



SB1236
RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE
Senate Committee on Hawaiian Affairs
Senate Committee on Government Operations

February 13, 2015

1:30 p.m.

Room 224

The Office of Hawaiian Affairs (OHA) provides the following **COMMENTS** on SB1236, which provides preferential consideration for “native Hawaiian organizations” in public procurement contracts, with “native Hawaiian organization” defined as having at least fifty-one percent of its board of directors enrolled with the Native Hawaiian Roll Commission. OHA appreciates this bill’s intent to support Native Hawaiian-owned businesses and to expand economic opportunities for Native Hawaiians. However, SB1236’s definition of a native Hawaiian organization utilizes the Native Hawaiian Roll in a manner that is premature at this time given that a Native Hawaiian governing entity is impending. At this time, the committees may want to look to other more appropriate definitions of Native Hawaiian and Hawaiian currently found in the Hawai‘i Revised Statutes.

This bill appears to mimic the spirit of a federal program that currently provides support for “Native Hawaiian organizations.” Similar to the procurement preference in this bill, the U.S. Small Business Administration’s Native 8(a) program provides Native Hawaiian organizations with, among other things, the ability to receive sole-source government contracts. To be an eligible Native Hawaiian organization under this federal program, the majority of an organization’s membership and board must be “Native Hawaiian.”

Notably, this bill differs from the federal Native 8(a) program in two important ways. First, while both this bill and the Native 8(a) program require that at least 51 percent of a Native Hawaiian organization’s board of directors be Native Hawaiian, their definitions of “native Hawaiian” differ significantly. “Native Hawaiian” for the purposes of the 8(a) program is defined as anyone “whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawai‘i.” On the other hand, in SB1236, “native Hawaiian organizations” with a board of directors must have no less than 51 percent of their board comprised of members of the roll established by section 10H-3, administered by the Native Hawaiian Roll Commission.

Accordingly, this bill’s definition of “native Hawaiian organization” will not include organizations that may be considered Hawaiian by other standards, and who are comprised of board members eligible to enroll with the Roll Commission. Because a

Native Hawaiian governing entity, envisioned by section 10H-3, has not yet formed, it may be premature to establish such a definition of “native Hawaiian organization” specifically for government contracting preferences. The committees may want to instead consider defining Native Hawaiian consistent with the definition of “qualified Native Hawaiian” in HRS § 10H-3 or consistent with the definition of “Hawaiian” found in HRS § 10-2.

Second, this bill proposes a quota of contracts that must be awarded to native Hawaiian organizations, rather than the federal 8(a) program’s preference for Native Hawaiian organizations to receive specific contracts. OHA notes that there are other preferences found within the procurement code for small business and Hawai‘i made products currently found in HRS §§ 103D-906 and -1002.

Mahalo nui loa for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR

PAULA A. YOUNGLING
ASSISTANT ADMINISTRATOR

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**TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE SENATE COMMITTEES
ON
HAWAIIAN AFFAIRS
AND
GOVERNMENT OPERATIONS
February 13, 2015, 1:30 p.m.**

**SB 1236
RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE**

Chair Shimabukuro, Chair Dela Cruz, Vice-Chair Galuteria, Vice-Chair Nishihara and members of the committee, thank you for the opportunity to submit testimony on SB 1236. The State Procurement Office (SPO) supports programs that assist the success of native Hawaiian organizations, but must oppose this bill at this time due to the current small business environment in the state.

The State of Hawaii has a small business set-aside law, the purpose of which encompasses the intent of this bill. The creating legislation, HB 162 SD 1 CD 1 (2005), specifically mentions promoting the growth and development of businesses qualified under the disadvantaged business program and the federal 8(a) business development program as part of the purpose of the act. Pursuant to that legislation, the Procurement Policy Board (PPB) is charged with promulgating rules to implement the small business set-aside (HRS § 103D-901 thru -906). The PPB previously drafted a set of interim rules. Although in place for several years, the attempt at implementation proved unsuccessful as the set-aside yielded only two contracts. The interim rules eventually expired without the establishment of permanent rules.

Under new administration, the SPO is currently in the process of research and development to formulate a plan that will avoid the mistakes and failure of the previous attempt at small business set-aside rules. In our process, we have engaged small business stakeholders within the community and government agencies, and we have benchmarked small business set-asides across the United States. At present, the SPO is sifting through over 1,400 responses from our small business survey. Our benchmarking research shows a few key trends relevant here: 1) a small business office staffed with small business experts who can set percentages and identify best-suited projects using real data is a best practice for success; 2) the commitment of resources and expertise to monitor the qualifications of such programs is necessary; and 3) self-certification, similar to the federal small business programs, is a proven method for qualification.

The SPO is working on how to support small businesses through government contracting and its primary goal in this regard is to assist in the success of the small business set-aside. While the SPO also generally

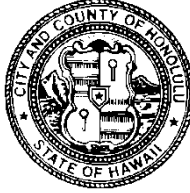
supports smaller subset initiatives of small business such as native Hawaiian organizations, like the federal Small Business Administration started doing in 1954, the first step is to prove that the state can implement a higher level program with some success before we can begin to tackle even more restricted competitive areas.

In the interim, SPO suggests supporting native Hawaiian organizations and other special interest groups through business incentives such as tax-credits, grants, and start-up funding. The SPO would also suggest supporting our efforts to implement a successful broad-based small business program so that we may move closer towards initiatives such as the one envisioned by this measure.

Thank you.

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TESTIMONY OF NELSON H. KOYANAGI, JR.
DIRECTOR OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
BEFORE THE SENATE COMMITTEE ON HAWAIIAN AFFAIRS
AND
THE SENATE COMMITTEE ON GOVERNMENT AFFAIRS
FEBRUARY 13, 2015, 1:30 P.M., Conference Room 224

SENATE BILL 1236, "RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE"
Position: In Opposition

TO: The Honorable Maile S.L. Shimabukuro, Chair
and Members of the Committee on Hawaiian Affairs

The Honorable Donovan M. Dela Cruz, Chair
and Members of the Committee on Government Operations.

The Department of Budget and Fiscal Services, City and County of Honolulu,
opposes Senate Bill No. 1236, Relating to the Hawaii Public Procurement Code.

In general, any set-asides will require additional time and resources for review, and analysis. Set-asides increase the chances of a protest or complaint. Set-asides will increase costs to the City.

For the reasons stated above, the City respectfully requests that this bill be held.

Mahalo for the opportunity to testify on this bill. Should you have any questions or concerns, please feel free to contact the Department of Budget & Fiscal Services' Division of Purchasing at 808-768-5535 or bfs purchasing@honolulu.gov.



KO`OLAUPOKO HAWAIIAN CIVIC CLUB

February 12, 2015

TO: Senator Maile S.L. Shimabukuro, Chair / & Members
Committee on Hawaiian Affairs

Senator Donovan M. Dela Cruz, Chair / & Members
Committee on Government Operations

FROM: Alice P. Hewett, President
Ko'olaupoko Hawaiian Civic Club

RE: Support for S.B. 1236. Relating to the Hawaii Public Procurement Code

Aloha, Senators Shimabukuro and Dela Cruz, and Members of the Committees on Hawaiian Affairs and Government Operations.

The Ko'olaupoko Hawaiian Civic Club offers its strong support for S.B. 1236, which would require state agencies to award at least 20% of their contracts to native Hawaiian organizations.

In our view, this measure would make Hawai'i's procurement awards more accessible to Native Hawaiian businesses and its definitions more consistent with federal Small Business Administration language. If the State of Hawai'i wants to keep our economy strong and hold onto as many tax dollars as possible, we should be awarding contracts to local businesses that are firmly established here in the islands, and that are committed to investing and staying here and serving our people fairly and well.

As with any procurement requirements, we would assume the State agency would hold the vendors or contract awardees accountable to ensure the state's interests are satisfied by the work, service performed or products produced.

We ask your favorable action on this measure.

Mahalo for allowing us to share our mana`o.

The Ko'olaupoko Hawaiian Civic Club was established in 1937 and is a not-for-profit community organization dedicated to preserving and perpetuating the history, heritage and culture of Native Hawaiians. Its membership is open to people of Hawaiian ancestry and those who are "Hawaiian at heart".

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Unity, Equality, Aloha for all



To: SENATE COMMITTEES ON
HAWAIIAN AFFAIRS and
GOVERNMENT OPERATIONS

For hearing Friday February 13, 2015

Re: SB 1236 RELATING TO THE HAWAII PUBLIC PROCUREMENT CODE.
Requires a state agency to award not less than 20% of the total value
of the agency's procurement contracts to native Hawaiian
organizations. Defines "native Hawaiian organization".

TESTIMONY IN OPPOSITION

Establishing a minority set-aside in government procurement or
contracting is a very dangerous thing to do, because it invites civil
rights lawsuits under the 14th Amendment Equal Protection
clause of the U.S. Constitution.

For a government agency to engage in a program of racial discrimination, such as favoring one race over all others in government procurement, the program must satisfy strict scrutiny; i.e., it must be narrowly tailored to meet a compelling government interest.

For example, a compelling government interest would be to make up for the effects of past discrimination. But there has been no proof -- not even an accusation -- that the government of the State of Hawaii has engaged in racial discrimination against Native Hawaiians while favoring all other ethnic groups, which would therefore warrant a remedy of racial set-asides in government procurement to make up for past discrimination.

To be narrowly tailored, a program must have a deadline, or at least a timeframe, when the goals will have been achieved and the program can end; but this bill sets forth no timetable. On the contrary, it seems to envision forever.

There is also no evidence that companies controlled by Native Hawaiians, nor independent contractor individuals who are Native Hawaiians, have been receiving a significantly lower percentage of government contracts that their percentage of the relevant workforce. For example, it might be asserted that Native Hawaiians comprise about 20% of our population and therefore should be expected to receive 20% of government contracts. However, there are many major flaws in that reasoning. For example, according to Census 2010, the median age of Native Hawaiians living in Hawaii was only 26, compared to a median age of 39 for Hawaii's population as a whole, which becomes a median age of 42 for all the rest of Hawaii's people who are not Native Hawaiian. Very few people at age 26 are owners or majority stockholders in a company capable of supplying goods or services

to our government, whereas by age 42 such ownership is far more likely. Indeed, a much larger fraction of Native Hawaiians are below the age when it is legal for them to work, compared with the rest of the population. So it is expected and normal that far less than 20% of government contracts would be awarded to Native Hawaiians, simply because the median age of that racial group is so young. There must be strong evidence to prove discrimination or disproportionate representation; yet no evidence at all has been submitted to support this legislation.

The factor usually considered most essential to justify a minority set-aside is the need for adequate waiver provisions. A waiver provision is a procedure by which a non-minority contractor may receive a contract set aside for a minority by showing that after good faith efforts the set-aside requirements cannot be met. The state government needs to hire companies that can do computer programming and systems management, along with statistical analysis and actuarial work related to the state retirement system -- but are there Native Hawaiian controlled companies capable of handling 20% of that workload? Whoever wrote this bill apparently never considered the need for waivers.

Another consideration is that in Hawaii, every ethnic group is a minority; so if a set-aside is demanded for Native Hawaiians, then why not another set-aside for Filipinos, and another set-aside for Micronesians, etc.? Also, many individuals have multiple ethnicities in their genealogies. So it's a difficult question whether an individual should be assigned to a single minority based on the largest percentage of his genealogy, or whether an individual could be attributed to every one of his multiple heritages.

Please put this bill into the trash. The committee chair should never have scheduled it for a hearing.



Ko`olau Foundation

P. O. Box 4749
Kane`ohe, HI 96744

February 12, 2015

TESTIMONY IN SUPPORT OF S.B. 1236 – RELATING TO THE HAWAII
PUBLIC PROCUREMENT CODE

To: Sen. Maile Shimabukuro, Chair
Sen. Brickwood Galuteria, Vice Chair
Members, Hawaiian Affairs Committee

From: Mahealani Cypher, Secretary/Board Member
Ko`olau Foundation

Subject: Support for S.B. 1236 –
Relating to the Hawaii Public Procurement Code

Aloha, Chair Shimabukuro, Chair Dela Cruz, and Members of the
Committees on Hawaiian Affairs and Government Operations.

The Ko`olau Foundation asks your support and approval of Senate Bill
1236 which would require state agencies to award at least 20% of their
contracts to Native Hawaiian businesses.

It is likely that there will be some who disagree with giving favorable
treatment to the Native Hawaiians. Perhaps that's understandable, but a
reasonable rationale is that companies owned or controlled by Native
Hawaiians currently constitute a very small ratio of island businesses that
receive government contract awards from the State of Hawai`i.

This bill would rejuvenate the energy needed to encourage Native Hawaiian
and other island businesses to bring in Hawaiians as part of their
organization, and possible ensure that most of the money will stay right
here in the islands. As we see it, a significant amount of the money from
state contract awards currently leave the State of Hawai`i. That is money
lost to our economy and lost to our tax coffers.

We urge your committees to approve this measure. Mahalo.

Mahealani Cypher