July 8, 2008

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

Dear Madam President and Members of the Senate:

I am transmitting herewith SB2824 SD2 HD1 CD1, without my approval, and with the statement of objections relating to the measure.

SB2824 SD2 HD1 CD1 A BILL FOR AN ACT RELATING TO PROCUREMENT.

Sincerely,

LINDA LINGLE
STATEMENT OF OBJECTIONS TO SENATE BILL NO. 2824

Honorable Members
Twenty-Fourth 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. 2824, entitled "A Bill for an Act Relating to Procurement."

The purposes of Senate Bill No. 2824 are to: (1) remove the voting powers of the Comptroller and the county employee as members of the State Procurement Policy Board; (2) require the Board to annually audit a minimum of two executive departments, divisions, or agencies for compliance with chapter 103D, Hawaii Revised Statutes; and (3) require the Legislative Auditor to conduct a compliance, performance, and management audit of the State Procurement Office and the executive branch of the State to determine compliance with chapter 103D.

This bill is objectionable because by removing the voting rights of the Comptroller and the county employee who sit as members of the State Procurement Policy Board, this bill denies the State and county government from fully participating in the decisions of the Board and deprives the State and county government of full representation. The other five members of the Board are specifically designated by law not to be full-time State or county employees, provided that one member must be a certified professional in the field of procurement. There does not seem to be a basis to remove the voting rights of the Comptroller, whose department is responsible for procurement and
who oversees the State Procurement Office. Depriving the counties of a voice on the Board is counter to homerule and erroneously presumes their contributions are irrelevant to the successful functioning of this body.

Given the public attention paid to government procurement, the goal of the State Procurement Code (chapter 103D, Hawaii Revised Statutes) to provide transparency in State and county procurements, and the public's concern that the Legislature exempts itself from laws requiring its decision-making to be more transparent, such as the Sunshine Law (part I of chapter 92, Hawaii Revised Statutes), this bill is ill-conceived by requiring the Auditor to determine procurement compliance by the State Procurement Office and the executive branch, but not of the judicial and legislative branches.

For the foregoing reasons, I am returning Senate Bill No. 2824 without my approval.

Respectfully,

LINDA LINGLE
Governor of Hawaii
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

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

PART I.

SECTION 1. The legislature finds that the comptroller should be an ex-officio nonvoting member of the state procurement policy board in order to ensure the board's independence.

The purpose of this part is to make the comptroller an ex-officio nonvoting member of the procurement policy board.

SECTION 2. Section 103D-201, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The state procurement policy board shall consist of seven members. Notwithstanding the limitations of section 78-4, the members of the board shall include:

(1) The comptroller[+] as an ex-officio nonvoting member;

(2) A county employee with significant high-level procurement experience[+] as an ex-officio nonvoting member; and
(3) Five persons who shall not otherwise be full-time employees of the State or any county; provided that at least one member shall be a certified professional in the field of procurement, at least one member shall have significant high-level, federal procurement experience, and at least two members shall have significant experience in the field of health and human services.

Each appointed member shall have demonstrated sufficient business or professional experience to discharge the functions of the state procurement policy board. The initial and subsequent members of the state procurement policy board, other than the comptroller, shall be appointed by the governor from a list of three individuals for each vacant position, submitted by a nominating committee composed of four individuals chosen as follows: two persons appointed by the governor; one person appointed by the president of the senate; and one person appointed by the speaker of the house. Except as provided in this section, the selection and terms of the state procurement policy board members shall be subject to the requirements of section 26-34. No member of the state procurement policy board shall act concurrently as a chief procurement officer.
members of the state procurement policy board shall devote such
time to their duties as may be necessary for the proper
discharge thereof."

PART II.

SECTION 3. The legislature finds that the State
procurement policy office, in order to fully discharge its
responsibilities, must take further steps to ensure compliance
with chapter 103D, Hawaii Revised Statutes, by the executive
agencies.

The purpose of this part is to require the State
procurement policy board to conduct compliance audits.

SECTION 4. Section 103D-202, Hawaii Revised Statutes, is
amended to read as follows:

"$103D-202 Authority and duties of the state procurement
policy board. (a) Except as otherwise provided in this
chapter, the state procurement 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.
All rules shall be adopted in accordance with chapter 91;
provided that the state procurement policy board shall have the
power to issue interim rules by procurement directives, which
shall be exempt from the public notice, public hearing, and
gubernatorial approval requirements of chapter 91. The interim
rules shall be effective for not more than eighteen months.

(b) The state procurement 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.

(c) The state procurement 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.

The state procurement policy board shall annually audit a
minimum of two executive departments, divisions, or agencies,
to ensure compliance with this chapter, as follows:

(1) Based upon a pattern of noncompliance; or

(2) Based upon circumstances of a particular procurement
that may indicate an intention to circumvent this
chapter;

provided that there shall be follow-up audits of a department,
division, or agency that has been previously audited under
paragraph (1) or (2).
In addition, the state procurement policy board shall
select any department, division, or agency for compliance
audits, to be randomly selected or as otherwise authorized by
law.

The state procurement office shall report the results of
all compliance audits to the legislature no later than twenty
days before the convening of each regular session."

PART III.

SECTION 5. The Hawaii public procurement code was
originally enacted by Act 8, Special Session Laws of Hawaii
1993, codified as chapter 103D, Hawaii Revised Statutes. Since
1993, only one audit of the State's procurement practices has
been performed. That audit, Auditor's Report No. 95-8, was
performed in 1995 and states in pertinent part in the summary:

"We found that the administration has been slow in
implementing the procurement code and has not taken the
necessary steps to ensure effective implementation. The
late start of the Procurement Policy Office without
appropriate staff has limited the ability of the policy
board to carry out its responsibilities. Furthermore, the
late appointment of the interim administrator of the
Procurement Office delayed development of an on-going
training program, procurement manual, and a periodic review
of the procurement process. Because rules were issued late
and insufficient attention was paid to interpreting the law
and communicating the rules clearly, we found a number of
instances of noncompliance and confusion about the law and
rules. . . .

The new procurement organization structure is
ineffective with conflicting and unclear roles and
responsibilities. The division of responsibility and
authority between the administrator and the policy office
is not clear in law or practice. Both have a
responsibility to audit procurement practices. In
addition, we found that the administrator has conflicting
roles as the chief procurement officer (CPO) for the
Executive Branch and as the individual responsible for
reviewing procurement practices of all governmental
agencies."

The legislature finds that a new audit is timely and
necessary, given that thirteen years have elapsed since the 1993
audit and the recent problems in state procurement practices
brought to light during the interim hearings by the senate
committee on tourism and government operations. One of the
concerns is the apparent noncompliance with procurement laws in
the award of contracts, which is a critical element of public
procurement.

The purpose of this part is to require the auditor to
conduct a compliance, performance, and management audit of
executive agency compliance with chapter 103D, Hawaii Revised
Statutes, and the administrative rules adopted thereto.

SECTION 6. The auditor shall conduct a compliance,
performance, and management audit of chapter 103D, Hawaii
Revised Statutes, and the administrative rules adopted pursuant
to chapter 103D. The audit shall be limited to the state
procurement office and the purchasing agencies, as defined in
section 103D-104, Hawaii Revised Statutes, of the State, not
including the legislature, judicial branch, office of Hawaiian
affairs, and the several counties.

The purpose of the audit, among other relevant issues as
determined by the auditor, shall be to determine compliance with
chapter 103D, Hawaii Revised Statutes, including but not limited
to:

(1) Compliance with requirements that contracts be awarded
to the highest ranking bidder;
(2) The use of an evaluation committee by a procurement purchasing agency to score proposals based on evaluation criteria;

(3) Whether awards are based solely on qualifications, and not on other considerations such as personal judgments and biased preferences when selecting another bidder with a lower score;

(4) The proper documentation of each step of the procurement process by a purchasing agency and its chief procurement officer, including but not limited to decisions and justifications to select a bidder and to award a contract;

(5) Whether adequate procurement practices training is made available to and regularly attended by appropriate procurement officials of state agencies;

(6) The proper use of an alternative procurement method.

SECTION 7. The auditor may contract with a private entity for purposes of conducting the audit and studies required under this part.

SECTION 8. The auditor shall make an interim report of the findings and recommendations to the legislature no later than

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twenty days prior to the convening of the regular session of 2009, and a final report on findings and recommendations, including proposals for statutory amendments, to the legislature no later than twenty days prior to the convening of the regular session of 2010.

PART IV.

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 10. This Act shall take effect on January 1, 2009; provided that part III of this Act shall take effect upon the approval of this Act.