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DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
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November 30, 2010

COMPTROLLER'S MEMORANDUM NO. 2010-38

TO: Heads of Departments and Agencies

FROM: Russ K. Saito, State Comptroller 

SUBJECT: Act 68, SLH 2010, Employment of State Residents
on Construction Procurement Contracts

This memorandum, effective immediately, amends and replaces Comptroller's Memorandum No. 2010-36. It clarifies instructions for implementing Act 68, Session Laws of Hawai'i 2010, which requires a contractor awarded certain construction contracts under HRS Chapter 103D to perform the contract with a workforce of whom not less than eighty percent is composed of Hawai'i residents. The Act also requires the contractor to certify monthly that its eighty percent Hawai'i resident workforce is maintained. The attached Exhibit 1 is a copy of Act 68.

Act 68, Hawai'i resident workforce requirements, must be included in applicable procurement solicitations. The attached Exhibit 2 "PROVISIONS TO BE INCLUDED IN ALL CONSTRUCTION PROCUREMENT SOLICITATIONS," may be used for this purpose.

Compliance with Act 68 must be documented by the contractor. The attached Exhibit 3, "CERTIFICATION OF COMPLIANCE FOR EMPLOYMENT OF STATE RESIDENTS," may be used to ensure monthly compliance with Act 68.

In addition to this form (Exhibit 3), contract provisions should include requirements for the Contractor and Subcontractors to maintain records of all employees who worked on the project that would validate compliance with Act 68. Acceptable records include:

1. Certified payroll for all laborers and mechanics working at the site.
2. Time sheets for all other employees who performed work on the project.

The requirement of this Act shall apply to all construction procurement solicitations that are advertised after the issuance of Comptroller's Memorandum No. 2010-36, dated November 16, 2010, and any solicitations that can incorporate the requirements of this Act by addendum.

This Act shall not apply to procurements for professional services under HRS §103D-304 and small purchases under HRS §103D-305. The Act also shall not apply if the application of this Act is in conflict with any federal law, or if the application of this Act will disqualify the State from receiving Federal funds or aid.

Attachments

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

SB2840 HD1 HMS 2010-2491



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.



PROVISIONS TO BE INCLUDED IN CONSTRUCTION PROCUREMENT SOLICITATIONS

1. Definitions for terms used in Act 68, SLH 2010:
 - a. “Contract” means contracts for construction under 103D, HRS.
 - b. “Contractor” has the same meaning as in section 103D-104, HRS, provided that “contractor” includes a Subcontractor where applicable.
 - c. “Construction” has the same meaning as in section 103D-104, HRS.
 - d. “Procurement Officer” has the same meaning as in section 103D-104, HRS.
 - e. “Resident” means a person who is physically present in the State of Hawai‘i at the time the person claims to have established the person’s domicile in the State of Hawai‘i and shows the person’s intent is to make Hawai‘i the person’s primary residence.
 - f. “Shortage trade” means a construction trade in which there is a shortage of Hawai‘i residents qualified to work in the trade as determined by the Department of Labor and Industrial Relations.

2. Employment of State Residents Requirements - Act 68, SLH 2010:
 - a. A Contractor awarded a contract shall ensure that Hawai‘i residents compose not less than eighty percent of the workforce employed to perform the contract work on the project. The eighty percent requirement shall be determined by dividing the total number of hours worked on the contract by Hawaii residents, by the total number of hours worked on the contract by all employees of the contractor in the performance of the contract. The hours worked by any Subcontractor of the Contractor shall count towards the calculation for this section. The hours worked by employees within shortage trades, as determined by the Department of Labor and Industrial Relations (DLIR), shall not be included in the calculation for this section.
 - b. Prior to starting any construction work, the Contractor shall submit the subcontract dollar amount for each of its Subcontractors.

- c. The requirements of this section shall apply to any subcontract of \$50,000 or more in connection with the Contractor, that is, such Subcontractors must also ensure that Hawai'i residents compose not less than eighty percent of the Subcontractor's workforce used to perform the subcontract.
- d. The Contractor and any Subcontractor whose subcontract is \$50,000 or more shall comply with the requirements of Act 68 for the entire duration of the contract.
 - 1. Certification of compliance shall be made on a monthly basis. If no progress payments are made for any month, the Contractor, and any Subcontractor as applicable, shall still be required to submit the certification on monthly basis to the Contracting Officer.
 - 2. The certification of compliance shall be made under oath by an officer of the company by completing a Certification of Compliance for Employment of State Residents form and executing the Certificate before a licensed notary public.
 - 3. In addition to the monthly certification as indicated above, the Contractor and Subcontractors shall maintain records such as certified payrolls for laborers and mechanics who performed work at the site and time sheets for all other employees who performed work on the project. These records shall include the names, addresses and number of hours worked on the project by all employees of the Contractor and Subcontractor who performed work on the project to validate compliance with Act 68. The Contractor and Subcontractors shall retain these records and provide access to the State for a minimum period of four (4) years after the final payment, except that if any litigation, claim, negotiation, investigation, audit or other action involving the records has been started before the expiration of the four (4) year period, the Contractor and Subcontractors shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the four (4) year period, whichever occurs later. Furthermore, it shall be the Contractor's responsibility to enforce compliance with this provision by any Subcontractor.
- e. A Contractor who fails to comply with this section shall be subject to any of the following sanctions:

1. Temporary suspension of work on the project until the Contractor or its Subcontractor complies with Act 68;
 2. Withholding of payment on the contract until the Contractor or its Subcontractor complies with Act 68;
 3. Permanent termination of the Contractor or Subcontractor from any further work on the project;
 4. Recovery by the State, as applicable, of any moneys expended on the contract or subcontract as applicable; or
 5. Proceedings for debarment or suspension of the Contractor or Subcontractor under Hawai'i Revised Statutes §103D-702.
3. Conflict with Federal Law: This section shall not apply if the application of this section is in conflict with any federal law, or if the application of this section will disqualify the State from receiving Federal funds or aid.

**CERTIFICATION OF COMPLIANCE
FOR
EMPLOYMENT OF STATE RESIDENTS
ACT 68, SESSION LAWS OF HAWAI'I 2010**

Project Title: _____
Agency Project No: _____
Contract No.: _____

As required by Act 68, Session Laws of Hawai'i 2010 -- Employment of State Residents on Construction Procurement Contracts, I hereby certify under oath, that I am an officer of _____ and for the month of _____, 20____, _____ is in compliance with Act 68, SLH 2010, by employing a workforce of whom not less than eighty percent are Hawai'i residents, as calculated according to the formula in the solicitation, to perform this Contract.

- I am an officer of the **Contractor** for this contract.
- I am an officer of a **Subcontractor** for this contract.

CORPORATE SEAL

(Name of Company)

(Signature)

(Print Name)

(Print Title)

Subscribed and sworn to me before this
____ day of _____, 2010.

Doc. Date: _____ # of Pages _____ Circuit

Notary Name: _____

Doc. Description: _____

Notary Public, ___ Circuit, State of Hawaii
My commission expires: _____

Notary Signature Date

NOTARY CERTIFICATION