

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR



**PROCUREMENT POLICY
BOARD**
RICHARD HELTZEL
LANCE INOUE
LISA MARUYAMA
DIANE NAKAGAWA
KEITH REGAN

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

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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 p.m.

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 approve 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 that 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 p.m., 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 p.m. 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 p.m.

Respectfully submitted,



Diane Nakagawa
Secretary, Procurement Policy Board