butt, Department of Education
Lois Mow, Department of Education

Guests: Pane Meatoga
Gregg Serikaku
Tim Lyons
JSM3201

I. Call to Order, Public Notice

Chair Lisa Maruyama called the Procurement Policy Board (PPB) meeting to order at 1:30 pm.

II. Roll Call, Quorum

All Procurement Policy Board members were present. There was quorum.

The Deputy Attorney General assigned to DAGS and staff of the State Procurement Office were introduced.

III. Approval of Minutes of February 16, 2023, Meeting

Keith Regan made a motion and Rick Heltzel seconded the motion to accept the minutes of the February 16, 2023, meeting as presented. Since there were no objections, the minutes were approved.

IV. Hawaii Administrative Rules

A. Update on Rulemaking Pursuant to Chapter 91, Hawaii Revised Statutes

Kevin Takaesu of the State Procurement Office provided a brief on the Hawaii Administrative Rule (HAR) process. One of the responsibilities of the PPB is to adopt administrative rules pursuant to Chapters 103D and 103F, Hawaii Revised Statutes (HRS). All rules shall be adopted in accordance with Chapter 91, HRS, which addresses the permanent rule making process. Mr. Takaesu stated that only the PPB has an interim rule process.

Mr. Takaesu stated that Act 188, SLH 2021, authorized a Past Performance Database and requires that the SPO adopt rules on the Past Performance Database no later than December 31, 2023. Mr. Takaesu stated that the SPO believes that first establishing interim rules is the best path, pursuant to Section 103D-202, HRS, "...the policy board shall have the power to issue interim rules by procurement directives, which shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91. The interim rules shall be effective for not more than eighteen months..." He continued to explain that after the PPB approves the interim rules, the rules then go to the Lieutenant Governor's office for final approval. To make the rules permanent, within this 18-month interim rule period, the PPB can review and revise the rules as needed before holding a public hearing on the rules. If there are no changes to the rules after the public hearing, the PPB can approve the rules, which are then sent to the Governor's office for final approval to become permanent.

Mr. Takaesu stated that the SPO's proposed amendments to HAR §3-122 – "Source Selection and Contract Formation," were provided to the PPB in Ramseyer format; word deletions are shown as strike outs and additions are underlined. Mr. Takaesu stated that after all the sections of the revised rules are reviewed and approved by the PPB, the rules are then signed by the PPB Chair, the Comptroller, and the Deputy Attorney General.

Chair Maruyama asked for clarification on holding a public hearing and the benefit of having interim rules. Mr. Takaesu clarified that pursuant to Chapter 91, HRS, the public hearing is held by the SPO and is only for changes to the HAR, which is different from a Legislative hearing. The public hearing is advertised, and the public can provide testimony on the rule changes. The benefit of having interim rules streamlines the rule-making process.

SPO Acting Administrator Bonnie Kahakui added that because the rules are needed to launch the Past Performance database by the end of this year.

There were no questions by other PPB members.

B. Proposed Amendments to Hawaii Administrative Rules HAR §3-122 - Source Selection and Contract Formation

Ms. Kahakui explained that the SPO staff reviewed and is proposing revisions to the HAR. The SPO explained the proposed changes to the Hawaii Administrative Rules as outlined in this agenda and invited the PPB members to ask questions. Deputy Attorney General Stella Kam will also provide comments on the proposed rule changes

PPB member Lance Inouye asked if there is an entity similar to the Legislative Reference Bureau (LRB) to make sure that the changes to the rules are consistent throughout the HAR. Deputy AG Kam said that in the interim rule-making process, the Deputy AG reviews the proposed changes to ensure that the rules do not conflict with each other or with Chapter 103D, HRS. Mr. Takaesu added that the LRB review the rules for formatting.

SPO staff Carey Ann Sasaki explained the proposed changes to HAR Chapter 3-122, subchapters 1 to 4.5 relate to the Hawaii Public Procurement Code ("Code"), Chapter 103D, HRS, and that those proposed changes are to implement the Code. The purpose of the Code is to promote economy, efficiency, effectiveness, and consistency in all procurements by the State and the several counties.

i. Subchapter 1 – Definitions

Ms. Sasaki explained the following:

Three items were added in the Table of Contents:

1. New §3-122-52.5 Clarifications with offerors after receipt of proposals is added;
2. New subchapter 13.5 Contractor Past Performance Assessment Form is added; and
3. New §3-122-115.01 Contractor past performance assessment is added.

Two items were repealed in the Table of Contents: 1) §§3-122-45, Determinations, and 2) 3-122-111, Notice of intent of offeror. One item, §3-122-43, was amended in the Table of Contents. When competitive sealed bidding is not practicable or advantageous, which is amended to now read as "Procurement planning."

Three items were added in Subchapter 1 Definitions. "Non-disclosure agreement (or NDA)", definition for "Recent" and definition for "Relevant" are added to provide clarity and amended for housekeeping purposes. These terms are related to past performance in IFBs, RFPs, and Sole Source procurements.

Mr. Heltzel expressed his concern that the term "or some" in the definition of "recent" is vague and suggested replacing the term "or some" with one that is more definitive. Mr. Inouye and Mr. Heltzel suggested that "or some" be replaced with "fully completed." Mr. Inouye also suggested that "or some" be deleted. Mr. Regan agreed. Mr. Heltzel said that the definitions are related to Past Performance, not experience. In order to complete a Past Performance evaluation, the project would have to be completed. He recommended that for clarity, the definition would have the word "completed," reference Past Performance evaluation, and describe what "recent" and "relevant" mean.

Mr. Inouye also asked clarifying questions, and also asked if the PPB is going to approve the proposed HAR during this meeting, or will the PPB members and the public be given the chance to review the proposals before approval. Ms. Kahakui explained that the PPB is able to make modifications to the HAR. When the process arrives at the final rules, a public hearing will be held. Mr. Regan clarified the interim rule-making process, that the PPB meeting is a public hearing, and members of the public had the opportunity to participate in this public meeting and provide input and testimony on the proposed amendments to the HAR, which were posted online. As part of Chapter 91, HRS, in moving to finalize the rules, a formal public hearing will be held to gather and accept public input.

Ms. Kahakui stated that there are members of the public and other government entities participating in this PPB meeting via Zoom. She explained that §3-122 Source Selection is large and will take multiple meetings. Mr. Inouye explained wanted to make sure that the PPB gets public input before making a decision. Chair Maruyama acknowledged Mr. Inouye's comments about the PPB's due diligence and stated how the interim rule-making process allows the SPO staff to move forward on its initiatives and the PPB to make changes to and obtain public feedback on the interim rules.

Chair Maruyama asked if there are many instances in which a contract is not completed, but is still considered recent if the contract takes longer than five years. Mr. Heltzel commented that Federal contracts use reference points that an offeror has successfully performed a project of similar scope, size, and relevancy within a certain period. He said that he feels that it is important for an agency to decide what is a fair lookback period. The Federal government has a lookback period of 15 years. He said he is ok with five years, but feels that the definition is vague. He suggested to give the agencies the flexibility to have a longer lookback period. Ms. Kahakui agrees that agencies be given that flexibility, especially with Information Technology (IT) procurements; and has concerns about the work "completed within the last five years" for large-scale projects that will take more than five years; should performance be based on some of the performance.

Ms. Nakagawa agreed that the phrase "or some" can be confusing and would support deleting that. The phrase "as determined by the procurement officer" gives flexibility to make some of these changes that is more related to a particular bid. Mr. Regan, Mr. Inouye, and Mr. Heltzel discussed the definition and past performance evaluation. Ms. Kahakui explained that the Past Performance questionnaire allows agencies to evaluate the contractor's performance and provide some guidance.

Deputy Attorney General Kam suggested that to meet the deadline for the Past Performance rules, the SPO and PPB consider doing interim rules specifically for the sections needed to implement the Past Performance database, with the idea that within 18 months, these rules will be finalized. She recommended that discussion continue on §3-122 Source Selection. Mr. Inouye and Chair Maruyama agree that the PPB be given additional time to continue to review these rules.

- ii. Subchapter 2 – General Provisions
In the interest of time, this agenda item was deferred.
- iii. Subchapter 3 – Specifications
In the interest of time, this agenda item was deferred.
- iv. Subchapter 4 – Methods of Source Selection and General Guidance

In the interest of time, this agenda item was deferred.

- v. Subchapter 4.5 – Source Selection for Federal Grants
In the interest of time, this agenda item was deferred.

- vi. NEW Subchapter 13.5 – Contractor Past Performance Assessment Form

SPO Purchasing Specialist Stacey Kauleinamoku explained Hawaii Administrative Rules Chapter 3-122's new Subchapter 13.5, Contractor Past Performance Assessment Form, which was created pursuant to Act 188, Session Law of Hawaii 2021, requiring the State Procurement Office to establish and administer a Past Performance database and adopt rules regarding information and procedures associated with the Past Performance database. Act 188, SLH 2021, was enacted by the State Legislature to provide clear direction on awarding contracts to responsible bidders or offerors to increase accountability, enhance performance and utilize taxpayer dollars more efficiently. Currently some contracts may be awarded to the lowest bidder or offeror without regard to that

- vii. §3-122-115.01 - Contract Past Performance Assessment

Ms. Kauleinamoku explained HAR section 3-122-115.01, Contractor Past Performance Assessment, that was created pursuant to Act 188, Sessions of Laws 2021, requiring the State Procurement Office to establish and administer a past performance database and adopt rules regarding information and procedures associated with the past performance database.

- 1. §3-122-115.05 subsections (a) and (b) were added to establish the information required to be included in the past performance database and references back to the requirements listed in Act 188, SLH 2021; which includes:
 - a. The name of the state contractor;
 - b. The date of the project;
 - c. The size of the project;
 - d. A brief description of the project;
 - e. The responsible managing employees for the project;
 - f. Whether or not the project was timely completed;
 - g. The project's authorized budget; and
 - h. The positive and negative differences between the final cost of the project and the project's authorized budget, including the reason(s) for the differences.

This information can also be found in §103D-329, Hawaii Revised Statutes, Past Performance Database, as well as on the Contractor Past Performance Assessment Form. This form is available in an electronic format to be completed by the purchasing agency, the contractor being assessed, and the procurement officer to review and finalize, which will be kept in a statewide contractor Past Performance Database located on SPO's Hawaii Awards & Notices Data System (HANDS). This complies with §103D-320, HRS, Retention of Procurement Records Evaluations. Once the assessment is finalized and posted, it will be accessible to government entities to use in conducting meaningful and consistent performance evaluations for future projects when the procurement officer needs to determine a contractor's responsibility to help address issues of repeated contractor inefficiencies and substandard work as required in §103D-310(b), Hawaii Revised Statutes, Responsibility of Offerors.

2. §3-122-115.01 subsection (c)(1) was added to explain the contractor past performance assessment process; to include when the procurement officer shall begin preparing the contractor past performance assessment, which would be at the end of the contract or more frequently as designated by the chief procurement officer or designee; the procedures on how a contractor is informed of the information contained in the past performance database about the contractor, which includes an electronic notification to the contractor that the assessment is ready for comment. Upon notification, the contractor has 10 working days to review, submit comments, rebuttals, or additional information to the purchasing agency making the assessment. The contractor's past performance assessment form can also be considered accepted by the contractor. The assessment is then returned to the purchasing agency, whose procurement officer will receive an email notification to review the assessment. The procurement officer will have five working days to submit the final assessment into the database. To ensure that the procurement officer completes the final assessment, pursuant to Act 188, SLH 2021, the final contractor past performance assessment form is required prior to making a final payment. If the procurement officer does not submit the final assessment after five days, they will receive a reminder daily until they submit the final assessment.
3. §3-122-115.01 subsection (c)(2) was added to establish the process for a contractor to correct or respond to the information contained in the past performance database about the contractor. The contractor shall submit a request with substantial evidence to the procurement officer for reconsideration within 10 working days from the date of notification of the past performance assessment has been posted to HANDS. If there are any changes required, the procurement officer shall update the past performance database system taking into consideration any contractor comments. The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee.

Ms. Kauleinamoku addressed a recurring question: "What happens if a contractor is still not satisfied with the assessment even after reconsideration?" The SPO acknowledges that not everyone will be satisfied or please with some of their reviews, which may lead to a lengthy interaction between the purchasing agency and the contractor, while keeping in mind that §103-10, HRS, Payment for Goods and Services, requires payment to the vendor no later than 30 calendar days following receipt and satisfactory delivery of goods or performance of service, otherwise the vendor is entitled to late interest payment. Final payment cannot be made until the final assessment is completed. The SPO also acknowledges that the heads of the purchasing agencies and the procurement officers would be the most knowledgeable of the solicitations. The language in §3-122-115.01 subsection (c)(2) hopefully expedites this resolution process.

Mr. Heltzel asked if there is language regarding the time limit for the procurement officer to complete the initial past performance assessment and has concerns that without this, the contractor may end up waiting for final payment.

Ms. Kauleinamoku responded to Ms. Kam's inquiry as to whether the procurement officer has ability to withhold final payment to the contractor and said that the SPO added this language with the hope to have the agency complete the past performance assessment. Ms. Kam will confer with staff at the Department of the Attorney General and cautioned that withholding payment can be an overreach beyond the authority given by Act 188, SLH 2021, and about the application of §103-

10, HRS, about payment of interest to a vendor. Ms. Kam also suggested some revisions:

- Consider changing the title of Subchapter 13.5, "Contractor Past Performance Assessment Form," to a generic title. Ms. Kahakui suggested to change the title to "Contractor Past Performance Assessment" and leave out the word "Form."
- Instead of referencing Act 188, SLH 2021, reference §103D-329, unless there is other information to be referenced in Act 188, SLH 2021.
- Other non-substantive revisions for clarity, consistency, and style.

Mr. Heltzel suggested changing rules to state that the procurement officers can start the final evaluation after there is substantial completion of a project, setting a time limit on when the assessment must be completed, determining a trigger date that initiates that time period, and integrating the rebuttal statement into the final record. Ms. Kahakui said confirmed that the rebuttal is part of the final record.

Mr. Regan asked for clarification on the meaning of "more frequently" in (c)1: "(1) Procurement officers shall prepare the contractor past performance assessment form at the end of the contract, or **more frequently** as designated by the CPO or designee." Ms. Kahakui explained that in the case of a multi-year, multi-phase contract, the assessment can be done more often. Mr. Regan said that this information is beneficial. Mr. Heltzel stated that the Federal government requires interim annual evaluations, and final evaluations, which allows evaluation on an interim period. A contractor is also given the opportunity to correct performance.

Chair Maruyama asked for any suggestions on modifying "more frequently" in (c)(1). Ms. Kahakui said the SPO can provide guidance through procurement circular to all the individual jurisdictions to conduct interim evaluations for multi-year contracts.

Mr. Inouye expressed his concerns that the determination lies with the purchasing agency and would prefer that the assessment includes the contractor's comments, including both sides of the story. He expressed concerns about ratings.

Ms. Kauleinamoku displayed and explained the Past Performance Assessment Form, specifically the portions that pertain to the Hawaii Administrative Rules. The form includes the functionality of notifying the contractor to comment and/or submit a rebuttal to the assessment, and the ability to capture contractor performance information in a structured and uniform method. Act 188, SLH 2021, amended HRS sections 103D-302, Competitive Sealed Bidding, Subsection F; 103D-303, Competitive Seal Proposals, Subsection E; and 103D-306, Sole Source, Subsection A; by requiring that Past Performance, if available, be used for evaluation.

Ms. Kauleinamoku displayed and explained the following sections of the form:

- Contractor Past Performance Assessment Guidance, which was developed by a subject matter expert and will be part of the procurement circular on Past Performance
- Assessment to be completed as objectively as possible.
- Contractor Comments allows the contractor to add comments, rebuttals, or additional information.

Ms. Kahakui explained that the SPO looked at various rating models and determined that the rating of Satisfactory – Unsatisfactory – N/A was the most objective. Mr. Inouye commented that this is a step in the right direction, but is more concerned with its implementation, how it will be used to evaluate a bidder, what goes into the record, and who does the rater, because there are a variety of factors that go into the rating.

Ms. Kam analyzed what is statutorily required to go into the assessment, if the project was completed on time, if there was a difference in the estimated and final cost, factual descriptions of problems that arose during the project, issues during the performance, and contractor's rebuttal. The next procuring agency can review this information and make their own judgement. Ms. Kam said that the Legislature attempted to provide a database that all agencies can access in the consideration of contractors. Ms. Kahakui explained that the SPO tried to standardize the past performance assessment.

Ms. Nakagawa asked if the SPO received comments from the agencies. Ms. Kauleinamoku responded that in February 2022, the SPO issued Procurement Circular 2022-10 to request the Executive Branch departments and other Chief Procurement Officer jurisdictions agencies to provide feedback on the proposed amendments to the HAR and assessment form for Past Performance. The SPO received input from the Department of Public Safety, The Department of Education the Department of Accounting and General Services – Public Works Division, Hawaii County Department of Water Supply, City & County of Honolulu – Department of Budget and Fiscal Services, the University of Hawaii Systems, and State Department of Transportation – Highway Division.

Ms. Nakagawa expressed her concern from government perspective, the Past Performance database's rollout, resources required for the database, additional steps to the procurement process, and the withholding of payment to vendors. and stated that more communication is needed. She asked how the Past Performance rating will be used by procurement staff, and training on and access to the database by staff. Ms. Kahakui responded that the SPO started a training guide with a flow chart showing the process, adding that the SPO would like to roll out the database early for testing, obtaining feedback, and refinement before the December 2023 deadline. There will be multiple trainings, circulars.

Mr. Inouye asked if the SPO received any comments from the contractors, general contractors, and subcontractors. Ms. Kauleinamoku responded that the SPO requested feedback but did not receive any. Mr. Takaesu added that several years ago, a House Resolution requested a Past Performance study. A consultant hired to conduct the study met with various stakeholders. Mr. Inouye also noted that there was also a task force, which found that it is difficult to do a past performance. He reiterated Ms. Kam's suggestion that the assessment questionnaire include only facts required by the statute and exclude a subjective rating. Ms. Kahakui stated that the intent is to standardize the questionnaire.

Ms. Maruyama asked Ms. Kahakui and Mr. Inouye if the assessment questionnaire can be modified to satisfy both sides, and if there are any technical modifications that would require comments before moving on to the next assessment question.

In the interest of time, Chair Maruyama consulted with Ms. Kam on board procedures regarding the agenda. Ms. Kam recommended that the Chair can defer agenda items to the next meeting

and go into Executive Session. Ms. Maruyama asked that SPO prioritize action items for consideration by the PPB so the SPO can move forward with its initiatives. She expressed her appreciation for the dialogue on the proposed rules for the Past Performance database.

V. Announcements

The next Procurement Policy Board meetings will be held on Thursday, May 18, 2023, at 1:30 p.m., and Monday, June 5, 2023, at 1:30 p.m. The meetings will be hybrid on Zoom and in person at the physical location of Room 410 at 1151 Punchbowl Street.

VI. Executive Session: Discussion of personnel matters in the recruitment for Administrator, State Procurement Office

Mr. Regan made a motion to go into Executive Session. Ms. Nakagawa seconded the motion. There were no objections. At 3:30 pm, the Board recessed its regular meeting and went into Executive Session pursuant to Section 92-5(a)(2) and (4), Hawaii Revised Statutes, to discuss personnel matters and to consult with the Board's attorney on questions and issues pertaining to the Board's powers and duties.

The Board reconvened its regular meeting at 4:00 pm. Ms. Maruyama reported that the Board met in Executive Session to discuss the recruitment of a permanent SPO Administrator and reported that interviews will take place.

VIII. Adjournment

Since there was no new business, Mr. Inouye moved to adjourn the meeting; and Mr. Heltzel seconded the motion. There were no objections. The meeting adjourned at 4:01 pm.

Respectfully submitted,

Diane Nakagawa
Secretary, Procurement Policy Board

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
Amendments to Chapter 3-122

Interim
Hawaii Administrative Rules

May 18, 2023

1. §3-122-1, Hawaii Administrative Rules, is amended to read as follows:

"§3-122-1 Definitions. Definitions for terms used in this chapter are in section 103D-104, HRS. The following definitions are also applicable to terms used in this chapter:

"Alternative procurement method" means a procurement method used due to a waiver from the competitive sealed bids or proposals process when one or no responsive, responsible offer is received.

"Award" means the written notification of the State's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror.

"Best value" means the most advantageous offer determined by evaluating and comparing all relevant criteria in addition to price so that the offer meeting the overall combination that best serves the State is selected. These criteria may include, in addition to others, the total cost of ownership, performance history of the vendor, quality of goods, services, or construction, delivery, and proposed technical performance.

"Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

"Brand name or equal specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet requirements, and which provides for the submission of equivalent products.

"Brand name specification" means a specification

limited to one or more items by manufacturers' names or catalogue numbers, commonly referred to as a restrictive specification.

"Capability" means capability at the time of award of contract.

"Chief financial officer" means, depending upon the purchasing agency, either the comptroller, a county's director of finance, or the respective chief financial officers of the University of Hawaii, the department of education, the judiciary, or the legislative branches of the State or county.

"Contract administrator" means the person designated to manage the various facets of contracts to ensure the contractor's total performance is in accordance with the contractual commitments and obligations to the purchasing agency are fulfilled.

"Contract price" means the amount designated on the face of the contract for the performance of the work including allowances for extras, if any.

"Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the State to consider whether the item meets its needs.

"Design specifications" means the dimensional and other physical requirements of the item being purchased, how a product is to be fabricated or constructed.

"Discussion" means an exchange of information to promote understanding of a state agency's requirements and offeror's proposal and to facilitate arriving at a contract that will be the best value to the State. Discussions are not permissible in competitive sealed bidding, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

"Opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

"Performance specifications" means the functional or performance requirements of the item, what a

product does and how well it performs.

"Practicable" and "Advantageous" shall be given ordinary dictionary meanings. "Practicable" means what may be accomplished or put into practical application. "Advantageous" means a judgmental assessment of what is in the State's best interest. The use of competitive sealed bidding may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the State's best interest.

"Qualified products list" means an approved list of goods, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirement.

"Quotation" means a statement of price, terms of sale, and description of goods, services, or construction offered by a prospective seller to a prospective purchaser, usually for purchases pursuant to section 103D-305, HRS.

"Recent" means performance information in which the performance has occurred within 5 years or as determined by the procurement officerⁱ that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated.

"Relevant" means performance information that is similar in size, scope, and complexity to the requirement being solicited or evaluated.

"Request for information" means a request soliciting information to obtain recommendations from suppliers for a procurement that cannot be described in sufficient detail to prepare a solicitation.

"Standard commercial product" means a product or material, in the normal course of business, is

ⁱ *"Recent" time periods for consideration may be different according to the type of requirement, however the Contractor Past Performance Assessment Report shall only be available on the database for three years. If the procurement officer determines that the requisition justifies seeking past performance information that is older than three years (i.e., by request of the offeror or the chief procurement officer), then they may seek specific contract files from the contracting agency which would contain the assessment report information.*

customarily maintained in stock or readily available by a manufacturer, distributor, or dealer for the marketing of the product." [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/08; am]
(Auth: HRS §103D-202) (Imp: HRS §§103D-104, 103D-202)

2. §3-122-33, Hawaii Administrative Rules, is amended to read as follows:

"§3-122-33 Bid evaluation and award. (a) The award shall be made to the lowest responsive, responsible bidder as determined by the procurement officer pursuant to Subchapter 13.5, Contractor's Past Performance Assessment and shall be based on the criteria set forth in the invitation for bids.

(b) Only objectively measurable criteria which are set forth in the invitation for bids shall be applied and may include but not be limited to:

- (1) Discounts;
- (2) Transportation costs; and
- (3) Total or life cycle costs.

(c) Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall:

- (1) Be reasonable estimates based upon information the government jurisdiction has available concerning future use; and
- (2) Treat all bids equitably.

(d) The invitation for bids shall set forth any evaluation criterion to be used in determining product acceptability:

- (1) The solicitation may require the submission of samples, descriptive literature, technical data, or other material to verify product acceptability;
- (2) The solicitation may also provide for accomplishing any of the following prior to award:
 - (A) Inspection or testing of a product for characteristics as quality or

- workmanship;
- (B) Examination of elements as appearance, finish, taste, or feel; or
- (C) Other examinations to determine whether product conforms to any other purchase description requirements;
- (3) The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the invitation for bids;
- [5] (4) Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.
- (e) The award shall be issued to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids and posted pursuant to section 103D-701, HRS, for five working days.
- (f) In the event all bids exceed available funds, the provisions of section 1030-302(h), HRS, shall apply." [Eff 12/15/95; am and comp 11/17/97; am and comp 3/21/2008; am] (Auth: HRS §1030-202) (Imp: HRS §1030-302)

3. Subchapter 13.5, Hawaii Administrative Rules, is added to read as follows:

"SUBCHAPTER 13.5

Contractor Past Performance Assessment

§ 3-122-115.01 Contractor past performance assessment.ⁱⁱ (a) Except for any contract entered into

ⁱⁱ *Although it is not required, it is recommended that a new clause of consent to assessment and evaluation process should be included in the solicitation and the contract's general conditions, identifying the process by which the contractor specifically consents to the process of performance assessment, review, finalization, and posting of final Contractor Past Performance Assessment to be accessible for future solicitation*

pursuant to sections 103D-305 or 103D-307, HRS or as directed by the chief procurement officer, all state and county procurement officers or agents shall complete a contractor past performance assessment form approved by the procurement policy board.

(b) The contractor past performance assessment shall include information contained in Act 188, SLH 2021.

(c) The contractor past performance assessment process shall include the following:

(1) Procurement officers shall prepare the contractor past performance assessment form at the end of the contract, or more frequently as designated by the chief procurement officer or designee:

- (A) Procurement officer shall begin preparing the contractor past performance assessment form prior to contract completion and shall enter information into an electronic past performance database system;
- (B) Procurement officer who rates a vendor an unsatisfactory performance assessment is required to document the action (i.e., notice to cure) used to notify the vendor of the contractual deficiencies;
- (C) Agency assessments of contractor past performance shall be provided to the contractor as soon as practicable after completion of the assessment. The contractor shall receive a notification when an assessment is ready for comment;
- (D) Contractor shall review the contractor past performance assessment form within 10 working days from the date of notification of the contractor past performance assessment and submit comments, rebutting statements, or

evaluations as a condition of award for applicable methods of procurement.

- additional information, or the contractor past performance assessment form shall be considered accepted by the contractor;
- (E) Procurement officer shall submit a copy of the final contractor past performance assessment form in the agency's contract file and electronically in the past performance database system within five working days of receipt;
 - (F) The final contractor past performance assessment form is required prior to making a final payment.
- (2) Contractor's past performance assessment form dispute process:
- (A) Contractor shall submit a request with substantial evidence to the procurement officer for reconsideration within 10 working days from the date of notification of the past performance assessment;
 - (B) The procurement officer shall update the past performance database system taking into consideration any contractor comments;
 - (C) The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee." [Eff] (Auth: HRS§103D-202) (Imp: HRS §§103D-104, 103D-202)

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____ by the Procurement Policy Board, pursuant to rulemaking authority in chapter 91, Hawaii Revised Statutes, and filed with the office of the Lieutenant Governor on _____.

LISA MARUYAMA
Chairperson
Procurement Policy Board

KEITH REGAN
State Comptroller

Dated: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General



CONTRACTOR PAST PERFORMANCE ASSESSMENT

Section 1. GENERAL INFORMATION - To be completed by each Procuring Agency.

Please complete form, by providing the information requested below, for whom the Contractor has provided or is currently providing products, services and/or construction specified herein.

PROCURING AGENCY INFORMATION	
Procuring Agency Department:	
Procuring Agency Division	Procuring Agency Jurisdiction
Procuring Agency Contact Name:	Procuring Agency Contact Title:
Procuring Agency Postal Address:	Procuring Agency Contact Phone:
Procuring Agency Contact Email:	Procuring Agency Contact Fax:
Procurement Officer Name:	
Procurement Officer Email:	
CONTRACTOR INFORMATION	
Contractor/Business Name:	Contractor Contact Name:
Contractor Contact Phone:	Contractor Contact Email:
Business Address:	
License Requirement(s) Placed on Bidders for Project, if applicable (i.e., A, B, C13, etc.):	
Name(s) of Responsible Managing Employees for Project:	
SOLICITATION/PROJECT INFORMATION	
Solicitation Title:	Term of Contract/Project Date(s), including all supplemental periods, if applicable:
Method of Procurement: <input type="checkbox"/> Competitive Sealed Bidding <input type="checkbox"/> Competitive Sealed Proposals <input type="checkbox"/> Sole Source	
Solicitation/Contract No.:	Original Awarded Amount (Size of the Project):
Notice of Award Date:	Notice to Proceed Date:
Brief Description of the Project:	

Estimated Start & Completion Dates:	From:		To:	
Actual Start & Completion Dates:	From:		To:	
Reason(s) for Difference Between Estimated and Actual Dates, if applicable:				
Project's Authorized Budget:			Project's Final Cost:	
Positive or Negative Difference, if applicable:				
Reason(s) for Change in Cost, if applicable:				

CONTRACTOR PAST PERFORMANCE ASSESSMENT GUIDANCE (to be used to best reflect your assessment of the contractor's performance):

Rating	Definition + General Factors	Notes
Satisfactory (S)	<p>Performance meets minimum contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.</p> <p><i>This rating represents contractors meeting expected performance to support the project.</i></p> <p>To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order:</p> <ul style="list-style-type: none"> • Meets standards, objectives, and all performance requirements. • Stayed within project's authorized budget. • Deliveries on-time. • Schedule not impacted. • Met expectations. • Adequate user satisfaction. • Met goals and expectations of the project. <p>NOTE: The term "authorized budget" is defined as the initial funds allocated to a project and encumbered.</p>	<p>There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.</p>
Unsatisfactory (U)	<p>Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains serious problems for which the contractor's corrective action appear or were ineffective (i.e., reports, letters, etc.).]</p> <p><i>This rating represents contractors whose performance consistently does not meet requirements defined in the contract.</i></p> <p>To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government:</p> <ul style="list-style-type: none"> • Work consistently fails to meet contract requirements. • Close supervision of the contractor was necessary to progress/complete the work. • Many performance requirements were not met. • Did not stay within project's authorized budget. • Missed multiple schedule deadlines which negatively impacted cost. • Lack of cooperation. • Unnecessary changes. 	<p>A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency).</p>

	<ul style="list-style-type: none"> • Delayed • Lack of user satisfaction. <p>NOTE: If a contractor is deemed “unsatisfactory,” the rating must be accompanied with multiple letters (department head) sent to the contractor to cure the problem. If no results occur by the contractor, it can be stated that the department will submit its recommendation to SPO for suspension and debarment.</p>	
Not Applicable (N/A)	No information or did not apply to contract requirements.	NOTE: Rating will be neither positive nor negative.

Section 2. ASSESSMENT - To be completed by each Procuring Agency.

Please provide an adjectival rating for the following questions (the adjectival rating is defined above. In addition, please provide comments to substantiate the assigned rating. At a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

1. Technical (Quality of Product and/or Service):			
	S	U	N/A
Quality of technical data/report preparation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Met quality standards specified for technical performance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Timeliness/effectiveness of contract problem resolution without extensive customer guidance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Adequacy/effectiveness of quality control program and adherence to contract quality assurance requirements (without adverse effect on performance)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			
2. Schedule/Timeliness of Performance (for Goods, Services, & Construction):			
	S	U	N/A
Complied with contract delivery/completion schedules including any significant intermediate milestones. (If liquidated damages were assessed or the schedule was not met, please address below)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			

3. Cost/Financial Management (for Goods, Services, & Construction):			
	S	U	N/A
Met the terms and conditions within the contractually agreed price(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor's timeliness and accuracy in submitting monthly invoices with appropriate back-up documentation, monthly status reports/budget variance reports, compliance with established budgets and avoidance of significant and/or unexplained variances (under runs or overruns)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor managed and tracked costs accurately	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rate Contractor's financial management abilities to pay subcontractors/suppliers timely	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			
4. Management/Personnel/Labor (for Goods, Services, & Construction):			
	S	U	N/A
Management of suppliers, materials, and/or labor force, including subcontractors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Managed Government-Owned Property	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Implemented changes in requirements and/or priority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Transitioned personnel and operations when taking over from the incumbent Contractor	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).			
5. Customer Satisfaction (for Goods, Services, & Construction):			
	S	U	N/A
Contractor cooperated in dealing with your staff (including resolving disagreements/disputes; responsiveness to administrative reports, businesslike and communication)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overall customer satisfaction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

6. Safety/Security (for Goods, Services, & Construction):

	S	U	N/A
Contractor maintained and/or exceeded an environment of safety, adhere to its approved safety plan, and respond to safety issues? (Includes: following the user's rules, regulations, and requirements regarding housekeeping, safety, correction of noted deficiencies, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor complied with all security requirements for the project and personnel security requirements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

7. General (for Goods, Services, & Construction):

	S	U	N/A
Responded to emergency and/or urgent situations (including notifying HOPA, Project Manager, or Procurement Officer in a timely manner regarding urgent contractual issues)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please share your experience, at a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

Section 3. CONTRACTOR COMMENTS - To be completed by the Contractor

Contractor Name:

Procuring Agency Name:

Comments, Rebuttals, or Additional Information by Contractor assessed in Section 2.

Comments, Rebuttals, or Additional Information from the Contractor
Please cite specific assessment criteria you are providing comments, rebuttals, or additional information to.
<i>Pursuant to HAR section 3-122-115.01(c)(1)(D), Contractor shall review the Contractor past performance assessment form within 10 working days, from the date of notification of the contractor past performance assessment, and submit comments, rebutting statements, or additional information, or the Contractor past performance assessment form shall be considered accepted by the contractor.</i>

Section 4. PROCUREMENT OFFICER DETERMINATION - To be completed by the Procuring Agency

Keep a copy of this assessment in your agency's procurement/contract file.

Validation of Referenced Project Data assessed herein.

Comments from Procuring Agency	
As a Buyer/Contract Administrator/Project Manager, etc. of the Procuring Agency listed above, I approve the responses to the statements and ratings about the performance of the Company/Contractor listed above on the project identified in Section 2 of this Contractor Past Performance Assessment.	
Name:	Title:
Signature:	Date:
<i>Pursuant to HAR sections 3-122-115.02(c)(2)(B), The procurement officer shall update the past performance database system with any contractor comments; (c)(2)(C), The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee.</i>	
As a Procurement Officer of the Procuring Agency listed above, I approve the responses to the statements and ratings about the performance of the Company/Contractor listed above on the project identified in Section 2 of this Contractor Past Performance Assessment.	
Name:	Title:
Signature:	Date:

Thank you for providing this valuable feedback. Please keep a copy of this assessment in your agency's procurement/contract file.