

LINDA LINGLE
GOVERNOR



RUSS K. SAITO
Comptroller

SANDRA L. YAHIRO
Deputy Comptroller

**STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
AND GENERAL SERVICES**
P.O. BOX 119
HONOLULU, HAWAII 96810-0119

TESTIMONY
OF
RUSS K. SAITO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
FINANCE
ON
March 25, 2010

S.B. 2840, S.D. 2, H.D. 1

RELATING TO PUBLIC PROCUREMENT

Chair Oshiro and members of the Committee, thank you for the opportunity to testify on S.B.2840, S.D.2, H.D. 1.

The Department of Accounting and General Services (DAGS) has concerns about this bill and defers to the Attorney General's assessment as to whether requiring local residents for construction projects will survive a legal challenge. DAGS understands that S.B. 2840, S.D.2, H.D. 1 would be assessed against the privilege and immunities clause of the US Constitution, Article IV, Section 2, which states that citizens of each state shall be entitled to all privileges and immunities of citizens of the other states. This would appear to assure the right of a citizen of one state to do business in another state on an equal basis with a citizen of the other state.

DAGS understands the desire to have local citizens working on Hawai'i construction projects. If the State procurement code and existing laws are applied

rigorously to solicit construction projects, Hawai'i companies can compete with out of state companies on an equal footing, and because they and their employees are already in the state, would have a competitive advantage, all other things being equal.

Thank you for the opportunity to testify on this matter.

Council Chair
Danny A. Mateo

Vice-Chair
Michael J. Molina

Council Members
Gladys C. Baisa
Jo Anne Johnson
Sol P. Kaho'ohalahala
Bill Kauakea Medeiros
Wayne K. Nishiki
Joseph Pontanilla
Michael P. Victorino

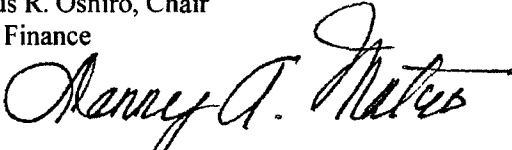


Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
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March 24, 2010

TO: The Honorable Marcus R. Oshiro, Chair
House Committee on Finance

FROM: Danny A. Mateo 
Council Chair

SUBJECT: **HEARING OF MARCH 25, 2010; TESTIMONY IN SUPPORT OF SB 2840, SD2,
HD1, RELATING TO PUBLIC PROCUREMENT**

Thank you for the opportunity to testify in support of this important measure. The purpose of this measure is to require that residents of Hawaii make up at least 80 percent of the labor force working on certain public works projects and construction procurement contracts.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I support this measure for the following reasons:

1. This measure puts Hawaii's construction industry and Hawaii's construction workers back to work. It is no secret that the construction industry has come to a stall within the last few years, and allowing mainland companies to come in and take away what little jobs there already are, only adds to the burden felt by the unemployed men and women of Hawaii's construction industry.
2. This measure keeps Hawaii taxpayers' dollars in Hawaii. By requiring that at least 80 percent of the workforce of certain taxpayer-funded construction projects are Hawaii residents, an increased amount of those dollars will stay in Hawaii and help resuscitate the local economy. Why export Hawaii tax dollars to the bank accounts of mainland workers when the bank accounts of Hawaii's unemployed are in dire need of infusions?
3. While the goal of this measure is simple—reduce unemployment in Hawaii—the means by which it is achieved creatively challenges previous procurement practices. I feel the time has come to break the status quo and fight hard for the jobs of our residents. We need to get our people back to work.

For the foregoing reasons, I support this measure.

Council Chair
Danny A. Mateo

Vice-Chair
Michael J. Molina

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March 24, 2010

TO: Honorable Marcus R. Oshiro, Chair
House Committee on Finance

FROM: Bill Kauakea Medeiros
Council Member

DATE: Thursday, March 25, 2010, 10:00am Conf. Rm. 308

**SUBJECT: TESTIMONY IN SUPPORT OF SB 2840, SD2, HD1, RELATING TO
PUBLIC PROCUREMENT.**

I SUPPORT SB 2840, sd2, hd1, relating to public procurement for the reasons cited in testimony submitted by the Maui County Council Chair Danny A. Mateo, and urge you to support this measure.



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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State House of Representatives

Committee Finance

Testimony by
Hawaii Government Employees Association
March 25, 2010

S.B. 2840, S.D. 2, H.D. 1 – RELATING
TO PUBLIC PROCUREMENT

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 2840, S.D. 2, H.D. 1 which requires at least 80% of workers on public works contracts and construction procurements to be Hawaii residents. This measure seeks to positively impact our state's record-high unemployment by creating jobs for Hawaii residents and in turn stimulate our local economy.

HGEA knows intimately the dampening effect of choosing non-local contractors over local jobs. Our members have been impacted by layoffs, furloughs and wage reductions. Yet at the same time the state has chosen to contract with mainland providers to perform jobs traditionally done by our members who are local residents. This means less money spent at local businesses and less taxes to our state. Contracting with out-of-state companies is a mistake. It furthers the pain of this recession which affects all families and our local community.

We should all agree with supporting our local economy. In these tough economic times, the direction is simple - jobs for Hawaii's people and keeping dollars at home are the right ways to support our economy.

Thank you for the opportunity to testify in support of S.B. 2840, S.D. 2, H.D. 1.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director



Randy Perreira
President

HAWAII STATE AFL-CIO

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Finance

Testimony by
Hawaii State AFL-CIO
March 25, 2010

S.B. 2840, SD2, HD1 – RELATING TO PUBLIC
PROCUREMENT

The Hawaii State AFL-CIO strongly supports S.B. 2840, SD2, HD1 which requires at least eighty percent of workers on public works and construction contracts to be Hawaii residents and requires contractor to provide proof of compliance, if challenged.

Hawaii's unemployment rate remains alarmingly high. With such high unemployment and a substantial state budget deficit, it is imperative to pass S.B. 2840, SD2, HD1. No longer should Hawaii residents sit on the bench while out-of-state workers get the jobs our workers so desperately need. It is time to put our unemployed back to work and stimulate our economy. We must do all we can to keep the unemployment rate from rising further and allow local families to be forced out of their homes because out-of- state workers have claimed their local jobs.

Than you for the opportunity to testify on this matter.

Respectfully submitted,

Jason Bradshaw
COPE Director



HAWAII BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO
Gentry Pacific Design Center, Suite 215A * 560 N. Nimitz Highway, #50 * Honolulu, Hawaii 96817
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NOLAN MORIWAKI
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Local 1 & Plasterers/Cement Masons
Local 630

JOSEPH O'DONNELL
Vice President
Iron Workers Local 625

DAMIEN T.K. KIM
Financial Secretary
International Brotherhood of
Electrical Workers Local 1186

ART TOLENTINO
Treasurer
Sheet Metal Workers I.A. Local 293

MALCOLM K. AHLO
Sergeant At Arms
Carpet, Linoleum, & Soft Tile
Local 1296

REGINALD CASTANARES
Trustee
Plumbers & Fitters Local 675

HADDEUS TOMEI
Elevator Constructors Local 126

JOSEPH BAZEMORE
Drywall, Tapers, & Finishers
Local 1944

RICHARD TACCERE
Glaziers, Architectural Metal &
Glassworkers Local 1944

GARY AYCOCK
Boilermakers, Ironship Builders
Local 627

LYNN KINNEY
District Council 50
Painters & Allied Trades Local 1791

EUGENE SOQUENA
Operating Engineers Local 3

DOUGLAS FULP
International Assoc. of Heat & Frost
Insulators & Allied Workers Local 132

RONAN KOZUMA
Hawaii Teamsters & Allied
Workers Local 996

PETER GANABAN
Laborers' International Union of
North America Local 368

VAUGHN CHONG
Roofers, Waterproofers & Allied
Workers United Union of Roofer
Local 221

March 23, 2010

Honorable Representative Marcus R. Oshiro, Chair
Honorable Representative Marilyn B. Lee, Vice Chair
Members of the House Committee on Finance
Hawaii State Capital
415 South Beretania Street
Honolulu, HI 96813

RE: **IN SUPPORT** OF **SB 2840, SD2, HD1**
RELATING TO PUBLIC PROCUREMENT

Dear Chair Oshiro, Vice Chair Lee and the Committee on Finance

For the Record my name is Buzz Hong, the Executive Director for the Hawaii Building & Construction Trades Council, AFL-CIO. Our Council is comprised of 16- construction unions and a membership of 26,000 statewide.

The Council **SUPPORTS** the passage of **SB 2840, SD2, HD1** that requires at least eighty percent of workers on construction procurements to be Hawaii residents and further provides sanctions for non-compliance including temporary suspension of contract work, payment withholding, disqualification from the project, recovery of contract payments, and disbarment or suspension.

Thank you for the opportunity to submit this testimony in support of **SB 2840, SD2, HD1**.

Sincerely,

William "Buzz" Hong
Executive Director

WBH/kb

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March 24, 2010

Representative Marcus R. Oshiro
Chair, House Committee on Finance
<repmoshiro@Capitol.hawaii.gov>
Representative Karl Rhoads
Chair, House Committee on Labor and Public Employment
<reprhoads@Capitol.hawaii.gov>
Representative Angus L.K. McKelvey
Chair, House Committee on Economic Revitalization, Business & Military Affairs
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Hawai'i House of Representatives
State Capitol
Honolulu, Hawaii 96813

Subject: S.B. No. 2840, H.D. 1 Relating to Public Procurement

Dear Chairs Oshiro, Rhoads, and McKelvey:

I am writing with regard to questions that have been raised regarding (1) the definition of "resident" in S.B. No. 2840, H.D. 1; (2) whether the enactment of this Bill would be in some way inconsistent with obligations under NAFTA or the World Trade Organization; and (3) the language of the Bill in the current H.D.1.

(1) The definition of "resident" in this Bill has been taken from the language in Section 78-1(c) in the Hawaii Revised Statutes, which defines residency for purposes of government employment. This definition was put into the Hawaii Revised Statutes after courts questioned more restrictive definitions. The language in the current definition is a relatively standard definition which is consistent with the federal constitution and should not raise any significant constitutional issues.

(2) The enactment of this Bill will not create any inconsistencies with obligations under the North American Free Trade Agreement (NAFTA) or the World Trade Organization (WTO), because it involves the State's decision about how to spend its own money, and does not involve state regulation of the expenditure of private funds. Federal courts have long recognized that when a state enters the market as a "player," it has the same autonomy of action as does a private entrepreneur. Cases addressing this situation apply the "market participant exception," which allows states to act

without regard to the restrictions found in the Dormant Commerce Clause that apply to state actions involving regulation of private entrepreneurial actions. See, for instance, *Hughes v. Alexandria Scrap Corp.*, 425 U.S. 794 (1976) (allowing Maryland to prefer Maryland scrap companies when spending funds to clean up abandoned automobiles); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding South Dakota's policy of restricting the sale of cement from a state-owned plant to state residents); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 104 (1983) (allowing the City of Boston to require contractors receiving contracts from the City to employ at least half of its workers who are residents of the City).

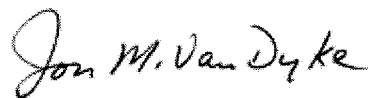
The market participant exception does not apply to the Privileges and Immunities Clause, but foreign entrepreneurs seeking to gain the benefits of NAFTA or the WTO could not invoke the protection of the Privileges and Immunities Clause, because that Clause only provides benefits to "citizens" and has never been interpreted to provide any benefits or privileges to those who are not citizens of the United States. This Clause also protects only individuals, not corporations. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (Taney, C.J.); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868). As I have explained in earlier testimony, the requirements of S.B. 2840 meet the test governing the Privileges and Immunities Clause laid down in *Hicklin v. Orbeck*, 437 U.S. 518 (1987), because its requirement (that those receiving contracts under the Procurement Code hire residents to fill 80% of the positions created by the public contract) is substantially related to the important governmental goal of reducing unemployment and is targeted to a defined, identified, and documented practice that is increasing the unemployment Hawai'i and thereby leading to a reduction in revenues kept in the State from public works projects funded by state taxpayers.

Finally, the U.S. Supreme Court has ruled recently in *Medellin v. Texas*, 128 S.Ct. 1346 (2008), that the federal government cannot override the core elements of state sovereignty, even pursuant to its treaty and foreign affairs powers, and therefore that states retain autonomy with regard to how they spend their own taxpayer-generated funds. The State of Hawaii has the sovereign authority and responsibility to determine how its own funds should be spent, and the federal government cannot interfere with such a decision, even through an international agreement such as NAFTA or the WTO.

(3) The language in S.B. No. 2840, S.D.2 is preferable to that in S.B. No. 2840, H.D.1, because the former contains additional language in its purpose clause (Section 1) that should help the Bill withstand any judicial challenge that might be filed, and because its language on compliance (in "§ -3 Requirements of contractor" in Section 2) ensures that the Bill will actually promote the goals that it is designed to achieve.

This letter is written on behalf of District 50, and is based on my teaching of Constitutional Law during the past 42 years. Please let me know if I can provide any further assistance regarding these matters.

Sincerely yours,

A handwritten signature in cursive script that reads "Jon M. Van Dyke". The signature is written in black ink and is positioned above the printed name.

Jon M. Van Dyke

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 24, 2010 3:39 PM
To: FINTestimony
Cc: nkkinney@gmail.com
Subject: Testimony for SB2840 on 3/25/2010 10:00:00 AM

Testimony for FIN 3/25/2010 10:00:00 AM SB2840

Conference room: 308
Testifier position: support
Testifier will be present: Yes
Submitted by: Nathaniel Kinney
Organization: District Council 50
Address:
Phone:
E-mail: nkkinney@gmail.com
Submitted on: 3/24/2010

Comments:
District Council 50 stands in strong support of SB 2840