



JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

STATE OF HAWAI'I | KA MOKU'ĀINA O HAWAI'I
PROCUREMENT POLICY BOARD

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4701
Email: procurement.policy.board@hawaii.gov
<http://spo.hawaii.gov>

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

Procurement Policy Board Meeting
Monday, October 16, 2023, 1:30 pm – 3:30 pm HST
Virtual and Physical Location

Virtual Meeting Using Interactive Conference Technology – Zoom

Join Zoom Meeting

<https://zoom.us/j/99298000968?pwd=S1A1Ujc0eWJtR2ppZjA4MDIZMEN5Zz09>

Meeting ID: 992 9800 0968

Passcode: 1FnU8d

One tap mobile

+12532050468,,99298000968#,,, *869810# US

+12532158782,,99298000968#,,, *869810# US (Tacoma)

Dial by your location

- +1 253 205 0468 US
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 669 444 9171 US
- +1 669 900 6833 US (San Jose)
- +1 719 359 4580 US
- +1 929 436 2866 US (New York)
- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US

Meeting ID: 992 9800 0968

Passcode: 869810

Find your local number: <https://zoom.us/j/99298000968?pwd=S1A1Ujc0eWJtR2ppZjA4MDIZMEN5Zz09>

Physical Location

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

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

Contact for Meeting Information/Written Testimony

To request email notification of meetings, email procurement.policy.board@hawaii.gov.

We request that testimony be submitted no later than 72 hours prior to the meeting to ensure time for review by Board members. Testimony received after that time will still be considered by the board but might not be distributed to board members until the start of the meeting. Written testimony may be submitted by one of the methods listed below:

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

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

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

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

If you need an auxiliary aid/service or other accommodation due to a disability, contact Ruth Baker at (808) 587-4701 or at ruth.a.baker@hawaii.gov as soon as possible, preferably by 4:30 p.m., October 12, 2023. Requests made as early as possible have a greater likelihood of being fulfilled.

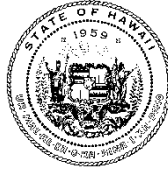
Upon request, this notice is available in alternate formats.

Procurement Policy Board Meeting
Agenda
Monday, October 16, 2023, 1:30 p.m. – 3:30 p.m.

- I. Call to Order, Public Notice**
- II. Roll Call, Quorum**
- III. Approval of Minutes of July 11, 2023, Meeting**
- IV. Public Testimony – Public testimony will be taken on all items as those items occur during the meeting**
- V. Review and Possible Approval of Proposed Past Performance Assessment / Questionnaire, which shall be completed by all state and county procurement officers or agents at the end of a contract.**
- VI. Discussion and Possible Approval of Proposed Amendments to Hawaii Administrative Rules HAR §3-122 - Source Selection and Contract Formation**
 - A. §3-122-1 – Definitions – Addition of “recent,” and “relevant” as definitions
 - B. §3-122-33 - Bid evaluation and award – Addition of “Bidder’s past performance, if available.”
 - C. New Subchapter 13.5 – Contractor Past Performance Assessment Form – addition of language and procedures pertaining to contractor past performance assessment.
- VII. Announcements**
Next Meeting: Monday, December 4, 2023, 1:30 p.m.
- VIII. Executive Session: Discussion of personnel matters in the recruitment for Administrator, State Procurement Office**
The Procurement Policy Board anticipates the need to meet in executive session closed to the public pursuant to Section 92-4, Hawaii Revised Statutes. The executive session will be conducted pursuant to Section 92-5(a)(2), 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.
- IX. Adjournment**

If you need an auxiliary aid/service or other accommodation due to a disability, contact Ruth Baker at (808) 587-4701 or at ruth.a.baker@hawaii.gov as soon as possible, preferably by 4:30 p.m., October 12, 2023. Requests made as early as possible have a greater likelihood of being fulfilled.

Upon request, this notice is available in alternate formats.



JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

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

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4701
Email: procurement.policy.board@hawaii.gov
<http://spo.hawaii.gov>

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

Procurement Policy Board

Minutes of Meeting

Date/Time: Tuesday, July 11, 2023, 1:30 p.m.

Locations: 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

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

State Procurement
Office Staff: Bonnie Kahakui, Acting Administrator
Christopher Amandi
Ruth Baker
Stacey Kauleinamoku
Carey Ann Sasaki
Donn Tsuruda-Kashiwabara
Kevin Takaesu

Other State Staff: Eric Nishimoto, Department of Accounting and General Services - Public Works Division
Gordon Wood, Department of Accounting and General Services - Public Works Division

Guests: Rep. Scot Matayoshi, House of Representatives
S. Inouye
Sarah Love, Building Industry Association (BIA)
Sean Maskrey
Pane Meatoga III
Ryan Sakuda

I. Call to Order, Public Notice

Chair Lisa Maruyama called the Procurement Policy Board (Board) meeting to order at 1:45 p.m. held on Zoom and in-person in Room 410 of 1151 Punchbowl Street. The meeting was recorded.

II. Roll Call, Quorum

Roll call was taken of the Procurement Policy Board members; there was quorum.

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

III. Approval of Minutes of June 5, 2023, Meeting

The minutes of the June 5, 2023, were reviewed. Rick Heltzel made a motion and Diane Nakagawa seconded the motion to accept the minutes as presented. The members unanimously voted to approve the minutes.

The June 5, 2023, meeting minutes accurately stated that Member Inouye requested a list of stakeholders that sent a survey on the Past Performance. Member Inouye withdrew his request for that information, which is documented in the July 11, 2023, minutes.

IV. Legislative Update

Chair Maruyama recognized State Rep. Scot Matayoshi and asked if he wanted to provide an update on the past legislative session. He did not offer a report but stated that he was attending the Board meeting to talk about the Past Performance Database, which is later on the agenda.

SPO Acting Administrator Bonnie Kahakui reported in the 2023 Legislative Session, three bills that affected procurement were passed and were signed by the Governor.

- House Bill 977 HD1 SD1 / Act 44 abolished the Community Council on Purchase of Health and Human Services
- House Bill 978 HD2 SD2 CD1 / Act 45 amended the treatment of services and how it can be applied, and delegates responsibility of the purchase of treatment of services to applicable department heads. Relevant administrative rules will need to be amended.
- House Bill 1184 HD1 SD1 CD1 / Act 188 allows agencies to rank fewer than three persons for professional services under specific conditions and may request an alternative procurement when fewer than three qualified persons respond to the solicitation. The SPO issued an update and guidance to government agencies through procurement circular.

V. Past Performance Assessment – Survey of Stakeholders

Chair Maruyama recognized Rep. Matayoshi, who provided testimony on the Past Performance Assessment. He explained that as the author of the Past Performance legislation, he wanted to thank the Board for their time and provide the members feedback on the intent of the legislation, which was a result of discussion with colleagues. He stated that he didn't mean for the bill to be restricted to the categories described, which is why (b)(1) of the bill states that SPO shall adopt rules on information to be in the Past Performance database. Rep. Matayoshi stated that the Legislature wanted to make sure that information listed in the bill are included in the database. He cited that in the language of the bill, the SPO shall adopt rules to establish information required to be included in

the Past Performance database. He reiterated that it was the Legislature's intent for the SPO to determine the criteria in the Past Performance assessment to ensure that the best contractors can compete and get hired by the state. He said that at some point all stakeholders would have to come to an agreement on the past performance assessment so it can be utilized, then modify the assessment through rule-changes or legislation, as needed, in the future.

Acting Administrator Kahakui explained that the SPO conferred with other states and the federal government, then took the best of the evaluation criteria such as budget, contract, management, safety, cooperation, and technical support. She said that the SPO reviewed various grading/rating systems, then selected those that were the most objective. She added that the SPO wants to work with stakeholders on making the assessment more objective and revising the timeline of the assessment.

Eric Nishimoto of DAGS Public Works Division commented that the SPO works on obtaining feedback from stakeholders, and that the Board is the entity that promulgates the rules.

Sarah Love, President of BIA Hawaii, stated that BIA has submitted testimony about its concerns on allowing subjectivity in the evaluation process, and on the due process to allow contractors to challenge negative ratings. The BIA asks for an objective, rather than subjective, perspective pertaining to procurement.

With the conclusion of the public testimony/input on the past performance assessment, Acting Administrator Kahakui provided a report from the SPO on the results of its survey of the assessment. She reported that 25,000 emails asking for input were sent to stakeholders, including vendors in HlePRO, those in the SPO's small business data base, external vendors, State of Hawaii Executive Branch Department Directors, and Chief Procurement Officers within the state of Hawaii. The SPO received responses from nine vendors and eight government agencies. The responses included recommendations to revise the timeframe and delete assessment questions.

Deputy Attorney General Stella Kam referenced the suggestion made by Rep. Matayoshi, that the database can be changed and tweaked as needed. She stated that the Hawaii Administrative Rules (HAR) are restrictive and binding, and if the HAR states what assessment information goes into the database, the HAR has the full force of the law. With the deadline for the Board to promulgate the rules by the end of 2023, she suggested that the HAR can be amended in a manner to allow for flexibility. She will review the rules for language that has some leeway, and conversely, the language that restricts and binds the database to be kept as is on December 31, 2023.

Acting Administrator Kahakui reiterated that the SPO wanted to give the Board members the opportunity to look at the diverse feedback and comments from stakeholders. She summarized that the SPO can create the assessment and the database pursuant to the language in the Past Performance legislation, but since the database still needs the rules to be promulgated by the Board, the SPO requests direction on this matter.

Various Board members commended the SPO staff on their research and work on the Past Performance database and assessment.

Member Heltzel asked that the SPO provide a scoresheet summarizing the comments on each section of the assessment and for a tally of three answers: 1) In Favor, 2) Against, and 3) Neutral. He noted that most of the comments were "Against" a subjective database, and pointed out that in the purpose of the database to root out the few bad performers requires a lot of resources from government agencies. He asked that the Board consider the impact that the rules have on the agencies, which are understaffed and busy. He said that the purpose of Federal past performance database, which goes a little beyond objectivity in the past performance questions, is to improve the chances for good performers to win Federal contracts.

To provide more time to work on the Past Performance Assessment, Member Heltzel suggested that a working group be formed to work on the Past Performance assessment, if allowable. Deputy Attorney General Kam explained the difference between a working group and a Permitted Interaction Group (PIG). A working group would have to follow the Sunshine Law for public meetings and notices need to be posted on the State Calendar. The other option is a PIG, which works on tasks that would otherwise be too time-consuming for the entire Board. During a regular Board meeting, the chair would name two Board members and the SPO staff to serve on the PIG and outline the scope of the PIG. The PPB cannot have more than two members on a PIG (the members on a PIG must be less than a quorum, i.e. three members for the PPB) and does not have to follow the Sunshine Law. She noted that the PIG will likely not provide an environment that would adequately involve the views of all the members since the members represent diverse backgrounds (industries), thus, the Board will need to be comfortable with having two members on the PIG represent the entire five-member Board. Following its formation, the PIG would meet to discuss and recommend proposed administrative rules, then present those findings and recommendations to the full Board during a regular meeting. One regular Board meeting would be on the presentation by the PIG on those findings, and recommended administrative rules. A second regular Board meeting would be on the vote to approve the rules as recommended.

Member Diane Nakagawa echoed Deputy Attorney General Kam's comments regarding the expertise of each Board member and prefers that the discussion continue during regular Board meetings. She also thanked the SPO for conducting the recent survey of the stakeholders on the Past Performance assessment and compiling the responses, which included responses from critical stakeholders. She sensed that the sentiment expressed in the responses is a level of discomfort. Member Nakagawa asked the Board to continue its discussion on this issue and come up with a product with which it is comfortable.

Member Inouye stated that there are many factors, such as a poor design/plan or change orders, that will cause a project to go awry. Since Past Performance applies to different types of procurement (goods, services, construction, and other procurement), each type of service may have to be carved out and recommended that the database start off by being not so subjective.

Chair Maruyama asked for information on the overall vendor list for the State to understand who is being impacted the most when the Board makes decisions. She asked if there needs to be a different approach for each industry since there is so much variability across the different industries. The Chair asked Acting Administrator Kahakui if the survey results and feedback from respondents have convinced the SPO to modify its approach to the Past Performance Assessment. Acting Administrator Kahakui responded that the SPO was interested in the feedback and is open to changing some aspects of the assessment, such as the timeline for the assessment feedback. She added that she doesn't want to restrict the assessment to only those listed in the legislation because that information does not say anything about the performance of the contractor.

Chair Maruyama asked Members Inouye and Heltzel about their thoughts on the assessment points listed in the Past Performance legislation and the SPO's proposed list of assessment points. Member Heltzel said that the assessment should strive to be as objective as possible and offered a suggestion: during the contract, a government contracting agency needs to keep written documentation (correspondence and notices) on contractor performance. A contracting agency can provide this subjective documentation along with the existing objective data to be referenced for future contracting jobs. He expressed the concern with the impact of the Past Performance assessment on government contracting agencies that are short-staffed. Acting Administrator Bonnie Kahakui said that one of the iterations for the Past Performance assessment is correspondence to the contractor to document an unsatisfactory rating.

Chair Maruyama took comments from the public.

Sarah Love of the BIA offered a lawyer's perspective of the administrative rules, that the agency must take into consideration past performance. If the assessment is limited to only two categories – "satisfactory" and "unsatisfactory" – and a contractor receives an "unsatisfactory" rating and does not have the means to challenge the final determination, then that contractor is deprived of due process. She added that when variables such as change orders lead to disputes, she felt that the SPO and the Board need to sort out the process to hear those disputes.

Eric Nishimoto of the Department of Accounting and General Services – Public Works Division (DAGS PWD) offered his thoughts. He said that although this is more work for the agencies, he felt that the documentation of poor performance of contractors is objective, and the process to debar contractors that are consistently poor performers is difficult, citing how an agency expended much time, effort, and resources to debar a poor-performing contractor. The Past Performance database as a repository for this information/documentation on contractors would be useful for agencies, especially for the debarment process. The application of the Past Performance Assessment on all forms of procurement (such as professional services, furniture and equipment, maintenance, and custodial services), would require a lot of work for short-staffed government agencies. He recommended to start off with a simple assessment, then as stakeholders see the value of the Past Performance Database and agencies have more staff, add to the assessment.

Chair Maruyama acknowledged that the Past Performance Database is mandated to be launched by the end of the year and asked Acting Administrator Kahakui if there are any modifications that can be made to the assessment, based on the feedback and responses offered by stakeholders. Acting Administrator Kahakui clarified that the SPO did not request the Past Performance legislation, which states that agencies consider Past Performance in their determination of responsibility. She said that the SPO can review the assessment and make that as objective "satisfactory" and "unsatisfactory." Acting Administrator Kahakui stated that she will look at comments and provide a revised assessment and proposed administrative rules.

Deputy Attorney General Kam added that the contracting records maintained by the purchasing agencies are public records. Many of the records (emails, correspondence) are already in PDF format and can be easily uploaded to the Past Performance Database, as opposed to drafting a history with information and problems of the project. There would be no dispute on the agency's written communication to the contractor expressing its concerns on the project.

Member Heltzel stated that if a vendor knows they are going to be graded and held to that accountability for future jobs, they may begin to improve their performance. He asked that the SPO consider eliminating any ties of performance to the final payment to vendors. Federal procurement does not tie final performance pay to their contract. Acting Administrator Kahakui responded that the SPO had already planned to eliminate that final performance requirement.

Chair Maruyama summarized the feedback received: the Past Performance Database must be objective and include just the facts, and the goal is to weed out bad performers, not eliminate the good performers. She also acknowledged the work of the SPO.

Acting Administrator Kahakui stated that the SPO will look at simplifying the assessment for the Past Performance Database, which needs to be launched by the end of this year. The proposed administrative rules do not have a mandated deadline.

VI. Announcements

The next Procurement Policy Board meetings will be held on Thursday, August 31, 2023, at 1:30 p.m., and Tuesday September 12, 2023. 1:30 pm. These meetings will be hybrid on Zoom and in person at the physical location of Room 410 in 1151 Punchbowl Street.

There were no additional announcements.

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

Since the board had no updates on the matter of the recruitment for the position of Administrator of the State Procurement Office, this agenda item was deferred.

VIII. Adjournment

Since there was no new business, Member Heltzel moved to adjourn the meeting; Member Nakagawa seconded the motion. All members voted to adjourn the meeting. The meeting adjourned at 3:10 p.m.

Respectfully submitted,

Diane Nakagawa
Secretary, Procurement Policy Board

[Return to Agenda](#)

1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813-6452
Telephone (808) 531-8031
Facsimile (808) 533-2242
E-Mail: aho@hawaiilawyer.com
www.hawaiilawyer.com

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

David H. Abitbol
Nicholas K. Ernst
Matthew T. Evans
Tred R. Eyerly
Clint K. Hamada
Diane D. Hastert
Max J. Kimura
Christine A. Kubota
Gregory W. Kugle
Kenneth R. Kupchak
Na Lan

Megan L.M. Lim
Jonathan N. Marchuk
David P. McCauley
Casey T. Miyashiro
Mark M. Murakami
Anna H. Oshiro
Christopher H. Pang
Laurel E. Pepe
Douglas C. Smith
Ross Uehara-Tilton
Toren K. Yamamoto
Amber M. Yonamine
Michael A. Yoshida
Madeleine M.V. Young

Of Counsel
Jed Kurzban

Denis C.H. Leong
(1942-2023)
R. Charles Bocken
(1921-2020)
C. F. Damon, Jr.
(1926-2017)
Charles W. Key
(1929-2008)



Providing business clients
worldwide access to
sophisticated legal advice
and exceptional service.

Procurement Policy Board
September 11, 2023
Page 2

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."

Procurement Policy Board
September 11, 2023
Page 3

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

Procurement Policy Board
September 11, 2023
Page 4

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

A handwritten signature in black ink, appearing to read 'A. Oshiro', with a horizontal line extending to the right.

Anna H. Oshiro

AO:kynf
80652

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.

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.

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 on 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.

[Return to Agenda](#)



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 each contract under which ~~whom~~ the Contractor has provided or is currently providing ~~products~~ goods, services and/or construction specified herein.

Commented [KSL1]: Added in suggested language from Board of Water Supply to clarify that the form needs to be filled out for each contract that the contractor performed under, and not for each procurement officer or procuring agency.

Commented [KSL2]: Took UH System's suggestion to replace the word "products" with "goods" to be consistent with terminology in HRS chapter 103D.

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:	
<u>License Requirement(s)</u> Placed on Bidders for Project , if applicable (i.e. <u>e.g.</u> , 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:

Commented [KSL3]: Added in suggested changes from Board of Water Supply to clarify that the identified licenses should be those required for the project, whether or not the procuring agency placed those requirements on bidders. Also, should be changed from i.e., (in other words) to e.g. (for example).

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:			

Commented [KSL4]: Removed "Notice of Award Date," "Notice to Proceed," "Estimated start/completion dates," and "Reason(s) for Difference between estimated and actual dates, if applicable," information as suggested by UH Systems as these items are not required by Act 188 and are unnecessary requirements.

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

Rating	Definition + General Factors	Notes
Satisfactory (S)	<p>Performance meets minimum contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.</p> <p><i>This rating represents contractors meeting expected performance to support the project.</i></p> <p>To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. <u>For example:</u></p> <ul style="list-style-type: none"> • Meets standards, objectives, and all performance requirements. • Stayed within project's authorized budget. • Deliveries <u>on-time on time</u>. • Schedule not impacted. • Met expectations. • Adequate user satisfaction. • Met goals and expectations of the project. • <u>Managed delays.</u> • <u>Managed project schedule.</u> <p>NOTE: The term "authorized budget" is defined as the initial funds allocated to a project and encumbered <u>along with any change orders and/or amendments authorized and encumbered in accordance with the contractual terms and conditions and/or HAR.</u></p>	<p>There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.</p>
Unsatisfactory (U)	<p>Performance does not meet <u>most-significant/material</u> contractual requirements and recovery <u>is-was not likely-accomplished</u> in a timely manner. The contractual performance of the element or sub-element contains <u>serious-material</u> problems for which the contractor's corrective action appear or were ineffective (<u>i.e.e.g., reports, letters, etc.</u>).</p> <p><i>This rating represents contractors whose performance did not meet material requirements defined in the contract whether due to a number of material performance issues or significant problems with one aspect of contract performance. consistently does not meet requirements defined in the contract.</i></p> <p>To justify an Unsatisfactory rating, identify <u>multiple</u> significant event(s) in each category that the contractor had trouble overcoming and state how it impacted the Government. <u>For example:</u></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. 	<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>

Commented [KSL5]: Added "For example" before Satisfactory and Unsatisfactory rating bullets to clarify these items are suggestions to be considered.

Commented [KSL6]: Added in Board of Water Supply's additional categories to assess timeliness of a contractor's performance.

Commented [KSL7]: Added in City and County of Honolulu's Budget & Fiscal Services suggested language as contractors are entitled to changes in price and schedule in clearly defined circumstances under HAR 3-125 and 3-126, and the terms and conditions of the contract, and should be deemed part of the "authorized budget" for performance assessment purposes.

Commented [KSL8]: Added in Board of Water Supply's suggested changes to provide additional clarity on what an unsatisfactory rating entails and closes the loop on where a contractor met many minor requirements (more than 50% total requirements), but fails to meet significant or material requirements. Requires recovery to have actually occurred to take a rating beyond unsatisfactory. Also provides more specific, useful language.

	<ul style="list-style-type: none"> 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. Delayed <u>Delays</u> Lack of user satisfaction. <p>NOTE: If a contractor is deemed "unsatisfactory," the rating must be accompanied with multiple letters <u>documentation</u> (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.

Commented [KSL9]: Added in City and County of Honolulu's Honolulu Fire Department's suggestion to replace "multiple letters" with "documentation" to provide the flexibility to include documentation that is admissible evidence.

Also deleted second to last sentence, "If no results occur by the contractor, it can be stated that the department will submit its recommendation to SPO for suspension and debarment" as suggested by City and County of Honolulu's Budget & Fiscal Services and Department of Design and Construction because suspension and debarment actions are beyond the intent of the performance evaluation.

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 rate the contractor's project performance for each of the following items.~~ At a minimum, provide comments to substantiate any rating that is checked Unsatisfactory (U).

Commented [KSL10]: Added in Board of Water Supply's suggested changes to clarify the rating system to be used and requires notation to justify failures so evaluators can do a further review of the question.

1. Technical (Quality of Work (for Goods, Services, & Construction) 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"/>
<p>Please share your experience, at a minimum, provide c <u>Comments</u> to substantiate any rating that is checked Unsatisfactory (U) <u>rating</u>.</p>			
2. Schedule/Timeliness of Performance (for Goods, Services, & Construction):			
	S	U	N/A

Commented [KSL11]: Deleted Section 1. Technical in its entirety as suggested by GCA Hawaii.

Changed to "Quality of Work (for Goods, Services, & Construction)" as suggested by UH Systems and have only Satisfactory and Unsatisfactory ratings only throughout Section 2. Assessment.

Complied with contract delivery/completion schedules including any significant intermediate milestones. (If liquidated damages were assessed or the schedule was not met, <u>or delays beyond the contractor's control</u> please address below)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<u>Submittal of all required close out documents.</u>	<input type="checkbox"/>	<input type="checkbox"/>	
Comments to substantiate Unsatisfactory (U) rating. 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). <u>including approved changes.</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractor's timeliness and accuracy in submitting al of 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 checked="" type="checkbox"/>
Rate Contractor's financial management abilities to pay subcontractors/suppliers timely	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Comments to substantiate Unsatisfactory (U) rating. 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"/>
<u>Managed Management of Government-Owned Property</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Implemented changes in requirements and/or priority	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Transitioned personnel and operations when taking over from the incumbent Contractor	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments to substantiate Unsatisfactory (U) rating. Please share your experience, at a minimum, provide comments to substantiate any rating that is			

Commented [KSL12]: Took part of Subcontractors Association of Hawaii (SAH) suggested verbiage to provide clarity on delays beyond the contractor's control.

Commented [KSL13]: Added in UH System's suggested language because many agencies struggle with closing out a project because close-out documents are not timely delivered. This criterion will assist with timely closing of projects.

Also took out verbiage "timely" as it is subjective.

Commented [KSL14]: Change made to entire Section 2 Assessment as suggested by the City & County of Honolulu's Budget & Fiscal Services (BFS) because it is impossible to name every criteria to assess for each major category. It is best to allow the agency to take responsibility for providing the exact examples of the actual action/inaction and circumstances that led to an "unsatisfactory" rating in any of the major categories.

Commented [KSL15]: Added in Subcontractors Association of Hawaii (SAH)'s suggested verbiage to clarify approved changes are included in assessment.

Commented [KSL16]: Deleted 4th assessment item as suggested by City & County of Honolulu's Department of Design and Construction as agency administering construction is unlikely to have information necessary to rate contractor's financial management abilities to pay subcontractors/suppliers timely.

Commented [KSL17]: Added in Board of Water Supply's suggested change to provide clarification that the rating is for the contractor's management of government-owned property and not just whether or not such property was managed.

Deleted Item #3 as requested by City & County of Honolulu's Department of Design and Construction as transitioning of personnel and operations when taking over from the incumbent contractor is typically not applicable to construction contracts.

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

	S	U	N/A
Contractor maintained and/or exceeded an overall environment of safety, adhered to its approved safety plan, and responded 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"/>

Comments to substantiate Unsatisfactory (U) rating.

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

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

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

Commented [KSL18]: Removed original Criteria #5, Customer Satisfaction (for Goods, Services, & Construction) as suggested by GCA Hawaii, Board of Water Supply, and the City & County of Honolulu's Department of Design and Construction as "Customer Satisfaction" does not apply to the construction contractor when the construction project is administered by an agency other than the agency that owns and operates the facility. The user agency's (customer's) input needs to be incorporated into the plans and specifications, which is what the construction contractor is required to comply with.

Commented [KSL19]: Added in suggested change of "overall" from Subcontractors Association of Hawaii (SAH) as HIOSH has 1700 pages of safety standards and anyone can be cited for even a minor violation.

Made grammatical change as requested by Board of Water Supply.

Commented [KSL20]: Spelt out "HOPA" as suggested by City & County of Honolulu's Department of Design and Construction for clarity and consistency.

[Comments to substantiate Unsatisfactory \(U\) rating.](#)

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	
<p>Please cite specific assessment criteria you are providing comments, rebuttals, or additional information to.</p>	
<p>Pursuant to HAR section 3-122-115.01(c)(1)(DC), Contractor shall review the Contractor past performance assessment form within 10-20 working days, from the date of notification of the contractor past performance assessment, and submit comments rebutting statements, or additional information. If the Contractor, or the Contractor does not respond, the contractor past performance assessment form shall be considered accepted by the contractor.</p>	

Commented [KSL21]: Added in GCA Hawaii's suggestion of 20 working days to align with suggested changes to Act 188 HARs.

Commented [KSL22]: Added in suggested changes from Board of Water Supply to provide clarity regarding consequences of the contractor's failure to timely respond to the assessment.

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	
<p>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.</p>	
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 <u>taking into consideration with any</u> 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 <u>shall be final and not subject to any appeal</u>.</i></p>	
<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.</p>	
Name:	Title:
Signature:	Date:

Commented [KSL23]: Added in Board of Water Supply's suggested changes to clarify that the decision of the head of the purchasing agency or designee is not subject to appeal. Also clarifies that the procurement officer's updates should take the contractor comments into consideration, and not simply repeat them.

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

[Return to Agenda](#)

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

Interim
Hawaii Administrative Rules

October 16, 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 five 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.

Return to Agenda

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)

Justification:

Pursuant to Act 188, SLH 2021, section 103D-104, HRS, was amended to add the new the new definition Past Performance, to read: ""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)." Therefore, the following changes, related to past performance in Competitive Sealed Bidding, Competitive Sealed Proposals, and Sole Source procurements, are recommended:

- (1) Adds new definition of "Recent" as time periods for consideration may be different according to the type of requirements and is added to mean performance information in which performance occurred within five year or as determined by the procurement officer that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated.
- (2) Adds new definition of "Relevant" to mean performance information that is similar in size, scope, and complexity to the requirements being solicited or evaluated.

Changes after PC2023-07's Feedback: No additional changes made. Definitions are as per PPB's suggested changes to "Recent" on 5/18/2023 PPB meeting.

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 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 ~~[.];~~ and
- (4) Bidder's past performance, if available.

(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

Return to Agenda

- 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)

Justification:

- (1) *Change is made to remind State employees that past performance, if available, shall be taken into consideration when making an award to the lowest responsive, responsible bidder pursuant to section, 103D-302(f), HRS, Competitive Sealed Bidding which states, "Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. 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**. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids."

- (2) Change is made to correct numerical error in subsection (d).

Changes after PC2023-07's Feedback:

- (1) Removed SPO's added suggested language in subsection (a): "...as determined by the procurement officer pursuant to Subchapter 13.5, Contractor's Past Performance Assessment..." as additional language presents ambiguity.
- (2) Added City and County of Honolulu's Department of Facilities and Maintenance's suggested language to modify HAR 3-122-33(b) to reflect alternative language amended in HRS 103D-302 subsection (f).

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) For any contract entered into pursuant to sections 103D-302, 103D-303, and 103D-306, 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 complete the assessment form in the electronic past performance database at the end of the contract, or more frequently as designated by the chief procurement officer or designee:

(A) Procurement officer who rates a contractor as unsatisfactory, in any part of the contractor's performance assessment is required to document the action (i.e., notice to cure) used to

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

- notify the contractor of the contractual deficiencies;
- (B) 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 review and/or comment;
- (C) Contractor shall review the contractor past performance assessment form within 20 working days from the date of notification of the contractor past performance assessment and submit comments, rebutting statements, or additional information. If the contractor does not respond, the contractor past performance assessment form shall be considered accepted;
- (D) The final assessment form shall be posted electronically in the past performance database system within 20 working days of receipt;
- (E) A copy of the assessment form shall be kept in the agency's contract file.
- (2) Contractor's past performance assessment form dispute process:
 - (A) Contractor shall submit a written request with documentation 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 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 shall be final and not subject to any appeal." [Eff
] (Auth: HRS§103D-202) (Imp: HRS
§§103D-104, 103D-202)

[Return to Agenda](#)

Justification:

Pursuant to Act 188, SLH 2021, section 103D-329, HRS, Past Performance Database, was created, requiring the State Procurement Office to implement and administer a past performance database in regard to state contract and adopt rules no later than December 31, 2023, on the information required to be included in the past performance database. With the creation of this statute, the following changes are recommended:

- (1) Adds language about the information and procedures associated with the past performance database pursuant Act 188, SLH 2021;
- (2) Includes the procedures to information a contractor of the information contained in the past performance database about the contractor;
- (3) Includes the procedures for a contractor to correct or respond to the information contained in the past performance database about the contractor, and also notifies the contractor that once finalized the assessment will be posted electronically into the past performance database and accessible for future solicitation evaluations as a condition of award for the applicable methods of procurement affected by Act 188, SLH 2021.

Changes after PC2023-07's Feedback:

- (1) Removed references to HRS 103D-305 and 103D-307 in subsection (a) and added in what procurement methods Act 188 requires agencies to do a past

performance assessment for: HRS sections 103D-302, 103D-303, 103D-306.

- (2) Added in Board of Water Supply's suggested language to subsection (c)(1) to provide clarity to ensure the form is completed, not just prepared, by the procurement officer.*
- (3) Removed original subsection (c)(1)(A) in its entirety to remove confusion on when the past performance assessment shall be completed.*
- (4) Added in suggested changes to original subsection (c)(1)(B), now subsection (c)(1)(A) from ABC Hawaii Chapter to clarify that procurement officers are required to document the basis for, and the contractor's response to, any part of an assessment identified as "unsatisfactory" to ensure greater transparency in the process and afford a contractor a fuller record upon which it can refer or rely in the event it seeks to dispute an assessment after final submission.*
- (5) Added in suggested language to original subsection (c)(1)(C), now subsection (c)(1)(B) from ABC Hawaii Chapter to add the requirement that the agency confirm a contractor's receipt of notification to keep the agency accountable and provides a cleaner record in the event of a contractor dispute.*
- (6) Changed number of working days from 10 to 20 in original subsection c)(1)(D), now subsection (c)(1)(C) as suggested by both the General Contractors Association of Hawaii (GCA Hawaii) and the County of Hawaii - Department of Public Works to align with the time allowed in federal procurement and to give contractor a more reasonable amount of time to provide a rebuttal to a negative assessment and the State/County to provide a response to the rebuttal.*
- (7) Also added in suggested language to original subsection c)(1)(D), now subsection (c)(1)(C), from Board of Water Supply to provide clarity on process for evaluation of the assessment and*

- for the consequences of a contractor failing to timely provide further statements.*
- (8) *Changed number of working days from 5 to 20 in original subsection c) (1) (E), now subsection (c) (1) (D) to give the procurement officer a more reasonable amount of time to post the completed assessment electronically into the past performance database system.*
 - (9) *Removed original subsection (c) (1) (F) in its entirety as requested by Gartner, Department of Accounting and General Services - Contract Management Branch, GCA Hawaii, and the City and County of Honolulu's Department of Design and Construction (DDC) and Budget & Fiscal Services (BFS) to clarify that the contractor should not have its final payment delayed if failure to complete the assessment is not due to any fault of the contractor. There is also the question if the State/County can legally withhold or delay payment to a contractor for the government's inability to timely perform an assessment.*
 - (10) *Added in suggested language to original subsection (c) (1) (F), now subsection (c) (1) (E) to remind agencies that a copy of the completed assessment shall be kept in the agency's contract file.*
 - (11) *Added in suggested changes from City and County of Honolulu Budget & Fiscal Services for contractors to submit a "written" request to make the rebuttal formal and to remove the arbitrary standard of "substantial" evidence in subsection (c) (2) (A). No change made to 10 working days as contractors already have 20 working days to dispute and rebut assessment and it only takes 5 working days to submit a protest under HRS 103D-701.*
 - (12) *Removed "any" from subsection (c) (2) (B) for clarity, consistency, and style.*
 - (13) *Added in suggested changes from Board of Water Supply to subsection (c) (2) (C) to provide*

*clarity that the final determination is not
subject to any appeal.*

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

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

LISA MARUYAMA
Chairperson
Procurement Policy Board

KEITH REGAN
State Comptroller

Dated: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General