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September 11, 2023

**Via EMAIL** (procurement.policy.board@hawaii.gov)
**FIRST CLASS MAIL and**
**FACSIMILE:** (808) 587-4703

Procurement Policy Board
1151 Punchbowl Street, Room 416
Honolulu, HI 96813

Re: TESTIMONY OF ANNA H. OSHIRO
Comments Regarding Past Performance Database

Dear Board Members:

Thank you for the opportunity to submit testimony. As a practitioner who works in procurement and who represents contractors in connection with construction jobs both public and private, I would like to offer the following testimony regarding the Past Performance Database rules under consideration.

1. Any "past performance" database should only be collected as a means to establish a basis for a determination of bidder responsibility and in no instance shall the database be used to effect a "de factor" basis for debarment or suspension.

The plain language of the statute as defined, makes clear that the "past performance" of the bidder is only supposed to be used for a determination of a finding of responsibility. Haw. Rev. Stat. 103D-104, states clearly as follows:

> "Past performance" 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).

*See* Haw. Rev. Stat. 103D-104 (emphasis added). Clearly, the past performance language as defined by the legislature, "shall be considered in a responsibility determination" only. This makes sense, because if a bidder should be found to have a past "bad" job, the bidder should have an opportunity to address why the innumerable factors that may have given rise to a prior job's circumstances would not be applicable to this one, (such as (1) a former employee who is no longer with the company; (2) a hardship being experienced by the company at the time that is no longer at play; (3) an issue with a subcontractor or supplier or third party that may have affected performance on another job; (4) an issue with the construction manager or design professional evaluating contractor's performance on the prior

job; (5) a dispute with the state agency over a change order or claim or delay or any other issue, including personal differences between personnel, that may have affected the contractor's rating on a prior job, that would not be an issue on the present job). Attempting to assign a scarlet letter "U" unacceptable to a contractor on a past job may be evidence of something, but it is not evidence sufficient to render the contractor's bid nonresponsive. At most, it is a factor to consider (and on which the contractor should be entitled to be heard, as in all responsibility determinations) prior to the contractor being rejected from the job. Thus, the rules should make clear that any past performance determination is only, per law, to be considered as one factor in determining bidder responsibility. Anything more and the "past performance database" would be a *de facto* basis for debarment or suspension – in violation of the law and existing procurement code.

2. There is no legal basis for using a "past performance database" to effect debarment or suspension outside of the requirements of the law. Under the procurement code, procuring debarment or suspension against a contractor is perceived to be a difficult and time-consuming process. There is a good reason for this. Debarment represents the ultimate punishment – capital punishment -- for contractors who earn their living through public construction work. If a contractor is debarred, it and all of its employees are debarred from earning that living when debarment or suspension is employed against them. Allowing a "past performance" factor to be used to prevent alleged "bad contractors" from getting work, is essentially an admission that the intent behind the process is to allow *de facto* debarment or suspension without having to go through the mandated legal steps to obtain debarment. If so, then the statute is being used to effectively deny the due process already recognized as necessary to achieve debarment. If the state agencies seeking to impose this requirement believe that debarment as currently provided for by the law is too difficult to achieve to cull the bad actors in the industry, then the answer should be to address holes in the debarment process, *not* to use a new statute to avoid that process.

The process for debarment is set forth in 103D-702 and importantly the statute itself acknowledges that debarment or suspension are very serious steps and therefore can only be undertaken as required by law:

> "The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for a governmental body's protection and not for the purpose of punishment. An agency shall impose debarment or suspension to protect a governmental body's interests and only for cause and in accordance with this section."

Haw. Rev. Stat. § 103D-702 (emphasis added). A contractor having had a bad job (for, as noted above, any number of a myriad of possible reasons), is not to be used to punish the contractor on future jobs. This is why the process for debarment or suspension calls for a number of steps – to ensure that it is carried out carefully, mindfully, and without substantial opportunity for favoritism or personal politics or personal animosity affecting decision making. There must be opportunity for third party review of any such decisions, otherwise the taxpaying public could potentially be denied the potential for increased competition for bids without good and fair cause.

3. If a "past performance" database ends up getting used to reject a bidder, rather than as a factor that can be considered in a determination of responsibility as the law currently states, it is legally equivalent to debarment or suspension without following the requirements for debarment or suspension. This is problematic, especially because of modifications such as those requested by the Board of Water Supply, which has asked that any final decisions by the procurement officer be deemed "final" and not subject to appeal:

> "The final determination on the contractor's past performance assessment shall be the decision of the head of the purchasing agency or designee shall be final and not subject to any appeal."

This is directly at odds with the due process recognition afforded to contractors under the existing procurement code 103D-702(b) for debarment or suspension:

> (h) A decision under subsection (d) shall be final and conclusive, unless the debarred or suspended person commences an administrative proceeding under section 103D-709. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §23; am L 1999, c 162, §2; am L 2004, c 216, §2]

In other words, in order to debar a contractor from bidding for public works, State agencies must follow a stepped process and even after the decision, are subject to an administrative appeal (and civil actions reviewing any administrative appeal thereafter). There are numerous safeguards to ensure that contractors and the workers they employ are not put out of work and denied the opportunity to bid for work unless afforded full and fair due process. This is key because the specific language of 103D-329 does not require any finding of "satisfactory" or "unsatisfactory". HAR 3-122-33(e) provides that offers 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 day." If a bidder is deemed to have performed in an "unsatisfactory" manner pursuant to a newly imposed, allegedly "objective criteria" determination that is part of the "past performance" database (see discussion regarding alleged "objective criteria" being used to determine performance), it is easy to see a State agency attempting the claim the bidder is either nonresponsive or otherwise disqualified from the work. This would be at odds with the law's definition of "past performance," at odds the procurement code's requirements for debarment and suspension, and a constitutional due process violation.

For these reasons, we strongly recommend that any administrative rule to be adopted herein, preface any database creation with language parroting the definition of "Past Performance" so that State agencies understand any past performance findings are to be utilized *only* as a single factor to be considered as part of a responsibility determination at the outset of a job.

Moreover, we also strongly recommend that the language requested by the Board of Water Supply, that any findings made by a State Agency that become a part of past performance database be not subject to appeal, be deleted. The actions of a state agency that result in potential adverse consequences to a contractor must be subject to administrative appeal as they have a direct bearing upon a determination of the bidder's ability to perform work on future jobs. The bidder must have a full and fair opportunity to contest a decision that it deems fraudulent, arbitrary or capricious, or wholly unsupported by the facts of the job.

Respectfully submitted

Anna H. Oshiro

AO:kynf
80652

GENERAL
CONTRACTORS
ASSOCIATION
OF HAWAII

September 12, 2023

TO: STATE PROCUREMENT POLICY BOARD

SUBJECT: **COMMENTS ON PROPOSED AMENDMENTS TO HAR 3-122, NEW SUBCHAPTER 13.5 – CONTRACTOR PAST PERFORMANCE ASSESSMENT**

Dear Members of the Procurement Policy Board,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA provides comments on the proposed amendments to the HAR to create a new subchapter 13.5 – Contractor Past Performance Assessment Form.

The Contractor Past Performance Assessment Form is the result of Act 188 (2021).

The measure requires three things:

(1) To require the SPO to adopt rules no later than December 31, 2023, pursuant to chapter 91 to establish a past performance database that 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 or negative difference between the final cost of the project and the project's authorized budget, including the reasons for the difference, if any;

(2) Procedures to inform a contractor of the information contained in the past performance database about that contractor; and

(3) Procedures for a contractor to correct or respond to the information contained in the past performance database about that contractor.

Anything beyond this is not required by law.



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QUALITY PEOPLE. QUALITY PROJECTS

This measure received concerns from the Department of Accounting and General Services, Department of Design and Construction and Department of Budget and Fiscal Services of the City and County of Honolulu, Building Industry Association of Hawaii, and GCA regarding the necessity for or subjectivity of a past performance database.

The purpose of a procurement code is to ensure the fair, ethical, and transparent procurement of goods and services while maximizing taxpayer funds. The Hawaii Procurement Code specifically highlights the importance of objectivity in order to ensure fair, ethical, and transparent procurement. This can be seen with the language of 103D-302(f), which states that "those criteria that will affect the bid price and be considered in evaluation for award shall be as objectively measurable as possible, such as discounts, transportation costs, total or life cycle costs, and the bidder's past performance, if available." Remaining as objective as possible is critical to prevent unethical behavior in state procurement.

Comments on proposed amendments to the HAR, which add a new Subchapter 13.5, Contractor Past Performance

- §3-122.115.01(c)(1)(A) – 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.

  Allowing the procurement officer to rate a vendor as unsatisfactory is inherently subjective and beyond the requirements of Act 188 (2021). GCA respectfully, requests that the Past Performance Assessment be limited to the specific requirements contained in Act 188 (2021) as stated under the proposed §3-122.115.01(b).

- §3-122.115.01(c)(1)(C)- If the contractor does not respond, the contractor past performance assessment form shall be considered accepted.

  GCA is concerned with the proposed language. There could be reasons why a contractor fails to respond, such as fear of retaliation, and silence should not be considered as acceptance by the contractor.

- §3-122.115.01(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 shall be final and not subject to any appeal.

  GCA is concerned with language that allows the head of the purchasing agency or designee to make the final determination and not subject to any appeal. GCA believes that this opens the door for subjectivity and the potential for unethical procurement. Instead, the facts should be laid out and any potential reviewer should make their own interpretation and determination.

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Additionally, because the assessment is used to determine a bidders responsibility, it could serve as a de facto debarment from state work. This would ultimately raise concerns of due process.

Comments on the Contractor Past Performance Assessment Form

- Section 1 of the Contractor Past Performance Assessment Form includes the specific requirements of Act 188 (2021). GCA supports the inclusion of this information.

- Section 2 of the Contractor Past Performance Assessment Form includes an assessment to be completed by each procuring agency. This section asks that a contractors performance be rated as satisfactory, unsatisfactory, or not applicable and includes ratings on standards, schedule, financial management, labor management, safety, and emergency situations.

  GCA appreciates SPO's attempts to remain objective, but because Section 2 of the proposed Contractor Past Performance Assessment is not required under Act 188 and anything other than the use of facts inherently includes subjectivity, GCA requests that the section be removed from the form.

  For example, one agency may view a single unsatisfactory mark as enough to determine a lack of responsibility, while a different agency may not. The practical use of this is inherently subjective.

GCA's due process concerns arise from allowing "past performance" to be used to prevent certain contractors from getting work, is essentially a method of debarment or suspension without having to go through the mandated legal steps to obtain debarment.

GCA believes that it is in the best interest of the public to limit the past performance database to the specific requirements contained under Act 188 (2021) to ensure fair, ethical, and transparent procurement. This would allow the parties to meet the deadline of December 31, 2023, while going through the rulemaking process at a later date for anything beyond the requirements of Act 188.

Thank you for the opportunity to provide comments.

**STATE PROCUREMENT POLICY BOARD**
**KALANIMOKU BUILDING**

September 11, 2023

RE: TESTIMONY RE: PROPOSED AMENDMENTS TO HAWAII ADMIN RULES 3-122 – SOURCE SELECTION AND CONTRACT FORMATION

Members of the Board:

My name is Sarah Love, current President of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii. Our members build the communities we all call home.

BIA Hawaii provides the following additional comments for the Board's consideration on the proposed amendments to Hawaii Administrative Rules Chapter 3-122 relating to Contractor's Past Performance circulated for the Board's consideration in the September 12, 2023 meeting.

As set forth in our prior testimony to the Board dated June 16, 2023, BIA Hawaii has significant concerns that the proposed amendments do not provide Contractors with a mechanism to appeal decisions by the agency which they believe are not justified, effectively resulting in debarment or suspension without due process of the law. While certain changes have been made to the proposed language of the rules, BIA Hawaii's concern has not been addressed and the Board must address this concern.

Hawaii Revised Statutes 103D-104 provides that past performance shall be considered part of the responsibility determination for the Contractor:

> "Past Performance" 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).

See Haw. Rev. Stat. 103D-104 (emphasis added). Given the language of HRS 103D-104, the more appropriate insertion of considerations of past performance of the contractor would be in HAR 13-122-108, which is in the subchapter of the rules relating to the responsibility of the bidder and offeror. HAR 13-122-108 also allows for an appeal of the agency's decision of the contractor's responsibility determination which would alleviate BIA Hawaii's concern about effective debarment or suspension of a contractor from state and county projects without due process of the law. The legislature clearly had this in mind in enacting HRS 103D-104's definition of past performance which requires taking into consideration Section 103D-702, which expressly discusses the process for debarment of a contractor and requires that the contractor be provided with the opportunity to administratively appeal the procurement officer's decision on debarment. The proposed revisions to HAR 3-122-33 as currently drafted effectively do the opposite by providing for evaluation of past performance without including the considerations of Section 103D-702. The proposed amendment to HAR 3-122-33(b)(4) should be deleted and relocated to HAR 13-122-108. For the same reasons, BIA Hawaii also objects to the proposed language in HAR 3-122-115.01(c)(2)(C) which makes the decision of the head of the purchasing agency

or designee not subject to appeal and this language should also be deleted from here and the Contractor's Past Performance Assessment form.

In addition to BIA Hawaii's concerns on debarment and suspension, HAR 3-122-33(b)(4) is also not the proper place for the insertion of contractor's past performance as it is clear that HAR 3-122-33(b) relates to awarding contracts to bidders based upon "objectively measurable criteria." As we have previously noted, a past performance determination is inherently subjective and not an objective measure. By placing the requirement in this section, it will invite procurement challenges from bidders that do not receive awards arguing that the agency failed to take into account a winning bidder's past performance and that any rating other than satisfactory om past jobs, for whatever reason, would make a winning bidder's bid non-responsive.

With respect to the Contractor Past Performance Assessment Form, BIA Hawaii continues to have concerns with the form. For the reasons set forth above, one unsatisfactory rating on one sub-issue could result in a contractor being challenged as non-responsive from non-winning bidder. Further, Section 2 of the form contains rating of many areas which simply do not make sense for construction projects. By way of example only, the section "managed and tracked costs accurately," how is the procurement officer going to know this or measure it? Additionally, "met the terms and conditions within the contractually agreed price(s), including approved changes." The contractor is only going to be paid the stipulated sum plus approved change orders. Does this mean if a contractor submits for change order that is not approved by the agency, then a "U" determination has to be made? Given the different types of contracts that are being covered by this form, we do not believe the assessment section can be one size fits all. Accordingly, we would request that the Assessment Section in its entirety be deleted and that one overall assessment be provided for the project.

Thank you for the opportunity to share our comments and concerns.