



JOSH GREEN, M.D.
GOVERNOR
KE KIA'AINA

BONNIE KAHAKUI
ACTING ADMINISTRATOR

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

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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, December 4, 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
Keith Regan

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

State Procurement
Office Staff: Bonnie Kahakui, Acting Administrator
Christopher Amandi
Ruth Baker (in public conference room)
Jacob Chang
Matthew Chow
Stacey Kauleinamoku
Jittima Laurita
Cynthia Sato
Alan Yeh

Government Staff

State: Christopher Butt, Department of Education
Chris Kinimaka, Department of Accounting and General Services - Public Works Division
Lois Mow, Department of Education
Eric Nishimoto, Department of Accounting and General Services - Public Works Division

County: Kelsi Imamura, City & County of Honolulu - Department of Budget and Fiscal Services,
Purchasing Division

Guests: Reid Goto
Tim Lyons
F. Moore
Ryan Sakuda, General Contractor's Association
Kelly Wu
Michael Yadao

I. Call to Order, Public Notice

Vice Chair Rick Heltzel called the Procurement Policy Board (Board) meeting to order at 1:31 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. Public Testimony

Public testimony was on all items as those items occur during the meeting. There was no oral testimony.

IV. Approval of Minutes of October 16, 2023, Meeting

The minutes of the October 16, 2023, were reviewed. Member Keith Regan made a motion to approve the minutes. Member Diane Nakagawa seconded the motion. There was no discussion. The members voted to approve the minutes.

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

Oral testimony: None

Vice Chair Heltzel called upon Bonnie Kahakui, SPO Acting Administrator, who stated that the hope is to approve the past performance form (Form) and the associated Hawaii Administrative Rules (HAR). She introduced SPO Purchasing Specialist Stacey Kauleinamoku, who stated that the amended form incorporated suggestions from Board members presented at the October 16, 2023, meeting, and comments from Deputy Attorney General Stella Kam. Purchasing Specialist Kauleinamoku explained that the Form is an electronic version in the past performance database, includes the functionality of notifying the contractor about the Form for comment/rebuttal, and captures a contractor's performance information in a structured and uniform way. She went over the proposed changes as detailed in the agenda packet, including renaming title to "Contractor Past Performance Form," and explained that any feedback on the Form would be provided to the Past Performance database developer so that the database can be updated and unhidden on the Hawaii Awards and Notice and Database System page before the mandated deadline of December 31, 2023.

Member Heltzel thanked the work and effort of the SPO and stated that he went through and made notes on the Form.

The Members made the following comments/suggestions.

- Section 1: Non-substantive changes on the form were made for clarity. Revised wording: "Contract Start and Completion Dates" (to include executed change orders) for clarity.
- The contractor would be able to provide comments in the "Contractor Comments" section.
- The Board can revisit and revise the form in the future.

Vice Chair Heltzel asked if the members had any questions, and there were none. He then asked if Members are ready to vote on the proposed past performance form. Member Regan made a motion

to approve the past performance form as presented during this meeting and to allow for staff to make non-substantive changes to the Form as appropriate. Member Nakagawa seconded the motion. The Members voted unanimously to approve the past performance form.

While discussing the Agenda Item VI.C. HAR Subchapter 13.5, the Board and stakeholders returned to Agenda V to revisit the comment process on the past performance form, specifically the section "Comments from Procuring Agency." The Board and stakeholders agreed to change the Form to read that the Form is completed and add an attestation to the form. Member Regan revised his previous motion on the past performance form to eliminate Section 3 and to modify Section 2 to include an attestation component of the form.

Discussion: It was clarified and confirmed for Member Inouye that there is an appeal process through HRS 103D-329 on the use of the past performance form. Acting Administrator Kahakui commented on the Member Regan's motion, agreeing with changing Section 3 to be the attestation, but suggested to not tack the attestation on to Section 2 because that section is "Contractor Comments."

Member Regan withdrew his motion and revised his motion to have Section 3 become the attestation to the past performance form and eliminate the other language in Section 3. Member Nakagawa seconded the motion. The members voted unanimously to approve the form with the modifications as discussed.

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

There was written testimony received. There was no oral testimony.

Vice Chair Heltzel called upon the SPO. Acting Administrator Kahakui turned the floor over to Purchasing Specialist Kauleinamoku, who presented proposed amendments to HAR Chapter 3-122, based on Act 188, Session Laws of Hawaii (SLH) 2021, which revised Hawaii Revised Statutes (HRS) Chapter 103D, The Hawaii Public Procurement Code (Code). The purposes of the Code is to promote economy, efficiency, effectiveness, and consistency in all procurements by state and counties. The posted agenda packet includes the proposed amendments to the HAR.

Purchasing Specialist Kauleinamoku explained that the proposed amendments are in Ramseyer format, in which deleted words are strikethroughs in brackets, and new wording are underlined.

A. HAR §3-122-1 – Definitions – Addition of "recent," and "relevant" as definitions.

Purchasing Specialist Kauleinamoku explained the following:

Act 188, SLH 2021, revised HRS §103D-104, by adding a definition to be appropriately inserted and to read 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)."

Therefore, definitions of "Recent" and "Relevant" from the definition of "Past Performance" were added to the new HAR Chapter 13.5 for clarity, as both these terms are related to past performance, and Invitation for Bid, Request for Bid, and Sole Source procurements. As a result, recommended changes are as follows:

- (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 feedback from Procurement Circular 2023-07: No additional changes made. The definition of “Recent” were based on feedback from the Board’s May 18, 2023, meeting.

Changes made to HAR §3-122-1 after feedback from Board meeting on October 16, 2023: Removed SPO’s footnote (i) in its entirety. This recommendation by Acting Administrator Kahakui is to remove any time limit for the past performance reports to be available. At the October 16, 2023, meeting, there was a consensus that agencies should begin the flexibility to have a longer look back period for information technology procurements and took into consideration that the federal government has a lookback period of 15 years.

The Members discussed the five-year lookback, the addition of clarifying language that “Recent” would mean within five years or as determined by the procurement officer and specified in the solicitation document, the need for the procurement officer to have some flexibility to make each solicitation more appropriate to that solicitation, and these proposed HAR are interim rules that the Board can revisit to revise as necessary.

Vice Chair Heltzel passed the gavel to Chair Lisa Maruyama, who noted that the definition of “Recent” requires more thought, discussion, and improvement. Members Regan and Nakagawa have no objections to the language as it is.

B. HAR §3-122-33 – Bid evaluation and award – Addition of “Bidder’s past performance, if available.”

The revision to HAR §3-122-33 is to conform with HRS §103D-302(f), Competitive Sealed Bidding, as amended by Act 188, SLH 2021. The amendment adds the language, “bidder’s past performance, if available.”

As stated in the proposed HAR included in the agenda packet, this amendment 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.”

The non-substantive change, the adjustment of the numbering, was made to HAR §3-122-33.

The following changes were made after feedback received from Procurement Circular 2023-07’s Feedback:

- (1) Removed SPO's added suggested language in subsection (a): "...as determined by the procurement officer pursuant to Subchapter 13.5, Contractor 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).

Feedback on HAR §3-122-33 from Board meeting on October 16, 2023: There was no feedback, thus no additional changes were made.

C. New HAR Subchapter 13.5 – Contractor Past Performance Assessment Form – addition of language and procedures pertaining to contractor past performance assessment.

Purchasing Specialist Kauleinamoku explained the addition of HAR Subchapter 13.5 and the reasons for the suggested language and the revisions made to the proposed language in previous meetings. HAR Subchapter 13.5 and HAR §3-122-115.01, Contractor Past Performance Database, are added as required by Act 188, SLH 2021. Act 188, SLH 2021, created HRS §103D-329, Past Performance Database, which required the SPO to establish and administer a Past Performance database and adopt rules regarding the information and procedures associated with these duties. As outlined in the agenda packet, HAR Subchapter 13.5 is added to read as follows, in Ramseyer format:

"SUBCHAPTER 13.5

Contractor Past Performance Database

§ 3-122-115.01 Contractor past performance database.¹ (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:

(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 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 of the contractor past performance form and submit comments, rebutting statements, or additional information. If the contractor does not respond, the

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

contractor past performance form shall be considered complete;

(C) The final form shall be posted electronically in the past performance database system within 20 working days of receipt;

(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 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;

(C) Contractors shall be entitled to appeal decisions as provided by state law."

[Eff](Auth: HRS§103D-202) (Imp: HRS §§103D-104, 103D-202)

The agenda packet explained the addition of HAR Subchapter 13.5 and HAR §3-122-115.01:

- (1) Add language about the information and procedures associated with the Past Performance database pursuant Act 188, SLH 2021;
- (2) Include the procedures to information a contractor of the information contained in the Past Performance database about the contractor;
- (3) Include 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 the assessment will be posted electronically into the past performance database and is accessible for future solicitation evaluations as a condition of award for the applicable methods of procurement affected by Act 188, SLH 2021.

Changes were made based on stakeholders' feedback from Procurement Circular 2023-07:

- (1) Removed references to HRS 103D-305 and 103D-307 in subsection (a). Added that a past performance assessment is required for procurement methods described in HRS sections 103D-302, 103D-303, 103D-306.
- (2) Added Honolulu 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 or designee.
- (3) Removed original subsection (c)(1)(A) in its entirety to eliminate confusion on when the past performance assessment shall be completed.
- (4) Added suggested changes to original subsection (c)(1)(B) [now subsection (c)(1)(A)] from Associated Builders and Contractors (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 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 contractors 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 suggested language to original subsection c)(1)(D) [now subsection (c)(1)(C)] from Member Inouye to provide clarity on the process for evaluation of the assessment and to clarify that if a contractor fails to timely provide further statements, the assessment will be considered "complete" versus "accepted."
- (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, State Department of Accounting and General Services – Contract Management Branch, GCA Hawaii, City and County of Honolulu's Department of Design and Construction (DDC), and City and County of Honolulu's 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 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 suggested changes from City and County of Honolulu BFS 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 was made to 10 working days, as contractors already have 20 working days to dispute and rebut the assessment, and it only takes 5 working days to submit a protest under HRS 103D-701.

Changes made based on feedback provided at Board Meeting on October 16, 2023:

- (1) Renamed HAR Subchapter 13.5’s title to Contractor Past Performance Database.
- (2) Removed the word “assessment” from HAR section 3-122-115.01.
- (3) Non-substantive change: renumbered footnote (ii) to footnote (i) after original footnote (i) in section 3-122-1 was deleted in its entirety.
- (4) As suggested by Acting Administrator Kahakui, added verbiage to footnote (i): “It is recommended that the IFB, RFP, and Sole Source state the past performance process in the solicitation,” as past performance is statutory.
- (5) As suggested by Deputy Attorney General Kam, added to subsection (a) verbiage from the definition of “Past Performance”: “that includes available recent and relevant performance of the contractor” to justify new definitions “recent” and “relevant” added to HAR section 3-122-1.
- (6) Removed original subsection (b) in its entirety as the Board removed the entire Section 2. Assessment of the Contractor Past Performance Form with SPO’s recommended “responsibility determination standards” pursuant to Act 188, SLH 2021, which amended the definition of “responsible bidder or offeror” in HRS section 103D-104.
- (7) Non-substantive change: Original subsection (c) is now subsection (b). The word “assessment” was replaced with “database.”
- (8) Added “or designee” after procurement officer in new subsection (b)(1), as suggested by Acting Administrator Kahakui.
- (9) Removed original subsection (c)(1)(A) in its entirety as the Board removed entire Section 2. Assessment of the Contractor Past Performance Form with SPO’s recommended “ratings.”
- (10) Added suggested change to new subsection (b)(1)(B) from Member Inouye, for the form to be completed versus accepted if the contractor does not respond within 20 working days.
- (11) Added suggested change to end of original subsection (c)(2)(A) [now subsection (b)(2)(A)], to state “form is posted,” as recommended by Acting Administrator Kahakui.
- (12) Added suggested changes from Member Heltzel, for the procurement officer to complete (rather than update) the assessment to include any contractor comments, not just taking them into consideration to original subsection (c)(2)(A) [now subsection (b)(2)(A)].
- (13) Added suggestion by Member Heltzel, to original subsection (c)(2)(C) [now subsection (b)(2)(C)], to clarify that the final determination is subject to appeal decisions as provided by state law.

The Board members and stakeholders discussed the various revisions to proposed HAR Subchapter 13.5.

- Since these are interim rules, the Board can evaluate, adjust, and revise these rules as necessary to provide clarification.
- The language “or as directed by the Chief Procurement Officer,” should be kept in (a). Deputy Attorney General Kam reiterated that that Act 188, SLH 2021, adds a past performance requirement to HRS sections 103D-302, 103D-303, 103D-306, as well as section 103D-320, which reads “Written past performance evaluations for all procurements over the small purchase threshold shall be maintained in the processing department’s procurement files and in the statewide past performance database.” This is interpreted that the Board should keep the reference to give the prerogative and flexibility to the chief procurement officer in order to accommodate to accommodate the revised HRS sections 103D-302, 103D-303, 103D-306, and 103D-320.

- Requiring a past performance evaluation to be completed after each phase is not feasible because not all projects have phases and the requirement can be complicated and stipulative for the project. The information provided on the past performance form are the start date and completion date.
- HRS 103D-329 provides an appeals process in (3), which reads as follows: “Procedures for a contractor to correct or respond to the information contained in the past performance database about that contractor.”
- HAR §3-122-115.01 (C) was revised to mirror the past performance form and provide clarification: “The final form together with contractor comments, rebutting statements or additional information. If the contractor does not respond, the contractor past performance form shall be considered complete.” Language about the contractor’s past performance form dispute process was deleted from HAR Subchapter 13.5.

This discussion prompted the Board to revisit Agenda Item 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.

After much discussion the Board revised HAR Subchapter 13.5 to read as follows:

“SUBCHAPTER 13.5

Contractor Past Performance Database

§ 3-122-115.01 Contractor past performance database.¹ (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:

- (1) Procurement officer, or designee, shall complete the form in the electronic past performance database at the end of the contract:
 - (A) Upon agency completion of the form on the database, the contractor shall receive an electronic notification that the 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 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 the 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 of the contractor’s response;
 - (D) A copy of the form shall be kept in the agency’s contract file. [Eff](Auth: HRS§103D-202) (Imp: HRS §§103D-104, 103D-202)

Member Regan made a motion to accept the proposed HAR as modified. Member Nakagawa seconded the motion. The members voted unanimously to approve the HAR as modified.

VII. Explanation of Debarment, Pursuant to §103D-702, Hawaii Revised Statutes, (Information Only)

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

Chair Maruyama stated that in the interest of time, the explanation of Debarment, pursuant to HRS §103D-702, was deferred to the next meeting. This agenda was meant for information for the Board members.

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

Member Regan made a motion and Member Nakagawa 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 HRS §92-4. The executive session was conducted pursuant to HRS §92-5(a)(2) to discuss personnel matters and to consult with the Board's attorney on questions and issues pertaining to the Board's powers and duties.

Vice Chair Heltzel left the meeting; the remaining members constituted quorum.

The members left the public meeting and went into executive session at 5:05 p.m. The members returned to the public meeting at 5:24 p.m. Member Nakagawa reported that the Board agreed to recommend three candidates for the position of State Procurement Office Administrator to the Governor.

VIII. Announcements

The next Procurement Policy Board meeting is scheduled for Friday, January 12, 2024, 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. Adjournment

Since there was no new business, Member Regan moved to adjourn the meeting; Member Inouye seconded the motion. All members voted to adjourn the meeting. The meeting was adjourned at 5:25 p.m.

Respectfully submitted,

Lisa Maruyama
Chair, Procurement Policy Board