

December 4, 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.

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

- §3-122-1 Definitions.
  - "Recent" means performance information in which the performance has occurred within 5 years or as determined by the procurement officer that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated.
  - GCA suggests the following amendments "Recent" means performance information in which the performance has occurred within 5 years [~~or as determined by the procurement officer that is closely connected and appropriate to consider for the type of requirement being solicited or evaluated~~] from the date of the advertised bid opening.
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- §3-122-33

GCA believes that the amendments to this section should be placed at the end of Section 3-122-108(a). See concerns raised in testimony by Anna H. Oshiro at the last meeting.
- New Subchapter 13.5

1. Subchapter 13.5, Hawaii Administrative Rules, is added to read as follows:

"SUBCHAPTER 13.5

Contractor Past Performance Database

§ 3-122-115.01 Contractor past performance database.<sup>1</sup> (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 form approved by the procurement policy board that includes available recent and relevant performance of the contractor.

(b) The contractor past performance database process shall include the following:

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<sup>1</sup> *It is recommended that the IFB, RFP, and Sole Source state the past performance process in the solicitation.*

- (1) Procurement officer, or designee, shall complete the 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) Agency reviews of contractor past performance shall be provided to the contractor ~~[as soon as practicable]~~ withing 10 working days after completion of the form. The contractor shall receive a notification when a form is ready for review and/or comment;
- (B) Contractor shall review the contractor past performance form within 20 working days, from the date of ~~[notification]~~ receipt of the contractor past performance form and submit comments, rebutting statements, or additional information. If the contractor does not respond, the contractor past performance form shall be considered complete;
- (C) The final form together with contractor comments, rebutting statements or additional information, if any, shall be posted electronically in the past performance database system within 20 working days of ~~[receipt]~~ completion;
- (D) A copy of the form shall be kept in the agency's contract file.
- (2) Contractor's past performance form dispute process:
  - (A) Contractor shall submit a written request with documentation to the procurement officer for reconsideration within ~~[10]~~ 20 working days from the date of notification of the past performance form is posted;
  - (B) The procurement officer shall complete the past performance database system to include any contractor comments, rebutting statements or additional information, if any;
  - (C) Contractors shall be entitled to appeal decisions as provided by state law." [Eff  
] (Auth: HRSS103D-202) (Imp: HRS §§103D-104, 103D-202)

GCA provides these edits for clarity and consistency.

Thank you for the opportunity to provide comments.