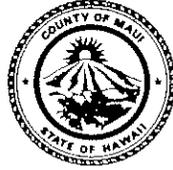


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
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June 15, 2010

MEMO TO: Sheri Morrison
Managing Director

FROM: Brian T. Moto
Corporation Counsel

A handwritten signature in black ink, appearing to read "Brian T. Moto", is written over the typed name of the Corporation Counsel.

SUBJECT: Capital Improvement Projects Employment Bill

I. Introduction.

The purpose of this memorandum is to respond to your request for comments on a draft bill entitled, "A Bill for an Ordinance Establishing a New Chapter 2.98, Maui County Code, Pertaining to Employment For Capital Improvement Projects", proposed by Council Vice Chair Michael J. Molina ("Draft Bill").¹ The Draft Bill is similar to Act 68, S.B. No. 2840, S.D. 2, H.D. 1 (2010) ("Act 68"), relating to public procurement, which took effect as a result of a veto override.²

To our knowledge, the Draft Bill has not been the subject of any Council deliberations and is subject to change. Should the Draft Bill undergo revision, the comments set forth herein may or may not be relevant to the Draft Bill as revised.

II. Summary description of Act 68 and the Draft Bill.

In summary, Act 68 requires that residents of the State of Hawaii compose not less than eighty per cent of the workforce employed to perform on a state or county construction contract. The Draft Bill would require that residents of the County of Maui compose not less than eighty per cent of the workforce employed to

¹ See Exhibit "A", attached hereto.

² See Exhibit "B", attached hereto.

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perform on a County "capital improvement project" contract. The Draft Bill would apply to "all construction procurements" and "any subcontract of \$10,000 or more in connection with any general contract".

Both the Draft Bill and Act 68 reference provisions of the Hawaii Public Procurement Code, Chapter 103D, Hawaii Revised Statutes ("Procurement Code").

III. Short answers.

As discussed below, we conclude that:

- A. The Draft Bill would conflict with the Procurement Code and Act 68, and would be preempted by state law.
- B. Act 68 would likely withstand a facial constitutional challenge on Commerce Clause grounds if brought before the U.S. Court of Appeals for the Ninth Circuit. The Commerce Clause does not prohibit state and local governments acting as "market participants" from favoring residents in procurement contracts.
- C. The Draft Bill has certain technical and other drafting issues that would require inquiry.

IV. Analysis and discussion.

- A. The Draft Bill would conflict with the Procurement Code and Act 68 and, therefore, would be invalid.

As discussed in Corporation Counsel opinions,³ the Constitution of the State of Hawaii ("Hawaii Constitution") and the Hawaii Revised Statutes reserve to the State Legislature the power to enact laws of statewide concern.

- 1. The State Legislature may enact laws of statewide concern, and county ordinances may not conflict with such laws.

Article VIII, Section 6, of the Hawaii Constitution, pertaining to local government and statewide laws, states:

³ See, e.g., memorandum to Gladys C. Baisa, Council Member, from Brian T. Moto, Corporation Counsel (May 4, 2010).

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This article shall not limit the power of the legislature to enact laws of statewide concern.

Section 50-15, Hawaii Revised Statutes, pertaining to reserved powers of the State Legislature, states:

Notwithstanding the provisions of this chapter, there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith.

The Hawaii Supreme Court has held that a law of general application throughout the state is a law of statewide concern within the meaning of the Hawaii Constitution.⁴

In general, counties may not adopt ordinances that are in conflict with laws of statewide concern. The Hawaii Supreme Court has held that a county ordinance conflicts with a statute governing matters of statewide concern if the ordinance "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication."⁵

2. State statutes that constitute a comprehensive and uniform scheme disclosing an express or implied intent to be exclusive and uniform throughout the state may preempt county ordinances that cover the same subject matter embraced within the state statutes.

Section 46-1.5(13), Hawaii Revised Statutes, pertaining to general powers and limitation of the counties, states:

Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state

⁴ Richardson v. City and County of Honolulu, 76 Hawai`i 46, 66, 868 P.2d 1193, 1213 (1994) (citing Marsland v. First Hawaiian Bank, 70 Haw. 126, 133, 764 P.2d 1228, 1232 (1988)).

⁵ Richardson v. City and County of Honolulu, 76 Hawai`i at 60-61. See also Pac. Int'l Services Corp. v. Hurip, 76 Haw. 209, 215 (1994).

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statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State

The Hawaii Supreme Court has held that a county ordinance may be preempted by Section 46-1.5(13) if (1) the ordinance covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) the ordinance conflicts with state law.⁶

3. The Procurement Code is a state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state.

The Intermediate Court of Appeals of Hawaii has described the Procurement Code as "a unitary body of laws to govern and 'promote economy, efficiency, and effectiveness' in the procurement process."⁷ In doing so, the Court observed that the State Legislature had included the following "substantial statement of intent"⁸ when enacting the Procurement Code:

It is the legislature's intent that there be a **single source of public procurement policy to be applied equally and uniformly to the State and counties**. This Act shall apply to the procurement practices of all entities created by the State's and counties' constitution, charters, statutes, ordinances, administrative rules, or executive orders, including the office of Hawaiian affairs, and the departments, commissions, councils, boards, bureaus, committees, institutions, authorities, legislative bodies, agencies, government corporations, or other establishment of the State or its several counties.⁹ (Emphasis added.)

The Legislature further stated that the purposes of the

⁶ Richardson v. City and County of Honolulu, 76 Hawai`i at 59-67; see also Citizens Utilities Co. v. County of Kauai, 72 Haw. 285, 814 P.2d 398 (1991); In re Application of Anamizu, 52 Haw. 550, 481 P.2d 116 (1971).

⁷ Communications-Pacific, Inc. v. City and County of Honolulu, 121 Hawai`i 527, 532, 221 P.3d 505, 510 (2009).

⁸ *Id.* at 531.

⁹ 1993 Haw. Sp. Sess. Laws Act 8, § 1 at 37-38.

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Procurement Code extended to "the construction of public works for the State and counties".¹⁰

Section 103D-102, Hawaii Revised Statutes, pertaining to the application of the Procurement Code, states that it applies "to all procurement contracts made by governmental bodies".

Therefore, based on the plain language of the Procurement Code, court decisions, and the Procurement Code's legislative history, we conclude that the Procurement Code is a state statute disclosing an express intent to be exclusive and uniform throughout the state.¹¹

Although Act 68 amends the Hawaii Revised Statutes by adding a new chapter (whose chapter number remains as yet undesignated), it makes numerous references to Chapter 103D and its various sections. Consequently, we do not believe that Act 68 altered the Procurement Code's purpose of serving as a comprehensive statutory scheme of public procurement that is intended to be exclusive and uniform throughout the state.

4. State constitutional and statutory law would preempt the Draft Bill.

By requiring that residents of the County of Maui compose not less than eighty per cent of the workforce employed to perform on a County construction contract, the Draft Bill would conflict with state law by covering a subject matter embraced within a comprehensive state statutory scheme that is designed to be exclusive and uniform throughout the State.¹² The Draft Bill would

¹⁰ *Id.* at 38.

¹¹ See Franks v. City and County of Honolulu, 74 Haw. 328, 334 (1993) ("When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself..."); Communications-Pacific, Inc., 121 Hawai'i at 530 ("[W]here the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning.").

¹² See In re Application of Anamizu, 52 Haw. at 554-555 (holding that Honolulu ordinance imposing "additional qualifying regulations" upon electrical contractors was preempted by "comprehensive" state regulatory scheme for the licensing of all

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also conflict with state law in that it enters areas (*i.e.*, state and county government procurement and work force requirements in construction contracts) that are fully occupied by state law.

The Procurement Code, and the administrative rules adopted pursuant thereto, constitute a comprehensive and uniform scheme of procurement that is intended to be uniform and exclusive. The Procurement Code and administrative rules do not authorize counties to adopt ordinances favoring contractors who hire local residents.¹³

Further, Section 1 of Act 68 states, in part:

The intent of this Act is to level the playing field for **Hawaii residents** and to remedy the adverse effects of nonresident employment on construction procurement contracts, while preserving contractors' flexibility to employ nonresidents where necessary.

The purpose of this Act is to require that **state residents** compose not less than eighty per cent of the labor force working on construction procurement contracts. (Emphases added.)

Act 68 clearly states that its purpose is to ensure that state residents, not the residents of a particular county, constitute a significant majority of the workforce on government construction contracts. Act 68 does not authorize counties to change the requirements of Act 68, nor does it authorize counties to impose their own workforce residency requirements on construction contracts.

Therefore, even assuming, for the sake of argument, that Act 68 were not considered part of the Procurement Code's comprehensive statutory scheme because the Act establishes a separate chapter of the Hawaii Revised Statutes, the Draft Bill would nevertheless conflict with the stated intent of Act 68 and a plain reading of the Act's provisions.

Therefore, we believe that the Draft Bill would conflict with Act 68 and the Procurement Code by entering an area fully occupied

contractors); see also Citizens Utilities Co., 72 Haw. at 288-289 (holding that Kauai ordinance regulating height of utility poles was preempted by state statute pertaining to Public Utilities Commission and by PUC regulation).

¹³ See Haw. Admin. Rules tit. 3, ch. 124 (pertaining to preferences in procurement).

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by state law. Further, the Draft Bill would conflict with state law by covering a subject matter embraced within a comprehensive state statutory scheme that is designed to be exclusive and uniform throughout the State and applicable to all state and county government construction contracts. The Draft Bill would also conflict with the stated intent of Act 68 and a plain reading of the Act's provisions.

B. Notwithstanding the Governor's veto remarks concerning Senate Bill No. 2840, laws favoring the employment of residents in government construction contracts may be permissible under the "market-participant" exception to the dormant Commerce Clause limitation on state and local power.

In vetoing Senate Bill No. 2840, Governor Linda Lingle included the following statement in her Statement of Objections:

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.¹⁴

Notwithstanding the Governor's Statement of Objections, we believe that, based on federal court decisions, Act 68 would likely withstand a facial Commerce Clause challenge if brought before the U.S. Court of Appeals for the Ninth Circuit.

1. The dormant Commerce Clause limits the power of states and municipalities to discriminate against interstate commerce, but, in certain circumstances, states and municipalities may be exempt from such limitations under the market participant exception.

The commerce clause of the U.S. Constitution provides that "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States...."¹⁵ The U.S. Supreme Court has long recognized that the Commerce Clause "not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate

¹⁴ Governor's Message No. 521, Statement of Objections to Senate Bill No. 2840, at 3 (Apr. 25, 2010).

¹⁵ U.S. Const. art. I, § 8.

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against interstate commerce."¹⁶ This limitation on state power is referred to as the "dormant commerce clause", which, in general, "prohibits economic protectionism - that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."¹⁷

However, the U.S. Supreme Court has exempted states and municipalities from dormant Commerce Clause limitations when the state or municipality acts as a "market participant" rather than as a "market regulator". Under the market participation exception to the dormant Commerce Clause, the U.S. Supreme Court has upheld state and municipal laws favoring local interests when the state or municipality engages in activities such as selling cement,¹⁸ purchasing goods,¹⁹ or hiring workers.²⁰

2. The U.S. Supreme Court has upheld the ability of local government to favor residents in procurement contracts under the market participant exception.

In White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983), the United States Supreme Court upheld an executive order of the mayor of Boston, Massachusetts, requiring that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, be performed by a work force consisting of at least half bona fide residents of Boston. The Court stated that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."²¹ The Court further stated:

If the city is a market participant, then the Commerce

¹⁶ Big Country Foods, Inc. v. Board of Education of Anchorage School District, Anchorage, Alaska, 952 F.2d 1173, 1177 (1992) (citing New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988)).

¹⁷ *Id.*

¹⁸ Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

¹⁹ Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

²⁰ White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983).

²¹ *Id.* at 208.

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Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.²²

The holding in White supports the proposition that a municipal measure favoring residents in locally funded procurement contracts for construction would not violate the dormant Commerce Clause. There is also support in White for the proposition that such a measure would not violate the dormant Commerce Clause even when applied to construction projects funded in part by federal programs, provided that the federal program regulations sanction the local hiring preferences.²³

3. Although federal circuit courts are divided over the issue, the Ninth Circuit has applied the market participant exception to a state statute that required political subdivisions to favor state residents in procurement contracts.

The circuits of the U.S. Court of Appeals have divided over the issue of whether the market participant exception to the dormant Commerce Clause applies to state statutes, such as Act 68, that require political subdivisions to employ state residents on public works projects.²⁴

The Seventh Circuit has held that the market participant exception does not apply in such circumstances, on the grounds that, when a state imposes home-state preferences on a local government project that does not involve any state funds or supervision, the state is not acting as a "market participant", but as a "regulator".²⁵ However, the Ninth Circuit (which includes the

²² *Id.* at 210.

²³ *Id.* at 213-215.

²⁴ There are twelve regional circuits of the U.S. Court of Appeals. The state of Hawaii is in the Ninth Circuit.

²⁵ W.C.M.Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984) (ruling unconstitutional Illinois state regulation that

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U.S. judicial district of Hawaii), along with the Third Circuit, have held that the market participant exception does apply, on the grounds that political subdivisions generally exist at the will of the state and should be considered part of the state for commerce clause purposes, and that states should not be penalized for exercising their powers through local government and local government projects.²⁶

Based on such decisions, we believe that federal courts within the Ninth Circuit would apply the market participant exception to a statute, such as Act 68, that imposes home-state hiring preferences on both state and local government construction projects.

C. The Draft Bill has certain technical and other drafting issues that would require inquiry.

The Draft Bill has certain technical and other drafting features that raise a number of issues.

For example, the Draft Bill includes the following definition of "resident":

"Resident" means a person who meets one of the following criteria:

1. Currently employed in the County;
2. A full-time student residing in the County;
4. [sic] A person who is physically present in the county and can prove domicile in the county.

Although not dispositive, intent is a standard criterion in determining residency for most purposes. However, the definition of resident in the Draft Bill does not explicitly reference a person's intent to make Hawaii, or the County of Maui, the person's primary residence. The Draft Bill would treat anyone who is

required contractors on any public works project or improvement for the State of Illinois or any political subdivision to employ only Illinois laborers).

²⁶ Big Country Foods, Inc., 952 F.2d at 1178-1179; Trojan Technologies, Inc. v. Commonwealth of Pennsylvania, 916 F.2d 903 (3d Cir. 1990) (applying market participant exception to a Pennsylvania statute requiring political subdivisions to buy American-made steel in connection with a public works project).

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"currently employed in the County" as a County resident, regardless of the person's intent, if any, to permanently reside here, or to return here whenever the person is absent.²⁷ By contrast, Act 68 defines "resident" in terms of a person's intent.²⁸

Further, the Draft Bill states that it shall apply "to all construction procurements under chapter 103D, Hawaii Revised Statutes."²⁹ However, the Draft Bill does not define "construction", but defines another term, "Capital improvement projects". By contrast, Act 68 uses the term "construction" and defines it.

Further, unlike Act 68, the Draft Bill does not exempt from its provisions procurements for professional services under Section 103D-304, Hawaii Revised Statutes, and procurements for small purchases under Section 103D-305, Hawaii Revised Statutes.³⁰ We have no information as to why this is the case.

BTM:lak
Attachments: Exhibits "A" and "B"

cc: Michael J. Molina, Council Vice-Chair
 Traci F. Villarosa, First Deputy Corporation Counsel
 Kalbert Young, Director of Finance
 Webpage

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²⁷ Cf. § 11-13(1), Haw. Rev. Stat. ("The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has the intention to return".).

²⁸ "'Resident' means a person who is physically present in the state at the time the person claims to have established the person's domicile in the state and shows the person's intent is to make Hawaii the person's primary residence." Act 68 at 3.

²⁹ Draft Bill at 2.

³⁰ Cf. Act 68, § 2.

ORDINANCE NO. _____

BILL NO. _____ (2010)

A BILL FOR AN ORDINANCE ESTABLISHING A NEW CHAPTER 2.98, MAUI COUNTY CODE, PERTAINING TO EMPLOYMENT FOR CAPITAL IMPROVEMENT PROJECTS

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Title 2, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

“Chapter 2.98

EMPLOYMENT FOR CAPITAL IMPROVEMENT PROJECTS

Sections:

2.98.010	Purpose.
2.98.020	Definitions.
2.98.030	Application of chapter.
2.98.040	Requirements of contractor.
2.98.050	Conflict with federal or state law.
2.98.060	Applicability

2.98.010 Purpose. A. The county, like much of the nation, is experience difficult economic times. As a result many residents are experiencing loss of employment, which may result in economic hardships such as loss of home and personal property.

B. The Mayor and the Council appropriates millions of dollars in taxes revenues for capital improvement projects for water development, repair and maintenance of roads, solid waste, waste water disposal, environmental management, creation and improvement of parks as well as numerous other projects.

C. Therefore the Council finds that in order to assist our residents with finding employment, to stimulate the local economy and to insure that our taxes revenues are utilized to benefit our families; the purpose of this chapter is to require that county residents will compose of not less than eighty percent of the labor force working on county funded capital improvement projects.

EXHIBIT "A"

2.98.020 Definitions. A. For the purposes of this chapter, unless the context clearly indicates otherwise, the following words and phrases shall be defined as follows:

“Capital improvement projects” means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. The term includes the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

“Contract” means all types of agreements, regardless of what they may be called, for the procurement or disposal of goods or services, or for construction.

“Contractor” means any person having a contract with a governmental body.

“Resident” means a person who meets one of the following criteria:

1. Currently employed in the County;
2. A full-time student residing in the County;
4. A person who is physically present in the county and can prove domicile in the county.

“Shortage trade” means a construction trade in which there is a shortage of county residents qualified to work in the trade.

2.98.030 Application of chapter A. This chapter shall apply to all construction procurements under chapter 103D, Hawaii Revised Statutes.

B. This chapter shall apply to any subcontract of \$10,000 or more in connection with any general contract otherwise covered by this chapter.

2.98.040 Requirements of contractor. A. A contractor awarded any contract shall ensure that county residents compose not less than eighty percent of the workforce employed to perform the contract on a particular capital improvement project, as determined under subsection (B).

B. The eighty percent requirement under subsection (A) shall be determined by dividing the total number of hours worked on a contract by residents, by the total number of hours worked by all employees of the contractor in the performance of the contract. Hours worked for any subcontractor of the contractor shall count towards the calculation for purposes of this subsection. The hours worked by employees within shortage trades shall not be included in the calculations for purposes of this subsection. The county department that is procuring the contract shall determine the shortage trade portion of the contract.

C. Every contractor shall comply with this chapter for the entire duration of the contract. Certification of compliance with this chapter shall be made under oath by an officer of the contractor to the director of the applicable department or their designee on a monthly basis.

D. A contractor who fails to comply with this chapter shall be subject to any of the following penalties:

1. Temporary suspension of work on the project until the contractor or subcontractor complies with this chapter;
2. Withholding of payment on the contract or subcontract, as applicable, until the contractor or subcontractor complies with this chapter; and

3. Permanent disqualification of the contractor or subcontractor from any further work on the project;

4. Recovery by the county, as applicable, of any revenues expended on the contract or subcontract, as applicable.

2.98.050 Conflict with federal or state law. A. This chapter shall not apply if the application of this chapter is in conflict with any federal or state law, or if the application of this chapter will disqualify any county agency from receiving federal and state funds or aid.

2.98.060 Applicability. A. This chapter shall not affect contracts that have been executed prior to the effective dated of this measure.

SECTION 2. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

CM:MHP:CIP_employment_bill:grs

A BILL FOR AN ACT VETO OVERRIDE

RELATING TO PUBLIC PROCUREMENT.

ACT No. 68
Approved: [Signature]
Dated: April 29, 2010

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.

