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July 25, 2011

COMPTROLLER'S MEMORANDUM NO. 2011-18

TO: Heads of Departments and Agencies

SUBJECT: Hawai'i Revised Statutes (HRS) §103B--Employment of State Residents on Construction Procurement Contracts, as Amended by Act 192, Session Laws of Hawai'i (SLH) 2011

This memorandum addresses legislative changes made to HRS Chapter 103B--Employment of State Residents on Construction Procurement Contracts, by Act 192, SLH 2011. Comptroller's Memorandum No. 2010-38 shall continue to apply to contracts fully executed before July 1, 2011.

The requirements of HRS Chapter 103B--Employment of State Residents on Construction Procurement Contracts apply to all construction procurements under Chapter 103D except procurements for professional services (103D-304) and small purchase procurements (103D-305) and must be included in all solicitations for such procurements [and if there is no solicitation as in sole source (103D-306) or emergency procurements (103D-307), then such provisions must be included in the contract]. HRS Chapter 103B also applies to all subcontracts of \$50,000 or more of contracts covered by this chapter. The attached Exhibit 1, "PROVISIONS TO BE INCLUDED IN CONSTRUCTION PROCUREMENT SOLICITATIONS," lists sample provisions which may be used for this purpose.

HRS Chapter 103B requires any affected Contractor and Subcontractor to perform its contract with a workforce of which not less than eighty percent are Hawaii residents.

Primarily, Act 192 amended HRS §103B-3 to allow: (1) a Contractor, prior to award, to withdraw its bid without penalty if the Contractor finds that it is unable to comply with these requirements, and (2) compliance to be certified in writing under oath by an officer of the General Contractor and applicable Subcontractors with the notice of completion by the General

Contractor. The attached Exhibit 2, "CERTIFICATION OF COMPLIANCE FOR EMPLOYMENT OF STATE RESIDENTS," may be used to certify compliance.

In addition to Exhibit 2, 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 HRS Chapter 103B. Acceptable records include:

1. Certified payroll for all laborers and mechanics working at the site;
2. Time sheets for all other employees that performed work on the project; and
3. Names and addresses of residency of all employees who performed work on the project.

However, the changes made to HRS Chapter 103B by Act 192 shall not apply to contracts which have been fully executed prior to July 1, 2011. For these contracts, Comptroller's Memorandum No. 2010-38 shall continue to apply.

The requirements of Act 192 and this memorandum shall apply to all applicable construction procurement contracts which have been fully executed on July 1, 2011, or thereafter.

For those applicable contracts for which offers were made prior to July 1, 2011, but were not fully executed until July 1, 2011, or thereafter, the procuring agency may issue an amendment to the contract to incorporate the requirements of Act 192 and this memorandum.

Finally, note that HRS Chapter 103B shall not apply if its application is in conflict with any federal law, or will disqualify the State from receiving federal funds or aid.

Questions concerning this memorandum may be directed to Eric Nishimoto of our Project Management Branch at 586-0460.


BRUCE A. COPPA
State Comptroller

Attach.

PROVISIONS TO BE INCLUDED IN CONSTRUCTION PROCUREMENT SOLICITATIONS

1. Definitions for terms used in HRS Chapter 103B as amended by Act 192, SLH 2011:
 - 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. “General Contractor” means any person having a construction contract with a governmental body.
 - e. “Procurement Officer” has the same meaning as in Section 103D-104, HRS.
 - f. “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.
 - g. “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. HRS Chapter 103B as amended by Act 192, SLH 2011–Employment of State Residents Requirements:
 - a. A Contractor awarded a contract shall ensure that Hawai‘i residents comprise not less than 80% of the workforce employed to perform the contract work on the project. The 80% requirement shall be determined by dividing the total number of hours worked on the contract by Hawai‘i 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 award of a contract, an Offeror/Bidder may withdraw an offer/bid without penalty if the Offeror/Bidder finds that it is unable to comply with HRS Chapter 103B as amended by Act 192, SLH 2011.
- c. Prior to starting any construction work, the Contractor shall submit the subcontract dollar amount for each of its Subcontractors.
- d. 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 comprise not less than 80% of the Subcontractor's workforce used to perform the subcontract.
- e. The Contractor and any Subcontractor whose subcontract is \$50,000 or more shall comply with the requirements of HRS Chapter 103B as amended by Act 192, SLH 2011.
 - 1) Certification of compliance shall be made in writing under oath by an officer of the General Contractor and applicable Subcontractors and submitted with the final payment request.
 - 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 certification of compliance 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 HRS Chapter 103B as amended by Act 192, SLH 2011. 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-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-year period, whichever occurs later. Furthermore, it shall be the Contractor's responsibility to enforce compliance with this provision by any Subcontractor.

- f. A General Contractor or applicable Subcontractor who fails to comply with this section shall be subject to any of the following sanctions:
- 1) With respect to the General Contractor, withholding of payment on the contract until the Contractor or its Subcontractor complies with HRS Chapter 103B as amended by Act 192, SLH 2011.
 - 2) 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
HRS CHAPTER 103B, AS AMENDED BY ACT 192, SLH 2011**

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

As required by Hawai'i Revised Statutes Chapter 103B, as amended by Act 192, Session Laws of Hawaii 2011—Employment of State Residents on Construction Procurement Contracts, I hereby certify under oath, that I am an officer of _____ and
(Name of Contractor or Subcontractor Company)
for the Project Contract indicated above, _____ was in
(Name of Contractor or Subcontractor Company)
compliance with HRS Chapter 103B, as amended by Act 192, SLH 2011, by employing a workforce of which 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 _____, 2011.

Doc. Date: _____ # of Pages _____ 1st Circuit

Notary Name: _____

Doc. Description: _____

Notary Public, 1st Circuit, State of Hawai'i
My commission expires: _____

Notary Signature _____ Date

NOTARY CERTIFICATION