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May 24, 2023

PROCUREMENT CIRCULAR NO. 2023-07

TO: Office of the Governor, Chief Operating Officer
Office of the Lieutenant Governor, Chief of Staff
Executive Department Heads
Hawaii State Public Library System, State Librarian

Chief Procurement Officers: (CPOs)
Department of Education, Superintendent
University of Hawaii, President
Office of Hawaiian Affairs, Chairperson of the Board
Hawaii Health Systems Cooperation, President and Chief Executive Officer
Judiciary, Administrative Director of the Courts
Senate, President
House of Representatives, Speaker

Counties of Hawaii, Kauai, and Maui, and City & County of Honolulu
Executive Branch, Finance Director
Legislative Branch, City/County Council Chair
Board/Departments of Water Supply, Manager/Chief Engineer
Honolulu Authority for Rapid Transportation, Executive Director

CC: Administrative Services Offices

FROM: Bonnie Kahakui, Acting Administrator *Bonnie A Kahakui*

SUBJECT: Procurement Policy Board (PPB) Procurement Review Request
Past Performance HARs and Assessment Pursuant to Act 188/SLH 2021

Act 188 of the 2021 Session Laws of Hawaii (SLH) requires the State Procurement Office (SPO) to implement and administer a past performance database by December 31, 2023, and adopt rules regarding information and procedures associated with a past performance database.

Currently, some public contracts may be awarded to the lowest bidder or offeror, who may be considered qualified, without regard to that bidder's or offeror's past performance. To prevent this from recurring, Act 188 was enacted by Legislature to provide clear direction on awarding contracts to responsible bidders or offerors to increase accountability, enhance performance, and utilize the taxpayers' dollars more efficiently. The purpose of considering a contractor's

past performance in the procurement process and creating and maintaining a past performance database, which routinely captures contractor performance information in a structured and uniform way, is to help address the issues of repeated inefficiencies and substandard work, and to prevent poor performing vendor from being awarded a contract.

As a stakeholder in the State procurement process we are requesting your review of the draft Hawaii Administrative Rules (HAR) and assessment for past performance. It is important to hear your concerns and feedback on how past performance should be evaluated and implemented into a database.

If you believe any provision of the proposed rules and/or assessment form are unclear, then identify that section, line or sentence being referenced. In addition, for each item, the alternative language and the justification for the suggested language must be provided. See submission samples below.

Sample 1: Proposed Hawaii Administrative Rules:

Reference: HAR section 3-122-1, Definitions, for definition of “recent,” which states, “means performance information in which the performance has occurred within 5 years or as determined by the procurement officer that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated.”

Alternative Language: ““Recent” means performance information in which all or some of the performance has occurred within 5 years or as determined by the procurement officer that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated.”

Justification for Suggested Language: The definition of “recent” should be more flexible to account for Information Technology projects or other large-scale projects that may take longer than 5 years to complete, but contractor is providing satisfactory performance.

Sample 2: Contractor Performance Database Assessment:

Reference: Section 2. Assessment. Evaluation Factor 3. Cost/Financial Management (for Goods, Services, & Construction), which states, “Met the terms and conditions within the contractually agreed price(s).”

Alternative Language: ““Met the terms and conditions within the contractually agreed upon prices, including any amendments, extensions, change orders, and/or supplemental agreements requested by the State.”

Justification for Suggested Language: There may be times that the State discovers new needs and requirements, after the contract is signed, and request a change order. But right now, in order to receive a “Satisfactory” rating, a contractor must be within the “authorized budget” of the contract and currently “authorized budget” is defined as the initial funds allocated to a project and encumbered and does not mention any changes orders or amendments.

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To ensure your input will be taken into consideration, please submit your feedback to the PPB's email address: procurement.policy.board@hawaii.gov, **no later than COB, Friday, June 16, 2023.**

Questions concerning this Procurement Circular may be directed to Stacey Kauleinamoku at 586-0571 or email stacey.l.kauleinamoku@hawaii.gov or you may contact me at phone at 587-4700 or email bonnie.a.kahakui@hawaii.gov.

Attachments.

Proposed Rule Changes for Act 188, SLH 2021; and
Contractor Performance Assessment

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

Interim
Hawaii Administrative Rules

As of 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.

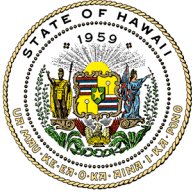
(c) The contractor past performance assessment process shall include the following:

(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)



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
<p>Satisfactory (S)</p>	<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>
<p>Unsatisfactory (U)</p>	<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:
<p><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></p>	
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.