



GOV. MSG. NO. 890

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

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 SB2867 SD2 HD2 CD1, without my approval, and with the statement of objections relating to the measure.

SB2867 SD2 HD2 CD1

A BILL FOR AN ACT RELATING TO THE HAWAII
PUBLIC PROCUREMENT CODE.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Lingle".

LINDA LINGLE

EXECUTIVE CHAMBERS

HONOLULU

July 8, 2008

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 2867

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. 2867 entitled "A Bill for an Act Relating to the Hawaii Public Procurement Code."

The purposes of Senate Bill No. 2867 are to deter governmental agencies from knowingly including false information or misrepresentations in its solicitations by causing such solicitation to be nullified, and to deter bidders and their subcontractors from knowingly including false information or misrepresentations in their bids by not awarding them the contract and imposing a one-year suspension.

The intent of the bill to penalize those that include false information or misrepresentations in their solicitations is laudable. However, the bill is objectionable because it creates confusion and ambiguity in the State Procurement Code. The implementing provisions are not clearly articulated, are internally inconsistent, and conflict with existing provisions of the State Procurement Code. The resulting confusion will invite protests regarding the meaning and intent of the amendments and cause additional delay in the procurement process. For example, the bill confuses the terms bidder and offeror and references a section of the Procurement Code dealing with contract breaches and tries to apply that section to non-award of a contract. The bill makes false information captured

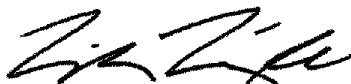
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in a bid confidential, but since the false information was the basis for not selecting the firm, it should not be kept secret.

The bill is also objectionable because it creates hardships for governmental bodies soliciting contracts. Under this bill, disgruntled bidders easily could allege that the winning bidder submitted false information or misrepresentations. The allegation will cause the award of the contract to be stayed while the government investigates the allegation. In other situations, the government could avail itself of section 103D-701 and request the chief procurement officer to allow it to proceed with the award because it is necessary to award the contract to protect the substantial interests of the State. However, if the winning bidder is alleged to have submitted false information or misrepresentations, then even were it necessary to award the contract to protect the substantial interests of the State, the government could not proceed.

For the foregoing reasons, I am returning Senate Bill No. 2867 without my approval.

Respectfully,



LINDA LINGIE
Governor of Hawaii

A BILL FOR AN ACT

RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.

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

1 SECTION 1. Section 103D-310, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§103D-310 Responsibility of offerors. (a) Unless the
4 policy board, by rules, specifies otherwise, before submitting
5 an offer, a prospective offeror, not less than ten calendar days
6 prior to the day designated for opening offers, shall give
7 written notice of the intention to submit an offer to the
8 procurement officer responsible for that particular procurement.

9 (b) Whether or not an intention to bid is required, the
10 procurement officer shall determine whether the prospective
11 offeror has the financial ability, resources, skills,
12 capability, and business integrity necessary to perform the
13 work. For this purpose, the officer, in the officer's
14 discretion, may require any prospective offeror to submit
15 answers, under oath, to questions contained in a standard form
16 of questionnaire to be prepared by the policy board. Whenever
17 it appears from answers to the questionnaire or otherwise, that



1 the prospective offeror is not fully qualified and able to
 2 perform the intended work, a written determination of
 3 nonresponsibility of an offeror shall be made by the head of the
 4 purchasing agency, in accordance with rules adopted by the
 5 policy board. The unreasonable failure of an offeror to
 6 promptly supply information in connection with an inquiry with
 7 respect to responsibility may be grounds for a determination of
 8 nonresponsibility with respect to ~~such~~ the offeror. The
 9 decision of the head of the purchasing agency shall be final
 10 unless the offeror applies for administrative review pursuant to
 11 section 103D-709.

12 (c) All offerors, upon award of contract, shall comply
 13 with all laws governing entities doing business in the State,
 14 including chapters 237, 383, 386, 392, and 393. Offerors shall
 15 produce documents to the procuring officer to demonstrate
 16 compliance with this subsection. Any offeror making a false
 17 affirmation or certification under this subsection shall be
 18 suspended from further offerings or awards pursuant to section
 19 103D-702. The procuring officer shall verify compliance with
 20 this subsection for all contracts awarded pursuant to sections
 21 103D-302, 103D-303, 103D-304, and 103D-306; provided that the
 22 attorney general may waive the requirements of this subsection



1 for contracts for legal services if the attorney general
2 certifies in writing that comparable legal services are not
3 available in this State.

4 (d) Any false information or misrepresentation knowingly
5 placed in the solicitation of an offeror or a subcontractor by
6 an agency shall be a basis for nullification of the solicitation
7 by the administrator of the state procurement office.

8 (e) Any false information or misrepresentation knowingly
9 placed in the bid of the bidder or subcontractor shall be the
10 basis for:

11 (1) Not awarding the bid to that bidder or the bidder's
12 subcontractor; provided that the bidder or
13 subcontractor may protest the non-award first under
14 section 103D-701, secondly thereafter to the chief
15 procurement officer under section 103D-703, and
16 thirdly thereafter to the department of commerce and
17 consumer affairs as provided in section 103D-709;

18 (2) Application by the chief procurement officer of the
19 provisions of section 103D-702; and

20 (3) Imposition by the chief procurement officer of a one
21 year mandatory suspension of the bidder or



1 subcontractor from consideration for awards under this
2 chapter.

3 [~~(d)~~] (f) Information furnished by an offeror pursuant to
4 [~~this section~~] subsections (a), (b), and (e) shall not be
5 disclosed to any person except to law enforcement agencies as
6 provided by chapter 92F."

7 SECTION 2. Section 103D-703, Hawaii Revised Statutes, is
8 amended by amending subsection (a) to read as follows:

9 "(a) This section applies to controversies between a
10 governmental body and a contractor which arise under, or by
11 virtue of, solicitation, bids, a contract between them,
12 including, without limitation, controversies based upon breach
13 of contract, mistake, misrepresentation, or other cause for
14 contract modification or rescission."

15 SECTION 3. Section 103D-709, Hawaii Revised Statutes, is
16 amended by amending subsection (a) to read as follows:

17 "(a) The several hearings officers appointed by the
18 director of the department of commerce and consumer affairs
19 pursuant to section 26-9(f) shall have jurisdiction to review
20 and determine de novo, any [~~request~~]:

21 (1) Request from any bidder, offeror, contractor [~~7~~
22 ~~person~~];



- 1 (2) Person aggrieved under section 103D-106 [~~er~~
2 ~~governmental body~~] or section 103D-310; or
- 3 (3) Governmental body aggrieved by a determination of the
4 chief procurement officer, head of a purchasing
5 agency, or a designee of either officer under section
6 103D-310, 103D-701, or 103D-702."

7 SECTION 4. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 5. This Act shall take effect upon its approval.

