

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, May 18, 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: Lance Inouye
Lisa Maruyama
Diane Nakagawa
Keith Regan

Members Excused: Rick Heltzel

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
Margaret Phillips
Donn Tsuruda-Kashiwabara
Kevin Takaesu

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

County Staff: Mahealani M. Krafft, County of Kauai
Paula Youngling, City & County of Honolulu Purchasing Administrator

Guests: Laura Barzilai
Matt Bracken
Hugo Cabrera

Christopher Delaunay, Pacific Resource Partnership
David Imanaka, Building Industry Association of Hawaii
Mark L. Ishmael
Aaron Larrimore
Tim Lyons, Subcontractors Association of Hawaii
Jeff Masatsugu
Pane Meatoga III
Ryan Sakuda, General Contractors Association of Hawaii
Gregg Serikaku
Cameron Takamura
Jenna
Teresa

I. Call to Order, Public Notice

Chair Lisa Maruyama called the Procurement Policy Board (PPB) meeting to order at 1:32 p.m., held on Zoom and in-person. The meeting was recorded.

II. Roll Call, Quorum

Roll call was taken of the Procurement Policy Board members. Member Rick Heltzel was excused. There was quorum.

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

III. Approval of Minutes of April 20, 2023, Meeting

Keith Regan made a motion and Diane Nakagawa seconded the motion to accept the minutes of the April 20, 2023, meeting as presented. Lance Inouye asked for clarification of the minutes. Following discussion about amended the minutes for clarity, Mr. Regan withdrew his motion. Approval of the minutes was deferred until the next meeting.

IV. Proposed Amendments to Hawaii Administrative Rules (HAR) Section 3-122 – Source Selection and Contract Formation

Chair Maruyama reported that the Board received written testimony on this matter. (For the record, testimony is from the General Contractors Association of Hawaii and the Building Industry Association of Hawaii.)

Acting Administrator Bonnie Kahakui took the agenda items in a different order from they are listed:

- i. Subchapter 13.5 - Contractor Past Performance Assessment
- ii. Subchapter 1 – Definitions
- iii. Section 3-122-33 – Bid evaluation and award

Ms. Kahakui acknowledged that during the previous Board meeting, concerns were expressed about the evaluation questions on the Past Performance assessment form. She cited that [Act 188, SLH 2021](#), listed a few criteria should be included on the form. However, it is clear to the SPO that the legislature intended to have evaluation criteria and ratings on the past performance assessment form for the Past Performance Database. Ms. Kahakui referred to Section 1, of [Act 188, SLH 2021](#), which states as follows:

The legislature finds that the State's procurement process requires clear legislative direction to award contracts to responsible bidders or offerors to increase accountability, enhance performance, and utilize taxpayer dollars more efficiently. Currently, some public contracts may be awarded to the lowest bidder or offeror without regard to that bidder's or offeror's poor past performance. Specifically, these bidders or offerors may be considered qualified despite their poor past performance on public contracts, which may result in repeated inefficiencies and substandard work.

The legislature further finds that 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 and is accessed and utilized when future procurements need to determine a contractor's responsibility, will help to address issues of repeated inefficiencies and substandard work.

Ms. Kahakui added that although the statute does not identify every criterion, it tasked the SPO to create the past performance database to reflect the legislative intent and create support administrative rules. Simply listing the following would NOT address the question of responsibility.

- The name of the state contractor;
- The date of the project;
- The size of the project;
- A brief description of the project;
- The responsible managing employees for the project;
- Whether or not the project was timely completed;
- The project's authorized budget; and
- The positive or negative difference between the final cost of the project and the project's authorized budget, including the reasons for the difference, if any;

Ms. Kahakui referenced Act 188, SLH 2021, Section 3, which adds the definition of "past performance," which means "available recent and relevant performance of a contractor, including positive, negative, or lack of previous experience, on contracts that shall be considered in a responsibility determination within the relevance of the current solicitation, including the considerations of section 103D-702(b)." The SPO's understanding of determining "positive" or "negative: past experience can only be done if the past performance assessment form includes criterion that can be given a positive or negative evaluation. The SPO determined that "satisfactory and unsatisfactory" will meet this requirement. Based on the Act's definition of past performance, the questionnaire must be able to conclude an assessment of either "positive" or "negative."

The Act also

- Requires past performance to be added as an evaluation factor in IFBs and RFP (Sections 4 and 5); and
- Further amends 103D-310(b), HRS: "For the purpose of making a responsibility determination,
- the procurement officer shall possess or obtain available information, including past performance, sufficient to be satisfied that a prospective offeror meets the applicable standards." (Section 7).

Ms. Kahakui cited Merriam-Webster, evaluation is defined as "determination of value, nature, character, or quality of something or someone." An agency cannot make evaluation based on an

assessment that only included vendor name, dates, size, description, project manager(s), timeliness, budget (positive/negative). She added that SPO would be doing a disservice to the agencies if the assessment form only included these few criteria.

Ms. Kahakui explained that not having a rating would be analogous to having a Yelp review of a restaurant that included only the restaurant's name, location, size, hours of operation, menu offerings, restaurant manager, and prices. But consumers also want to know if the food was good or bad, or if the service was satisfactory. Yelp, like Amazon and many other companies, gives star ratings. At the very minimum it gives potential users a preview of what to expect.

Ms. Kahakui explained that the SPO conducted extensive research on what other states and the federal government are doing for past performance.

- **Texas:** Vendor Performance Tracking System - requires that agencies submit a vendor performance report within 30 days of the reporting event. Letter grades used are A, B, C, D and F. Report grades of A, B, and C do not require a vendor response. A vendor may submit a response within 30 days of the report.
- **Pennsylvania:** Contractor Responsibility Program - a centralized system that collects from and disseminates to agencies information concerning a contractor's lack of responsibility and deficient performance.
- **Washington:** Contract monitoring process - measures contract performance, cost, service delivery quality and other standards.
- **Ohio:** Vendor performance survey - Includes product satisfaction, customer satisfaction, overall satisfaction. Rating: Outstanding, very satisfied, satisfied, somewhat dissatisfied, very dissatisfied. Forms may vary by county but have similar rating (exceptional, very good, satisfactory, marginal, unsatisfactory).
- **Arkansas:** Vendor Performance Reports – required of all state agencies. Categories include customer service, delivery, quality, pricing. Ratings include standard, below standard, above standard. Below standard requires explanation and documentation.
- **Nebraska:** Vendor Performance Program – “build history” of vendor performance over time allows agencies to consider past contractor performance when awarding a new contract. Performance areas: delivery, and quality (inferior service, unsatisfactory workmanship, failure to meet specs). Miscellaneous considerations include inaccurate invoices, failure to respond, and unauthorized changes.
- **Minnesota:** Vendor Performance – the goal is to maintain and improve the quality of the state's vendor base by 1) acknowledging excellent vendors, 2) recognizing poor performance; 3) resolving problems, and 4) removing poor quality vendors. Vendor performance report rating include exceptional and unsatisfactory.
- **Arizona:** Requires agencies to complete assessment for all statewide mandatory contracts. This assessment is more descriptive in nature; no ratings are assigned.
- **Montana:** Contractor Performance Assessments. Required contract manager report contractor performance using Total Contract Manager in eMACS. Accurately reporting Contractor performance allows Contract Managers to share Contractor information, which facilitates better oversight of State contracts (e.g., aids in identifying Contractors that have exceptional performance history, and protects the State from Contractors with unethical business practices).
- **Washington, DC:** Vendor Client Past Performance Evaluation (construction) – Elements include quality of work, timeliness, cost control, business relations, and customer satisfaction. Rating: Excellent, Good, Acceptable, Poor, Unacceptable.
- **Federal Government Services Administration:** Extensive categories include quality, schedule, cost control, management, compliance. Rating: Exceptional, very good, satisfactory, marginal,
- unsatisfactory. Past performance is used in source selection information.

Ms. Kahakui commented that the State of Hawaii is not the first state to establish a past performance database or reporting system and there is sufficient evidence that a rating system is essential to the process. She cited a webinar presented by with Dr. John Wilkinson, a subject matter expert in contracting with federal experience, confirmed that it is imperative that past performance must have an evaluation rating to be effective. The SPO understands the need to be objective as possible and thus chose to use a rating system that would have the least amount of controversy and yet still provide value for agencies when making a responsibility determination. She concluded that the SPO has to have database running by December 31, 2023.

Mr. Inouye stated he appreciated Ms. Kahakui's presentation and that he doesn't know how the other states are using Past Performance, which is usually used in the Request for Proposal (RFP) processes. He added that Act 188, SLH 2021, received a lot of negative comments on how it will be implemented, and its rating system may create angst among contractors. He acknowledged that the SPO is trying to prevent problems with the rating. He added that he doesn't want to rush into approval, and rather look at this matter carefully and weigh research done by stakeholders.

Ms. Kahakui responded by stating she is unsure if the SPO has information on how other states are using past performance but clarified that the statute requires that Past Performance be used to determine responsibility in Information for Bids (IFBs), Request for Proposals (RFPs), and Sole Source methods of procurement.

Mr. Inouye stated that in addition to the procurement officer and the contractor, other considerations such as planning professionals and change orders, are not factored into this form. There is concern about the procurement officer making the final rating, which will be subjective in spite of efforts to make this objective.

Ms. Kahakui understands the concern, stating that the procurement officer is ultimately responsible for that procurement and that completion of the form will require multiple people (procurement professionals, project manager, and onsite manager) involved in the project. The assessment form will capture information in a standardized format with the procurement officer considering all comments before signing the assessment.

Mr. Regan commented that Mr. Inouye brings up a good point about on placing this responsibility on an individual who may or may not have direct management or control over the contract. He asked if it would be more acceptable to have the assessment completed by the contract administrator then verified by the procurement officer. To address the concern about having the assessment completed by the procurement officer who may not have direct involvement with the contractor, he suggested a process in which the assessment is completed by the contract manager and is specific about who signs off on the form. He stated that he won't feel comfortable with the assessment form unless this is more specific.

Ms. Kahakui said that Past Performance applies to services as well as construction and asked if including the contract administrator would be satisfactory. She clarified that the intent of the discussion is to put forth the rules needed to post and support the Past Performance assessment form, adding that problems will arise if the assessment form has deficiencies.

Mr. Inouye said that one example of the non-subjective requirements, as listed in Act 188, SLH 2021, is whether or not a project was timely completed. There may be a case in which liquidated damages are assessed due to an unauthorized change order for time, which is a negative. This is not devoid of measures the contractor's performance. Ms. Kahakui responded that not all contractors have liquidated damages; a contractor can do a poor job and yet not be assessed liquidated damages.

Mr. Inouye stated that in evaluating the positive/negative cost of the final cost of the project, the cost of change orders that were justified and approved should be included in the budget. Some of the requirements will help the next procuring agency in evaluating a vendor. He said that not meeting the time requirement is a valid criterion, but it is not devoid of measures to be used by the next procuring agency. He added that he has difficulty relying on a final assessment by someone in the department that may not have an unbiased opinion.

Chair Maruyama asked if there a mechanism for the contractor to provide context to the contract administrator before that person completes this form via a written document. Mr. Inouye explained that the assessment can trigger a debate between the contractor and the agency and even create an environment in which contractors avoid refuting the assessment and retribution. He suggested the contractor add comments to the record.

Chair Maruyama asked Ms. Kahakui to confirm that there is an appeal process and an opportunity for the contractor to refute comments. Ms. Kahakui confirmed that the contractor's comments become part of the record. Mr. Regan asked if the contractor enters comments directly or if this is done by purchasing staff. Ms. Kahakui responded that the contract administrator and the contractor are able to enter and edit their own comments. Mr. Regan asked if contractors are concerned that change orders may be used against them or are perceived as negative. Mr. Inouye explained the complex appeal process for change orders from the perspective of a contractor. The contractor and the procuring agency can get into a debate about change orders, but the final determination is with the procuring agency.

Mr. Inouye commended the SPO staff who worked on the Past Performance database but is expressing the contractors' perspective in an effort to make the Past Performance as objective as possible. Chair Maruyama appreciates the SPO's work and intention to find the broadest and best utility of the assessment form to populate the Past Performance database, and that she understands the concerns that this process is exposed to retribution, subjectivity based on negative experience and relationships. She understands that Board members want to make the assessment form to be the fairest vehicle for Past Performance. She said that the rules need to be promulgated based on the aspects of this form and asked the Board members if they are prepared to vote on the rules.

Mr. Inouye suggested going from the very least subjective approach to be evaluated before getting into a more subjective approach and that the Board consider starting with what Section 2 of Act 188, SLH 2021 requires, which may be helpful.

Ms. Kahakui responded that [103D-310\(c\), HRS](#), requires that the agencies make a determination of responsibility, which may not be possible if the assessment is based only on whether or not the project was made in a timely manner.

Chair Maruyama asked Deputy Attorney General Stella Kam for insight in the law and making the assessment form less subjective. Deputy AG Kam sensed that the Board may be uncomfortable with approving rules and an assessment form that contains information in addition to what is listed in [103D-329 Subsection \(b\)\(1\), HRS](#). She understands both the concerns of contractors and the intent of the Legislature to have a more in-depth assessment form.

Mr. Regan asked Ms. Kahakui if the SPO had referenced the Legislative report on Past Performance and the required metrics. She responded that the SPO found that Act 188, SLH 2021, and all the legislative committee reports, consistently referenced the need to make a determination of responsibility, as already stated in [103D-310\(c\), HRS](#). Based on the analysis of the legislative reports and Past Performance programs of other states, the SPO came up with objective criteria for the assessment of contractors' performance and is open to input from the Board.

Mr. Regan asked if the form was sent to the counties for feedback. Ms. Kauleinamoku responded that the SPO sent the form via a procurement circular asking all state agencies in the Executive Branch and other government jurisdictions for feedback on the proposed HAR on Past Performance and the assessment form. The proposed HAR and form being presented is based on the feedback received. The SPO also sent the form to contractors for review but did not get any feedback until 24 hours prior to this Board meeting.

Mr. Regan noted that there are members of the public and staff of other government agencies present in the virtual meeting and that he would like to get their feedback and insight on this matter. Deputy AG Kam said that if the Board wishes, it can accept general comments from the public on Past Performance. Ms. Kahakui said that the SPO can send out a survey on the current proposed rules and the current proposed assessment form to government agencies.

Chair Maruyama opened the floor to meeting attendees to provide comments, which are as follows:

- Paula Youngling, Purchasing Administrator for the City & County of Honolulu. She acknowledged that Past Performance is one of the most difficult procurement issues to tackle and appreciates that the Board is taking serious consideration and hearing at all sides of this issue. Ms. Youngling commented that a myriad of issues come into play on components such as extensions of time, change orders (many of which are requested by a government agency), cost overruns, and timely completion. She and her staff will plan to complete the survey.
- Ryan Sakuda, representing the General Contractors Association of Hawaii (GCA), an organization made up of approximately 500 general contractors and construction-related firms, stated that its members work on a majority of public works projects. GCA submitted written testimony and would like an opportunity to for its members to review and provide feedback on the proposed rules and assessment form.
- David Imanaka, representing the Building Industry Association of Hawaii (BIA), a non-profit trade organization representing many contractors and builders, stated that BIA submitted written testimony. Their testimony mirrors GCA's concerns on the subjectivity in the Past Performance assessment form. They look forward to future discussions with the Board.
- Tim Lyons, Subcontracts Association of Hawaii, asked for clarity on the flow of the comments entered by the purchasing agency and contractor, does the procurement officer have the ability to edit comments in the assessment? He cited an example of how the assessment form can be refined to address. In the "Definition" and "General Factors" sections of the proposed HARs for satisfactory rating, one criterion is whether or not the project stayed within the authorized budget, defined as the initial funds allocated. He pointed out that if a change order is approved, this is in excess of the initial funds, however, this is not a problem and should not be part of the assessment if the change order is under a supplemental budget.

Ms. Kahakui answered Mr. Lyons' questions. She said that the contract administrator and contractor can change their own but not each other's comments. She also explained that the statute states that a criterion is based on the authorized budget. The SPO will finetune details the assessment as best as possible.

Mr. Inouye asked how the previous Past Performance survey was distributed and what responses were received. Ms. Kauleinamoku responded that the SPO sent a procurement circular with the proposed HAR and assessment form on past performance asking all state agencies in the Executive Branch and other government jurisdictions for feedback. The SPO also sent the proposed HAR and form via email to a list of interviewees on the construction policy review

compiled in February 2022. Chair Maruyama asked the SPO to provide the previous distribution list, survey, and responses. She added that a new survey sent to a comprehensive list of stakeholders will provide feedback to enable the current Board in making an informed decision on the proposed HARS and assessment form on Past Performance. Ms. Kahakui stated that the survey of stakeholders will be on the rules and assessment form as currently proposed.

Mr. Regan asked for clarification on when the Board needs to complete its work on the proposed rules in order to meet the mandated deadline for the Past Performance database. Ms. Kahakui confirmed that the Legislature mandates that the Past Performance database must be implemented before December 31, 2023. Interim rules will be in effect 18 months upon Board approval. Ideally, the Board's review and approval of the interim rules and assessment form would be completed to allow for the refinement and finalization of the rules, response requirements, assessment form, and technological functions. The database and technology have been developed and now needs the assessment questions to be built into the online system. If the agencies and vendors can begin accessing and testing the database by September/October of 2023, the SPO would be able to meet the December 31, 2023, deadline.

Chair Maruyama asked the Board members for their input on starting fresh with a new survey and distribution list. Mr. Regan stated that he supports having the Board take fresh look at Past Performance and have the SPO staff focus its limited resources on a new survey and gathering input moving forward, rather than pulling up and presenting information on what was done previously. Chair Maruyama commented with the renewed attention of the contracting community, the Board and SPO anticipates a more robust response to the proposed HARs and assessment form.

Chair Maruyama recommended that the Board defer its decision on the proposed rules. She affirmed that the Board would support the survey of stakeholders and the work of the SPO staff to distribute the survey. She asked if the Board would like to offer its expectations for the survey.

Ms. Kahakui requested for Board input on the distribution of the survey to the contractors, recommending that the survey be distributed to GCA and other trade organizations for further distribution to its members, and to the State's Executive Branch and jurisdictions for distribution to purchasing staff. Mr. Regan agreed with this and asked for the support and assistance of Mr. Sakuda and Mr. Imanaka in distributing the survey to the members of GCA and BIA. Mr. Sakuda and Mr. Imanaka responded that they will assist. Mr. Lyons also stated that he can assist in communicating with the members of the Subcontractors Association of Hawaii, which represents nine different subtrades; the members also periodically act as general contractors. Ms. Kahakui said the proposed HAR on Past Performance applies to services, as well as construction. She added that the SPO has the ability to send announcements about the survey to all to all government jurisdictions through the Hawaii Awards and Notices Database System

Ms. Kahakui and Mr. Takaesu confirmed with Chair Maruyama that Act 188, SLH 2021, amends only Chapter 103D (Sections 103D-302, 103D-303, and 103D-306), HRS, and does not affect Chapter 103F, HRS; purchases under 103F will not be part of the Past Performance database.

Mr. Inouye noted that several of the attendees in his Board meeting represented subcontractors and participated in a Procurement Task Force.

Chair Maruyama affirmed that the stakeholders have a comprehensive plan for distribution of the survey. Further discussion will continue at the June meeting.

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

Mr. Regan made a motion to go into Executive Session. Mr. Inouye seconded the motion. There were no objections. At 3:08 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 3:15 p.m.

VI. Announcements

The next two Procurement Policy Board meetings will be held on Monday, June 5, 2023, at 1:30 p.m.; and Tuesday, July 11, 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.

VII. Adjournment

Since there was no new business, Mr. Inouye moved to adjourn the meeting; and Ms. Nakagawa seconded the motion. There were no objections. The meeting adjourned at 3:18 p.m.

Respectfully submitted,



Diane Nakagawa
Secretary, Procurement Policy Board