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

Procurement Policy Board

Minutes of Meeting

Date/Time: Monday, October 16, 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
Keith Regan

Excused: Diane Nakagawa

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

State Procurement
Office Staff: Bonnie Kahakui, Acting Administrator
Christopher Amandi
Ruth Baker
Jacob Chang
Matthew Chow
Stacey Kauleinamoku
Jittima Laurita
Carey Ann Sasaki
Cynthia Sato
Donn Tsuruda-Kashiwabara
Alan Yeh

Government Staff
State: Christopher Butt, Department of Education
Lois Mow, Department of Education
Eric Nishimoto, Department of Accounting and General Services - Public Works Division
Gordon Wood, Department of Accounting and General Services - Public Works Division
Jolie Yee, Department of Accounting and General Services - Public Works Division

County: Paula Youngling, City & County of Honolulu - Department of Budget and Fiscal Services,
Purchasing Division

Guests: Sarah Love, Building Industry Association (BIA)
Tim Lyons, Subcontractors Association of Hawaii
F. Moore
Ryan Sakuda, General Contractors Association

I. Call to Order, Public Notice

Chair Lisa Maruyama called the Procurement Policy Board (Board) meeting to order at 1:30 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 July 11, 2023, Meeting

The minutes of the July 11, 2023, were reviewed. Eric Nishimoto asked that his statement on page be revised for clarification purposes. Rick Heltzel made a motion and Keith Regan seconded the motion to accept the revised minutes as presented. The members unanimously voted to approve the minutes.

IV. Public Testimony

Public testimony was 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

Chair Maruyama reported that the Procurement Board Procurement Board was in receipt of written testimony and took oral testimony on the subject of the proposed Past Performance Assessment / Questionnaire.

Sarah Love, President of BIA Hawaii, stated that they submitted written testimony and acknowledged that the Board and the State Procurement Office has been working hard on the Assessment and questionnaire. She wanted to reiterate that they still have a concern about the revised Assessment and that the appeal process needs to be addressed before the Board approves the Assessment.

Eric Nishimoto of Department of Accounting and General Services (DAGS) - Public Works Division stated that the rating should be poor performing contractors.

Ryan Sakuda of the General Contractors Association of Hawaii stated that they agree with many points presented by the testimony provided by both the Building Industry Association and Anna Oshiro.

Chair Maruyama called upon Bonnie Kahakui, SPO Acting Administrator. Administrator Kahakui explained that the SPO took into account feedback, suggestions, and testimony, then revised the Assessment, deleting some of the questions. She added that while public testimony stated that the Assessment went beyond what specifically stated in statute, she said that a legislator left it up to the SPO to come up with the assessment criteria. She explained that the revised Assessment, which was included in the agenda packet, shows the various changes and explanations, and introduced SPO Purchasing Specialist Stacey Kauleinamoku.

Staff Kauleinamoku explained that the Assessment is an electronic format in the past performance database, which notifies the contractor about the Assessment for comment/rebuttal, captures a contractor's performance information in a structured and uniform way. She explained the changes, reason for each change, and the comments offered by stakeholder, as outlined in the attachment. Any feedback received from this meeting will be provided to the designer of the past performance database so that the database can be developed by December 31, 2023.

Members Comments

Chair Maruyama opened the floor to the PPB members for questions/comments.

Member Lance Inouye thanked the SPO for their efforts on working on the original version of the Assessment. He commented that the Assessment should be kept to what the law requires and be added to after December. He provided the following comments/suggestions and will send the SPO his written revision:

- Keep Section 1. Specify a dollar amount of a contract that would trigger an Assessment. Change "Estimated Start & Completion Dates," to "Contract Start & Completion Dates," to satisfy Section 2 (b)(1)(F) "Whether or not the project was timely completed." Delete "Past Performance Assessment Guidance," but keep that on file for possible future use. He said that the Assessment should follow what is stated in Act 188, SLH 2022.
- Revise Section 1 to read, "Reason(s) for difference Between Contract and Actual Dates, if applicable."
- Delete Section 2.
- Keep Section 3 because it provides for contractor comments. Add language that if the contractor does not respond, the Contractor Performance Assessment Form shall be considered complete. Remove the word "accepted," noting that silence should not be considered an acceptance by the contractor.
- Revise Section 4: "Pursuant to HAR section 3-122-115.02(c)(2)(B), the procurement officer shall update the past performance database system by including any and all timely submitted contractor comments." The rest of the sentence, "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," is not in accordance with the spirit of the procurement law. Delete "taking into consideration" and include any contractor comments. Contractors should be entitled to appeal decision as provided by state law.
- He wants to avoid subjective ratings. He noted that there are so many factors why a contractor will have an unsatisfactory rating. If there is an unsatisfactory rating, comments would have to be entered and there needs to be an appeal process. There needs to be safeguards in place.
- To be sensitive to Building Industry Association's comments, new language proposed to be added to Hawaii Administrative Rules 3-122-33 should be moved to Hawaii Administrative Rules 122-108.

Member Inouye added that the effort to rate contractors was done over 10 years ago was so subjective and difficult.

Member Heltzel also thanked the work and effort of the SPO and stated that he went through and made notes on the Assessment. He agreed with Member Inouye in striking Section 2, and offered the following comments/suggestions:

- Section 1: For “Contract Start and Completion Dates,” include approved/executed change order because many projects have change orders that extend the completion date. This will provide clarity.
- Section 4: Delete “...taking into consideration” and replace it with “to include any.” Also delete the sentence “(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,” and replace it with “Contractors shall be entitled to appeal decision as provided by state law.”
- While the Assessment form can be simple, how this would be used by procuring agencies can’t be controlled. This opens up to legal issues and possible protests.

Member Keith Regan asked what value would the Database provide if we were to remove all of the important information that would be collected as part of the evaluation of the contractor, from the perspective of the contract manager. He said that at times, keeping it simple is the best way to start on things, and that he is open to considering reducing the amount of information collected in the Assessment for now, with the understanding that the Assessment will be revisited and additional information on past performance can be collected and analyzed, if the PPB deems this as important and critical to bring value to this Past Performance Database. While he somewhat agrees with Members Inouye and Heltzel’s points to a certain extent, he acknowledges that the SPO compiled a good questionnaire for collecting information to help with the assessment process. He also understands the limited resources of state contracting staff and the impact of additional documentation on agencies, such as DAGS, that have a lot of contracts. A cost threshold on contracts may address this. He would like to move forward with the database to meet the spirit of the law.

Oral Testimony from Stakeholders:

Acting Administrator Kahakui acknowledged that Act 188, SLH 2021, did not detail what the Past Performance Assessment should include. However, Rep. Scott Matayoshi stated during a previous PPB meeting that he wanted the SPO to come up with the assessment criteria. Based on data with only the contractor’s name, project start dates, and the budgeted amount agency, an agency would have difficulty in making a determination of responsibility for construction projects, Invitations for Bids, Request for Proposals, and Sole Source procurements.

Jolie Yee of DAGS Public Works Division provided a general comment that consideration should be given to the fact that the proposed changes would reduce the transparency of the procurement process for construction because it introduces inherent subjectivity by requiring procurement personnel to make subjective decisions regarding information that is recent and relevant, especially as related to construction. Deputy Attorney General Kam commented on Ms. Yee’s observation, that subjective information that result in a contractor being struck from consideration of a project may likely result in a protest. She provided clarity that the terms “recent” and “relevant” are not part of Hawaii Administrative Rules 3-122, but are in the HRS for factors to be considered for Past Performance.

Eric Nishimoto of DAGS Public Works Division said that resources should focus should be on the poor performing contractors. The Public Works Division staff document poor performance so they can debar contractors. The Past Performance database can be helpful if it is simple and implementable for all state and county agencies. Having one question on the Assessment, "Was the performance satisfactory or unsatisfactory?" is implementable and provides an easier method for staff to document performance.

Paula Youngling of the City & County of Honolulu Department of Budget and Fiscal Services said that they compiled the responses/feedback from their departments. They suggested that all the sub-categories in Section 2 be removed. They suggest that Section 2 could be similar to the Contractor's Comments section with satisfactory or unsatisfactory. Poor performance would be rated unsatisfactory with a written assessment followed by the contractor's rebuttal.

Chair Maruyama asked if the question addresses the concerns about debarment as shared by industry representatives. Ms. Love responded that the concerns shared are regarding insertion of the language into Hawaii Administrative Rules 3-122-33, and that comments on the form would not have an appeal process. Anyone deemed unsatisfactory would be precluded from bidding again. Ms. Love suggested moving that language under the responsibility factor, which already takes into account an appeals process.

Tim Lyons of the Subcontractors' Association of Hawaii appreciates the discussion on limiting the Assessment to center on satisfactory and unsatisfactory performance. This brings up the question of details regarding an unsatisfactory performance as a result of a bad subcontractor. With a shortened timeline/process, does the agency have the resources to investigate unsatisfactory performance for a job handled by up to 18 different subcontractors under one general contractor.

Acting Administrator Kahakui answered various questions and offered comments:

- The process and framework for the Past Performance Database is already in place.
- She understands the points offered by PPB members, staff, and other stakeholders, but commented that without having at least one question, the questionnaire is not an assessment and has no value. She would like to have at least one question (Was the performance satisfactory or unsatisfactory? Was the performance acceptable or not?), and build on the Assessment form after December 31, 2023, if the PPB wishes.
- In answer to questions regarding adding/removing questions to the Assessment, after December 31, 2023, older assessments will be missing information and will be different from those that are completed with new questions.
- Assessments should be done for both satisfactory and unsatisfactory performances for review by the agencies.
- Adding a dollar threshold for the Assessment would help the agencies.

Chair Maruyama asked the PPB members on their thoughts for the Assessment: Keep Section 1 of the Assessment, not have question if the performance satisfactory or unsatisfactory, and instead focus on the debarment law. In the Assessment, the project manager can list concerns without any rating and contractors have the ability for rebuttal, thereby helping the procuring agencies in building a case against a potentially chronic poor performer.

Member Regan stated that he likes Deputy Attorney General Kam's recommendation of having comments, noting that the comments can be associated with criteria (H) of Act 188, SLH 2021 ("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;"). The only area where there is room for

explanation/comment would be on whether or not the project was timely completed, criteria (F), comments by the project manager and rebuttal from the contractor. Criteria (F) and (H) can have a satisfactory and unsatisfactory. He added that there absolutely has to be an appeal process. Remove the language about not being able to appeal, ensure that contractors can appeal, and explain the appeal process to avoid possible lawsuits.

Mr. Nishimoto of DAGS Public Works Division commented that without a satisfactory and unsatisfactory rating makes the Assessment meaningless. Their division completes a form for consultants, and if there is an unsatisfactory rating, comment on the reason for that rating. A letter sent to the consultants provides an opportunity to meet and have a dialogue to explain the reason. The Public Works Construction Management Branch has a mandatory form to be completed at the end of each project. There is no process to disqualify poor performers, who are still allowed to bid.

Chair Maruyama offered an idea for the Assessment in order to make the December 31, 2023, deadline to implement the Past Performance Database. To meet the requirement of Act 188, SLH 2021, add the following to Section 1 of the Assessment:

- Comment box for criteria (F), which says "Whether or not the project was timely completed." Deputy Attorney General Kam said that this can be a can be "yes" or "no" question. She commented that because procuring entity didn't issue a rating of satisfactory or unsatisfactory, the next procuring entity can determine if that Assessment is relevant for their purposes. She confirmed that the rebuttal entered into the Past Performance Database for others to consider for their project.
- Comment box for criteria (H), which says "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;"). Deputy Attorney General Kam said that since this allows for a contractor to respond, there is no need for an appeal. The appeal is needed only if there is a rating of satisfactory or unsatisfactory.

Following the deadline, the Chair asked that the PPB makes a commitment to look at the SPO's Assessment and come up with one that is simple for procurement staff to complete and yet provides documentation for unsatisfactory performance.

Ms. Yee of DAGS Public Works Division shared their concern that there will be subjectivity and an increase in protests. She asked if a better mechanism is to improve the suspension and debarment process to address poor performers. Chair Maruyama is in favor of adding suspension/debarment to the next meeting agenda.

Motion:

Member Regan made a motion to approve the Assessment form based on the proposed changes: to limit the Assessment to what is contained in 103D-329, Hawaii Revised Statutes; to not include a satisfactory or unsatisfactory rating, however, to include a comment on whether or not project was timely completed; and to include a comment on "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."

Deputy Attorney General Kam said that the motion can direct that the SPO revise the questionnaire to limit it to criteria (A) through (H), with the opportunity for comment in (F) and (H) to follow Act 188, SLH 2021, precisely. Member Regan is happy to make that motion. He expressed his concern about being able to meet the database implementation deadline of December 31, 2023, per statute.

Deputy Attorney General Kam offered a motion that would capture the modifications to the Assessment. Since Section 1 describes what is necessary, the SPO can include a comment box for the "Actual Start & Completion Dates." There is already a comment box for "Reason(s) for Change in Cost, if applicable." Sections 1 and 3 allows the contractor to rebut. Section 4 is unnecessary and would create a problem by stating that this is a final determination of the agency.

Member Inouye asked the PPB to consider that the Assessment form be considered complete and not accepted because of silence.

Acting Administrator Kahakui asked if 20 working days is adequate for contractors to input their comments. Deputy Attorney General commented that this is ok, and this will be in the Hawaii Administrative Rules, and that most of the contractors are interested in the number of days they have to rebut.

Chair Maruyama said that her priority is to look at rule changes related to debarment and other issues. Member Regan made a motion to approve the revised Assessment, in which Section 1 has a comment section for criteria (H), Section 1 will read, "Reason(s) for difference Between Contract and Actual Dates, if applicable," and for Section 3, if the contractor does not respond, the Contractor Past Performance Assessment form shall be considered complete. Member Inouye second the motion.

The PPB members unanimously voted to approve the revised Assessment.

SPO staff will work to make those modifications,

VI. Discussion and Possible approval of Proposed Amendments to Hawaii Administrative Rules HAR §3-122 - Source Selection and Contract Formation

The members voted to defer this agenda item was deferred to December 4, 2023.

VII. Announcements

The next Procurement Policy Board meeting will be held on Monday, December 4, 2023, at 1:30 p.m. This meeting will be hybrid on Zoom and in person at the physical location of Room 410 in 1151 Punchbowl Street.

There were no additional announcements.

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

Keith Regan made a motion and Lance Inouye seconded the motion to go into Executive Session. The members unanimously voted to go into Executive Session, which is closed to the public pursuant to Section 92-4, Hawaii Revised Statutes. The executive session was 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.

The members went into executive session at 3:57 p.m. and returned to the public meeting at 4:01 p.m. Chair Maruyama reported that the members were provided a status of the hiring process for the permanent State Procurement Office Administrator and that interviews will commence in the next two weeks.

IX. Adjournment

Since there was no new business, Member Heltzel moved to adjourn the meeting; Member Inouye seconded the motion. All members voted to adjourn the meeting. The meeting adjourned at 4:02 p.m.

Respectfully submitted,

Lisa Maruyama
Chair, Procurement Policy Board