

ACT 188

H.B. NO. 526

A Bill for an Act Relating to Procurement.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the State's procurement process requires clear legislative direction to award contracts to responsible bidders or offerors to increase accountability, enhance performance, and utilize taxpayer dollars more efficiently. Currently, some public contracts may be awarded to the lowest bidder or offeror without regard to that bidder's or offeror's poor past performance. Specifically, these bidders or offerors may be considered qualified

despite their poor past performance on public contracts, which may result in repeated inefficiencies and substandard work.

The legislature further finds that considering a contractor's past performance in the procurement process and creating and maintaining a past performance database, which routinely captures contractor performance information in a structured and uniform way and is accessed and utilized when future procurements need to determine a contractor's responsibility, will help to address issues of repeated inefficiencies and substandard work.

Accordingly, the purpose of this Act is to:

- (1) Define past performance of contractors;
- (2) Require the state procurement office to establish and administer a past performance database and adopt rules regarding information and procedures associated with the past performance database; and
- (3) Require procurement officers to consider specific factors, including past performance, when available.

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

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

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

- (1) Information required to be included in the past performance database; provided that the information shall include:
 - (A) The name of the state contractor;
 - (B) The date of the project;
 - (C) The size of the project;
 - (D) A brief description of the project;
 - (E) The responsible managing employees for the project;
 - (F) Whether or not the project was timely completed;
 - (G) The project's authorized budget; and
 - (H) The positive or negative difference between the final cost of the project and the project's authorized budget, including the reasons for the difference, if any;
- (2) Procedures to inform a contractor of the information contained in the past performance database about that contractor; and
- (3) Procedures for a contractor to correct or respond to the information contained in the past performance database about that contractor.”

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

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

““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).”

2. By amending the definition of “responsible bidder or offeror” to read:

““Responsible bidder or offeror” means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and

reliability ~~[which]~~ that will assure good faith performance~~[-]~~, pursuant to the responsibility determination standards adopted by the policy board.”

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

“(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 as objectively measurable[-] as possible, such as discounts, transportation costs, ~~[and]~~ 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.”

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

1. By amending subsection (e) to read:

“(e) The request for proposals shall include as an evaluation factor, past performance on projects of similar scope for public agencies or private industry, and shall state the relative importance of price, past performance, and other evaluation factors.”

2. By amending subsection (i) to read:

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

- (1) A request for proposals is issued to prequalify offerors to select a short list of no more than three responsible offerors, prior to the submittal of proposals; provided that the number of offerors to be selected for the short list shall be stated in the request for proposals and prompt notice is given to all offerors as to which offerors have been short-listed;
- (2) A conceptual design fee may be paid to non-selected offerors that submit a technically responsive proposal; provided that the cost of the entire project is greater than \$1,000,000; ~~[and]~~
- (3) The criteria for pre-qualification of offerors, design requirements, development documents, proposal evaluation criteria, terms of the payment of a conceptual design fee, or any other pertinent information shall be stated in the request for proposals~~[-]~~; and
- (4) Past performance on projects of similar scope for public agencies or private industries shall be an evaluation factor for the prequalification of offerors.”

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

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

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

“(b) 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] the purpose[-the] of making a responsibility determination, the procurement officer shall possess or obtain available information, including past performance, sufficient to be satisfied that a prospective offeror meets the applicable standards. 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.”

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

“~~[[§103D-320]]~~ **Retention of procurement records[-]; evaluations.** All procurement records shall be retained and disposed of in accordance with chapter 94 and records retention guidelines and schedules approved by the comptroller. 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.”

SECTION 9. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 10. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 11. This Act shall take effect upon its approval.

(Approved July 6, 2021.)

Note

1. Edited pursuant to HRS §23G-16.5.