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# A BILL FOR AN ACT

RELATING TO PROCUREMENT.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that the State's  
2 procurement process requires clear legislative direction to  
3 award contracts to responsible bidders or offerors to increase  
4 accountability, enhance performance, and utilize taxpayer  
5 dollars more efficiently. Currently, some public contracts may  
6 be awarded to the lowest bidder or offeror without regard to  
7 that bidder's or offeror's poor past performance. Specifically,  
8 these bidders or offerors may be considered qualified despite  
9 their poor past performance on public contracts, which may  
10 result in repeated inefficiencies and substandard work.

11           The legislature further finds that considering a  
12 contractor's past performance in the procurement process and  
13 creating and maintaining a past performance database, that  
14 routinely captures contractor performance information in a  
15 structured and uniform way and is accessed and utilized when  
16 future procurements need to determine a contractor's



1 responsibility, will help to address issues of repeated  
2 inefficiencies and substandard work.

3 Accordingly, the purpose of this Act is to:

- 4 (1) Define past performance of contractors;
- 5 (2) Require procurement officers to consider specific  
6 factors, including past performance, when available;
- 7 (3) Require the state procurement office to establish and  
8 administer a past performance database and adopt rules  
9 pursuant to this past performance requirement; and
- 10 (4) Appropriate funds for the development, implementation,  
11 and training of certain procurement resources tools,  
12 including a past performance guide and past  
13 performance database.

14 SECTION 2. Chapter 103D, Hawaii Revised Statutes, is  
15 amended by adding a new section to part III to be appropriately  
16 designated and to read as follows:

17 "§103D- Past performance database. (a) No later than  
18 December 31, 2023, the state procurement office shall implement  
19 and administer a past performance database with regard to state  
20 contractors.



1           (b) The state procurement office shall adopt rules no  
2 later than December 31, 2023, pursuant to chapter 91 to  
3 establish:

4           (1) Information required to be included in the past  
5 performance database; provided that the information  
6 shall include:

7           (A) The name of the state contractor;

8           (B) The date of the project;

9           (C) The size of the project;

10          (D) A brief description of the project;

11          (E) The responsible managing employees for the  
12 project;

13          (F) Whether the project was timely completed or not;

14          (G) The project's authorized budget; and

15          (H) The positive or negative difference between the  
16 final cost of the project and the project's  
17 authorized budget, including the reasons for the  
18 difference, if any;

19          (2) Procedures to inform a contractor of the information  
20 contained in the past performance database about that  
21 contractor; and



1        (3) Procedures for a contractor to correct or respond to  
2                    the information contained in the past performance  
3                    database about that contractor."

4            SECTION 3. Section 103D-104, Hawaii Revised Statutes, is  
5 amended as follows:

6            1. By adding a new definition to be appropriately inserted  
7 and to read:

8            "Past performance" means available recent and relevant  
9 performance of a contractor, including positive, negative, or  
10 lack of previous experience, on contracts that shall be  
11 considered in a responsibility determination within the  
12 relevance of the current solicitation, including the  
13 considerations of section 103D-702(b)."

14           2. By amending the definition of "responsible bidder or  
15 offeror" to read:

16           "Responsible bidder or offeror" means a person who has the  
17 capability in all respects to perform fully the contract  
18 requirements, and the integrity and reliability [which] that  
19 will assure good faith performance[-], pursuant to the  
20 responsibility determination standards adopted by the policy  
21 board."



1 SECTION 4. Section 103D-302, Hawaii Revised Statutes, is  
2 amended by amending subsection (f) to read as follows:

3 "(f) Bids shall be evaluated based on the requirements set  
4 forth in the invitation for bids. These requirements may  
5 include criteria to determine acceptability such as inspection,  
6 testing, quality, workmanship, delivery, and suitability for a  
7 particular purpose. Those criteria that will affect the bid  
8 price and be considered in evaluation for award shall be as  
9 objectively measurable[-] as possible, such as discounts,  
10 transportation costs, [~~and~~] total or life cycle costs[-], and  
11 the bidder's past performance, if available. The invitation for  
12 bids shall set forth the evaluation criteria to be used. No  
13 criteria may be used in bid evaluation that are not set forth in  
14 the invitation for bids."

15 SECTION 5. Section 103D-303, Hawaii Revised Statutes, is  
16 amended as follows:

17 1. By amending subsection (e) to read:

18 "(e) The request for proposals shall include as an  
19 evaluation factor, past performance on projects of similar scope  
20 for public agencies or private industry, and shall state the



1 relative importance of price, past performance, and other  
2 evaluation factors."

3 2. By amending subsection (i) to read:

4 "(i) In addition to any other provisions of this section,  
5 construction projects may be solicited through a request for  
6 proposals to use the design-build method; provided that:

7 (1) A request for proposals is issued to prequalify  
8 offerors to select a short list of no more than three  
9 responsible offerors, prior to the submittal of  
10 proposals; provided that the number of offerors to be  
11 selected for the short list shall be stated in the  
12 request for proposals and prompt notice is given to  
13 all offerors as to which offerors have been short-  
14 listed;

15 (2) A conceptual design fee may be paid to non-selected  
16 offerors that submit a technically responsive  
17 proposal; provided that the cost of the entire project  
18 is greater than \$1,000,000; [and]

19 (3) The criteria for pre-qualification of offerors, design  
20 requirements, development documents, proposal  
21 evaluation criteria, terms of the payment of a



1 conceptual design fee, or any other pertinent  
2 information shall be stated in the request for  
3 proposals[-]; and

4 (4) Past performance on projects of similar scope for  
5 public agencies or private industries shall be an  
6 evaluation factor for the prequalification of  
7 offerors."

8 SECTION 6. Section 103D-306, Hawaii Revised Statutes, is  
9 amended by amending subsection (a) to read as follows:

10 "(a) A contract may be awarded for goods, services, or  
11 construction without competition when the head of a purchasing  
12 agency determines in writing that there is only one source for  
13 the required good, service, or construction, the determination  
14 is reviewed and approved by the chief procurement officer, the  
15 written determination is posted in the manner described in rules  
16 adopted by the policy board, a review of past performance, if  
17 available, has been conducted, and no objection is outstanding.  
18 The written determination, any objection, past performance  
19 evaluations relied upon, and a written summary of the  
20 disposition of any objection shall be included in the contract  
21 file."



1 SECTION 7. Section 103D-310, Hawaii Revised Statutes, is  
2 amended by amending subsection (b) to read as follows:

3 "(b) Whether or not an intention to bid is required, the  
4 procurement officer shall determine whether the prospective  
5 offeror has the financial ability, resources, skills,  
6 capability, and business integrity necessary to perform the  
7 work. For [this] the purpose[~~, the~~] of making a responsibility  
8 determination, the procurement officer shall possess or obtain  
9 available information, including past performance, sufficient to  
10 be satisfied that a prospective offeror meets the applicable  
11 standards. The officer, in the officer's discretion, may  
12 require any prospective offeror to submit answers, under oath,  
13 to questions contained in a standard form of questionnaire to be  
14 prepared by the policy board. Whenever it appears from answers  
15 to the questionnaire or otherwise, that the prospective offeror  
16 is not fully qualified and able to perform the intended work, a  
17 written determination of nonresponsibility of an offeror shall  
18 be made by the head of the purchasing agency, in accordance with  
19 rules adopted by the policy board. The unreasonable failure of  
20 an offeror to promptly supply information in connection with an  
21 inquiry with respect to responsibility may be grounds for a



1 determination of nonresponsibility with respect to such offeror.  
2 The decision of the head of the purchasing agency shall be final  
3 unless the offeror applies for administrative review pursuant to  
4 section 103D-709."

5 SECTION 8. Section 103D-320, Hawaii Revised Statutes, is  
6 amended to read as follows:

7 "[+]§103D-320[+] Retention of procurement records[-];  
8 evaluations. All procurement records shall be retained and  
9 disposed of in accordance with chapter 94 and records retention  
10 guidelines and schedules approved by the comptroller. Written  
11 past performance evaluations for all procurements over the small  
12 purchase threshold shall be maintained in the processing  
13 department's procurement files and in the statewide past  
14 performance database."

15 SECTION 9. There is appropriated out of the general  
16 revenues of the State of Hawaii the sum of \$ or so  
17 much thereof as may be necessary for fiscal year 2021-2022 and  
18 the same sum or so much thereof as may be necessary for fiscal  
19 year 2022-2023 for the development, implementation, and training  
20 regarding the following procurement resources tools:

21 (1) A past performance guide;



- 1 (2) A past performance database functional requirements
- 2 document;
- 3 (3) The creation of a past performance database;
- 4 (4) The preparation and publication of rules, including
- 5 sending of surveys, discussions, and publication fees;
- 6 (5) Training; and
- 7 (6) Annual database maintenance.

8 The sums appropriated shall be expended by the state  
9 procurement office for the purposes of this Act.

10 SECTION 10. This Act does not affect rights and duties  
11 that matured, penalties that were incurred, and proceedings that  
12 were begun before its effective date.

13 SECTION 11. Statutory material to be repealed is bracketed  
14 and stricken. New statutory material is underscored.

15 SECTION 12. This Act shall take effect upon its approval;  
16 provided that section 9 of this Act shall take effect on July 1,  
17 2021.



**Report Title:**

Procurement; Past Performance; Contractors; State Procurement Office; Appropriation

**Description:**

Defines past performance. Requires procurement officers to consider specific factors, including past performance, when available. Requires the state procurement office to establish and administer a past performance database and adopt rules pursuant to this past performance requirement, by 12/31/23. Appropriates funds for the development, implementation, and training of certain procurement resources tools, including a past performance guide and past performance database. (SD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

