

REPORT ON THE STUDY ON PAST PERFORMANCE CONSIDERATION IN HAWAII CONTRACTING

Report to the Hawaii State Legislature

Pursuant to House Concurrent Resolution No. 176 (S.L.H. 2014)

Prepared by the
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State of Hawaii

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I. EXECUTIVE SUMMARY

The 2014 Hawaii State Legislature requested the State Procurement Office (SPO) conduct a study on the feasibility, necessary processes, and costs relative to requiring the consideration of past performance as a factor in awarding public contracts, including low bid (IFB) contracts, with House Concurrent Resolution No. 176 (HCR 176, SLH 2014)¹. The SPO presents this past performance report for consideration of future past performance initiatives.

The SPO researched past performance and ascertains that, per Hawaii Revised Statutes (HRS) 103D-310(b)², past performance is a responsibility consideration, as all contractors, in requiring ethical procurements³, must be **responsible** regardless of the method of solicitation. However, the fact that the procurement Statute does not *specifically* mandate past performance, and corresponding Rules do not provide clear guidance on implementation, perpetuates disparity and confusion among the state's decentralized structure of twenty-one (21) procurement jurisdictions. The result is varying interpretations of past performance requirements and allowances under the direction of the 21 Chief Procurement Officers (CPOs) across Hawaii. While some jurisdictions currently consider past performance on all procurements, others consider past performance in IFBs untouchable unless specifically authorized by the Procurement Code.

Federal procurement regulations employ a comprehensive past performance initiative, including mandating uniform performance evaluation collection and databases for retrieval of information. Twenty-nine states⁴ also implement formal past performance programs, through a variety of strategies.

Implementing a statewide past performance consideration process in Hawaii is feasible and will require time for process development and funding to develop and maintain tools and infrastructure. Critical infrastructure needs include developing an integral database to capture and accumulate past performance information at the end of a contract for consideration in future awards, and a training program for implementation. Currently, no infrastructure exists to support a uniform statewide past performance program, which would effectively require capturing and retrieving performance evaluations across the various procurement jurisdictions in Hawaii.

If the legislature mandates statewide past performance consideration for all government contracts, the following would be necessary:

- 1) A clear legislative mandate to include past performance considerations;
- 2) Administrative Rules developed from the Procurement Policy Board (PPB) to implement comprehensive past performance evaluation and consideration procedures;
- 3) Evaluation processes for all procurements consistent across CPO jurisdictions;
- 4) A centralized database for past performance information collection and retrieval; and
- 5) Resources for agency implementation (agency rule promulgation, evaluation tool development, and training for effective implementation).

¹ HCR 176, SLH 2014. See Appendix 1.

² Haw. Rev. Stat. Ann. § 103D-310(b). Responsibility of offerors requires the procurement officer to “determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work.”

³ HRS §103D-101. Requirements of ethical public procurement.

⁴ NASPO 2014_SurveySummaryReport_7-17-14 available at https://www.naspo.org/surveytool/Documents/NASPO%202014_SurveySummaryReport_7-17-14.pdf.

II. BACKGROUND

A. HAWAII LEGISLATIVE DIRECTIVE

During the 2014 legislative session, The Hawaii State Legislature passed House Concurrent Resolution 176 (HCR 176, SLHL 2014), requesting the SPO conduct a study on the feasibility of requiring **past performance** as a factor in awarding any public contract, including low bid (IFB) contracts.

B. OVERVIEW OF PROCUREMENT IN HAWAII

The SPO administers, implements, and ensures compliance with the Hawaii Public Procurement Code for the purchase of goods, services, and construction (HRS chapter 103D) and Purchases of Health and Human Services (HRS chapter 103F). Beyond these two chapters, government procurement involves numerous statutes (e.g. in Labor and Construction), administrative rules,⁵ contracting requirements,⁶ and internal agency processes which departments and agencies must meet to contract for goods, services or construction.

The consideration of past performance differs amongst the various methods⁷ of procurement during the evaluation source selection period.⁸ Generally, Competitive Sealed Bids (IFBs)⁹ and Competitive Sealed Proposals (RFPs)¹⁰ are the two main methods of procurement.¹¹ Logistically,

⁵ See HAR §§3-120 thru -133 (implementing HRS chapter 103D); HAR §§3-140 thru -149 (implementing HRS chapter 103F).

⁶ Contracting responsibilities must conform to contracting laws and be approved by the Hawaii attorney general as well as additional ethical obligations for expenditure of public moneys by government employees. See HRS § 103D-101 Requirements of Ethical Public Procurement; HAR §3-131-1.02 Procurement Code of Ethics; HRS ch. 84 Standards of Conduct for public employees of the State; HRS Ch. 103 Expenditure of Public Money and Public Contracts. See also County Ordinances regarding specific County ethical and contractual requirements.

⁷ HRS §103D-301. Methods of source selection. Unless otherwise authorized by law, all contracts shall be awarded pursuant to the following sections, as applicable: (1) Section 103D-302 (Competitive sealed bids); (2) Section 103D-303 (Competitive sealed proposals); (3) Section 103D-304 (Professional services procurement); (4) Section 103D-305 (Small purchases); (5) Section 103D-306 (Sole source procurement); and (6) Section 103D-307 (Emergency procurements).

⁸ Source selection is the period of evaluation prior to award of a contract. See SPO Acquisition Life Cycle, Appendix 16.

⁹ Competitive sealed bids, also known as invitation for bids (IFB) are “awarded to the lowest **responsible** and responsive bidder whose bid meets the requirements and [objective] criteria set forth in the invitation for bid”; HRS §103D-302(h) (“Competitive sealed bidding. . . . The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.”); HAR §3-122-33(a) (“The award shall be made to the **lowest responsive, responsible bidder** and shall be based on the criteria set forth in the invitation for bids.”); HAR §3-122-33(b) (“Only objectively measurable criteria which are set forth in the invitation for bids.”); HAR §3-122-33(e) (“The award shall be issued to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.”); See HRS § 103D-302.

¹⁰ HRS §103D-303. Competitive sealed proposals. “Award shall be made to the **responsible** offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals.”; (g) Award shall be made to the **responsible** offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals.

it has been more difficult to implement past performance in IFBs compared to RFPs where past performance is more easily included during proposal evaluations. It is up to the discretion of the procurement official to choose the appropriate method of source selection to meet the unique circumstances of each procurement.¹²

Procurement for health and humans services are regulated under HRS chapter 103F, and use request for proposals to acquire these services. No direct mention is made of past performance, however, past performance regularly becomes an evaluation criteria in proposals.¹³

C. PROCUREMENT POLICY IMPLEMENTATION

Procurement Policy is implemented through the PPB, the SPO, and the CPOs of each of Hawaii's twenty-one (21) jurisdictions.

1) PROCUREMENT POLICY BOARD - POLICY & RULES

The PPB is tasked with providing guidance for procurement policy and adopting administrative rules relating to procurement.¹⁴ Currently, there is no PPB guidance on past performance.

2) STATE PROCUREMENT OFFICE - POLICY, GUIDANCE, & RESOURCES

The SPO is the agency that oversees procurement for the State. The SPO is tasked with assisting, advising, and guiding governmental bodies in matters relating to procurement, developing and administering statewide training programs, and maintaining the accountability, responsibility, and transparency pillars of procurement. Currently, there is no SPO guidance on past performance.

3) INDIVIDUAL JURISDICTIONS

Hawaii has decentralized procurement with 21 individual CPOs.¹⁵ Each CPO is authorized to procure and supervise procurements within his or her jurisdiction.¹⁶ As a result, implementation of procurement policy can be varied amongst the jurisdictions when

¹¹ Other methods of procurement include: 1) HRS §103D-304 - Professional services procurement, awards for professional services are made through selection committee evaluation including evaluation of statements of qualification and **performance data** verifying experience, and professional qualifications, and past performance on projects of similar scope relevant to the project type; 2) HRS §103D-305 - Small purchases award shall be made to the lowest responsive, **responsible** offeror. See HAR 3-122-75; 3) HRS §103D-306 - Sole source procurement for situations where there is only one source for the required good, service, or construction; and 4) HRS §103D-307. Emergency procurements simplified process in verifiable emergency circumstances.

¹² Act 239 (SLH 2013) changed HRS § 103D-301 Methods of source selection from requiring source selection be made by competitive sealed bidding unless specifically authorized, to now authorizing choosing source selection method "as applicable."

¹³ HRS §103F-402(b) Competitive purchase of services mandates the request shall state all criteria which will be used to evaluate proposals, and the relative importance of the proposal evaluation criteria. HRS §103F-402(b).

¹⁴ HRS §103D-202 "Authority and duties of the policy board. Except as otherwise provided in this chapter, the policy board shall have the authority and responsibility to adopt rules, consistent with this chapter, governing the procurement, management, control, and disposal of any and all goods, services, and construction..."

¹⁵ HRS §103D-203 Chief Procurement Officers.

¹⁶ HRS §103D-205. Authority and duties of the chief procurement officer.

guidance from statute or rules is unclear. Some procurement jurisdictions read current law narrowly and will not include any process that is not specifically required by law.¹⁷ However, a few jurisdictions interpret current laws to imply consideration of past performance, and have invested resources into creating procedures for evaluation. For example, the City and County of Honolulu is implementing a past performance evaluation and consideration program for its contracts, including IFB construction contracts.¹⁸ Currently, there is no method to communicate past performance information between Hawaii's multiple jurisdictions, leaving a gap where poor performers may be awarded subsequent contracts.

D. CONTRACTOR RESPONSIBILITY & VENDOR COMPLIANCE

Current Hawaii statute and associated Administrative Rules require responsibility considerations and verification of vendor compliance for awarding government contracts.

HRS §103D-310, responsibility of offerors, provides statutory mandates:

(b)... 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.

(c) 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...

1) CONTRACTOR RESPONSIBILITY REQUIREMENTS

Procurement officers (POs) are required to determine the responsibility of offerors whether the prospective offeror has the financial ability, resources, skills, capability, and **business integrity** necessary to perform the work.¹⁹ Furthermore, "**responsible bidder or offeror**," is defined as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance."²⁰

¹⁷ See *PPB Meeting Minutes*, Appendix 11-13 (detailing agency comments during PPB meetings where past performance policy was considered).

¹⁸ See City and County of Honolulu Example - Construction Contractor Evaluation, Appendix 6.

¹⁹ HRS § 103D-310. Responsibility of offerors.

²⁰ HRS § 103D-104. Definitions.

2) **VENDOR COMPLIANCE VERIFICATION**

The procuring officer is required to verify an awardee's compliance with all laws governing entities doing business in the State for most methods of solicitation.²¹ During this compliance check, the PO's due diligence requires verification of the awardee's tax, labor, and business registration information.²²

3) **PENALTIES AND REMEDIES**

In addition to contractual remedies for an agency to recover from any breach of contract, the Procurement Code provides for administrative remedies²³ including a maximum of three years debarment during which a contractor is barred from being awarded government contracts.²⁴ However, because the causes for debarment or suspension are limited to very specific instances, Hawaii rarely sees debarment or suspension cases arising out of poor past performance.

²¹ HRS §103D-310(c) requires compliance verification for IFB, RFP, Professional Services, Sole Source, and Small Purchases of \$2,500 or more; Vendor compliance is not required for Emergency procurements under HRS §103D-307 or Small Purchases under \$2,500 under HRS §103D-305; *See Also* HAR §3-122-112.

²² HRS §103D-310(c) and HAR §3-122-112 require tax clearance, labor certificate, and a Certificate of Good Standing. Vendors can either register with Hawaii Compliance Express in a single "Certificate of Vendor Compliance," or retrieve all their paper verifications from each agency and submit their verification to the procurement officer.

²³ HRS § 103D-704. Exclusivity of remedies.

²⁴ HRS § 103D-702. Authority to debar or suspend.

(a) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the chief procurement officer, after consultation with the using agency and the attorney general or corporation counsel, may debar a person for cause from consideration for award of all public contracts and from performance on any public contract. The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for a governmental body's protection and not for the purpose of punishment. An agency shall impose debarment or suspension to protect a governmental body's interests and only for cause and in accordance with this section. The debarment period shall not exceed three years.... shall be applied only to causes, convictions, and violations under subsection (b) ...

(b) The causes for debarment or suspension include the following:

- (1) Conviction of a criminal offense [in obtaining or performing] a public or private contract;
- (2) Conviction [of] embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a contractor;
- (3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (4) [Serious] Violation of contract provisions:
 - (A) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (B) A recent record of failure to perform or of unsatisfactory performance ... [caused by acts within the control of the contractor];
- (5) Any other cause the chief procurement officer determines to be so serious and compelling as to affect responsibility as a contractor, including debarment by another governmental entity for any cause listed in the rules of the policy board; and
- (6) Violation of the ethical standards set forth in chapter 84 and its implementing rules, or the charters and ordinances of the several counties and their implementing rules...

III. ASSESSMENT OF PAST PERFORMANCE IN HAWAII GOVERNMENT CONTRACTING

A. PROCESS - STAKEHOLDER OUTREACH, RESEARCH, AND PROPOSALS

In fulfilling this legislative request, the SPO invested considerable time and reallocated resources to research past performance, engage stakeholders, and develop strategies for obtaining metrics and formulating recommendations. The SPO engaged government officials, contractors, and other procurement policy stakeholders to gather and share experiences, perceptions, opinions, and ideas on past performance accountability. The process of developing this white paper included the following actions:

- 1) Researched SPO applications of procurement statutes and rules compliance;
- 2) Benchmarked research from federal and select states' past performance initiatives and implementation tools;
- 3) Conducted a past performance perception and experience survey,²⁵ developed then distributed by posting on SPO website and email announcements to the following groups:
 - a) All CPOs and procurement staff,
 - b) Legislators,
 - c) Offices of the Governor and Lieutenant Governor,
 - d) Attorney General
 - e) Honolulu City Corporation Council
 - f) SPO Staff, Executive Branch Directors and Procurement Staff
 - g) Educators,
 - h) Unions & Trade Organizations,
 - i) Vendors & Buyers Registered with Hawaii Compliance Express (8,878 individual emails);
- 4) Engaged stakeholders to identify specific concerns, present theories, and brainstorm ideas.
 - a) Contractor and Government Focus Group held 07/11/2014,²⁶
 - b) Attorney Focus Group held 08/05/2014 with Hawaii Procurement Institute,
 - c) Procurement Task Force²⁷ presentation and discussion held 10/27/2014,²⁸
 - d) Ongoing Discussions with Stakeholders and Lobbyists;
- 5) Proposed Administrative Rule changes to the PPB,²⁹ and
- 6) Submitted a Legislative proposal for statutory changes through the Department of Accounting and General Services, Administrative Bill procedures.³⁰

²⁵ The SPO Past Performance Survey ran from June 30, 2014 to August 17, 2014 and received 844 responses. Complete Survey Results are included in Appendix. See SPO Survey Results, Appendix 7.

²⁶ See Past Performance Focus Group Notes, Appendix 8.

²⁷ A Procurement Task Force was established by SCR 92 (SLH 2013) "to study the cost impacts that the procurement process has had for public works construction projects as well as the existing bid preferences in relation to promoting economy, efficiency, effectiveness, and impartiality in procurement."

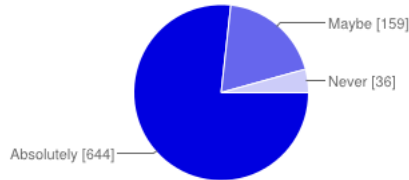
²⁸ See SPO Power Point To Procurement Task Force, Appendix 9.

²⁹ Procurement Policy Board was presented with proposed rule changes to clarify past performance as a matter of responsibility on September 29, 2014, and again with revised language on October 30, 2014, with final decision to take no action. See PPB Meeting Draft Minutes 10/30/2014 for discussion, Appendix 13.

³⁰ Legislative bill proposing a clear legislative mandate to consider available past performance for all procurements was submitted from SPO to DAGS, for inclusion in the 2015 administrative package. See SPO Proposed Legislation, Appendix 2.

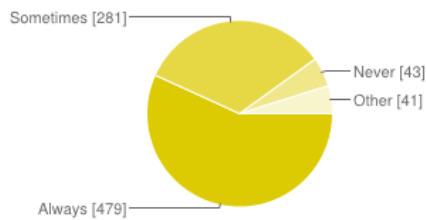
In its complexity, past performance involves multiple policy considerations, such as logistical resources, market pressures, maintaining free market, and political policy considerations. Stakeholders identified³¹ the reality of Hawaii government agencies' needs, contractor's rights and concerns, and public perception. Some key issues polled through the past performance survey show a large concern about past performance, with a majority of participants concluding that past performance should be "absolutely" considered with **recent and relevant** information:

- **Past performance should be considered** in determining whether a bidder has the capability to perform the contract requirements and has the integrity and reliability to assure good faith performance



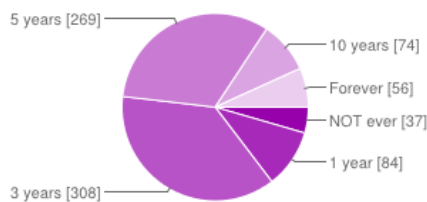
Absolutely	644	76%
Maybe	159	19%
Never	36	4%

- Majority of individuals think past performance should be an evaluation factor in IFBs



Always	479	57%
Sometimes	281	33%
Never	43	5%
Other	41	5%

- Majority of individuals see past performance within the last 3-5 years to be relevant time frame for consideration



NOT ever	37	4%
1 year	84	10%
3 years	308	36%
5 years	269	32%
10 years	74	9%
Forever	56	7%

In business, a contractor's *past performance* is used as an indicator of future performance. Effective past performance oversight encourages new innovative firms in to the market while keeping the bad actors and under-performers from receiving contracts. For the State this means value for quality projects, reduction in time and financial waste on poor performing contracts, and raising the standards of acceptable work on projects. However, under the current statutory scheme, procuring agencies must obtain necessary goods or services without clear guidance of past performance policy for meaningful implementation.

³¹ The SPO received 844 survey responses from general contractors, subcontractors, vendor employees, government employees, legislators, attorneys, policy advocates, and concerned taxpayers. See SPO Survey Results, Appendix 2.

B. IDENTIFIED ISSUES

As a general matter, well-performing contractors should want to have their past performance information shared widely. However, stakeholders bring up many issues of concern that should be addressed in the development of the evaluation process, which include:³²

- 1) Inadequate separation of government caused-delays, negatively impacting evaluation criteria;
- 2) Impartiality of evaluations - There is no clear directive for how POs should include past performance in their determinations;
- 3) Uniformity - in order to assure fairness for vendors, all agencies should be evaluating past performance consistently;
- 4) Opportunity to address a negative evaluation element to effectively remedy the consideration for future contracts;
- 5) No experience must not prevent opportunities to qualify for contracts;
- 6) Opportunity to assess blame where appropriate (i.e. subcontractors, material delivery or permit delays);
- 7) Unclear process by which to be evaluated;
- 8) Inadequate communications between jurisdictions;
- 9) Lack of necessary infrastructure to capture and retrieve information across jurisdictions;
- 10) Apparent conflict between PO's use of professional judgment to make responsibility determinations and hearing officer's interpretation of appropriate use of such discretion;
- 11) Unclear applications of "recent and relevant" information;
- 12) Increase in protests³³, thus delaying award and contract start date.³⁴

The following concerns have been raised specifically in respect of IFBs:

- 1) Timing. Bids are opened publicly, typically within an hour of the closing deadline. The public already has the information of the lowest bidder, and an expectation that the lowest bidder is therefore the awardee. However, the PO, has not yet had a chance to evaluate the lowest bidder for responsiveness and responsibility unless evaluated under the two-step IFB process as outlined in HAR §§3-122-61.05 through -61.08. Based on their evaluation, the awardee could not be the lowest **responsible** and responsive bidder.
- 2) Award Time. Conducting due diligence in the area of responsiveness and responsibility is mandated, however, this exercise can extend the time it takes to award the contract.
- 3) Erosion of objective IFB procurement process.

C. CONSIDERATIONS - PROCUREMENT CODE INTERPRETATIONS

Although the SPO and other jurisdictions interpret the Procurement Code as calling for past performance considerations in contractor responsibility determinations, others interpret the Procurement Code as exclusive and are hesitant to read any more interpretation into the statute

³² A complete listing of identified stakeholder concerns is available in the attached appendices. See SPO Survey Results, Appendix 7; See Focus Group Report, Appendix 8.

³³ The Procurement Code's protest system protects constitutional due process rights of contractors, increases transparency into the process, and provides a critical check for accountability. Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. See HRS §103D-701(a).

³⁴ Procuring agencies strive to avoid protests, which halts the procurement process and further delays the acquisition of the needed good or service. See PPB Meeting Draft Minutes 10/30/2014, Appendix 13.

without a clear mandate.³⁵ The SPO developed proposals for administrative³⁶ and legislative changes³⁷ to clarify policy and develop guidance on past performance as requested in the House Concurrent Resolution No. 176.

The SPO presented the issue of past performance to the PPB for consideration during 2014, and presented two drafts of administrative rule changes. The draft administrative rule changes presented past performance as a matter of the responsibility determination, which would allow POs to consider available relevant and recent past performance information. The PPB chose to take no action on the proposed rule changes until after the 2015 legislative session.³⁸

³⁵ See PPB Meeting Draft Minutes, 10/30/2014, Appendix 13.

³⁶ SPO presented administrative rule change proposals to the PPB on September 29, 2014 and October 30, 2014. See SPO Proposed Administrative Rule Changes, Appendix 3; See PPB Meeting Minutes, Appendix 12-13.

³⁷ SPO drafted a past performance bill for the 2015 legislative session and requested its inclusion in the Governor's 2015 Administrative Package through the administratively attached Department of Accounting and General Services. See SPO Proposed Legislation, Appendix 2.

³⁸ See PPB Meeting Draft Minutes, 10/30/2014, Appendix 13.

IV. BENCHMARKING RESEARCH

The SPO researched federal and select states to glean insight on past performance implementation strategies.

A. FEDERAL

Past performance evaluations are mandated for all federal acquisitions and determinations of responsibility including past performance evaluation information is applied comprehensively. The federal process implementing past performance requires intense resources for: multiple database funding; comprehensive training across federal agencies; individual agency implementation strategies; and verification of government compliance with the past performance mandates.

A guiding principle³⁹ of federal procurement is to deliver the best value products or services to the customer, and mandating federal POs to make a **determination of responsibility** of offerors⁴⁰ is part of ensuring best value. In “selecting contractors to provide products or perform services, the Government will use contractors who have a track record of **successful past performance** or who demonstrate a current superior ability to perform.”⁴¹

Due diligence requirements of the federal PO mandates considering all information in the federal database⁴² as well as other “**relevant**” **past performance information**⁴³ for larger

³⁹ FAR § 1.102 Statement of guiding principles for the Federal Acquisition System.

(a) The vision for the Federal Acquisition System is to deliver on a timely basis the **best value** product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.

(b)(ii) The Federal Acquisition System will...[use] contractors who have a track record of successful **past performance** or who demonstrate a current superior ability to perform... .

⁴⁰ FAR § 1.102-2(a)(3) (“Performance standards... When selecting contractors to provide products or perform services, the Government will use contractors who have a track record of **successful past performance** or who demonstrate a current superior ability to perform.”); 48 C.F.R. § 9.103(b). *See also* 48 C.F.R. § 9.103(a) (“Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”).

⁴¹ FAR § 1.102-2 Performance standards. (a) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service. . . . (3) When selecting contractors to provide products or perform services, the Government will use contractors who have a track record of **successful past performance** or who demonstrate a current superior ability to perform.

⁴² The Federal database is known as the Federal Awardee Performance and Integrity Information System (FAPIIS). *See* FAR § 9.104-6(a) (“Before awarding a contract in excess of the simplified acquisition threshold, the contracting officer shall review the Federal Awardee Performance and Integrity Information System (FAPIIS) *available at* www.ppirs.gov, then select FAPIIS.

⁴³ FAR § 9.104-6(b)-(d).

(b) The contracting officer **shall consider all the information** in FAPIIS and other **past performance information** (see subpart 42.15) when making a **responsibility determination**. ... Contracting officers **shall use sound judgment in determining the weight and relevance of the information** contained in FAPIIS and how it relates to the present acquisition. Since FAPIIS may contain information on any of the offeror’s previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, *e.g.*, a prior administrative action such as debarment or suspension that has

acquisitions.⁴⁴ Contractors are also instructed to provide “**recent and relevant** contracts for the same or similar items and other references” in their past performance information during submission of offers.⁴⁵

The Federal definition of **responsible contractor** is similar to Hawaii’s **responsibility of offerors**, but goes much further with accountability measures of requiring record reviews. Federal **responsible prospective contractor** means a contractor that meets the standards in Federal Acquisition Regulation (FAR) § 9.104 General Conditions, which includes:

- (a) Having, or has the ability to obtain, **adequate financial resources**⁴⁶ to perform the contract; ...
- (c) Having, or has the ability to obtain, a **satisfactory performance record**.⁴⁷ A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history;

expired or otherwise been resolved, or information relating to contracts for completely different products or services.

(c) If the contracting officer obtains relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, the contracting officer shall, unless the contractor has already been debarred or suspended—

(1) Promptly request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror’s responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official’s consideration.

(d) The contracting officer shall document the contract file for each contract in excess of the simplified acquisition threshold to indicate how the information in FAPIIS was considered in any responsibility determination, as well as the action that was taken as a result of the information. A contracting officer who makes a nonresponsibility determination is required to document that information in FAPIIS in accordance with 9.105-2 (b)(2).

⁴⁴ FAPIIS checks are required for all procurements over the “[s]implified acquisition threshold.” FAR § 2.101 provides: “Simplified acquisition threshold” means \$150,000, except for [those determined necessary], the term means— (1) \$300,000 [domestic]; and (2) \$1 million [foreign].

⁴⁵ FAR § 52.212-1(b)(10). 52.212-1 Instructions to Offerors—Commercial Items....As a minimum, offers must show . . . (10) **Past performance** information, when included as an **evaluation factor**, to include **recent and relevant contracts for the same or similar items and other references** (including contract numbers, points of contact with telephone numbers and other relevant information) . . .

⁴⁶ FAR § 9.104-3(a) “Ability to obtain resources. Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the contracting officer **shall** require acceptable evidence of the prospective contractor’s ability to obtain required resources. . . .”

⁴⁷ FAR § 9.104-3(b) Satisfactory performance record.

A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor’s control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality

- (d) Have a **satisfactory record of integrity and business ethics**;
- (e) Have the necessary organization, **experience**, accounting and operational controls, and technical skills; ...
- (g) Be otherwise **qualified and eligible** to receive an award under applicable laws and regulations.

For past performance information to be available during solicitation, there also is an affirmative due diligence responsibility⁴⁸ placed on federal POs to provide **relevant**⁴⁹ information for future source selection purposes⁵⁰ at contract close out and/or at the end of each contract year. Agencies assign responsibility and management accountability ratings, as well as identify and assign past performance evaluation roles.

FAR § 42.1501(a) provides the following to be considered when determining if the performance information is **relevant**:

Past performance information (including the ratings and supporting narratives) is **relevant** information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of—

- (1) Conforming to requirements and to standards of good workmanship;
- (2) Forecasting and controlling costs;
- (3) Adherence to schedules, including the administrative aspects of performance;
- (4) Reasonable and cooperative behavior and commitment to customer satisfaction;
- (5) Reporting into databases;
- (6) Integrity and business ethics; and
- (7) Business-like concern for the interest of the customer.

Although all agencies are required to meet the FAR past performance information sharing requirements, each agency also has discretion on how to implement past performance standards within their own specialty by:

- Establishing past performance reporting baseline, adjusting for any agency-specific thresholds or other anomalies that the standard reports do not reflect; and
- Setting the process for compliance: strategic quarterly targets for meeting the annual federal targets.

requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. . . .

⁴⁸ FAR § 42.1501(b) (“Agencies shall monitor their compliance with the past performance evaluation requirements (see 42.1502), and use the Contractor Performance Assessment Reporting System (CPARS) and Past Performance Information Retrieval System (PPIRS) metric tools to measure the quality and timely reporting of past performance information.”).

⁴⁹ FAR § 42.1501(a).

⁵⁰ FAR § 42.1501(b) Agencies shall monitor their compliance with the past performance evaluation requirements (see 42.1502), and use the Contractor Performance Assessment Reporting System (CPARS) and Past Performance Information Retrieval System (PPIRS) metric tools to measure the quality and timely reporting of past performance information.

Federal evaluations are based on complex calculation metrics involving six evaluation areas rating the contractor's performance in the federal Contractor Performance Assessment Reporting System (CPARS) database:

- 1) Quality;
- 2) Schedule;
- 3) Cost Control;
- 4) Management;
- 5) Utilization of Small Businesses;
- 6) Regulatory Compliance;
- 7) Other Areas (3) may be deemed necessary by the AO.⁵¹

B. STATES

In a 2014 Survey conducted by the National Association of State Procurement Officials (NASPO), it reported that in twenty-nine states, the state central procurement office tracks and maintains a record of vendor performance.⁵²

These 29 states attempt to address past performance considerations with simpler mandates and less funding than the federal model. While some approaches clearly mandates that past performance must be considered on solicitations, it is unclear how successful varying systems are with varying tools for past performance checks and implementation.

The SPO analyzed a select group of states that attempt to address the issue of considering past performance, and found differing methods of implementation. Alaska, Oregon, and Virginia do this through responsibility determinations while Texas considers and awards contracts to the best value rather than the lowest responsible bidder. Implementation of policies varies greatly and ranges from self-reporting reference checks to close out evaluation forms with performance metrics to online databases. The chart that follows on the next page provides a simplified comparison of the systems and tools utilized by selected states and Hawaii.

⁵¹ A quality written narrative for other areas is important, because it not only supports the rating assigned, but it also assists the source selection official in making an informed source selection and/or award decision. The narrative that supports the rating should be concise and provide sufficient supporting rationale.

⁵² NASPO 2014 Survey Summary Report - 7-17-14 *available at* https://www.naspo.org/surveytool/Documents/NASPO%202014_SurveySummaryReport_7-17-14.pdf.

STATE COMPARISON OVERVIEW

<u>STATE</u>	<u>PAST PERFORMANCE IMPLEMENTATION</u>	<u>IMPLEMENTATION TOOLS</u>
HAWAII	Past performance as a matter of responsibility is interpreted differently across the state’s jurisdictions. Past performance may be included in RFPs, and is included in Professional Services qualifications.	Self-Reporting Questionnaire with references may be requested at source selection.
<u>STATE</u>	<u>PAST PERFORMANCE IMPLEMENTATION</u>	<u>IMPLEMENTATION TOOLS</u>
ALASKA	Policies allow for considering past performance in determining responsibility but no evidence of practical application. Administrative rules allow government agencies to use a “record of performance” in determining if a bidder is responsible.	Self-Reporting Questionnaire
OREGON	“Satisfactory record of performance” is clearly considered in responsibility determinations, applicable to all methods of solicitation. Oregon also provides a program for prequalifying contractors with good past performance.	Vendor Data Sheet - Self-reporting of current and past projects of similar size and complexity with 3 references Prequalification Application Performance Evaluation Documentation
TEXAS	Contracts are awarded to the “bidder offering the best value for the state,” including the “quality of performance of previous contracts or services.” All purchasing agencies must submit vendor performance reports on any purchase over \$25,000. Vendor Reports scores four categories: commodity delivery, service delivery, commodity performance, and service performance.	Vendor performance tracking system collects and stores mandated performance reviews of contractors. Vendor Report Vendor Response - vendors have 14 calendar days to respond if there are any unsatisfactory scores.
VIRGINIA	Responsibility determinations may include past performance, though there are no clear factors to be considered in the responsibility determination. Procurement manual includes “satisfactory record of performance” as a factor to be considered at the discretion of each purchasing agency.	Vendor Data Sheets may be used at solicitation; Procurement Complaint Form establishes a record of unsatisfactory performance of a vendor. Vendor Contesting Determination of Nonresponsibility

V. RECOMMENDATIONS

Current Hawaii statute HRS 103D-310(b) requires POs to determine the responsibility of offerors whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. The Hawaii requirement to evaluate offeror responsibility mirrors the American Bar Association, 2007 Model Procurement Code for State and Local Governments:

*“To obtain true economy, the [State] must minimize the possibility of a subsequent default by the contractor, late deliveries, or other unsatisfactory performance [that] would result in additional administrative costs.”*⁵³

The SPO considers past performance as a subcategory under the responsibility requirement that spans all procurements, and recommends implementing a statewide process for increased accountability and transparency with contractors and government procurement. Because of the circular relationships during the acquisition life cycle,⁵⁴ the SPO recommends:

- **Prior to Award of Contracts:** Legislatively mandated requirements for POs to make contractor responsibility determinations that include **relevant and recent** past performance within the scope of the current acquisition need.
- **At Contract Close-out:** Legislatively mandated statewide past performance evaluations during contract close-out, which includes an opportunity for contractors to respond to evaluations, and requires evaluations to be posted to a centralized database to ensure governmental compliance.

For such a past performance initiative to be implementable, the SPO recommends the following steps be taken in a “phased” approach to a statewide past performance initiative:

A. Legislature to Provide a Clear Legislative Intent

Statutory changes to the procurement code to clarifying a legislative intent to:

- 1) Define “responsible bidder” to include past performance consideration;
- 2) Require Procurement Officer due diligence to complete a “responsibility determination” for all government contracts awarded;
- 3) Compel administrative rule changes to give effect to past performance consideration in government contracts.

B. PPB to Develop Statewide Administrative Rules

Administrative Rules that address situations of “relevant and recent” past performance considerations to use during responsibility determinations; and

- 1) Mandate uniform past performance assessment tools at all contract close-outs;
- 2) Define contractor’s timeline to respond to past performance report;
- 3) Mandate posting of past performance report.

C. SPO Develop Necessary Process, Accountability Tools, and Database

D. SPO Policy Guidance on Initiative

- 1) Develop Procurement Circulars for guidance;
- 2) Engage in trainings and discussion forums.

⁵³ American Bar Association, 2007 Model Procurement Code for State and Local Governments, 3-401, Commentary (1).

⁵⁴ Acquisition lifecycle is the complete process of procurement, from identification of a governmental need of requirements development, through solicitation and award of a contract, then through contract administration, and finally through contract closeout. See *SPO Acquisition Life Cycle*, Appendix 16.

A. LEGISLATURE - CLEAR LEGISLATIVE INTENT

Past performance can be interpreted differently across the state, and the PPB is not able to provide policy guidance with the current statutory language. Therefore, the SPO recommends the legislature provide clear legislative intent to include **relevant and recent** past performance information, as a responsibility determination required of all contractors awarded under the Hawaii Procurement Code. *(A complete draft of this legislative proposal and justification sheet is provided in the Appendix.)*

1) Define Responsible Bidder to Include Past Performance Consideration.

Current Hawaii statute defines “responsible bidder or offeror” with broad ideas of “integrity and reliability,”⁵⁵ requiring prospective offerors to have “the financial ability, resources, skills, capability, and business integrity necessary to perform the work.”⁵⁶

- SPO recommends including a new definition of “past performance” to include “available relevant and recent performance by the contractor on state, federal, or private contracts to be considered as a responsibility determination within the relevance of the current solicitation.”
- SPO recommends changing the statutory language to include responsibility determination standards to be adopted by the PPB.

2) Require Procurement Officer due diligence to complete a responsibility determination for all government contracts awarded.

Current Hawaii statute requires POs to “determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work.” However, there is no clear directive for POs to include past performance in the determination, nor is there accountability for when and how the PO makes a responsibility determination during IFBs.

- SPO recommends clarifying that a determination of responsibility is required for any awardee, pursuant to rules adopted by the PPB.
- SPO recommends language to clarify that, for the purpose of a responsibility determination, “the Procurement Officer shall possess or obtain available information sufficient to be satisfied that a prospective offeror meets the applicable standards set forth by the procurement policy board. The Procurement Officer shall consider **available recent and relevant** performance of the offeror as it applies to a responsibility determination for the current solicitation.”

3) Compel administrative rule changes to give effect to past performance consideration in government contracts.

Current Hawaii statute requires the PPB to adopt administrative rules, consistent with the Procurement Code, governing the procurement of all goods, services, and

⁵⁵ HRS § 103D-104 (“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 will assure good faith performance.”).

⁵⁶ HRS §103D-310. Responsibility of offerors.

construction.⁵⁷ However, without clear legislative authorization and direction, the PPB will not implement policy regarding past performance.

- SPO recommends changing the statutory language to include responsibility determination standards to be adopted by the PPB.

B. PPB - ADMINISTRATIVE RULES

It is the PPB's responsibility to develop administrative rules to give effect to legislative intent. Therefore, it will be the PPB's responsibility to develop the process and detailed policy for interpreting situations of "relevant and recent" past performance information to be considered during responsibility determinations;

- 1) Mandate uniform past performance assessment tools at all contract close-outs that may allow for limited additional information specific to the scope of the acquisition or needs of the jurisdiction;
- 2) Develop a contractor's process to respond to past performance report, including the timeline, format, and integrated agreement to evaluation to be included as a contract clause requirement;
- 3) Mandate posting of past performance report into a centralized database, within a specific timeframe, to be maintained by the SPO;

C. SPO - DEVELOP NECESSARY PROCESS, ACCOUNTABILITY TOOLS, AND DATABASE

Because the SPO is the centralized policy and training agency for procurement across the state, the SPO recommends the legislature provide financial resources directly to the SPO which are necessary to support development of necessary processes, accountability tools, and creation of a database to capture and store past performance information.⁵⁸

D. SPO - POLICY GUIDANCE ON INITIATIVE

- 1) Develop Procurement Circulars for Guidance. Once there is clear policy on past performance from the PPB, the SPO can offer in-depth guidance through Procurement Circulars. Procurement Circulars can communicate best practices for POs conducting responsibility determinations, including past performance information capturing guidelines, outlined processes, and resources for references.
- 2) Engage In Trainings And Discussion Forums. Because of the complexities of past performance information, how it is gathered and how it is used will become a critical training component for all POs. The SPO will need to engage in training and is recommending discussion forums to facilitate development of evolving policy applications.

⁵⁷ HRS § 103D-202. Authority and duties of the policy board. "Except as otherwise provided in this chapter, the policy board shall have the authority and responsibility to adopt rules, consistent with this chapter, governing the procurement, management, control, and disposal of any and all goods, services, and construction....The policy board shall consider and decide matters of policy within the scope of this chapter including those referred to it by a chief procurement officer. The policy board shall have the power to audit and monitor the implementation of its rules and the requirements of this chapter, but shall not exercise authority over the award or administration of any particular contract, or over any dispute, claim, or litigation pertaining thereto."

⁵⁸ See *supra* Section V. Feasibility For Statewide Mandating of Past Performance in Hawaii

VI. FEASIBILITY - ESSENTIALS

Jurisdictions that currently include past performance have invested resources for development, data collection, and additional PO time to complete due diligence with additional information and training for cohesive implementation. Just as those jurisdictions have made an investment in past performance initiatives, creating a statewide past performance system for evaluating and considering information will take time and money to implement.

A. NECESSARY PROCESS DEVELOPMENT

There are a number of processes to be developed for successful uniform statewide past performance implementation, including:

1) Standardized Evaluation Process

For effective statewide implementation of past performance consideration, the evaluation process should be standardized across the state jurisdictions and implemented uniformly with standardized evaluation tools and uniform criteria with uniform instructions that address different procurement types. Standardization and uniformity of process create a system within which contractors are aware with notice of the process, evaluations gathered are uniformly interpreted, and all jurisdictions are held to the same standard for implementing the evaluation process.

2) Standardized Evaluation Tool

A standard evaluation tool with uniform criteria and evaluation process must be agreed upon and uniformly implemented so that the information gathered has the same meaning across jurisdictions and is uniformly applicable to similar future projects. There must also be consideration for the diverse types of procurement. Information must be readily available and understandable with statewide application. To be effective, the evaluation tool would consider categories (i.e., good, better, best) and explanations with reference to the scope of work performed. For example, "time of completion" may be categorized as "ahead of schedule, on-time, minimal delays, or significant delays." The explanation is necessary because the "time of completion" can be influenced by the contractor's own performance, delays caused by another contractor, or government delays such as permit release from the city. Fair evaluation of past performance must take into account such variables. The evaluation tool may also afford individual jurisdictions leeway to include limited optional criteria specifically applicable to their jurisdiction.

3) Standardized Evaluation Categories for "Responsible Bidders"

Creating standardized evaluation categories will provide quick reference for further inquiry into responsibility determinations on the project's scope. This may likely be retrieved as: "exceptionally responsible;" "responsible;" "non-responsible;" or "no past performance information." Such standardized evaluation categories will allow for prompt initial screening by POs, time savings, and more in-depth inquiry into past performance where necessary. In addition, "no past performance information", should not be seen as or rated equivalent to "non-responsible".

4) Interagency Communications

For accurate and prompt retrieval of information to ensure implementation of a standardized evaluation process, interagency communications must be developed and supported with essential infrastructure.

5) Process for Contractor to Respond to Evaluation

Contractors must be provided with an opportunity to promptly respond to their performance evaluation prior to the evaluation being posted because the information may be considered for future contract awards. Creating a process for contractor response will fulfill due process in lieu of protest procedures by offering the contractor an opportunity to agree or disagree with specific aspects of their evaluation, and include additional information to explain the end result in respect to the evaluation criteria. The contractor's response should be included in the information retrieval system for consideration during future responsibility determinations, where the protest system will address due process concerns of contractors who may not be awarded future contracts based on the contractor's past performance evaluation.

B. INFRASTRUCTURE NEEDS

A centralized database system to collect past performance information and to expedite retrieval is necessary. Currently, there is no method to obtain past performance information between Hawaii's multiple jurisdictions other than self-reporting by contractors. The consequence is inconsistent and disjointed communications, which may allow poor past performers to avoid negative review reporting and time consuming individual verifications on available information.

C. TRAINING

Training is a critical factor for ensuring any policy is implemented correctly. SPO has previously requested training budgets to carry out the agency's mission of promoting efficiency and effectiveness through competent procurement guidance. Proper training takes time and resources for development and coordination. While adapting to budget cuts and the resulting understaffing and scarce resources, the SPO has been innovative in offering on-demand trainings online through their website. Statewide implementation of SPO trainings to all Hawaii government employees authorized to procure⁵⁹ takes strategizing and often requires additional individual jurisdiction processes to address unique internal agency needs. Thus, while implementing new statewide processes such as past performance, the resource component to feasibility of implementation cannot be understated.

D. AGENCY RESOURCES

The reality of limited agency resources and statewide budget cuts cannot be overlooked during this feasibility analysis. Jurisdictions and agencies that have implemented past performance evaluations have managed to allocate resources to policy development, evaluation criteria and forms, training on past performance consideration during source selection, and additional time factored into procurements for completion of such due diligence. But because of scarce agency resources and unclear guidance requiring past performance, most agencies are unable to

⁵⁹ HRS § 103D-208. Delegation of authority by the chief procurement officer. "Subject to the rules of the policy board, each chief procurement officer may delegate any authority or duty conferred upon the chief procurement officer by this chapter to designees or to any department, agency or official within their respective jurisdictions."

reallocate scarce resources necessary to implement a past performance initiative, even if they wanted to prioritize such a program. Adequate financial and logistical resources will, therefore, be critical for successful implementation of a comprehensive statewide policy of past performance evaluation and consideration.

E. TIME

For statewide implementation of past performance mandates, the consideration of realistic time frames for proper implementation is an essential component to this feasibility study. While new legislative mandates may become effective immediately or in a brief amount of time, agency implementation requires additional time to develop procedures and train employees. It is also important to recognize that the past performance processes will need to be dynamic and able to be improved upon. The SPO recommends a delayed effective date on any legislative initiative so that agencies have adequate time to prepare to implement the initiative successfully.

VII. FEASIBILITY – IMPLEMENTATION PLAN AND INITIAL COST ESTIMATES

Financial resources are a critical component to successful implementation of a comprehensive statewide policy such as past performance consideration. There are a number of essential resource needs discussed above, to facilitate the creation and implementation of a new past performance initiative. With the time constraints of this report request and unclear value in dedicating additional resources, the SPO presents the following initial implementation plan and rough-cost estimates⁶⁰ for consideration and further discussion.

The SPO stresses a phased-in approach which begins with utilization of past performance as a factor in the responsibility determination during the solicitation phase (prior to contract award), then the development and implementation of a past performance database as a second phase. To ensure an informed and consistent transition to the past performance mandate across the State, it is critical that the tasks below be completed **prior to** the effective date of the new legislation.

- Total rough estimate for initial implementation: **\$ 487,244**
 - Phase I: \$ 127,244.00
 - Phase II: \$ 360,000.00

A. **PHASE I - RESPONSIBILITY (PAST PERFORMANCE) ASSESSMENT PRIOR TO AWARD**

The SPO's recommended legislation would mandate that a responsibility determination be made on all procurements prior to the award of any contract and that contractor past performance be assessed as part of that responsibility determination. In order to effectively implement this statutory requirement, the following would need to be funded and executed to implement the past performance initiative.

- 1) **Procurement Policy Board Administrative Rule Development** (Interim and Final): As discussed above, consistent application of the new past performance factor during the solicitation phase will need to be guided by changes to the current HAR chapters governing State procurement. Successful rule development will result from drafting clear and concise rules that State procurement professionals and the contractor community can easily understand and apply. The following tasks will aid in the achievement of that goal:
 - a) Iterative and final drafting of proposed changes to the Hawaii Administrative Rules (HAR) Section 3-122, both interim and final.
 - b) In depth procurement stakeholder study, review and input on proposed revisions to HAR Section 3-122.
 - c) Coordination with and legal review of any rule changes by the State's Attorney General for compliance with statute.
 - d) Procurement Policy Board execution of interim rules to be followed during the administrative rule making process.
 - e) SPO shepherding proposed administrative rule changes through the administrative review and public comment process.
 - f) SPO creation of guidance to be followed by State procurement professionals via Procurement Circulars and any other standardized forms and/or checklists.

⁶⁰ All initial cost estimates are rough estimates, based on past experience with related procurement initiatives. More accurate cost estimates are possible with additional time.

2) Mandatory Training for all State procurement professionals: Prior to the effective date of the new statutory past performance requirement, it is critical that all State procurement professionals be trained on the new statutory and regulatory mandates and SPO guidance. In order to accomplish this task the SPO will need to develop mandatory training for all State procurement professionals on how to follow the new requirements. Based on achievement of the tasks set forth in item 1 above, SPO's training development will consist of the following tasks:

- a) SPO development of a script and accompanying slides for the training module.
- b) SPO coordination of compliance review of the module by procurement stakeholders.
- c) SPO recording of the training module for web-based, on-demand access to the training by State procurement professionals.
- d) SPO-sponsored State procurement professional "town-hall" meetings to provide live training accompanied by question and answer sessions.
- e) SPO continued review and update, if required, of the training module.

➤ The estimated cost to implement Phase 1 of the past performance initiative of \$127,244.00 includes:

- 1) Procurement Specialist – Administrative Rule Changes:** In order to achieve the tasks set forth in item 1 above, while also supporting its current mission requirements, SPO will need to add staff to aid in the drafting, coordination, facilitation, and development of the interim and final administrative rules. This position will also support drafting and writing procurement guidance, checklists, standardized forms, and any other documentation required to ensure the transition to the new requirements is clear and efficient. This position will require strong knowledge of the Hawaii Procurement Code, policy rationale behind current statutory and regulatory requirements, ability to coordinate and facilitate procurement stakeholder engagement at the highest levels, and strong writing and legislative drafting skills. This position is estimated to be required through FY 2016, extended as necessary.
- 2) Procurement Specialist – Training/Database Support:** In order to achieve the tasks set forth in item 2 above, while also supporting its current mission requirements, SPO will need to add staff to aid in the drafting, coordination, facilitation, and development of the training module and protocol to effectuate a standardized approach to the new statutory and regulatory requirements by all State procurement professionals. Since the evaluation of past performance may vary depending on the solicitation and the requirement, the SPO training must consist of more than mere recitations of the new statute and rules. The training must include development of past performance evaluation tools that can be tailored to various solicitations, past performance evaluation processes that can expand or contract depending on the size and type of procurement, and standardized past performance language and clauses to be used in solicitations. This position will require strong knowledge of the Hawaii Procurement Code, policy rationale behind current statutory and regulatory requirements, ability to develop clear training modules and tools that result in standardized implementation of the new past performance requirements and strong written and verbal presentation skills. This position is estimated to be required through FY 2016, extended as necessary. *Note*, this position will also support tasks associated with Phase 2, discussed below.

- 3) **Other costs** - Various additional costs of materials, equipment and travel to neighbor islands.

B. PHASE II - CENTRALIZED CONTRACTOR PAST PERFORMANCE DATABASE

Key to the success of the federal past performance assessment model was the creation of database systems that collect contractor past performance information. Centralized databases expedite retrieval of procurement information for procurement professionals, allow for contractor responses, providing a critical resource of necessary information for PO consideration. While the federal model resulted in the establishment of many “agency-specific” past performance databases feeding into larger centralized databases, SPO recommends the establishment of a singular “centralized” past performance database that accumulates contractor performance data across all State agencies. SPO anticipates the following tasks will need to be achieved to develop and maintain a successful centralized contractor past performance database.

- 1) **Contractor Past Performance Database Scope Development:** SPO will require significant support and expertise from subject matter experts in information technology and database development for inclusion of all hosting, software, hardware, programming and other requirements.
- 2) **Contractor Past Performance Database Development:** Utilizing the scope developed in item 1 above, SPO will solicit a contractor to develop the contractor past performance database.
- 3) **Database Training and Implementation Roll-out:** Once developed, tested and launched State procurement and agency project managers will need to be trained on the following:
 - a) Input of contractor past performance information after contract completion.
 - b) Contractor notification of poor performance rating and ability to provide rebuttal information.
 - c) Retrieval of contractor past performance information during the solicitation phase to aid in the Procurement Officer’s responsibility determination.
- 4) **Database Maintenance:** Once developed, tested and launched the contractor performance database will need to be maintained.

- The estimated cost to implement Phase 2 of the past performance initiative of \$360,000.00 includes the following costs:

- 1) **Procurement Specialist – Training/Database Support:** In order to achieve the tasks set forth in Phase 2, while also supporting its current mission requirements, SPO will need to add staff to aid in supporting the development, testing, training and implementation of the contractor performance database. Building on the training developed as part of Phase 1, this staff member will not only aid in coordinating the consultants and/or State-provided subject matter experts but also develop the training module to support the tasks listed above. The same qualifications discussed in Phase 1 above will be applicable to the tasks to be performed in Phase 2. This position is estimated to be required through FY 2016 and

possibly into the second quarter of FY 2017. *Note*, this position will also support tasks associated with Phase 1, discussed above.

- 2) **Subject Matter Expert Support:** The State does not currently have sufficient capacity to provide subject matter experts to aid in the development of the database scope of work or to actually create a contractor past performance database. As such, SPO has assumed these services will need to be outsourced and has included the cost of consultant support in this estimate. Consultants would be required for both scope development and database creation.

- 3) **Other Costs** – Various additional costs of materials, equipment and travel to neighbor islands.

Additional Costs Not Listed: SPO was unable to estimate the various cost associated with Agency support and compliance with this past performance initiative. During the discussions with procurement stakeholders discussed above, stakeholders have expressed concerns with the added administrative burden that the agency would incur in complying with the mandates at both the solicitation phase and post-award assessment phase. Many have expressed they would need to hire additional personnel to conduct the past performance due diligence and to input past performance information into a database collection system. Stakeholders have also expressed concern about the cost associated with delayed contract awards or possible increase in prices while past performance information is being retrieved to make a responsibility determination. As such, SPO was unable to assess these related potential costs.

VIII. CONCLUSION

"State and local governments are in the best position to exercise oversight early in the procurement process by requiring procuring agencies to render affirmative declarations of responsibility before awarding contracts. When procuring agencies take the duty to assess responsibility seriously, they promote integrity in their respective procurement systems and signal to the contractor community that they will be treated fairly and impartially during contract formation as well, throughout all phases of the procurement process"

- *Professor Danielle M. Conway*⁶¹

Unclear policy guidance regarding past performance should be addressed with clear legislative mandates and tools for effective agency enforcement. While there has been much debate about bad past performers, the issue of past performance in Hawaii contracting involves varied applications of current legislative mandates for contractor responsibility determinations. Statewide implementation in Hawaii is feasible with additional resources for proper development, implementation, and maintenance of a comprehensive past performance evaluation and consideration initiative to hold both contractors and government agencies accountable with taxpayer money.

⁶¹ Danielle M. Conway, *State and Local Government Procurement*, at 125 (2012).