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,

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
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 LINGE
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:

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

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

(b) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that
the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to [such] the offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709.

(c) All offerors, upon award of contract, shall comply with all laws governing entities doing business in the State, including chapters 237, 383, 386, 392, and 393. Offerors shall produce documents to the procuring officer to demonstrate compliance with this subsection. Any offeror making a false affirmation or certification under this subsection shall be suspended from further offerings or awards pursuant to section 103D-702. The procuring officer shall verify compliance with this subsection for all contracts awarded pursuant to sections 103D-302, 103D-303, 103D-304, and 103D-306; provided that the attorney general may waive the requirements of this subsection
for contracts for legal services if the attorney general
certifies in writing that comparable legal services are not
available in this State.

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

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

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

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

(3) Imposition by the chief procurement officer of a one
year mandatory suspension of the bidder or
subcontractor from consideration for awards under this chapter.

(f) Information furnished by an offeror pursuant to subsections (a), (b), and (e) shall not be disclosed to any person except to law enforcement agencies as provided by chapter 92F."

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

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

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

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

(1) Request from any bidder, offeror, contractor[.]

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

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

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