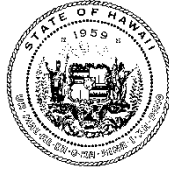


DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
MARA SMITH
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
WAYS AND MEANS
February 21, 2018, 10:10 AM

SENATE BILL 2601, SD1
RELATING TO PROCUREMENT

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the committee, thank you for the opportunity to submit testimony on SB2601, SD1. The State Procurement Office (SPO) supports this bill and provides the following comments.

To implement the purpose of the Act, the state procurement office requires an electronic procurement system, including a contract management component, which will also serve as central depository/database for all contract performance reviews, accessible by all executive department procuring agencies. The electronic procurement system would initially only be required for executive branch departments/agencies to allow the SPO time to develop policies and procedures to implement this Act. An initial investment of \$4,500,000 is required for an electronic procurement system. Attachment I explains what an eprocurement system is made up of and why it is important, along with our Return on Investment of 160%.

Therefore, Section 8, page 7, lines 1-4 is revised to read:

SECTION 8. There is appropriated out of the general revenues of the State of Hawaii the sum of \$4,500,000, or so much thereof as may be necessary for fiscal year 2018-2019 for the purposes of implementing this Act for executive branch departments/agencies.

No continuing funds will be required as this system will be procured through a self-funding model that allows the state to leverage buying power to maintain the system, similar to how we already procure for certain goods and services. This creates a very positive return on investment, allows for transparency, consistency and clarity in procurement, as well as accurate spend data analysis to enhance decision-making and improve the effectiveness of the procurement process across the board, ultimately creating valuable cost-savings and successfully performed contracts.

In addition to building a robust database to collect past performance information, SPO recommends the following verbiage is used in lieu of the current bill verbiage, with the exception of Section 6:

A. HRS 103D-302 Sealed Bidding to Replace Section 4

§103D-302 Competitive sealed bidding.

(f) 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 objectively measurable, such as discounts, transportation costs, and total or life cycle costs. **Past performance shall be evaluated in all bids expected to meet or exceed the small purchase threshold.** 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.

B. HRS 103D-303 Competitive Sealed Proposals to Replace Section 5

§103D-303 Competitive sealed proposals.

(e) The request for proposals shall state the relative importance of price and other evaluation factors. **Past performance shall be evaluated in all solicitations expected to meet or exceed the small purchase threshold. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This assessment of past performance information is separate from the responsibility determination required under HRS 103D-310. The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the solicitation requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror corrective actions. The Government shall consider this information, as well as information obtained from any other sources, when evaluating the offeror past performance. The procurement officer shall determine the relevance of similar past performance information. The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the procurement. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.**

C. HRS 103D-310 Responsibility to Replace Section 7

§103D-310 Responsibility of offerors. (a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the procurement officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.

(c) The award of a contract to a vendor based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

To be determined responsible, a prospective contractor must --

(a) Have adequate financial resources to perform the contract, or the ability to obtain them;

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record. A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history. A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the procurement officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The procurement officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination;

(d) Have a satisfactory record of integrity and business ethics;

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors).

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

(h) Unless the policy board, by rules, specifies otherwise, before submitting an offer, a prospective offeror, not less than ten calendar days prior to the day designated for opening offers, shall give written notice of the intention to submit an offer to the procurement officer responsible for that particular procurement.

~~(b)~~ (i) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709.

~~(e)~~ (j) All offerors, upon award of contract, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392, and 393. Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. Any offeror making a false affirmation or certification under this subsection shall be suspended from further offerings or awards pursuant to section 103D-702. The procuring officer shall verify compliance with this subsection for all contracts awarded pursuant to sections 103D-302, 103D-303, 103D-304, and 103D-306, and for contracts and procurements of \$2,500 or more awarded pursuant to section 103D-305; provided that the attorney general may waive the requirements of this subsection for contracts for legal services if the attorney general certifies in writing that comparable legal services are not available in this State.

~~(d)~~(k) Information furnished by an offeror pursuant to this section shall not be disclosed to any person except to law enforcement agencies as provided by chapter 92F. [L Sp 1993, c 8, pt of §2; am L 1997, c 352, §§10, 23; am L 2003, c 52, §6; am L 2004, c 216, §4; am L 2005, c 211, §1; am L 2011, c 190, §2]

D. HRS 103D-501 Contract Management to Add Contract administration guidance and requirement to keep past performance records

PART V. ~~MODIFICATION AND TERMINATION OF CONTRACTS~~ CONTRACT ADMINISTRATION

§103D-501 Contract Administration

(A) Contract Administration Office Functions

The contract administrator shall perform contract administration functions in accordance with HRS103D, associated administrative rules promulgated by the procurement policy board, the contract terms, and, unless otherwise agreed to in an interagency agreement, the applicable regulations of the procuring agency.

(a) The procurement officer normally delegates the following contract administration functions to a contract administrator:

- 1) Prepare evaluations of contractor performance in accordance with Subpart (B) Contractor Performance Information.
- 2) Review the contractor's compensation structure.
- 3) Review the contractor's insurance plans.
- 4) Conduct post-award orientation conferences.
- 5) Determine the allowability of costs suspended or disapproved as required, direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final payment.
- 6) Issue Notices of Intent to Disallow or not Recognize Costs .
- 7) Attempt to resolve issues in controversy.
- 8) Determine the contractor's compliance with Cost Accounting Standards and disclosure statements, if applicable.
- 9) Negotiate price adjustments and execute supplemental agreements.
- 10) Ensure timely notification by the contractor of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.
- 11) Monitor the contractor's financial condition and advise the procurement officer when it jeopardizes contract performance.
- 12) Issue work requests under maintenance, overhaul, and modification contracts.
- 13) Negotiate and assist the procurement officer in executing contractual documents for settlement of partial and complete contract terminations for convenience.
- 14) Negotiate and assist the procurement officer in executing contractual documents settling cancellation charges under multiyear contracts.
- 15) Process and execute novation and change of name agreements.
- 16) Perform property administration.
- 17) Perform necessary screening, redistribution, and disposal of contractor inventory.
- 18) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules.
- 19) Monitor contractor industrial labor relations matters under the contract; apprise the procurement officer and, if designated by the agency, the cognizant labor

- relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.
- 20) Ensure contractor compliance with contractual quality assurance requirements.
 - 21) Ensure contractor compliance with contractual safety requirements.
 - 22) Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.
 - 23) Evaluate for adequacy and perform surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development.
 - 24) Review and evaluate for technical adequacy the contractor's logistics support, maintenance, and modification programs.
 - 25) Report to the procurement office any inadequacies noted in specifications.
 - 26) Perform analyses of contractor cost proposals.
 - 27) Review and analyze contractor-proposed engineering and design studies and submit comments and recommendations to the procurement officer, as required.
 - 28) Review engineering change proposals for proper classification, and when required, for need, technical adequacy of design, producibility, and impact on quality, reliability, schedule, and cost; submit comments to the procurement officer.
 - 29) Assist in evaluating and make recommendations for acceptance or rejection of waivers and deviations.
 - 30) Approve the placement of subcontracts.
 - 31) Review, evaluate, and approve small business master subcontracting plans, if applicable.
 - 32) Assign and perform supporting contract administration.
 - 33) Ensure timely submission of required reports.
 - 34) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations which do not require additional contract funds, and other such changes.
 - 35) Obtain contractor proposals for any contract price adjustments resulting from amended shipping instructions. Review all amended shipping instructions on a periodic, consolidated basis to ensure that adjustments are timely made.
 - 36) Accomplish administrative closeout procedures.
 - 37) Support the program, product, and project offices regarding program reviews, program status, program performance and actual or anticipated program problems.
 - 38) Monitor the contractor's environmental practices for adverse impact on contract performance or contract cost, and for compliance with environmental requirements specified in the contract.

(b) Any additional contract administration functions not listed above, or not otherwise delegated, remain the responsibility of the head of the purchasing agency.

(B) Contractor Performance Information

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information.

(a) Past performance information is relevant information, for future evaluation purposes, regarding a contractor's actions under previously awarded contracts or orders.

(1) The evaluation should include a clear, non-technical description of the principal purpose of the contract or order. The evaluation should reflect how the contractor performed. The evaluation should include clear relevant information that accurately depicts the contractor's performance, and be based on objective facts supported by program and contract or order performance data. The evaluations should be tailored to the contract type, size content, and complexity of the contractual requirements.

Evaluation factors for each assessment shall include, at a minimum, the following:

(i) Technical (quality of product or service).

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements).

(iii) Schedule/timeliness.

(iv) Management or business relations.

(v) Small business subcontracting, including reduced or untimely payments to small business subcontractors when the contract requires a subcontracting plan.

(vi) Other (as applicable) (e.g., trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments).

(2) Evaluation factors may include subfactors.

(3) Each factor and subfactor used shall be evaluated and a supporting narrative provided. Each evaluation factor, as listed in paragraph (b)(2) of this section, shall be rated in accordance with a five scale rating system (i.e., exceptional, very good, satisfactory, marginal, and unsatisfactory). The ratings and narratives must reflect the definitions in the table 1 of this section.

(b) Agencies shall monitor their compliance with the past performance evaluation requirements, and measure the quality and timely reporting of past performance information.

(c) *General.* Past performance evaluations shall be prepared at least annually and at the time the work under a contract or order is completed. Past performance evaluations are required for

contracts and orders as specified in paragraphs (d) through (f) of this section. These evaluations are generally for the entity, division, or unit that performed the contract or order. Past performance information shall be entered into an evaluation reporting tool for all past performance reports on contracts and orders.

(b) *Contracts.* Except as provided in paragraph (f) of this section, agencies shall prepare evaluations of contractor performance for each contract that exceeds the small purchase threshold. Agencies are required to prepare an evaluation if a modification to the contract causes the dollar amount to exceed the small purchase threshold.

(c) Past performance evaluations shall be prepared for each architect-engineer services contract of \$25,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value. Past performance evaluations may also be prepared for architect-engineer services contracts below \$25,000.

(d) Past performance evaluations shall include an assessment of contractor's—

(1) Performance against, and efforts to achieve, the goals identified in the contract; and

(2) Reduced or untimely payments made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer shall--

(i) Consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period. The following payment or nonpayment situations are not considered to be unjustified:

(A) There is a contract dispute on performance.

(B) A partial payment is made for amounts not in dispute.

(C) A payment is reduced due to past overpayments.

(D) There is an administrative mistake.

(E) Late performance by the subcontractor leads to later payment by the prime contractor.

(e) Agency evaluations of contractor performance, including both negative and positive evaluations, shall be provided to the contractor as soon as practicable after completion of the evaluation. The contractor will receive a notification when an evaluation is ready for comment. Contractors shall be afforded up to 14 calendar days from the date of notification of availability of the past performance evaluation to submit comments, rebutting statements, or additional

information. Agencies shall provide for review at a level above the contract administrator to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirement of this subpart. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized.

(f) Agencies shall require frequent evaluation (e.g., monthly, quarterly) of agency compliance with the reporting requirements, so agencies can readily identify delinquent past performance reports and monitor their reports for quality control.

-(g) Other contract performance information.

(1) Agencies shall ensure information is accurately documented within 7 calendar days after a procurement officer—

(i) Issues a final determination that a contractor has submitted defective cost or pricing data;

(ii) Makes a subsequent change to the final determination concerning defective cost or pricing data;

(iii) Issues a final termination for cause or default notice;

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience;

(v) Determines that a contractor has a history of three or more unjustified reduced or untimely payments to small business subcontractors under a single contract within a 12-month period.

Table 1—Evaluation Ratings Definitions		
Rating	Definition	Note
(a) Exceptional	Performance meets contractual requirements and exceeds many to the Government’s benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
(b) Very Good	Performance meets contractual requirements and exceeds some to the Government’s benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
(c) Satisfactory	Performance meets 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.	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. There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
(d) Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the

	yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).
(e) Unsatisfactory . . .	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. 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 reports, or letters).

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (-) trend insufficient to change the evaluation status.

Note 2: N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation

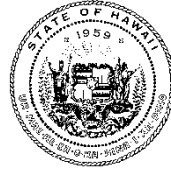
§103D-5042 Contract clauses and their administration. (a) The policy board shall adopt rules requiring the inclusion of contract clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

(1) The unilateral right of the governmental body to order in writing:

- (A) Changes in the work within the scope of the contract; and
- (B) Changes in the time of performance of the contract that do not alter the scope of the contract work;

Et Cetera...

Thank you.



STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

TESTIMONY OF
RODERICK K. BECKER, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
SENATE COMMITTEE ON WAYS AND MEANS
ON
WEDNESDAY, FEBRUARY 21, 2018
10:10 A.M.
CONFERENCE ROOM 211

S.B. 2601, S.D. 1

RELATING TO PROCUREMENT.

Chair Dela Cruz, Vice Chair Keith-Agaran and Members of the Committee, thank you for the opportunity to submit written testimony on S.B. 2601, S.D. 1.

The Department of Accounting and General Services (DAGS) opposes the proposed changes to the procurement code for the following reasons:

1. Although the current form of the bill addresses some of our concerns regarding lack of uniformity in rating systems and the data used to evaluate past performance, we continue to have concerns regarding the introduction of subjective criteria. The language of S.D. 1 states that evaluations should be based on objective facts, and lists several factors upon which such evaluations should be based. However, a number of the listed factors are inherently subjective, such as “quality of the product or service supplied.”
2. It is likely the introduction of subjectivity will result in an increase in the volume and frequency of bid protests.
3. The list of factors on which evaluations should be based includes “performance on small business contracting.” Implementation of this factor would require the State to develop, adopt and implement new processes to measure and record small-business contracting efforts, and will increase the costs of operation for implementing departments and agencies.

4. As noted in our prior testimony, the existing procurement code already contains a mechanism for consideration of past performance. On projects for which a department determines past performance should to be a selection factor, construction services can be procured using the Competitive Sealed Proposals method of procurement. Therefore, the proposed measure is unnecessary.
5. As noted in our earlier testimony, there already are existing mechanisms in place to address poor performance in construction contracts.
 - a. While projects are under construction, departments can provide feedback to contractors, assess liquidated damages, enforce the terms of the contract documents, limit the number of change orders issued, and document facts related to poor performance.
 - b. With sufficient documentation, filings can be made for suspension or debarment of poor-performing contractors.
 - c. The Department of Labor and Industrial Relations publishes a list of contractors who are suspended or debarred for violation of Hawaii Revised Statutes (HRS) Chapter 104.

Thank you for the opportunity to testify on this matter.

**DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL
MAYOR



ROBERT J. KRONING, P.E.
DIRECTOR

MARK YONAMINE, P.E.
DEPUTY DIRECTOR

February 20, 2018

The Honorable Donovan M. Dela Cruz, Chair
and Members
Senate Committee on Ways and Means
State Capitol, Room 211
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Dela Cruz and Members:

SUBJECT: Senate Bill No. 2601 SD1, Relating to Procurement

The Department of Design and Construction (DDC) respectfully **opposes** Senate Bill No. 2601 SD1, which "(1) Establishes factors to be included in any evaluation, consideration, or review of past performance required under part II of chapter 103D, Hawaii Revised Statutes, and ratings standards for those factors; (2) Requires past performance to be considered in future bid selection of a contractor; and (3) Requires departments to consider available assessments of previous performance on relevant and recent government and private contracts when making contract awards."

DDC primarily administers professional services and construction contracts. Existing law allows past performance to be considered prior to award for these types of contracts, so the proposed legislation would not create new opportunities in the existing procurement process.

Consideration of past performance in the selection of construction contractors by competitive sealed bidding is allowable under HRS 103D-302. DDC has developed and is continuing to refine procedures that incorporate past performance into qualification of bidders for construction contracts. Also, DDC's standard procedures include completing performance evaluations of construction contractors.

The Honorable Donovan M. Dela Cruz, Chair
and Members
February 20, 2018
Page 2

The proposed legislation will burden procurement procedures with requirements that consume additional resources and result in additional bid protests and contracting delays without commensurate benefits.

Based on the above considerations, DDC respectfully **opposes** Senate Bill No. 2601 SD1.

Thank you for the opportunity to express our concerns.

Very truly yours,


Per Robert J. Kroning, P.E.
Director

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Honolulu, HI 96819
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Email: info@gcahawaii.org
Website: www.gcahawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 21, 2018

TO: HONORABLE DONOVAN DELA CRUZ, CHAIR, HONORABLE GIL KEITH AGARAN, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON WAYS AND MEANS

SUBJECT: **COMMENTS & CONCERNS REGARDING S.B. 2601, SD1, RELATING TO PROCUREMENT.** Requires past performance to be factored into future bid selection of a contractor. Establishes factors to be included in any evaluation, consideration, or review of past performance required pursuant to part II of chapter 103D, Hawaii Revised Statutes, and ratings standards for those factors. Requires past performance to be considered in sole source procurement. Requires that upon completion of a procurement contract, the department that issued the request for proposal shall evaluate the work and performance of the respective contractors and maintain the evaluations in the department's files. Appropriates funds. (SD1)

HEARING

DATE: Wednesday, February 21, 2018
TIME: 10:10 a.m.
PLACE: Capitol Room 211

Dear Chair Dela Cruz, Vice Chair Keith Agaran and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over five hundred general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

S.B. 2601, SD1, Relating to Procurement proposes to require that past performance of a contractor be factored into future low bid selection and for sole source procurement. **GCA's comments are limited to how this measure relates to construction contracts only as it appears the areas of concern in construction include: (1) being on budget; (2) being on time; and (3) the delivery of good quality work.**

This measure may be premature as state and county agencies along with stakeholders have made initial steps in addressing possible solutions, thus may be able to provide better guidance in addressing how past performance can be used to evaluate contractors. Instead of mandating past performance be factored into all public works projects, the better option may be to get feedback from agencies that have initiated a pilot project where they have been able to test select projects and may have initiated the administration of past performance requirements on select projects. It is necessary to identify the best approach

to factor in past performance to ensure a fair and objective assessment of a contractor's performance and use information for future projects in a precise manner.

2013-2015 History of Past Performance Discussions and Task Forces

From 2013 through part of 2015 the Procurement Task Force was initiated pursuant to [Senate Concurrent Resolution 92 \(2013\)](#) which has been meeting since 2013 through the early part of 2015, and one of the issues discussed included how to address bad performing contractors. Additionally, in 2014 this body passed [House Concurrent Resolution 176 \(2014\)](#), which required a study of past performance of government contractors. These Task Forces together with participating government agencies and private industry stakeholders agreed that this issue needs further discussion before dictating an approach with potential unintended consequences. In 2015, pursuant to [Act 182 \(2015\)](#) the legislature extended the Procurement Task Force to specifically identify and propose amendments, if any, to the procurement code that may better promote economy, efficiency, effectiveness, and impartiality in the procurement of public works construction projects, specifically regarding statewide past performance standards and procedures. Unfortunately, the Act 182 (2015) Task Force never met to discuss these matters as directed by the legislature and there has not been any follow up since.

It is important to note that consideration of past performance in procurement is already permitted under 103D-302(f) under the invitation for bid process, what is commonly known as low bid, however for various reasons agencies choose not to use it. Under Section 103D-302(f), HRS an invitation for bid may set the requirements to determine qualifications and criteria for a project. In other words, the agency may set the criteria and qualifications for the bidder in its bid specifications, which could include such criteria as past performance, recent project history and any other qualifications an agency may find necessary. The reason for this reluctance on the part of the state agencies to use this section may be due to difficulty to quantify, evaluate, and administer past performance.

The consideration of past performance for low bid contracts raises a number of concerns for GCA, including but not limited to: ensuring objective administration and evaluation processes for agencies in determining qualified past performance criteria, including how the state or county would receive information about private projects; inability for a new contractor to bid public work due to lack of past performance qualifications; agency's lack of resources, including staff and funding for implementation and administration of past performance for low bid contracts – State Procurement Office noted in testimony that a system could cost up to \$4.5 Million to allow a past performance system; procedural due process concerns and appeal procedures; and ensuring efficiency, integrity and transparency in the procurement process of public works construction projects. Furthermore, adoption of federal past performance criteria may create a system that could lead to less contractors being eligible to bid on state contracts.

In construction, a number of evaluation factors must be taken into consideration, including licensing, subcontractor performance, less than stellar designs, unforeseen conditions, inclement weather, inadequate administration and oversight, untimely and disruptive owner requested change orders, unforeseen hazardous condition discoveries, the need to accommodate user activities that limit noise (such as exam week) or odorous, sometimes toxic activities, that may be reasons why the project does not come in satisfying the 3 noted criteria: (1) On budget; (2) On time; and (3) numerous changes to the original design.

Thank you for considering our comments on this measure and we respectfully request further discussion be had with agencies who may already in the process of implanting past performance criteria in assessing contractors. Furthermore, stakeholder feedback would ensure that a past performance program could be successfully implemented. **At this time, we respectfully request that this measure be deferred to allow further discussion on this matter.**