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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: 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 only poor performance of contractors needs to be 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,

Lisa Maruyama
Chair, Procurement Policy Board