



GOV. MSG. NO 521

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

April 25, 2010

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fifth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

I am transmitting herewith SB2840 SD2 HD1, without my approval, and with the statement of objections relating to the measure.

SB2840 SD2 HD1

A BILL FOR AN ACT
RELATING TO PUBLIC PROCUREMENT.

Sincerely,



LINDA LINGLE

EXECUTIVE CHAMBERS

HONOLULU

April 25, 2010

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 2840

Honorable Members
Twenty-Fifth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 2840, entitled "A Bill for an Act Relating to Public Procurement."

The purpose of this bill is to require contractors awarded public works construction contracts to employ a workforce consisting of at least eighty percent Hawaii residents, and provides sanctions for noncompliance including temporary suspension of contract work, payment withholding, disqualification from the project, recovery of contract payments, and disbarment or suspension.

I support the creation of local jobs for local residents. However, this measure does not create jobs, because it does not incentivize any new economic activity. Unfortunately, the bill will likely discourage some job creation activities by increasing the costs of public works construction in the State of Hawaii.

It establishes an ill-defined, ambiguous, and complex compliance structure for contractors and state and county agencies. For example, the bill fails to indicate whether a contractor must maintain the ratio of Hawaii and non-Hawaii resident workers every day the project is underway, every month, or over the entire duration of the project. Furthermore, the bill fails to specify if the quota applies only to jobsite staff or all contractor staff including administrative and managerial

personnel.

It will be difficult for a contractor to determine at the outset, prior to the commencement of the contract, the total number of workers and the total number of worker hours required for the duration of the contract. The contractor's flexibility to maintain a workforce that is responsive to changing needs of the project likely would be impaired if the contractor were required to maintain a quota within its workforce at all times during the contract. The eighty percent residency requirement would exacerbate the contractor's need to continually juggle its workforce, adding and deleting individuals, so as not to violate the quota requirement at any time during the contract. Further, it would also be difficult for contractors to determine which of their workers are state residents based on the criteria of the bill, as the contractor would have to glean the workers' intent to establish residency in Hawaii.

Additionally, the eighty percent requirement applies to the contractor's subcontracts that are priced at \$50,000 or more. Under this measure, the contractor would be responsible not only to maintain the composition its own workforce, but also the workforces of its subcontractors, over whom the contractor has limited authority.

State and county agencies would be similarly burdened to enforce the requirements of this measure, and will have to find the resources and staff to do so. In sum, the monitoring, enforcement and compliance that this bill requires are difficult, burdensome, and expensive for both contractors and public government agencies.

This measure's requirements are also likely to provide additional grounds for contractor protests, delaying projects at the expense of taxpayers and impeding the ability of the State and counties to carry out public works initiatives.

Finally, the courts are divided as to the validity of state statutes that require the employment of state residents in the construction of public works. The legislature may not have created a record with the necessary requirements to overcome a constitutional challenge, thereby subjecting the State to protracted and costly litigation.

For the foregoing reason, I am returning Senate Bill No. 2840 without my approval.

Respectfully,

A handwritten signature in black ink, appearing to read "Linda Lingle", written in a cursive style.

LINDA LINGLE
Governor of Hawaii

VETO

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

S.B. NO. 2840
S.D. 2
H.D. 1

A BILL FOR AN ACT

RELATING TO PUBLIC PROCUREMENT.

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

1 SECTION 1. The legislature finds that state and local
2 spending on construction procurement drives a significant
3 portion of Hawaii's economy. However, because of Hawaii's
4 higher cost of living, state contractors often find it cheaper
5 to employ nonresidents to work on construction procurement
6 contracts. As a result, Hawaii residents face difficulties
7 acquiring employment in this important sector of the Hawaii's
8 economy. Furthermore, nonresident employees working on
9 construction procurement contracts contribute very little to the
10 state's economy while they work in Hawaii, and return a
11 disproportionately large amount of their wages to their home
12 states upon the completion of their employment in Hawaii.

13 The legislature further finds that the inability of state
14 residents to acquire employment on construction procurement
15 contracts contributes to unemployment in the state, deprives the
16 state of fiscal resources and capital, and dampens the state's
17 economic development. The intent of this Act is to level the
18 playing field for Hawaii residents and to remedy the adverse



1 effects of nonresident employment on construction procurement
2 contracts, while preserving contractors' flexibility to employ
3 nonresidents where necessary.

4 The purpose of this Act is to require that state residents
5 compose not less than eighty per cent of the labor force working
6 on construction procurement contracts.

7 SECTION 2. The Hawaii Revised Statutes is amended by
8 adding a new chapter to be appropriately designated and to read
9 as follows:

10 "CHAPTER

11 EMPLOYMENT OF STATE RESIDENTS ON
12 CONSTRUCTION PROCUREMENT CONTRACTS

13 § -1. Definitions. As used in this chapter:

14 "Contract" means contracts for construction under chapter
15 103D.

16 "Contractor" has the same meaning as in section 103D-104;
17 provided that "contractor" includes a subcontractor where
18 applicable.

19 "Construction" has the same meaning as in section 103D-104.

20 "Procurement officer" has the same meaning as in section
21 103D-104.



1 "Resident" means a person who is physically present in the
2 state at the time the person claims to have established the
3 person's domicile in the state and shows the person's intent is
4 to make Hawaii the person's primary residence.

5 "Shortage trade" means a construction trade in which there
6 is a shortage of Hawaii residents qualified to work in the
7 trade.

8 § -2 Application of chapter. (a) This chapter shall
9 apply to all construction procurements under chapter 103D;
10 provided that this chapter shall not apply to procurements for
11 professional services under section 103D-304 and procurements
12 for small purchases under chapter 103D-305.

13 (b) This chapter shall apply to any subcontract of \$50,000
14 or more in connection with any general contract otherwise
15 covered by this chapter.

16 § -3 Requirements of contractor. (a) A contractor
17 awarded any contract shall ensure that Hawaii residents compose
18 not less than eighty per cent of the workforce employed to
19 perform the contract on a particular construction project, as
20 determined under subsection (b).

21 (b) The eighty per cent requirement under subsection (a)
22 shall be determined by dividing the total number of hours worked



1 on a contract by residents, by the total number of hours worked
2 by all employees of the contractor in the performance of the
3 contract. Hours worked for any subcontractor of the contractor
4 shall count towards the calculation for purposes of this
5 subsection. The hours worked by employees within shortage
6 trades, as determined by the department of labor and industrial
7 relations, shall not be included in the calculations for
8 purposes of this subsection.

9 (c) Every contractor shall comply with this chapter for
10 the entire duration of the contract. Certification of
11 compliance with this chapter shall be made under oath by an
12 officer of the contractor to the procurement officer on a
13 monthly basis.

14 (d) A contractor who fails to comply with this chapter
15 shall be subject to any of the following sanctions:

16 (1) Temporary suspension of work on the project until the
17 contractor or subcontractor complies with this
18 chapter;

19 (2) Withholding of payment on the contract or subcontract,
20 as applicable, until the contractor or subcontractor
21 complies with this chapter;



- 1 (3) Permanent disqualification of the contractor or
- 2 subcontractor from any further work on the project;
- 3 (4) Recovery by the State or county, as applicable, of any
- 4 moneys expended on the contract or subcontract, as
- 5 applicable; or
- 6 (5) Proceedings for debarment or suspension of the
- 7 contractor or subcontractor under section 103D-702.

8 § -4 Conflict with federal law. This chapter shall not
9 apply if the application of this chapter is in conflict with any
10 federal law, or if the application of this chapter will
11 disqualify any state or county agency from receiving federal
12 funds or aid."

13 SECTION 3. This Act does not affect rights and duties that
14 matured, penalties that were incurred, and proceedings that were
15 begun before its effective date.

16 SECTION 4. This Act shall take effect upon its approval.

