

Report of the Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award

Summary

The Senate Special Investigative Committee on the Hydrogen Investment Capital Special Fund Management Award (Committee) was formed pursuant to Senate Resolution No. 2 (2008) calling for an investigation into the procurement process for the management of the Hydrogen Investment Capital Special Fund (Hydrogen Fund). The Committee was formed following an informational briefing held by the Senate Committee on Tourism and Government Operations on September 4, 2007 which uncovered possible procurement improprieties that warranted legislative investigation to determine whether administrative malfeasance or misfeasance had occurred.

As a result of its investigation, the members of the Investigative Committee have unanimously approved and adopted the Findings, Conclusions, and Recommendations which are set forth in the attached Report. The Report sets forth the evidentiary based Findings of the Committee which are based on the Committee's review of over twenty-one thousand documents and over fifty-six hours of testimony received from twenty-two witnesses over the course of thirteen hearings.

This investigation was instituted in response to the Department of Business, Economic Development and Tourism's (DBEDT) award of the management contract for the Hydrogen Fund to the third-ranked proposal. The Committee concludes that the record supports the Findings in its Report which are summarized as follows:

- That the DBEDT Director (Director) sought to manipulate the procurement process and bypass procurement laws and rules to steer the Hydrogen Fund Management Contract to his favored bidder;
- That the Director had a pre-existing personal relationship with Barry Weinman which he concealed upon questioning by the Committee;
- That the Director allowed Mr. Weinman to be inappropriately involved throughout the procurement process including the preparation of the work plan which ultimately led to the Request for Proposals for the Hydrogen Fund Management Contract (RFP);
- That in furtherance of his favoring Mr. Weinman for the Hydrogen Fund Management Contract, the Director deviated from DBEDT's standard procurement practices, including removing DBEDT's contracts office from the administration of the RFP and replacing it with DBEDT's Strategic Industries Division which had little, if any, experience with the administration of a RFP;
- That the Director and his top management team, consisting of Ken Kitamura, Maurice Kaya, and John Tantlinger, misrepresented that their position that the Director had the authority to select the successful proposal was based on the past practice of DBEDT;
- That there were a large number of irregularities regarding the RFP which is the only known Request for Proposal with a strong pattern of actions inconsistent with DBEDT's procurement practices;

- That even after being directed by the State Procurement Office to award the Hydrogen Fund Management Contract to the highest ranked bidder, the Director continued to resist making the award and instead sought to cancel the entire RFP;
- That despite the Director's commitment on September 4, 2007, to immediately take all required corrective action, DBEDT did not award the RFP to the top-ranked bidder until February 22, 2008, which was after the adoption of Senate Resolution No. 2 (2008) and did not execute a contract with the top-ranked bidder until September 4, 2008;
- That there is evidence that the Director's top management team knew that State procurement laws and rules required the Director to approve the selection of the top-ranked bidder rather than allowing the Director to select the third-ranked bidder from a list of "qualified bidders";
- That the Hydrogen Fund RFP Evaluation Committee, which included two of the Director's top management team, disregarded its own scoring and evaluation by submitting a list of qualified bidders to the Director rather than submitting the highest ranked bidder for approval; and
- That there is a reasonable belief that the actions taken constitute a knowing and intentional violation of the State procurement laws and rules by the Director and his top management team.

Recommendations

The Committee's Recommendations, as set forth in the Report, are as follows:

- That the Report be submitted to the Department of the Attorney General for a determination whether the Director and his top management team violated applicable procurement laws and rules, and for further appropriate action as provided in section 103D-106, Hawaii Revised Statutes;
- That there is a conflict of interest created with regard to the Department of the Attorney General as a result of their representation of interested parties, including the Director, Ken Kitamura, and Maurice Kaya. Therefore, it is recommended that the Attorney General be recused from determining whether the Director and his top management team have violated State procurement laws and rules. As a result it is requested that independent legal counsel be appointed by the Attorney General to make the determination whether there has been a violation of procurement laws and rules by the Director and his top management team;
- That the Report be submitted to the State Ethics Commission for a determination whether the actions taken by the Director and his top management team constitute a violation of the State ethics code, codified as chapter 84, Hawaii Revised Statutes;
- That DBEDT be required to adopt administrative rules providing that it certify that each procurement made pursuant to the Request For Proposal or Competitive Sealed Bid processes has been conducted in compliance with the State procurement code and rules. It is further recommended that each of these procurements be subject to the mandatory review and oversight of the State Procurement Office to further ensure compliance with all applicable provisions of the State procurement code and rules;

- That DBEDT adopt comprehensive standardized procedures and forms to ensure its compliance with the State procurement code and rules;
- Finally, that DBEDT report back to the Legislature, by twenty days prior to the adjournment sine die of the 2009 Regular Session, on the status of its compliance with the recommendations set forth in the Report.

Response

The Committee adopted its Draft Report on September 10, 2008. On September 11, 2008 the Committee made the Draft Report available to witnesses for their consideration and comment. Responsive comments were received from Priscilla Thompson dated September 23, 2008, Barry Weinman dated September 24, 2008, and Theodore E. Liu dated September 30, 2008. These comments are included in the final version of the Report as Appendix "E". The Committee notes that while the Draft Report was received by each member of the Director's top management team, no responses or comments were submitted by Messrs. Kitamura, Kaya, or Tantlinger.

Ms. Thompson's response included three specific requests for non-substantive changes to the Draft Report which have been addressed in the final version of the Report.

Mr. Weinman provided comments regarding his role in the ownership and management of the bidder found to have been favored by the DBEDT Director. After full consideration and in light of the totality of the documents and testimony received on this issue, the Committee finds that changes to its Report are not warranted as a result of Mr. Weinman's comments. The Committee finds that Mr. Weinman's comments do not diminish the findings regarding his relationship with the DBEDT Director and his involvement in early meetings regarding the Hydrogen Fund and the development of the work plan which was the basis of the RFP. The Committee further notes that Mr. Weinman was present at the Best and Final Offer Meetings with H2 Energy.

Finally, with regard to the comments submitted by DBEDT Director, Theodore E. Liu, the Committee has carefully considered each of the points he asserts. The points raised by Mr. Liu are largely repetitive of arguments he raised at the Committee hearings. In light of the totality of the record of the hearings, including testimony conflicting with the Director's positions, the Committee did not find them to be supported by the record of the investigation. Therefore, the Committee concludes that Mr. Liu's comments do not warrant changes to the Report.

Mr. Liu has asserted that "Dedicated State civil servants were un-necessarily subpoenaed and unfairly maligned only for the purpose of creating a spectacle." The Committee responds that all witnesses called to testify received equal treatment and all were called to testify pursuant to subpoena. The Committee gratefully acknowledges the courage of various DBEDT staff members in cooperating with the investigation despite their being aware that their testimony could be in direct contravention of the testimony of the DBEDT Director and his top management team.

With regard to the conclusions provided in Mr. Liu's comments, the Special Investigative Committee responds as follows:

- Mr. Liu asserts that he did not knowingly or intentionally violate the State procurement laws. However, Mr. Liu has admitted that his understanding of the law was incorrect. The Committee notes that this position was asserted by Mr. Liu during the hearing, but that it was inconsistent with the preponderance of the documents and testimony received by the Committee. The Committee further responds that Mr. Liu's lack of knowledge regarding the law does not affect the finding that Mr. Liu steered the selection of the successful proposal to his favorite bidder;
- Mr. Liu comments that the findings were derived only with the benefit of hindsight and extracted witness testimony. The Committee believes that these comments describe the nature of any investigation and do not create a question as to the fairness of the hearings;
- Mr. Liu raises allegations regarding the illegality of the formation of the Committee and its conducting of hearings. The Committee responds that it acted consistent with the requirements of chapter 21, Hawaii Revised Statutes, and under advice of its legal counsel throughout the investigation. In addition, all witnesses, including Mr. Liu, were represented by deputy attorney generals assigned by the Attorney General throughout the hearings;
- Finally, Mr. Liu asserts that this investigation is the result of the desire of the Chair to persecute him. The Committee responds that the investigation was initiated pursuant to Senate Resolution No. 2 (2008), which was adopted by vote of the full Senate, finding sufficient grounds to justify an investigation of the procurement process for the Hydrogen Fund RFP. Further, the members of the Committee respond that Mr. Liu's allegation does not respect the independence of the Committee members, each of whom were present at the hearings and participated in the review of the documents and testimony. The members of the Committee independently considered the record of the investigation and thereafter unanimously voted to approve the Draft Report.

Throughout this investigation, Mr. Liu has repeatedly acknowledged that he erred in awarding the Hydrogen Fund management contract to the third-ranked bidder; however, he claims that this was due to a misunderstanding of the law and that he did not knowingly or intentionally violate State procurement laws and rules. However, the Committee notes that Mr. Liu's misunderstanding of the requirements of the State procurement law did not justify exercising favoritism and steering the award of the Hydrogen Fund management contract to his favored bidder.

In addition to the changes requested by Ms. Priscilla Thompson, the Committee has made technical, non-substantive changes to the Draft Report for the purpose of clarification.

After full consideration of the foregoing comments and discussion, the Committee has unanimously voted to stand by the Findings, Conclusions, and Recommendations made in its Draft Report and to adopt the attached document as its Final Report.

**Report of the
Special Investigative Committee on the Hydrogen Investment
Capital Special Management Contract Award**

I. BACKGROUND

- A. Legislative History of the Hydrogen Investment Capital Special Fund.**
- B. Solicitation for Management of the Hydrogen Fund.**
- C. Challenge to the Selection of H2 Energy.**
- D. Senate Resolution No. 2 / Special Investigative Committee.**
- E. Hearings and Subpoenas.**
- F. Appendixes to Committee Report.**

**II. FINDINGS OF THE SENATE SPECIAL
INVESTIGATIVE COMMITTEE**

- A. The Director Sought to Manipulate the Procurement Process and Bypass Procurement Laws and Rules to Steer the Hydrogen Fund Management Contract to his Favored Bidder Involving Barry Weinman.**
 - 1. The Director had an existing business relationship with Barry Weinman.**
 - 2. The Director concealed the nature of his relationship with Barry Weinman.**
 - 3. The Director involved Barry Weinman in matters related to the hydrogen fund from the beginning of the process.**
 - 4. The Director initiated and directed meetings and the preparation of the hydrogen work plan with the intent of partnering with Barry Weinman.**
 - 5. When it was determined that management of the hydrogen fund would be awarded through the RFP process, the Director favored Barry Weinman for the contract.**
 - 6. The Director deviated from standard procurement practice by taking DBEDT's contracts office off of the hydrogen RFP, instructing them not to give advice unless asked, and replacing it with DBEDT's strategic industry division.**

7. **The Director claims that DBEDT's past practice allowed him to make the final selection from among the qualified offerors.**
 8. **Since 1997, DBEDT's documented past practices for the RFP process have been that the Director has final approval authority, but does not have the authority to select from among qualified bidders.**
 9. **The hydrogen RFP had a large number of irregularities and is the only known RFP with a strong pattern of actions inconsistent with DBEDT's procurement practices.**
 10. **The Director sought to cancel the hydrogen RFP rather than award the hydrogen investment fund management contract to the highest ranked bidder as directed by the state procurement office.**
 11. **The Director continued to resist the execution of the contract to Kolohala as ordered by the State's chief procurement officer, and it was after the adoption of Senate Resolution No. 2, calling for a special investigation of the hydrogen RFP, that DBEDT awarded the contract to Kolohala, as required.**
- B. There is Evidence that the Director's Top Management Team (Kitamura, Kaya, and Tantlinger) Knew that the Procurement Code and Rules Required the Director to Approve the Selection Committee's Highest Ranked Bidder Rather than Allowing the Director to Select from a List of Qualified Bidders.**
- C. The Evaluation Committee Disregarded their Own Scoring and Evaluation by Only Submitting a List of Three Qualified Bidders to the Director for his Selection Rather than Making a Recommendation as Required by Law.**
- D. There is a Reasonable Belief that the Director's Actions Constitute a Knowing and Intentional Violation of the Procurement Code and Rules By the Director and His Top Management Team (Kitamura, Kaya, and Tantlinger).**

III. CONCLUSIONS OF THE SENATE SPECIAL INVESTIGATIVE COMMITTEE

IV. RECOMMENDATIONS OF THE SENATE SPECIAL INVESTIGATIVE COMMITTEE

Report of the Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award

I. BACKGROUND

A. Legislative History of the Hydrogen Investment Capital Special Fund.

The Hydrogen Investment Capital Special Fund (Hydrogen Fund) was created by Act 240, Session Laws of Hawaii 2006, and is codified as section 211F-5.7, Hawaii Revised Statutes. The purpose of the Hydrogen Fund is to provide seed capital for venture capital investments in private sector and federal projects for research, development, testing, and implementation of the Hawaii Renewable Hydrogen Program. The Hydrogen Fund was placed under the jurisdiction of the Hawaii Strategic Development Corporation (HSDC) for administrative purposes. HSDC is attached administratively to the Department of Business, Economic Development and Tourism (DBEDT) pursuant to section 211F-2, Hawaii Revised Statutes. There was an initial appropriation of \$10 million in Act 240, Session Laws of Hawaii 2006, with \$8.7 million of that amount designated for the Hydrogen Fund.

B. Solicitation for Management of the Hydrogen Fund.

In October of 2006, DBEDT began the process of retaining a manager for the Hydrogen Fund. Initially, a work plan was developed internally which contemplated awarding a contract to a selected manager through a sole source process. Subsequently, it was determined that the contract would have to be awarded through a competitive bid process and on February 20, 2007, DBEDT issued a Request For Proposal (RFP 07-11-SID) for the Hydrogen Investment Capital Special Fund and Renewable Hydrogen Program Management Services (Hydrogen RFP).

Pursuant to procedure required by the Hawaii Public Procurement Code in section 103D-303, Hawaii Revised Statutes, DBEDT established an evaluation committee to review the submitted bids, score each of them based upon the criteria of the Hydrogen RFP, and to determine the highest ranked bidder. The evaluation committee was made up of Maurice Kaya, John Tantlinger, and William Parks.¹ Messrs. Kaya and Tantlinger were employees of DBEDT and Mr. Parks is a federal employee assigned to work with DBEDT. The evaluation committee determined that there were three responsive bidders which would proceed to the best and final offer (BAFO) process. The three bidders which proceeded to the BAFO process were Kolohala Holdings LLP (Kolohala), Enterprise Honolulu, and H2 Energy LLC (H2 Energy). The members of the evaluation committee each scored the three proposals with Kolohala ranked highest² and H2 Energy ranked lowest.

On July 31, 2007, after completing their evaluation, the evaluation committee met with DBEDT Director, Theodore Liu (Director or Ted Liu). The evaluation committee did not share with the Director their rankings or scores at that meeting, rather they submitted all three

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1. Jon Kobayashi was initially a member of the evaluation committee but left that position prior to the completion of the evaluation and scoring.
 2. William Parks had Kolohala and Enterprise Honolulu equally ranked highest and H2 Energy ranked lowest.

proposals to him in their letter to the Director that he received on August 6, 2007, stating that all three proposals were in a competitive range. On the following day, based on his own criteria which were not included in the Hydrogen RFP, the Director advised the chair of the evaluation committee, Maurice Kaya, that he had selected H2 Energy as the successful bidder.

C. Challenge to the Selection of H2 Energy.

On August 17, 2007, The Honolulu Advertiser published an article by Sean Hao which reported that H2 Energy was selected to manage the Hydrogen Fund and that "H2 Energy was selected based in part on criteria such as management team and experience even though it was not the lowest bidder" (underscore added) Thereafter, by letter dated August 29, 2007, Kolohala filed a protest of the selection of H2 Energy as the successful bidder. Kolohala's protest alleged, *inter alia*, that the Director's selection was inconsistent with the evaluation criteria set forth in the Hydrogen RFP and that the Director failed to select the highest ranking proposal.

On August 31, 2007, the State Chief Procurement Officer (CPO) wrote to the Director advising DBEDT to stop any further action on the Hydrogen RFP. The Director responded that based on DBEDT's historical practice regarding procurement, he believed that he had the authority to "select" from among the qualified bidders. This began a series of communications between the CPO and the Director, which ultimately resulted in the CPO's letter to the Director, dated September 25, 2007, which set forth the CPO's "final review and determinations" and required DBEDT to take corrective action, including rescission of the selection of H2 Energy and issuance of a "new award based on the initial [evaluation committee] ranking." Despite the determination of the CPO and the Director's statement assuring immediate corrective action should its position be found to be based on an incorrect interpretation of procurement rules³, DBEDT did not issue a Notice of Award to Kolohala until February 22, 2008. In response to language included in the Notice of Award, the CPO wrote to DBEDT on February 29, 2008, unequivocally advising that the conditions set forth in the Notice of Award were improper and instructing that "[t]here should be no negotiation" and that "no further negotiation is necessary, and DBEDT should expedite the execution of the contract [with Kolohala]."

The Hydrogen RFP had also drawn the attention of the Senate. On September 4, 2007, the Senate Committee on Tourism and Government Operations (TSG) held a hearing "requesting [DBEDT] to provide a review of their procurement procedures. Specifically with regards to the request for proposals (RFP) for the administration contract of the State's Hydrogen Fund (HRS 196-10)." Subsequent informational briefings regarding DBEDT procurements were also conducted by the TSG committee.

D. Senate Resolution No. 2 / Special Investigative Committee.

As a result of the information received by the TSG committee and the lack of corrective action by DBEDT, on January 25, 2008, the Senate adopted Senate Resolution No. 2 (SR 2) entitled "ESTABLISHING A SENATE SPECIAL INVESTIGATIVE COMMITTEE TO CONDUCT AN INVESTIGATION OF THE AWARD OF A CONTRACT BY THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM TO H2

3. [Exh. 29 \(9/4/07 Written Statement of Ted Liu, pg. 4\).](#)

ENERGY LLC TO MANAGE THE HYDROGEN INVESTMENT CAPITAL SPECIAL FUND IN 2007, WHICH WAS SUBSEQUENTLY ORDERED TO BE RESCINDED."

Among other things, SR 2 provides in relevant part, that:

[T]he informational briefing, though resulting in the rescinding of the selection of H2 Energy LLC, also uncovered possible procurement improprieties that warrant legislative investigation in order to determine whether administrative malfeasance or misfeasance occurred ... ; and

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[T]hat there is established a Senate Special Investigative Committee ... to:

- (1) Investigate the selection of a manager for the hydrogen investment capital special fund in 2007; and
- (2) Inquire into, gather, and analyze information, including other contracts, that may provide relevant information concerning procurement improprieties relating to paragraph (1)[.]

As set forth in SR 2, the Special Investigative Committee on the Hydrogen Investment Capital Special Fund Management Contract Award (Special Investigative Committee) was established and was to be chaired by the Vice Chair of the TSG Committee and have four additional members appointed by the President of the Senate. The members of the Special Investigative Committee are Senator Donna Mercado Kim (Chair), Senator Clarence K. Nishihara (Vice Chair), Senator Gary L. Hooser, Senator Les Ihara, Jr., and Senator Sam Slom.

E. Hearings and Subpoenas.

In the course of its investigation the Special Investigative Committee held hearings to receive information from subpoenaed witnesses and also subpoenaed relevant documents. The testimony received was given subject to subpoena and made under oath, subject to the penalty for perjury which includes a civil fine up to \$1,000 or imprisonment up to one year.

As part of its investigation, the Special Investigative Committee conducted thirteen hearings lasting over a total of fifty-six hours and received testimony from twenty-two witnesses. In addition, the Special Investigative Committee received in excess of twenty-one thousand pages of documents in response to subpoenas.

F. Appendixes to Committee Report.

Appendix "A"	Hearing Notices of Special Investigative Committee.
Appendix "B"	Index of Exhibits.
Appendix "C"	List of Witnesses.
Appendix "D"	Applicable Statutes and Rules.
Appendix "E"	Responses to Draft Committee Report.
Appendix "F"	Master Timeline

II. FINDINGS OF THE SENATE SPECIAL INVESTIGATIVE COMMITTEE

Upon full and careful consideration of the testimony and documents received, the Special Investigative Committee determines that the following findings represent the credible version of the relevant facts.

A. The Director Sought to Manipulate the Procurement Process and Bypass Procurement Laws and Rules to Steer the Hydrogen Fund Management Contract to his Favored Bidder Involving Barry Weinman.

1. The Director had an existing business relationship with Barry Weinman.

Barry Weinman is a founder and director of HiBEAM which partnered with Sennet Capital to form H2 Energy which submitted a proposal for the Hydrogen RFP.⁴ The Director had a business relationship with Barry Weinman which pre-existed the process of selecting a manager for the Hydrogen Fund.⁵ Mr. Weinman worked with the Director from early in the Lingle Administration to develop political strategy to oppose Act 221, Session Laws of Hawaii 221 (Act 221), relating to the High Technology Tax Credit.⁶ Mr. Weinman acknowledges "knowing" several people within the Lingle Administration and his campaign spending report shows his support for the Administration.⁷

Mr. Weinman is also a founder of DragonBridge Capital LLC (DragonBridge).⁸ DragonBridge was organized at the suggestion of the Director.⁹ DragonBridge is a merchant investment bank which helps companies access the American market through Hawaii.¹⁰ In June 2005, DragonBridge appeared before the Hawaii Technology Development Corporation (HTDC) to make a presentation to HTDC's Board of Directors which was chaired by Jay Fidell, Esq.¹¹ In its Board minutes, HTDC describes DragonBridge as its partner.¹² Also, in 2005, HSDC invested \$50,000 in DragonBridge.¹³

DragonBridge presently has a lease agreement with DBEDT for the use of office space in Beijing, China.¹⁴ HTDC had set up a committee for the purpose of negotiating a Memorandum of Agreement (MOA) with DragonBridge; however, before such negotiations could take place,

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4. Testimony of Barry Weinman, 3/7/08.
 5. Testimony of Dawn Okuhama, 3/7/08 and Barry Weinman, 3/7/08.
 6. Testimony of Jay Fidell, 3/15/08
 7. Testimony of Barry Weinman, 3/7/08; [Exh. 182, Barry Weinman Campaign Spending Report](#).
 8. Testimony of Barry Weinman, 3/7/08.
 9. Testimony of Jay Fidell, 3/15/08; [Exh. 41 \(4/17/06 Hawaii Reporter article by Ted Liu\)](#); [Exh. 54 \(4/17/06 DragonBridge press release\)](#); and [Exh. 181 \(3/26/08 Letter from Senator Carol Fukunaga to Chair Donna Mercado Kim\)](#).
 10. Testimony of Barry Weinman, 3/7/08.
 11. Testimony of Barry Weinman, 3/7/08; [Exh. 183 \(6/2/05 Minutes of the HTDC Board\)](#).
 12. [Exh. 183 \(6/2/05 Minutes of the HTDC Board\)](#).
 13. [Exh. 190 \(3/13/08 Written Statement of Ted Liu, pp. 14-15\)](#).
 14. Testimony of Barry Weinman, 3/7/08.

the Director, on his own, circumvented the process by negotiating the terms for the MOA directly with Mr. Weinman and without a competitive bid process.¹⁵

Additional information further supports the finding that the Director had an existing business relationship with Mr. Weinman prior to the Hydrogen Fund. On June 9, 2006, the Director sent an email entitled "DragonBridge" which advised its recipients of Mr. Weinman's travel schedule to China and his intent to discuss his operational ideas with them.¹⁶ Also, email communication indicates that during the time that the Hydrogen Fund work plan was being developed, the Director requested and arranged an appointment for his son and son's partner who were trying to do a start up business, to meet with Mr. Weinman.¹⁷

2. The Director concealed the nature of his relationship with Barry Weinman.

Upon questioning by the Special Investigative Committee, the Director denied having involvement with the organization of DragonBridge. The Director further denied having a "business" relationship with Mr. Weinman and instead described his relationship as being professional, i.e. "I greet him when I see him."¹⁸ This description of the Director's relationship with Mr. Weinman is directly contrary to the bulk of the testimony and documents describing their relationship; specifically including the testimony of Mr. Jay Fidell who testified that their relationship was much more than "I greet him when I see him."¹⁹

The nature of the Director's relationship with Barry Weinman is also evidenced by Mr. Weinman's emails to the Director in which he offered possible solutions to the problems with the award of the Hydrogen RFP, including his own resignation from H2 Energy. On August 29, 2007, Mr. Weinman emailed the Director offering to resign from HiBEAM / H2 Energy if it would help and further proposing, "[i]f this is about [Enterprise Honolulu] or Kolohala not winning we could consider adding them to [H2 Energy]." That email concluded that "[i]t is not worth you getting bloodied if it has anything to do about me or HiBEAM."²⁰ Mr. Weinman's relationship with the Director is further evidenced in an email dated September 9, 2007 in which he submits a draft letter rescinding H2 Energy's proposal, to the Director for his approval or modification prior to even submitting it to his own partners.²¹

3. The Director involved Barry Weinman in matters related to the hydrogen fund from the beginning of the process.

The awarding of the management contract for the Hydrogen Fund was initially contemplated as "an open solicitation outside of the traditional RFP process."²² Mr. Weinman

15. Testimony of Jay Fidell, 3/15/08.

16. [Exh. 194 \(6/9/06 email from Ted Liu to Bo Wu, Janice Kato and others\)](#).

17. Testimony of Ted Liu, 3/13/08; [Exh. 3 \(8/7/06 email from Weinman to Liu, pg. 8\)](#); [Exh. 39 \(8/7/06 email from Liu to Weinman\)](#).

18. Testimony of Ted Liu, 3/13/08 (In response to tape recording of 9/4/07).

19. Testimony of Jay Fidell, 3/15/08.

20. [Exh. 207. \(8/29/07 email from Weinman to Liu\)](#).

21. [Exh. 208. \(9/9/07 email from Weinman to Liu and attached draft letter\)](#).

22. [Exh. 56 \(6/27/07 email from Priscilla Thompson to Bill Parks\)](#).

testified that when he learned about the Hydrogen Fund, he had vague talks with the Director regarding the management of the Hydrogen Fund.²³

The Director testified that he wanted a full and fair atmosphere for the selection of a Hydrogen Fund manager and was not predisposed to having Mr. Weinman manage the Hydrogen Fund. The Director further testified that he always desired to award the management contract through the RFP process.²⁴ The record before the Special Investigative Committee directly contradicts the testimony of the Director.

4. The Director initiated and directed meetings and the preparation of the hydrogen work plan with the intent of partnering with Barry Weinman.

The record indicates that the Director initiated meetings regarding the preparation of the hydrogen work plan with the intent of partnering with Barry Weinman. In early August 2006, the Director requested an exploratory meeting with Mr. Weinman regarding a hydrogen related energy project.²⁵ On August 31, 2006, the Director had his secretary set up a meeting with Maurice Kaya, Barry Weinman, and other representatives of HiBEAM which was confirmed for September 20, 2006.²⁶ On September 8, 2006, there was an organizational meeting for the renewable hydrogen program between the Director, Maurice Kaya, and John Tantlinger. At that meeting Mr. Weinman was identified as a potential third-party partner with DBEDT for the management of the Hydrogen Fund.²⁷ At that time, the Director contemplated doing a simple solicitation, not a full fledged RFP or utilizing Hawaii Strategic Development Corporation to bypass procurement process.²⁸

The record further contradicts the Director's testimony that he had no preference toward Mr. Weinman and that he desired a full, fair solicitation. Initial drafts of the hydrogen work plan prepared by Mr. Kaya specifically identify Mr. Weinman as a potential member of an advisory committee which would provide direction for the hydrogen program.²⁹ By the fourth revision of the work plan, dated September 25, 2006, Mr. Weinman's involvement had developed into HiBEAM being specifically identified eight times and as a potential partner for the management of the Hydrogen Fund.³⁰ On the same date, September 25, 2006, the Director requested that Mr. Kaya put together a simple proposal for a Hydrogen Fund manager to partner with the State of Hawaii (State) and specifically stated that he did not contemplate a "complicated full-fledged RFP." The Director further expressed his understanding that HSDC could solicit managers for the Hydrogen Fund without going through the procurement process.³¹ In other words, on the

23. Testimony of Barry Weinman, 3/7/08; [Exh. 3 \(8/7/06 email from Weinman to Liu, pg. 9\)](#); [Exh. 39 \(8/7/06 email from Liu to Weinman\)](#).

24. Testimony of Ted Liu, 3/13/08.

25. [Exh. 26 \(undated note from Weinman to Rachel Ogdie of HiBEAM\)](#); [Exh. 39 \(8/7/06 email from Liu to Weinman\)](#).

26. [Exh. 3 \(8/31/06 email from Liu to Okuhama, pg. 1\)](#); [Exh. 195 \(9/11/06 email from Okuhama to Weinman\)](#).

27. Testimony of Maurice Kaya, 3/20/08; [Exh. 25 \(Notes from the Renewable Hydrogen Program Organizational Meeting, 9/8/06\)](#);

28. [Exh. 27 \(9/25/06 email from Liu to Kaya\)](#); [Exh. 120 \(9/25/06 email from Kaya to Thompson\)](#); [Exh. 39 \(8/7/06 email from Liu to Weinman\)](#).

29. [Exh. 79 \(Hawaii Renewable Hydrogen Work Plan, revised 8/29/06\)](#).

30. [Exh. 119 \(Hawaii Renewable Hydrogen Work Plan, revised 9/25/06\)](#).

31. [Exh. 27 \(9/25/06 email from Liu to Kaya\)](#); [Exh. 120 \(9/25/06 email from Kaya to Thompson\)](#); [Exh. 39 \(8/7/06 email from Liu to Weinman\)](#).

date that the Director proposed a non-RFP solicitation and contemplated that it would be outside of the procurement process, HiBEAM had already been identified in the work plan as a potential partner to provide these services.

The testimony and documents indicate that the Hydrogen Fund work plan, as developed, reflected the thinking of the Director and specifically contemplated involvement by Barry Weinman. The work plan was prepared by Maurice Kaya and was a reflection of the Director's thinking and directions on how to proceed.³² The work plan was developed through meetings between the Director, Mr. Weinman and other representatives of HiBEAM.³³ Mr. Kaya testified that there were other parties interested in working with the State regarding the Hydrogen Fund, but since it was the Director's meeting, Mr. Kaya did not think it was his place to invite others.³⁴

At some time prior to October 11, 2006, the decision was made to select the Hydrogen Fund manager through the RFP process. In an email sent on that date, the Director informed Barry Weinman that the solicitation for the Hydrogen Fund management contract would be out in ten days.³⁵ A week later, on October 19, 2006, the Director sent an email to Ken Kitamura, who is DBEDT's administrative service officer (ASO), and Eileen Harada, who is DBEDT's contracts specialist, requesting a meeting to discuss the Hydrogen Fund solicitation and its process.³⁶ Also on October 19, 2006, Maurice Kaya sent a responsive email to the Director's secretary requesting that John Tantlinger and Priscilla Thompson be invited to attend a Hydrogen Fund meeting since they have been helping with revisions to the Hydrogen RFP. The Hydrogen Fund meeting between the Director and his DBEDT staff was held on October 20, 2006.³⁷ According to the timeline prepared by DBEDT's contracts office, the draft Hydrogen RFP was received on October 24, 2006.³⁸

5. When it was determined that management of the hydrogen fund would be awarded through the RFP process, the Director favored Barry Weinman for the contract.

Maurice Kaya and Priscilla Thompson both testified that the Hydrogen RFP was drafted based on the Hydrogen Fund work plan.³⁹ In October 2006, before other potential offerors learned about the Hydrogen RFP, the Director advised Barry Weinman about the anticipated scheduling for the Hydrogen RFP; later in December 2006, the Director updated Mr. Weinman about delays in the previously anticipated schedule.⁴⁰

The original deadline to respond to the Hydrogen RFP was March 30, 2007; however, the Director subsequently extended the deadline to respond to April 16, 2007.⁴¹ Barry Weinman formed H2 Energy to respond to the Hydrogen RFP. The membership of H2 Energy consists of

32. Testimony of Maurice Kaya, 3/20/08; [Exh. 80 \(9/14/06 note from Kaya to Tantlinger\)](#).

33. Testimony of Priscilla Thompson, 4/30/08; [Exh. 120 \(9/25/06 email from Kaya to Thompson\)](#).

34. Testimony of Maurice Kaya, 4/10/08.

35. [Exh 169 \(10/11/06 email from Liu to Weinman\)](#).

36. [Exh. 109 \(10/19/06 email from Liu to Kitamura and Harada\)](#).

37. [Exh. 108 \(10/19/06 email from Kaya to Okuhama\)](#).

38. [Exh. 192 \(ASO/Contracts Timeline, pg. 1\)](#).

39. Testimony of Maurice Kaya, 3/20/08; Testimony of Priscilla Thompson, 4/30/08.

40. [Exh. 169 \(10/11/06 email from Liu to Weinman\)](#); [Exh. 170 \(12/17/06 email from Liu to Weinman\)](#).

41. Testimony of Barry Weinman, 3/7/08.

HiBEAM and Sennet Capital LLC. Interestingly, H2 Energy was registered as a legal entity on April 11, 2007.⁴²

By email dated March 14, 2007, which was during the Hydrogen RFP process, Barry Weinman forwarded the Director an email from Sennet Capital which states that Kamehameha Schools "has agreed to support our application" ⁴³ This letter from Kamehameha Schools was included as part of H2 Energy's proposal to the Hydrogen RFP.⁴⁴

Representatives of Kolohala testified that initially they were not going to respond to the Hydrogen RFP because the word on the street was that the Hydrogen Fund had already been designated for HiBEAM to manage. Kolohala decided to submit a response to the Hydrogen RFP only after being advised by the Director that there had not been a pre-determined selection of HiBEAM.⁴⁵

During the Hydrogen RFP process, Robert Robinson, a principal of Kolohala, had a sharp exchange with the Director regarding Mr. Robinson's perceived criticism of the Lingle Administration's position on Act 221, the Hawaii high technology business investment tax credit (2001 Haw. Sess. Laws 221). During this exchange Mr. Robinson perceived the Director of threatening that Kolohala's offer regarding the Hydrogen RFP would be unsuccessful.⁴⁶ Jay Fidell testified that he had an absolute belief that the Director had threatened Kolohala and that he believed it was a very unfair situation. Mr. Fidell also testified that he recalled a prior situation in which Mr. Robinson received a "real nasty email" from Barry Weinman following Mr. Robinson making comments in support of Act 221.⁴⁷

6. The Director deviated from standard procurement practice by taking DBEDT's contracts office off of the hydrogen RFP, instructing them not to give advice unless asked, and replacing it with DBEDT's strategic industry division.

The DBEDT contracts office handles the administration of all DBEDT solicitations, which number approximately forty to fifty a year.⁴⁸ DBEDT relies on the contracts office to "find out exact rules" regarding the procurement process.⁴⁹

Eileen Harada has been a contracts specialist at DBEDT since 1998 and has been the lead contract specialist since 2000.⁵⁰ Over the past two years, there has been an ongoing effort by the State Procurement Office to provide departments with training on procurement. The only person from DBEDT who has participated in this training is Ms. Harada.⁵¹

42. Testimony of Barry Weinman, 3/7/08.

43. [Exh. 37 \(3/14/07 email from Weinman to Liu\)](#).

44. [Exh. 38 \(4/12/07 letter from Kamehameha Schools to Sennet Capital\)](#).

45. Testimony of Kolohala Holdings, 3/11/08.

46. Testimony of Kolohala Holdings, 3/11/08; [Exh. 8 \(5/23/07 email from Robinson to Fidell\)](#); [Exh. 9 \(undated draft letter from Pfeffer to Liu\)](#).

47. Testimony of Jay Fidell, 3/15/08.

48. Testimony of Eileen Harada, 3/6/08.

49. Testimony of Mark Anderson, 3/20/08.

50. Testimony of Eileen Harada, 3/6/08.

51. Testimony of Aaron Fujioka, 3/22/08.

In March 2007, approximately a month after the Hydrogen RFP was announced, the contracts office was taken off of the Hydrogen RFP.⁵² Ms. Harada testified that the Hydrogen RFP was the first solicitation that the contracts office did not handle during her tenure at DBEDT.⁵³ Primary responsibility of the Hydrogen RFP was assigned to DBEDT's Strategic Industry Division (SID).⁵⁴

The Director initiated a conversation with Ken Kitamura, DBEDT's administrative service officer, and advised Mr. Kitamura that the contracts office would not be handling the Hydrogen RFP.⁵⁵ The Director advised Mr. Kitamura that the reason for his decision was that the Hydrogen RFP was a high priority and the contracts office was busy.⁵⁶ However, Louise Mott of the contracts office testified that they were no more busy than usual in March 2007.⁵⁷ Eileen Harada testified that it was her understanding that the contracts office's role became to answer questions when asked, but not to initiate any advice.⁵⁸

Upon the Hydrogen RFP being assigned to SID for administration, the person primarily responsible for working on it was Priscilla Thompson.⁵⁹ Prior to being assigned to the Hydrogen RFP, Ms. Thompson had no experience with the administration of an RFP and did not have experience regarding correspondence and documentation relating to the procurement process.⁶⁰ Ms. Thompson testified that her supervisor, John Tantlinger, SID branch manager, knew that she did not have experience regarding the procurement process but that she was never consulted regarding the decision to delegate administrative responsibility for the Hydrogen RFP to SID.⁶¹ Ms. Thompson further testified that at the time of the delegation of administrative responsibility to SID, she had a "full plate." She opined that she should not have been given the administrative responsibility for the Hydrogen RFP and that she would have preferred not to have been given that responsibility.⁶²

7. The Director claims that DBEDT's past practice allowed him to make the final selection from among the qualified offerors.

Evaluation committee members Maurice Kaya and John Tantlinger, and Ken Kitamura, all testified that DBEDT's interpretation of the procurement rules was that the Director was able to select the successful proposal once the evaluation committee completed its evaluation of proposals in response to an RFP regardless of whether the evaluation committee made a recommendation of the successful proposal to the Director.⁶³ Subsequently, the Director took

52. Testimony of Ted Liu, 3/13/08; Testimony of Eileen Harada, 3/13/08; Testimony of Ken Kitamura, 3/6/08; Testimony of Louise Mott, 3/22/08.

53. Testimony of Eileen Harada, 3/6/08.

54. Testimony of Eileen Harada, 3/6/08; Testimony of Mark Anderson, 3/20/08.

55. Testimony of Ted Liu, 3/13/08; Testimony of Eileen Harada, 3/22/08; Testimony of Ken Kitamura 3/6/08.

56. Testimony of Ted Liu, 3/13/08; Testimony of Ken Kitamura, 3/6/08; Testimony of John Tantlinger, 3/7/08.

57. Testimony of Louise Mott, 3/22/08.

58. Testimony of Eileen Harada, 3/22/08.

59. Testimony of Eileen Harada, 3/6/08.

60. Testimony of Priscilla Thompson, 3/15/08; [Exh. 191 \(3/15/08 Written Statement of Priscilla Thompson\)](#); [Exh. 1 \(5/25/07 email from Thompson to Harada\)](#); [Exh. 157 \(2/28/07 email from Thompson to Tantlinger\)](#); [Exh. 158 \(2/27/07 email from Thompson to Kaya\)](#).

61. Testimony of Priscilla Thompson, 3/15/08; [Exh. 191 \(3/15/08 Written Statement of Priscilla Thompson\)](#).

62. Testimony of Priscilla Thompson, 3/15/08.

63. Testimony of Maurice Kaya, 3/20/08; Testimony of John Tantlinger, 3/7/08; Testimony of Ken Kitamura, 4/10/08.

the contrary position that it was his interpretation of the procurement rules that if the evaluation committee made a recommendation, that his authority was limited to awarding or not awarding the contract to the recommended bidder; however, in the event that there was no recommendation from the evaluation committee, that he was free to select which of the offerors would be awarded the contract.⁶⁴

Ken Kitamura testified that he advised the Director that the Director could select a successful bidder who was not the highest ranked; provided the selection was justified. However, he did not check with the contracts office to determine whether his advice to the Director was correct.⁶⁵ Eileen Harada subsequently testified that Mr. Kitamura's advice to the Director was not consistent with the position of the contracts office.⁶⁶ In addition, the Chief Procurement Officer (CPO), Aaron Fujioka, testified that the Director's interpretation of the procurement rules was false and that there is no substantiation for his interpretation.⁶⁷ Mr. Fujioka also testified that no other department follows the practice of giving its director the authority to select the successful bidder.⁶⁸

Both the Director and Mr. Kaya testified that their interpretation of the procurement rules was consistent with DBEDT's departmental practices of the past twenty years.⁶⁹ However, numerous other individuals from DBEDT, including Eileen Harada, John Chock (President of HSDC), Louise Mott, and Priscilla Thompson, provided testimony which contradicted the Director's position regarding DBEDT's past practices.⁷⁰ In addition, the former director of DBEDT, Dr. Seiji Naya, provided a statement to the Special Investigative Committee that contradicted the Director's testimony of DBEDT's past practice.⁷¹

8. Since 1997, DBEDT's documented past practices for the RFP process have been that the director has final approval authority, but does not have the authority to select from among qualified bidders.

Pursuant to the Hawaii Public Procurement Code, an evaluation committee is required to give numerical scores to proposals.⁷² The evaluation committee's numerical score must be based on the criteria set forth in the RFP.⁷³ The evaluation committee is not allowed to recommend an award to any other than the top ranked proposal.⁷⁴ Upon receiving the recommendation of the evaluation committee, the Director has the authority to approve or disapprove an award to the top

64. Testimony of Ted Liu, 3/13/08; [Exh. 190 \(3/13/08 Written Statement of Ted Liu, pg. 6\)](#).

65. Testimony of Ken Kitamura, 4/30/08.

66. Testimony of Eileen Harada, 5/21/08.

67. Testimony of Aaron Fujioka, 3/22/08 and 5/21/08; Testimony of Eileen Harada, 3/22/08.

68. Testimony of Aaron Fujioka, 3/22/08.

69. Testimony of Ted Liu, 3/13/08; Testimony of Maurice Kaya, 3/20/08; [Exh. 190 \(3/13/08 Written Statement of Ted Liu, pg. 6\)](#).

70. Testimony of Eileen Harada, 3/6/08; Testimony of John Chock, 3/6/08; Testimony of Louise Mott, 3/22/08; Testimony of Priscilla Thompson, 4/30/08.

71. [Exh. 130 \(3/28/08 email from Naya to Kim\)](#).

72. Testimony of Aaron Fujioka, 3/22/08.

73. Testimony of Eileen Harada, 3/6/08.

74. Testimony of Eileen Harada, 3/6/08; Testimony of Lloyd Unebasami, 3/15/08; Testimony of Ken Kitamura, 3/6/08.

ranked proposal, but the Director does not have the authority to select other than the top ranked proposal.⁷⁵

Contrary to the assertion that the Director's interpretation was consistent with DBEDT's historical procurement practices, a 1997 audit of DBEDT's procurement practice found that its practices complied with the requirements for awarding contracts through competitive sealed proposals.⁷⁶ This is consistent with the testimony of numerous persons knowledgeable in the procurement process. Eileen Harada testified that she is not aware of another situation during her ten years as a contracts specialist with DBEDT where a director has selected other than the highest ranked proposal of the evaluation committee.⁷⁷ When asked, Ms. Harada testified that she did not know how anyone could say that the Director's interpretation was consistent with DBEDT's past practice over the last twenty years. She further stated that she did not know of any basis that would support the Director's interpretation.⁷⁸ Louise Mott also testified that this was the first time during her tenure at DBEDT where the top ranked proposal was not awarded the contract.⁷⁹ Likewise, Aaron Fujioka testified that he was "pretty surprised" at this situation, that he was not aware of any basis to support the Director's interpretation, and that he has never seen an example where a director would choose the lowest ranked proposal and not look at the scores of the evaluation committee.⁸⁰

Perhaps the most telling statement came from Lloyd Unebasami who was the CPO at the time that the Hawaii Public Procurement Code was enacted. When asked about the Director's interpretation of his authority to select the successful bidder, Mr. Unebasami testified that the reason we have a procurement code is to prohibit actions like this situation.⁸¹

Despite their testimony regarding DBEDT's historical procurement practices, the Director and members of his management team at DBEDT also admitted that there was no precedence for allowing him the authority to select other than the top ranked proposal. Ken Kitamura testified that there has never been a situation during his six years that he has been in charge of the DBEDT contracts office where an award has been made to other than the highest scoring bidder. Mr. Kitamura further testified that it was "unusual" for the award to vary from the recommendation of the evaluation committee.⁸²

Maurice Kaya also testified that he is not aware of any RFP in which a director has exercised an authority to select who to award the contract to and that he was mildly surprised that the top ranked proposal for the Hydrogen RFP was not chosen, "because number 3 is a long ways off from number 1."⁸³ Mr. Kaya's own documents from previous RFPs are consistent with his testimony. Mr. Kaya sent an evaluation committee selection letter for RFP 03-02-ERTD, dated September 27, 2002, to then DBEDT director Dr. Seiji Naya that included all of the evaluation committee members' scores and a ranking of the proposals and that provided for the

75. Testimony of Eileen Harada, 3/6/08; Testimony of Louise Mott, 3/22/08; Testimony of Lloyd Unebasami, 3/15/08; [Exh. 130 \(3/28/08 email from Naya to Kim\)](#).

76. [Exh. 128 \(10/97 Procurement Audit of the Department of Business, Economic Development and Tourism\)](#).

77. Testimony of Eileen Harada, 3/6/08.

78. Testimony of Eileen Harada, 3/22/08.

79. Testimony of Louise Mott, 3/22/08.

80. Testimony of Aaron Fujioka, 3/22/08.

81. Testimony of Lloyd Unebasami, 3/15/08.

82. Testimony of Ken Kitamura, 3/6/08.

83. Testimony of Maurice Kaya, 3/20/08.

director to either approve or disapprove.⁸⁴ Similarly, Mr. Kaya sent an evaluation committee selection letter for RFP 04-12-SID, dated April 14, 2004, to the Director which included all of the evaluation committee members' scores, provided a ranking of the proposals, and that provided for the Director to either approve or disapprove.⁸⁵

Despite asserting that DBEDT's past practice supported the interpretation that the Director had the authority to select the successful bidder, the Director stated in his written statement that there has never been a situation where there was no recommendation made by the evaluation committee, so there is no precedence for this situation.⁸⁶ Mr. Kaya testified consistent with the Director's statement.⁸⁷ However, Kitamura, Harada, and Fujioka all testified that the evaluation committee findings letter or recommendation letter was in fact a recommendation.⁸⁸ Even Mr. Kaya, who insisted that the evaluation committee did not make a recommendation, contradicted this by stating, that "[i]n essence, it was a recommendation."⁸⁹

Mr. Kaya testified that DBEDT's procurement manual, in section V.d regarding BAFOs, specifically provides that the evaluation committee is to conduct its "final evaluation for an award of the contract."⁹⁰ Consistently and most compelling is the one-page document entitled "Request for Project Proposal Procedures" that Ken Kitamura circulated to all DBEDT division heads and administrators of attached agencies on September 14, 2006. The transmittal memorandum requested that the attached document be added to their Standard Operation Procedures Manual and specifically stated that "[t]hese procedures are immediately in effect."⁹¹ The attached document, entitled "Request for Project Proposal Procedures"⁹² states, in paragraph 9:

Pursuant to the Hawaii Administrative Rules (HAR) Section 3-122 Subchapter 6 *Competitive Sealed Proposals*, the following procedures shall immediately apply to all Requests for Proposals (RFPs).

* * *

9. Based upon an evaluation by the selection committee on the Best and Final offers, a new ranking will be determined and an offer will be made to the number one ranked bidder.

The document entitled "Request for Project Proposal Procedures" was issued after the contracts office had gone over the procedures step-by-step with the procurement office and discussed the

84. [Exh. 204 \(9/27/02 Letter from Kaya to Naya\)](#).

85. [Exh. 205 \(4/14/04 Letter from Kaya to Liu\)](#).

86. [Exh. 190 \(3/13/08 Written Statement of Ted Liu, pgs. 6-7\)](#).

87. Testimony of Maurice Kaya, 3/20/08.

88. Testimony of Aaron Fujioka, 3/22/08; testimony of Ken Kitamura, 4/30/08; and testimony of Eileen Harada, 3/6/08.

89. Testimony of Maurice Kaya, 3/20/08.

90. Testimony of Maurice Kaya, 3/20/08; [Exh. 30 \(DBEDT Procurement Manual, Best and Final Offers\)](#).

91. [Exh. 146 \(9/14/06 Memo from Kitamura to Division Heads, et al.\)](#)

92. [Exh. 147 \(Request for Project Proposal Procedures\)](#).

procedures with Mr. Kitamura.⁹³ The procedure set forth in paragraph 9 represented DBEDT's standard operating procedure and has always been part of the procurement rules.⁹⁴

In close proximity to the issuance of the "Request for Project Proposal Procedures," on October 19, 2006, the Director emailed Ken Kitamura and Eileen Harada stating that "[g]iven the importance of the hydrogen fund solicitation, I need to schedule a meeting with you to discuss the solicitation and its process. I wish to have Maurice [Kaya] and John [Tantlinger] there also." The Director's secretary, Dawn Okuhama, subsequently scheduled the requested meeting for October 20, 2006.⁹⁵

9. The Hydrogen RFP had a large number of irregularities and is the only known RFP with a strong pattern of actions inconsistent with DBEDT's procurement practices.

All three members of the evaluation committee ranked Kolohala highest and H2 Energy lowest based upon their review and numerical scoring of the BAFOs submitted by Kolohala, Enterprise Honolulu, and H2 Energy.⁹⁶ As a result, the cumulative scores of the three submittals were Kolohala with 255, Enterprise Honolulu with 243, and H2 Energy with 234.5.⁹⁷

The chair of the evaluation committee, Maurice Kaya, testified that there was not enough of a spread between the three scores to come up with a clear definitive winner; however, upon questioning, Mr. Kaya testified that he had previously served on evaluation committees where the point spread was smaller and in those situations, the evaluation committee came up with a recommendation.⁹⁸

On July 31, 2007, upon completing the scoring of the BAFOs, the evaluation committee met with the Director to discuss their findings on the three proposals.⁹⁹ Maurice Kaya testified that the evaluation committee did not come to a decision on which proposal to recommend to the Director at the time they met with him.¹⁰⁰ The evaluation committee did not advise or show the Director their scores or rankings; but instead, advised the Director in their letter dated July 31, 2007, which the Director did not receive until August 6, 2006, that the three BAFOs were in a competitive range.¹⁰¹ The term "competitive range" was something created by the evaluation committee.¹⁰² Ken Kitamura insisted on having the ranking included in the evaluation committee's selection letter.¹⁰³

Louise Mott testified that prior to the Hydrogen RFP, she does not believe that an evaluation committee had had a meeting to discuss their findings with a director. She also

93. Testimony of Eileen Harada, 5/21/08.

94. Testimony of Eileen Harada, 5/21/08; Testimony of Aaron Fujioka, 5/21/08.

95. [Exh. 109 \(10/19/06 email from Liu to Kitamura and Harada\)](#); [Exh. 108 \(10/19/06 email from Okuhama to Harada, Chock, Kitamura, Anderson and Kaya\)](#).

96. [Exh. 83 \(7/31/07 Memorandum from Kaya to Liu\)](#).

97. [Exh. 206 \(Evaluators Comments / Committee Worksheets\)](#)

98. Testimony of Maurice Kaya, 3/20/08.

99. Testimony of Maurice Kaya, 3/20/08; Testimony of Ted Liu, 3/13/08; and Testimony of William Parks, 3/7/08).

100. Testimony of Maurice Kaya, 4/10/08.

101. Testimony of Maurice Kaya, 4/10/08.

102. Testimony of Maurice Kaya, 4/10/08.

103. Testimony of Ken Kitamura, 3/6/08.

testified that she had not heard of the "competitive range" process prior to the Hydrogen RFP. Ms. Mott testified that it was the practice of the contracts office that the bidder with the highest numerical score is awarded the contract, regardless of how big or small the difference in the scores.¹⁰⁴

Within a day following his meeting with the evaluation committee (August 1, 2007), the Director selected H2 Energy as the successful bidder. This is inconsistent with the Director's written statement that he made the selection on August 3, 2007.¹⁰⁵ The Director testified that in making his selection of H2 Energy, he did not believe that he was bound by the same evaluation criteria as was set forth in the Hydrogen RFP. Rather he testified that the evaluation based on the criteria in the Hydrogen RFP had been completed by the evaluation committee and resulted in all three bidders being in a competitive range. Therefore, he specifically did not make his selection based upon the criteria set forth in the Hydrogen RFP but was just trying to figure out who could do the best job.¹⁰⁶

Former CPO, Lloyd Unebasami, testified that the Director's evaluation should be consistent with the criteria set forth in the RFP. He further stated that it would be "unacceptable" to have an RFP process where an evaluation committee was established, but the Director, as procurement officer for DBEDT, was authorized to pick other than the highest ranked bidder. Specifically, it would be "unacceptable" for the Director to be allowed to ignore the evaluation committee's scores and pick the lowest ranked bidder.¹⁰⁷

Eileen Harada and Louise Mott of the contracts office testified that they thought that Kolohala would get the award and were surprised to learn that the Director had selected H2 Energy. They learned of the Director's selection from the selection letter.¹⁰⁸

Upon learning that the Director had selected H2 Energy, Ms. Harada approached her supervisor, Ken Kitamura, and told him that the award did not comply with the requirements of the procurement rules.¹⁰⁹ Likewise, upon learning of the Director's selection, Louise Mott expressed her concern to Priscilla Thompson regarding who would be handling the protest.¹¹⁰ Ms. Thompson forwarded Ms. Mott's concern to Mr. Kitamura in an email.¹¹¹ Even Ms. Thompson, who was the primary staff-person responsible for the Hydrogen RFP testified that a question was raised in her mind when she learned of the Director's position that he could select who the successful bidder would be.¹¹²

The response by DBEDT management to the concerns raised was to essentially brush them off as unimportant. Ken Kitamura's response to Ms. Harada expressing her concern was to tell her that this is what they want so "just do it" and that so long as the Director could justify his

104. Testimony of Louise Mott, 3/22/08.

105. Testimony of Maurice Kaya, 4/10/08; Testimony of Ted Liu, 3/13/08; [Exhibit 4-B \(8/1/07 email from Kaya to Kitamura\); Exh. 190 \(3/13/08 Written Statement of Ted Liu, pg. 12 – Contrary to the exhibits and testimony, the Director's written statement states that he made the selection of H2Energy on August 3, 2008\).](#)

106. Testimony of Ted Liu, 3/13/08.

107. Testimony of Lloyd Unebasami, 3/15/08.

108. Testimony of Eileen Harada, 3/6/08; Testimony of Louise Mott, 3/22/08.

109. Testimony of Eileen Harada, 3/6/08 and 3/22/08; Testimony of Ken Kitamura, 3/6/08 and 4/30/08.

110. Testimony of Louise Mott, 3/22/08.

111. [Exh. 4-A \(8/8/07 email from Thompson to Kitamura\)](#)

112. Testimony of Priscilla Thompson, 4/30/08.

selection it would be acceptable.¹¹³ Ms. Harada was not in a position to challenge this response since contracts had been assigned to the position of "sit back and do what you are told."¹¹⁴ Management member John Tantlinger testified that he dismissed the concern being raised by Louise Mott because she was not a professional.¹¹⁵ This dismissive reaction of DBEDT management is especially relevant since DBEDT relies on its contracts office to find out the rules regarding procurement requirements.¹¹⁶

The Director prepared a justification letter which went beyond the criteria set forth in the Hydrogen RFP and therefore violated the procurement code and rules.¹¹⁷ At the time he initially read the justification letter, which was after the posting of the award, Ken Kitamura believed that it satisfied the requirements of the Hydrogen RFP. Mr. Kitamura was not familiar with the "three-point must" system used by the Director but testified that it appeared to be close to complying with the criteria of the Hydrogen RFP and requirements of the procurement code.¹¹⁸ When he considered the Director's justification letter at the hearing, Mr. Kitamura admitted that it probably was "not close" to complying with the criteria of the Hydrogen RFP and requirements of the procurement code.¹¹⁹ Maurice Kaya similarly testified that he is not familiar with the "three-point must" system utilized by the Director to justify his selection.¹²⁰

Based upon the testimony and records received by the Special Investigative Committee, there is a serious dispute as to the date that the Director actually drafted his justification letter. The justification letter is dated August 6, 2007; however, all indications from the credible testimony and records are that it was prepared much later, sometime after the posting of the award.

On August 8, 2007, Priscilla Thompson emailed Mr. Kitamura advising him that Louise Mott had inquired as to who would be handling the protest arising from the Director's selection of H2 Energy.¹²¹ As of that date, Mr. Kitamura had not received the justification letter.¹²² A few days after August 8, 2007, the date of the email from Priscilla Thompson expressing concern over the handling of a protest, Mr. Kitamura expressed his concern to the Director that the justification letter was not in the contracts file for the Hydrogen RFP.¹²³

Despite being advised by Eileen Harada that the justification letter was required to be in the contract file, Ken Kitamura testified that while he asked for the justification letter repeatedly, he did not receive a copy of it until around the time of Kolohala filing its protest to the award, which was dated August 29, 2007.¹²⁴ Similarly, Maurice Kaya testified that he is not sure when he first saw the justification letter and that it was probably a couple of weeks after the selection of H2 Energy by the Director. Mr. Kaya subsequently testified that he may not have seen the

113. Testimony of Eileen Harada, 3/6/08; Testimony of Ken Kitamura, 4/30/08.

114. Testimony of Eileen Harada, 3/22/08.

115. Testimony of John Tantlinger, 3/7/08.

116. Testimony of Mark Anderson, 3/20/08.

117. Testimony of Eileen Harada, 3/6/08.

118. Testimony of Ken Kitamura, 3/6/08.

119. Testimony of Ken Kitamura, 3/6/08.

120. Testimony of Maurice Kaya, 3/20/08.

121. [Exh. 4-A \(8/8/07 email from Thompson to Kitamura\)](#).

122. Testimony of Ken Kitamura, 3/6/08.

123. Testimony of Ken Kitamura, 3/6/08; Testimony of Ted Liu, 3/13/08.

124. Testimony of Ken Kitamura, 3/6/08.

justification letter until September 4, 2007, at the informational hearing conducted by the Senate Committee on Tourism and Governmental Operations.¹²⁵ Ms. Anna Wenz, a secretary with DBEDT's energy branch since 1989, testified that usually the basis of a selection would come to her for filing, but that she does not recall handling the justification letter.¹²⁶

The record further indicates that as late as August 16, 2007, which was three days after the posting of the award, the justification letter was not in the file or given to DBEDT's contracts office, and the record indicates that it was not known as of that date whether the justification letter was necessary. In notes from a meeting regarding the Hydrogen RFP on August 16, 2007, there is an entry that Ken Kitamura would "notify [the Director] should decision document be needed."¹²⁷ The implication is that as of August 16, 2007, the Director's top management team was not sure whether the required justification letter would be needed, which contradicts the testimony of Ken Kitamura and Maurice Kaya.

Furthermore, as of August 20, 2007, Ken Kitamura indicated in an email to Eileen Harada that he was aware that the justification letter was still missing from the contract file.¹²⁸ The timeline prepared by DBEDT's ASO/Contracts office indicates that the justification letter was not received until August 22, 2007.¹²⁹ Ms. Wanda Ino, a clerk typist with DBEDT since 2001, testified that on August 22, 2007, she was sent to pick up the justification letter from the Director's secretary, Dawn Okuhama, who stated to Ms. Ino, words to the effect that they "got it late."¹³⁰

Other employees of DBEDT's contracts office indicated that they first saw the justification letter on August 22, 2007, which was after Sean Hao and others had requested to review the justification letter.¹³¹ Eileen Harada testified that when she tried to get the justification letter for the contracts file, she was told by Ms. Okuhama that the justification letter "wasn't even written until afterwards."¹³² Ms. Harada testified that the implication led her to believe that the justification letter was written in response to numerous requests for that document.¹³³

In response to the testimony and documents indicating that he had back dated the justification letter, the DBEDT Director testified that he had drafted the letter at the time of his selection but had placed it in his personal working file for the Hydrogen RFP. Despite the request for the document, the Director was not thinking in terms of needing to have the justification in the contract file.¹³⁴

125. Testimony of Maurice Kaya, 3/20/08.

126. Testimony of Anna Wenz, 4/30/08.

127. [Exh. 85 \(Notes from 8/16/07 H2 Fund contract meeting\)](#).

128. [Exh. 102 \(8/20/07 email from Kitamura to Harada\)](#).

129. [Exh. 192 \(ASO/Contracts timeline, pg. 6\)](#).

130. Testimony of Wanda Ino, 3/22/07.

131. Testimony of Eileen Harada, 5/21/08; Testimony of Louise Mott, 3/22/08.

132. Testimony of Eileen Harada, 3/22/08 and 5/21/08.

133. Testimony of Eileen Harada, 3/22/08.

134. Testimony of Ted Liu, 3/13/08.

The current CPO, Aaron Fujioka, testified that it would be unfair for the justification letter justifying the Director's selection of a lower ranked bidder to be missing from the contract file at the time that a unsuccessful bidder had to appeal the selection.¹³⁵

On August 31, 2007, the Director requested that Ken Kitamura provide the "entire procurement code justification for my authority, including my authority to pick from a list provided by an evaluation committee."¹³⁶ Mr. Kitamura forwarded the Director's request to Eileen Harada and stated: ". . . as I recall, any hardcoded documents related to him being able to select from a list is non-existent."¹³⁷ Upon questioning, Mr. Kitamura testified that he knew that there were no hard coded documents in support of the Director's position. In addition, Mr. Kitamura was unable to provide any supporting basis for his belief that the Director had the authority to select other than discussions with DBEDT's contracts officer, Eileen Harada.¹³⁸ DBEDT employees Priscilla Thompson and John Chock testified that they knew that there was no basis for the Director's position that he could select a successful offeror other than the highest ranked by the evaluation committee.¹³⁹ Mr. Chock specifically testified that based on his discussions with Ms. Harada, he understood that the Director had to select the highest ranked offeror.¹⁴⁰

There were additional irregularities with the preparation of the selection and non-selection letters for the Hydrogen RFP. The standard evaluation committee recommendation letter, based on past practices of DBEDT, included a line for the Director to approve or disapprove of the evaluation committee's recommendation.¹⁴¹ In this case, the letter provided a line for the Director to indicate his selection.¹⁴² Eileen Harada testified that she had never seen an evaluation committee selection letter with a line for the Director to indicate his selection.¹⁴³

Likewise, the non-selection letter was also inconsistent with the form generally used by DBEDT. DBEDT's form non-selection letter specifically included a paragraph advising the recipient of their right to file a protest or included an attachment of the rules governing a protest.¹⁴⁴ The non-selection letters for the Hydrogen RFP did not include information regarding the right to file a protest or the notice of the five day deadline for filing a protest.¹⁴⁵

The Director testified that he did not know whether it was necessary to give unsuccessful bidders information regarding their right to file a protest.¹⁴⁶ However, former CPO, Lloyd Unebasami, testified that notification of the right to protest is part of the rules and should have been in the non-selection letter.¹⁴⁷

135. Testimony of Aaron Fujioka, 3/22/08.

136. [Exh. 139 \(8/31/07 email from Liu to Kitamura\)](#)

137. [Exh. 139 \(8/31/07 email from Kitamura to Harada\)](#).

138. Testimony of Ken Kitamura, 4/10/08.

139. Testimony of Priscilla Thompson, 3/15/08 and 4/30/08; Testimony of John Chock, 3/6/08.

140. Testimony of John Chock, 3/6/08.

141. [Exh. 204 \(9/27/02 letter from Kaya to Naya\)](#); [Exh. 205 \(4/14/04 letter from Kaya to Liu\)](#).

142. [Exh. 83 \(7/31/07 memorandum from Kaya to Liu\)](#).

143. Testimony of Eileen Harada, 3/6/08.

144. [Exh. 60 \(DBEDT Form Non-Selection Letter\)](#).

145. Testimony of Ted Liu, 3/13/08; Testimony of Maurice Kaya, 3/20/08.

146. Testimony of Ted Liu, 3/13/08.

147. Testimony of Lloyd Unebasami, 3/15/08.

Another major irregularity regarding the Hydrogen RFP is the misstatement that the Director had the authority to select rather than approve. A source of this misstatement can be found in Addendum No. 2 to the Hydrogen RFP.¹⁴⁸ The Director and the person responsible for transcribing the responses at the bidder's meeting, Jia Lin Sun, asserted that the written response to Question 16 accurately reflects the statement made by Eileen Harada that the Director had the power to select.¹⁴⁹ Ms. Sun testified initially that Addendum No. 2 was a verbatim transcription of the statements made at the meeting and that she reviewed the audio tape of the meeting to do her transcription.¹⁵⁰ However, a review of the audio tape of the meeting indicates that Ms. Harada's response to Question 16 was transcribed inaccurately and that she actually stated that the Director had the authority to award the contract to the organization with the highest point total, which is a correct interpretation of the procurement code. Specifically, Question 16 read: "Please describe the proposal evaluation process with terms, steps, feedback."¹⁵¹ Ms. Harada's actual statement in response to Question 16 was that "the Director will have the ultimate decision on whether the award will be made to the organization with the highest point total."¹⁵² However, as transcribed, her response read: "the DBEDT director will have the ultimate authority to make the final selection."¹⁵³

Louise Mott testified that she was surprised that Ms. Sun had made an error in the transcription since she requested the actual audio tape of the meeting to prepare Addendum No. 2.¹⁵⁴ Ms. Sun testified that the recording was clear and that she was not sure why she got it wrong.¹⁵⁵ Ms. Harada raised concerns over the accuracy of Addendum No. 2 with the deputy attorney general assigned to DBEDT and was told that contract's office was not in the lead on the Hydrogen RFP.¹⁵⁶ Ms. Harada testified that she signed off on the form of Addendum No. 2, but not as to its content.¹⁵⁷

10. The Director sought to cancel the hydrogen RFP rather than award the hydrogen investment fund management contract to the highest ranked bidder as directed by the state procurement office.

On August 31, 2007, Aaron Fujioka, the CPO, wrote to the Director advising him to stop any further action involving the Hydrogen RFP and set forth the CPO's preliminary findings.¹⁵⁸ In preparation for the September 2007 hearing before the Senate TSG committee, DBEDT's deputy director, Mark Anderson, advised the Director that they should consider cancelling the RFP and that they had no obligation to repeat an RFP process.¹⁵⁹ Mr. Anderson testified that there is no specific authority to support this recommended position.¹⁶⁰

148. [Exh. 96 \(Hydrogen RFP Addendum No. 2\).](#)

149. [Exh. 190 \(3/13/08 Written Statement of Ted Liu\).](#)

150. Testimony of Jia Lin Sun, 4/10/08.

151. [Exh. 96 \(Hydrogen RFP Addendum No. 2\).](#)

152. [Exh. 31 \(Verbatim transcript of Harada's statement at 3/7/07 bidder's meeting.\)](#)

153. [Exh. 96 \(Hydrogen RFP Addendum No. 2\).](#)

154. Testimony of Louise Mott, 3/22/08.

155. Testimony of Jia Lin Sun, 4/10/08.

156. Testimony of Eileen Harada, 3/22/08.

157. Testimony of Eileen Harada, 3/22/08; [Exh. 99 \(3/15/07 email from Harada to Thompson\)](#); [Exh. 100 \(3/15/07 email from Thompson to Harada and Kitamura\).](#)

158. [Exh. 196 \(8/31/07 letter from Fujioka to Liu\).](#)

159. [Exh. 73 \(8/30/07 email from Anderson to Liu, Kaya, and Kitamura\).](#)

160. Testimony of Mark Anderson, 3/20/08.

In a written statement to the TSG committee on September 4, 2007, the Director set forth DBEDT's understanding of the RFP procurement process allowing the Director the authority to select the successful proposal. In that statement, the Director specifically wrote: "Should the department's above-described practice be found to be based on an incorrect interpretation of the procurement rules, we shall take immediate corrective action."¹⁶¹ Despite this specific assurance, the Director continued to resist the corrective actions as described by the SPO.

The Director responded to Mr. Fujioka by letter dated September 17, 2007, in which he stated that DBEDT now understands the position of the CPO with regard to procurement requirements and proposes corrective actions to be taken.¹⁶²

By letter dated September 25, 2007, Aaron Fujioka set forth his final review and determinations. In that letter, the Mr. Fujioka directed the Director to take corrective action regarding the award of the Hydrogen RFP. Specifically, Mr. Fujioka ordered the Director to (1) rescind the award memo and non-award memos; (2) rescind the Director's selection portion of the selection letter; and (3) validate the evaluation committee's ranking.¹⁶³

Rather than simply complying with the specific directions of the CPO, the Director responded by issuing a letter dated November 13, 2007, in which he requested authority to completely cancel the Hydrogen RFP or to change or reduce the scope of services to be sought and provided under the Hydrogen RFP.¹⁶⁴ In support of his requests, the Director alleged that knowing that the Director did not have the authority to select the successful bidder would have impacted the evaluation committee's decision making process.¹⁶⁵ Maurice Kaya, chair of the evaluation committee, testified that such an erroneous assumption would not have impacted his decision making and evaluation.¹⁶⁶

The Director also called into question the impartiality of the evaluation committee members.¹⁶⁷ It is relevant to note that this issue was raised specifically with regard to relationships with a member of the Kolohala consortium, HNEI, but that the relationship with Barry Weinman was not cited as a potentially improper relationship.¹⁶⁸ Upon being questioned as to their impartiality, the members of the evaluation committee acknowledged their execution of an Affidavit of Government Serving on an Evaluation, Review, or Selection Committee,¹⁶⁹ in which they verify, among other things that:

I have no personal, business, or any other relationship that will influence my decision in the applicable evaluation, review, or selection process[.]

161. [Exh. 29 \(9/4/07 Written Statement of Ted Liu\)](#).

162. [Exh. 197 \(9/17/07 letter from Liu to Fujioka\)](#).

163. [Exh. 184 \(9/25/07 letter from Fujioka to Liu\)](#).

164. [Exh. 185 \(11/13/07 letter from Liu to Fujioka\)](#).

165. [Exh. 185 \(11/13/07 letter from Liu to Fujioka\)](#).

166. Testimony of Maurice Kaya, 3/20/08.

167. [Exh. 185 \(11/13/07 letter from Liu to Fujioka\)](#).

168. [Exh. 185 \(11/13/07 letter from Liu to Fujioka\)](#).

169. [Exh. 186 \(Affidavit of Government Serving on an Evaluation, Review, or Selection Committee\)](#)

Evaluation committee member William Parks testified that he does not know the basis for the Director's allegation regarding an improper relationship and that the allegation was very unfortunate.¹⁷⁰

Finally, the Director stated that there was a change in circumstance that he believed justified cancellation or modification of the Hydrogen RFP. The changed circumstance was based upon the recent emergence of a confidential and unidentified third party.¹⁷¹ Subsequently, on January 15, 2008, the Director identified the party as the U.S. Department of Energy.¹⁷² The Director's position was subsequently rejected by the CPO, Aaron Fujioka.

Aaron Fujioka testified that he was surprised by the Director's letter of November 13, 2007 and tried to get additional information from the Director. When no additional information was received Mr. Fujioka wrote to the Director requesting substantiation for the positions taken in the Director's November 13, 2007 letter.¹⁷³

On February 22, 2008, a notice of award of the Hydrogen RFP was issued to Kolohala, but the Director resisted executing a contract and asserted that negotiation would have to wait until a new SID director is named to replace Maurice Kaya, who had retired.¹⁷⁴

The Director testified that the reason DBEDT did not execute a contract with Kolohala is that there was no one available to negotiate the contract as a result of Maurice Kaya's retirement.¹⁷⁵ However, by letter dated February 29, 2008, Aaron Fujioka advised the Director that this was not a basis for not affecting the award to Kolohala, that "there should be no negotiation" and that "DBEDT should expedite the execution of the contract."¹⁷⁶

11. The Director continued to resist the execution of the contract to Kolohala as ordered by the State's chief procurement officer, and it was after the adoption of Senate Resolution No. 2, calling for a special investigation of the hydrogen RFP, that DBEDT awarded the contract to Kolohala, as required.

At the September 4, 2007 hearing of the Senate TSG committee, the Director submitted a written statement which stated that should DBEDT be wrong in their position, they will take immediate action to correct the situation.¹⁷⁷ However, the Director continued to resist executing a contract with Kolohala until September 4, 2008 despite the fact that an interim SID director had been named to replace Maurice Kaya in December 2007.¹⁷⁸

In January 2008, members of Kolohala met with the Governor's representative, Barry Fukunaga, to give the Lingle Administration Kolohala's side of the story.¹⁷⁹ On January 14, 2008, the Director emailed Loke Kim in the Governor's office denying that he has refused to

170. Testimony of William Parks, 3/7/08.

171. [Exh. 185 \(11/13/07 letter from Liu to Fujioka\)](#).

172. [Exh. 209 \(1/15/08 memorandum from Liu to Fujioka, pg. 1\)](#).

173. [Exh. 189 \(12/11/07 letter from Fujioka to Liu\)](#).

174. Testimony of Kolohala, 3/11/08.

175. Testimony of Ted Liu, 3/13/08.

176. [Exh. 43, \(2/29/08 letter from Fujioka to Liu\)](#).

177. [Exh. 198 \(9/4/07 Written statement of Ted Liu, pg. 4\)](#).

178. Testimony of Eileen Harada, 5/21/08.

179. Testimony of Kolohala, 3/11/08.

meet with Kolohala and complaining that Kolohala should suggest an "olive branch" since they "helped instigate Sen. Kim's hearings."¹⁸⁰

Kolohala's representatives testified that the Director has shown great reluctance to issue the contract to them and that they do not expect the contract to be awarded to them so long as Ted Liu is the Director.¹⁸¹ Particularly, Michael Pfeffer, Kolohala's managing partner, testified that he heard around town that the Director had said that Kolohala would not get the Hydrogen Fund management contract because Kolohala was "in cahoots with Senator [Kim] to ruin [the Director's] life."¹⁸²

The belief by Kolohala, that it would not be awarded the contract, appears justified given an email sent by Barry Weinman to Rob Robinson on or about September 3, 2007 in which he relayed his suspicion that "no one will get the Hydrogen Fund management" and states "[a]s they say---what goes around comes around."¹⁸³

B. There is Evidence that the Director's Top Management Team (Kitamura, Kaya, and Tantlinger) Knew that the Procurement Code and Rules Required the Director to Approve the Selection Committee's Highest Ranked Bidder Rather than Allowing the Director to Select from a List of Qualified Bidders.

Ken Kitamura is the DBEDT administrative service officer. In that capacity he is responsible for advising the Director and overseeing procurement for DBEDT. It is his duty to ensure that DBEDT follow all procurement laws and rules.¹⁸⁴ Mr. Kitamura, in 2006, issued a memorandum on DBEDT's policy on "Request for Proposal Procedures" which set forth that in the case of an RFP, the evaluation committee would score the best and final offers and an "offer will be made to the number one ranked bidder."¹⁸⁵

A review of emails indicate that the "Request for Proposal Procedures" was transmitted to various DBEDT employees, specifically including John Tantlinger, Priscilla Thompson, John Chock, Eileen Harada, Louise Mott, and Anna Wenz.¹⁸⁶

Contrary to the policy set forth in the DBEDT procurement manual, Mr. Kitamura testified that he advised the Director that the Director had the authority to select the successful bidder from a group of qualified bidders. Mr. Kitamura admitted that he now knows that the advice he gave the Director was incorrect.¹⁸⁷

Furthermore, Mr. Kitamura testified that when his contracts officer, Eileen Harada, confronted him about the Director's selection of the third ranked bidder, he thought her concern

180. [Exh. 42 \(1/14/08 email from Liu to Kim\)](#).

181. Testimony of Kolohala, 3/11/08; Exh. 13 (1/14/08 letter from Pfeffer to Fujioka, pgs. 6-7).

182. Testimony of Kolohala, 3/11/08.

183. [Exh. 199, \(9/3/07 Email from Weinman to Robinson\)](#)

184. Testimony of Ken Kitamura, 3/6/08.

185. [Exh. 147 \(Request for Project Proposal Procedures\)](#).

186. [Exh. 157 \(2/28/07 emails from Priscilla Thompson to John Chock and John Tantlinger\)](#); [Exh. 150 \(2/20/07 DBEDT email string\)](#).

187. Testimony of Ken Kitamura, 3/6/08.

was more about setting a precedent than about being able to make the selection.¹⁸⁸ On further questioning, Mr. Kitamura stated that he believed Ms. Harada's concern to be that the process used in the award of the Hydrogen RFP was inconsistent with DBEDT's past practice.¹⁸⁹ This is notable because it is inconsistent with the Director's position that he had the ability to "select" based on DBEDT's practice for the past twenty years.

With regard to the Director's justification letter being missing from the contract file, Mr. Kitamura testified that it was his ultimate responsibility to ensure that the justification letter was available prior to the award of the contract. However, Mr. Kitamura also testified that he interpreted his own duty as being to impress upon the Director the need to have the justification letter in the file.¹⁹⁰

At the outset of the Special Investigative Committee hearings the Director drafted questions for various potential witnesses.¹⁹¹ This document was submitted to the Chair of the Special Investigative Committee. This same document was also disseminated, through the Director's attorney, to potential witnesses, including Ken Kitamura and Eileen Harada prior to their testifying.¹⁹² The receipt of the proposed questions on behalf of the Director set off the suspicion in Ms. Harada's mind that her attorney did not have her best interest in mind and prompted her to request replacement legal counsel from the First Deputy Attorney General.¹⁹³

Evaluation committee member William Parks testified that the Hydrogen RFP was being "shepherded" by Maurice Kaya. Mr. Parks did not ask contracts specialist Eileen Harada any questions regarding the selection process. With regard to the selection process, Mr. Kaya was in charge of "directing traffic" and once the evaluation committee met with the Director, Mr. Parks stepped out of the process and no longer participated or remained involved with the RFP process.¹⁹⁴

Mr. Kaya, the chair of the evaluation committee, also testified that he erroneously believed that procurement procedures permitted the Director to select the successful bidder. However, Mr. Kaya served as the former Chief Technical Officer of DBEDT for approximately twenty years, as the head of the Strategic Industries Division for approximately three years and has chaired a number of other procurement evaluation committees.¹⁹⁵

John Tantlinger testified that he had served on "many" evaluation committees prior to the Hydrogen RFP and that he was familiar with the procurement rules. Mr. Tantlinger attended DBEDT's mini procurement boot camp which included instruction on the Director's ability to award the contract, but not select the successful bidder. Attendees of the mini procurement boot camp received DBEDT's procurement manual.¹⁹⁶ Additionally, Mr. Tantlinger requested a new

188. Testimony of Ken Kitamura, 3/6/08.

189. Testimony of Ken Kitamura, 3/6/08.

190. Testimony of Ken Kitamura, 3/6/08.

191. [Exh. 93 \(Questions for Witnesses\)](#).

192. Testimony of Eileen Harada, 3/22/08.

193. Testimony of Eileen Harada, 3/22/08; [Exh. 94 \(3/12/08 letter from Harada to Ginoza\)](#).

194. Testimony of William Parks, 3/7/08.

195. Testimony of Maurice Kaya, 3/20/08.

196. Testimony of Eileen Harada, 5/21/08.

contracts procedure manual in February 2007 and the "Request for Proposal Procedures" was transmitted to him by email from Priscilla Thompson on February 28, 2007.¹⁹⁷

Mr. Tantlinger further testified that there was never a time where an evaluation committee sent a ranking to a director and the director selected the lowest ranking proposal; however, he states that for the past twenty years it has always been his understanding that the director had the ability to do so.¹⁹⁸ In February 2007, prior to Mr. Tantlinger being assigned to the evaluation committee, he wrote to Priscilla Thompson advising that the evaluation committee's recommendation letter to the Director could be written to provide flexibility should negotiations not result in a contract with the evaluation committee's highest ranked proposal.¹⁹⁹ This statement by Mr. Tantlinger clearly indicates that he knew that the top ranked bidder had to be selected.

Despite the fact that DBEDT relied on the contracts office to comply with procurement requirements, Mr. Tantlinger was not concerned by an email describing concerns raised by Louise Mott, the DBEDT contracts assistant, over an anticipated protest. Mr. Tantlinger testified that he was not concerned because Ms. Mott was not a "professional."²⁰⁰

Eileen Harada testified that she is bothered that John Tantlinger has claimed that he had been misadvised as to the required procurement procedures since he has sat on numerous evaluation committees and had never alleged that the Director had the authority to select the successful bidder and Tantlinger had complied with the required procurement procedures up until the Hydrogen RFP.²⁰¹

C. The Evaluation Committee Disregarded their Own Scoring and Evaluation by Only Submitting a List of Three Qualified Bidders to the Director for his Selection Rather than Making a Recommendation as Required by Law.

All three members of the evaluation committee independently scored the three BAFO proposals. The result of these evaluations is that each committee member scored Kolohala the highest and H2 Energy the lowest.²⁰²

In addition to scoring H2 Energy as the lowest proposal, based on his detailed evaluation of the BAFO proposals, Maurice Kaya identified concerns in three categories, that H2 Energy's BAFO proposal may be in conflict with the law and with legislative intent.²⁰³

Despite their scoring and ranking of the three BAFO proposals, the evaluation committee stated that they had no strong recommendation and that all three offers were within the

197. [Exh. 106 \(2/28/07 email from Tantlinger to Kaya, et al.\)](#); [Exh. 157 \(2/28/07 email from Priscilla Thompson to John Tantlinger\)](#).

198. Testimony of John Tantlinger, 3/7/08.

199. [Exh. 148, 2/27/07 email from Tantlinger to Thompson](#).

200. Testimony of John Tantlinger, 3/7/08; [Exh. 4-A \(8/8/07 email from Thompson to Kitamura\)](#); [Exh. 193 \(3/22/08 Written statement of Louise Mott\)](#).

201. Testimony of Eileen Harada, 5/21/08; [Exh. 131 \(9/3/07 email from Tantlinger to Kaya\)](#).

202. [Exh. 206 \(Evaluators Comments / Committee Worksheets\)](#); Note that William Parks had Kolohala and Enterprise Honolulu tied with the highest score.

203. [Exh. 206 \(Evaluators Comments / Committee Worksheets\)](#).

competitive range and therefore they did not recommend Kolohala, the highest ranked bidder, to the Director. There was no existing basis supporting this concept of a competitive range, rather it was something that the evaluation committee came up with.²⁰⁴

The selection letter submitted by the evaluation committee to the Director provided him an option to select from among the three ranked proposals. However, this letter was received by the Director on August 6, 2007, five days after he had already exercised this option on August 1, 2007 by informing Maurice Kaya, in a telephone conversation, that he had selected H2 Energy.²⁰⁵ The form of the selection letter submitted to the Director was inconsistent with the standard form DBEDT selection letter which normally provided the committee's scores and ranking and the opportunity for the Director to only either approve or disapprove the evaluation committee's recommendation.²⁰⁶

D. There is a Reasonable Belief that the Director's Actions Constitute a Knowing and Intentional Violation of the Procurement Code and Rules By the Director and His Top Management Team (Kitamura, Kaya, and Tantlinger).

Hawaii Administrative Rules, Section 3-131-4 provides for the assessment of civil penalties when a person contracts for goods, services, or construction in a manner the person knows to be contrary to the requirements of the procurement law. This section further provides for criminal penalties where a person intentionally or knowingly contracts for goods, services, or construction, under a scheme or artifice to avoid the requirements of the procurement law. The criminal penalty shall be a misdemeanor.²⁰⁷

Ken Kitamura testified that the Director's selection of H2 Energy was a violation of the Hawaii Public Procurement Code.²⁰⁸ In his written statement to the Special Investigative Committee, the Director describes the violations of the procurement code as being unintentional mistakes.²⁰⁹ However, the CPO, Aaron Fujioka, testified that in order to determine whether an act rises to the level of being criminal, one must look at the facts to find evidence that there was a knowing violation of the procurement code.²¹⁰

Based upon a review of the totality of the testimony and records received by the Special Investigative Committee, there is a reasonable belief that the violation of the procurement code by the Director and his management team was knowing and intentional. The following is representative of the facts which justify this reasonable belief.

The Director knowingly and intentionally misrepresented to the Special Investigative Committee that he did not favor Barry Weinman for the awarding of the Hydrogen RFP.²¹¹ The record established that early in the process regarding the management of the Hydrogen Fund,

204. Testimony of Maurice Kaya, 3/20/08.

205. [Exh. 83 \(7/31/07 memorandum from Kaya to Liu\); Testimony of Maurice Kaya, 4/10/08.](#)

206. [Exh. 204 \(9/27/02 letter from Kaya to Naya\); Exh. 205 \(4/14/04 letter from Kaya to Liu\).](#)

207. [Exh. 172 \(Haw. Adm. Rules §3-131-4\).](#)

208. Testimony of Ken Kitamura, 3/6/08.

209. [Exh. 190 \(3/13/08 Written Statement of Ted Liu, pg. 16\).](#)

210. Testimony of Aaron Fujioka, 5/21/08.

211. [See](#), Section II.A.

there were meetings between the Director and Barry Weinman and that the Director tasked Maurice Kaya to develop the Hydrogen work plan which would include the participation of Mr. Weinman and HiBEAM. The record further indicates that the Director initially favored the concept that the management of the Hydrogen Fund be handled by a sole source contract awarded to Mr. Weinman. Early emails indicate that the Director was having discussions with Mr. Weinman regarding the management of the Hydrogen Fund. Subsequent emails indicate that the Director gave Mr. Weinman advanced information as to the timing of the Hydrogen RFP being issued and updates regarding its schedule. In addition, the Director appointed both Maurice Kaya and John Tantlinger to the evaluation committee for the Hydrogen RFP knowing that both of them had previously been involved in the early meetings which involved Barry Weinman and HiBEAM which resulted in the development of the Hydrogen work plan and ultimately the Hydrogen RFP.

Aaron Fujioka, administrator of the State Procurement Office, testified there would be a problem if DBEDT sought input from Mr. Weinman during the preparation of the work plan that ultimately led to specifications in the Hydrogen RFP which favored Mr. Weinman.²¹² Maurice Kaya testified that one should try to avoid discussions regarding RFPs with persons who may be submitting proposals.²¹³ Mr. Fujioka further testified that excluding others who wanted to participate in this process would create an issue as to fairness. He explained that contact with someone submitting a proposal may be acceptable if it is limited to being conceptual in nature, but that if it goes too much further, it would be inappropriate and should be avoided.²¹⁴

In addition, the Director knowingly and intentionally removed DBEDT's contracts office from the administration of the Hydrogen RFP and assigned that management to its Strategic Industries Division which had no experience in administering a RFP.²¹⁵ Specifically, the primary responsibility for the administration of the Hydrogen RFP was assigned to Priscilla Thompson, who John Tantlinger knew had no experience with the administration of an RFP.

Also, the record in this proceeding indicates that the Director knowingly made the selection of H2Energy one day after his meeting with the evaluation committee and five days prior to his receipt of the evaluation committee's recommendation.²¹⁶ The Director testified that the evaluation committee's recommendation invited him to select, but again, he did not receive this document until five days after he had made his selection.²¹⁷ Mr. Kaya testified that the Director did not know what the final recommendation of the evaluation committee was when their July 31, 2007 meeting ended, and that the evaluation committee met sometime thereafter to come up with their final determination of the BAFOs which was reflected in their transmittal to the Director which he received on August 6, 2008.²¹⁸ Aaron Fujioka testified that he found it odd that the Director would have selected H2 Energy as the successful bidder without having even seen the evaluation committee's memorandum to him regarding their evaluation of the Hydrogen RFP BAFOs.²¹⁹

212. Testimony of Aaron Fujioka, 5/21/08.

213. Testimony of Maurice Kaya, 3/20/08.

214. Testimony of Aaron Fujioka, 5/21/08.

215. See, Section II.A.6.

216. See, Section II.C.

217. Testimony of Maurice Kaya, 4/10/08.

218. [Exh. 83 \(7/31/07 memorandum from Kaya to Liu\)](#); Testimony of Maurice Kaya, 4/10/08.

219. Testimony of Aaron Fujioka, 5/21/08.

The record of this proceeding also indicates that the Director knowingly misstated the historical procurement practice of DBEDT.²²⁰ In a September 4, 2007 memorandum to Aaron Fujioka,²²¹ the Director wrote:

DBEDT's interpretation and practice in effect for several administrations has been that the departmental procurement officer may select an independent evaluation committee to evaluate the proposals. Once selected, an evaluation committee conducts its evaluation in accordance with [applicable procurement rules].

DBEDT's interpretation and practice under the above-referenced rules, explicitly reserves for the departmental procurement officer the authority to award the contract to "the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals" (HAR Section 3-122-57(a)). This interpretation and practice requires the departmental procurement officer to take into consideration the evaluation committee's recommendation, including its numerical scores, but does not bind the departmental procurement officer. Should the departmental procurement officer not concur with a recommendation of an evaluation committee, his/her reasons must be in writing, must be based on the evaluation criteria in the relevant request for proposal and must be included in the contract file, as is required by HAR Section 3-122-57(a). In all instances, the departmental procurement officer must be bound by the duty to act in a fair, independent and impartial manner.

The Director cites the advice of Ken Kitamura and the Contracts Office, and the RFP Addendum No. 2 as authority for his position in the footnotes of his memorandum to Aaron Fujioka:

- ¹. DBEDT ASO and Contracts Office indicate that this has been the interpretation and practice for as long as they can remember. Contract files indicate that this has been the interpretation and practice for at least the past decade.
- ². See RFP Addendum No. 2, Response to Question 16.

There is no credible evidence to support that the Director's position is based upon the past twenty years of practice and it is clear that the contracts office was not in agreement with the position that the Director had the authority to select from a group of qualified bidders. It is especially compelling that the Director's assertion as to DBEDT's past practice was directly disputed by Dr. Seiji Naya (former DBEDT director), Lloyd Unebasami (former Chief Procurement Officer), and Eileen Harada (DBEDT contracts specialist), all to the contrary. Upon questioning, Aaron Fujioka testified that the Director's statements in the September 4, 2007 memorandum are

220. See, Section II.A.7.

221. [Exh. 144 \(9/4/07 Memorandum from Ted Liu to Aaron Fujioka\)](#).

potentially deliberate misstatements of fact and that he has not heard anything to support the Director's statements.²²² Other than the testimony from the Director's own management team, all testimony and records establish that DBEDT's actual past practice was in compliance with the requirements of the procurement rules.

The record is undisputed that the Director's citation to RFP Addendum No. 2, Response to Question 16 is not credible since the response itself was an inaccurate transcription of the response actually given at the meeting for RFP Addendum No. 2. No viable explanation was given for this inaccurate transcription. While the written transcription was inaccurate, both Maurice Kaya and John Tantlinger were present at that meeting and heard Eileen Harada's statement which correctly stated the Director's authority. Testimony was received that when Eileen Harada questioned the inaccuracy, her concern was disregarded.²²³

The record indicates that the Director and Ken Kitamura knew that there was no substantiation for their position that the Director had the authority to select. On August 31, 2007, the Director emailed Mr. Kitamura requesting to provide him with the "entire procurement code justification for my authority, including my authority to pick from a list provided by an evaluation committee."²²⁴ In forwarding the Director's request to Eileen Harada, Mr. Kitamura specifically acknowledged that ". . . as I recall, any hardcoded documents related to him being able to select from a list are non-existent."²²⁵ In fact, Mr. Kitamura had previously issued the one-page Request for Proposal Procedures which directly contradicted the Director's position.²²⁶

With regard to the one-page Request for Proposal Procedures issued by Ken Kitamura²²⁷, specifically paragraph 9 which accurately sets forth the Director's authority to award, Aaron Fujioka testified that it is clear that when you issue a policy like this, you are aware of what it says and are responsible for it. While there is always room for error, Mr. Fujioka stated that some errors are bigger and harder to overlook.²²⁸ Mr. Fujioka, the person responsible for ensuring compliance with procurement processes, testified that giving an award to a third-ranked bidder is a significant departure from what is expected and that it escapes him how several high ranking officials at DBEDT could say that they did not know that the Director did not have the authority to select the successful bidder.²²⁹

The determination that the Director knowingly and intentionally violated procurement laws and rules is supported by the fact that he did not comply with the requirements that the Director himself sets out in his September 4, 2007 memorandum quoted above.²³⁰

In the September 4, 2007 memorandum the Director states that DBEDT's interpretation and practice required the departmental procurement officer, the Director, to "take into consideration the evaluation committee's recommendation, including its numerical scores." Clearly this requirement was not satisfied as both the Director and Maurice Kaya testified that

222. Testimony of Aaron Fujioka, 5/21/08.

223. Testimony of Eileen Harada, 3/22/08.

224. [Exh. 139 \(8/31/07 email from Liu to Kitamura\)](#).

225. [Exh. 139 \(8/31/07 email from Liu to Kitamura\)](#).

226. [Exh. 147 \(Request for Proposal Procedures\)](#).

227. [Exh. 147 \(Request for Proposal Procedures\)](#).

228. Testimony of Aaron Fujioka, 5/21/08.

229. Testimony of Aaron Fujioka, 5/21/08.

230. [Exh. 144 \(9/4/07 Memorandum from Ted Liu to Aaron Fujioka\)](#).

the Director never received the evaluation committee's scores and that no recommendation was made to the Director.

The September 4, 2007 memorandum further states that should the Director not concur with a recommendation, that his reasons "must be based on the evaluation criteria." Again, the Director himself testified that his evaluation and selection of H2Energy was not based on the evaluation criteria set forth in the Hydrogen RFP. Instead the Director used his own criteria and used a three-point must system to do his evaluation of the BAFO's.

Finally, the September 4, 2007 memorandum states that the Director's justification must be in writing and "must be included in the contract file as required by HAR Section 3-122-57(a)." The record is clear that the Director knew that his justification letter was not in the contracts file, and, in fact, he failed to respond to numerous requests from Ken Kitamura to provide the justification letter so that it could be included in the contract file. Further, the record indicates that Ken Kitamura knew that the contract file was incomplete when he instructed Eileen Harada to post the award of the Hydrogen RFP.²³¹

The record of this proceeding further supports the finding that the Director intentionally and knowingly sought to avoid awarding the Hydrogen Fund Management Contract to Kolohala by cancelling the entire Hydrogen RFP and discrediting the impartiality of the members of the evaluation committee.²³² By letter dated September 25, 2007, the Director was ordered by Aaron Fujioka to take the following corrective actions with regard to the Hydrogen RFP: (1) rescind the award memo and non-award memos; (2) rescind the Director's selection portion of the selection letter, and (3) validate the evaluation committee's ranking.²³³ Rather than complying with the CPO's order, which would have resulted in the rescission of the award to H2Energy, the Director responded and requested to cancel the Hydrogen RFP.²³⁴ In his effort to justify his request to cancel the Hydrogen RFP, the Director went so far as to discredit the members of the evaluation committee by questioning their impartiality, claiming that all three of the members had a prior relationship with HNEI, a member of the Kolohala consortium. However, the Director's concern regarding impartiality did not include the involvement of Maurice Kaya and John Tantlinger in the early meetings with Barry Weinman in which Mr. Weinman, or HiBEAM, was contemplated as the potential manager for the Hydrogen Fund. Mr. Fujioka testified that he was surprised by the Director's November 13, 2008 letter. While Mr. Fujioka sought additional information from the Director regarding the impartiality of the evaluation committee members, no additional information was provided by Mr. Liu.

The record of the proceedings also indicates that the members of the evaluation committee knowingly ignored their numerical scores of the BAFO's and enabled the Director to select H2Energy as the successful bidder.²³⁵ It is undisputed that all three members of the evaluation committee scored Kolohala as the highest ranked BAFO; however, instead of making a recommendation of Kolohala as the successful bidder, they claim that they did not make a recommendation to the Director and instead created the previously unknown concept of all three BAFO's as being in a competitive range. By doing this the evaluation committee enabled the

231. [Exh. 102 \(8/20/07 email from Kitamura to Harada\)](#); Testimony of Ken Kitamura, 3/6/08.

232. [See](#), Section II.A.10.

233. [Exh. 184 \(9/25/07 letter from Fujioka to Liu\)](#).

234. [Exh. 185 \(11/13/07 letter from Liu to Fujioka\)](#).

235. [See](#), Section II.A.9.

Director to select H2Energy, the lowest ranked bidder, rather than Kolohala. Contrary to the position that the evaluation committee did not make a recommendation to the Director, in their testimony to the Special Investigation Committee, Ken Kitamura, Eileen Harada, and Aaron Fujioka all testified that they considered the evaluation committee's numerical ranking of the BAFO's to constitute a recommendation. Furthermore, while Maurice Kaya stated that it was not a recommendation, upon questioning he contradicted himself by stating that "in essence it was a recommendation."²³⁶

The record indicates that both Maurice Kaya and John Tantlinger knew that the Director could not disregard the recommendation of the evaluation committee and instead choose the third-ranked bidder. When asked, Mr. Kaya could not identify another RFP where a director exercised the authority to select who to make the award to, and testified that he was "mildly surprised" that Kolohala was not chosen since it had the top-ranked proposal and "because number 3 is a long ways off from number 1."²³⁷ Furthermore, prior to being appointed to the evaluation committee, on February 27, 2007 John Tantlinger emailed Priscilla Thompson expressing his understanding that "[t]he memo could request the director's authority to negotiate the contract with the top contender, with contingency that should a good-faith negotiation effort not result in a contract, authority would be requested/approved to negotiate, in turn, and under the same contingency condition, the listed recommended bidders in order of priority."²³⁸ These positions previously taken by Messrs. Kaya and Tantlinger contradict their own testimony and the position taken by the Director.

236. Testimony of Maurice Kaya, 3/20/08.

237. Testimony of Maurice Kaya, 3/20/08.

238. [Exh. 148 \(2/27/07 email from Tantlinger to Thompson\)](#).

III. CONCLUSIONS OF THE SENATE SPECIAL INVESTIGATIVE COMMITTEE

Based on the foregoing Findings which the Special Investigation Committee determines to be the credible interpretation of the relevant facts, the following represent the Special Investigation Committee's Conclusions.

1. The DBEDT Director sought to manipulate the procurement process and bypass procurement laws and rules to steer the Hydrogen Fund management contract to his favored bidder, a newly formed business entity that included Barry Weinman.
2. The Director had an existing business relationship with Barry Weinman and sought to conceal the nature of this relationship.
3. The Director initiated and directed meetings and the preparation of the Hydrogen Fund work plan with the intent of partnering with Barry Weinman. When it was determined that the Hydrogen Fund management contract would be awarded through the RFP process, the Director continued to favor awarding the contract to Barry Weinman.
4. The Director deviated from DBEDT's standard procurement practice by taking its contracts office off of the Hydrogen RFP and replacing it with DBEDT's Strategic Industry Division and personnel who were not experienced in handling RFP's.
5. There is no credible basis for the Director's claim that DBEDT's past practice, over the past twenty years, allowed the Director to make the final selection of the successful offeror from among a group of qualified offerors. The credible evidence directly contradicts the Director's claim as to DBEDT's past practice and supports the position that since 1997, DBEDT's practice has been that the Director has the authority to award the contract but not select the successful offeror.
6. There were a large number of irregularities regarding the Hydrogen RFP and a pattern of actions that were inconsistent with DBEDT's established procurement practice.
7. Upon being ordered by the State's Chief Procurement Officer to award the contract to the highest ranked bidder, the Director sought to cancel the Hydrogen RFP rather than comply with the CPO's order. Despite the Director's stated belief that all remedial action had been taken, DBEDT did not execute a contract with the highest ranked bidder until September 4, 2008, approximately a year later.
8. The Director and his top management team (Kitamura, Kaya, and Tantlinger) knew that they were violating procurement laws and rules by construing them to provide that the Director had the authority to award the contract to the third ranked offeror. In doing so, the Director and Ken Kitamura intentionally disregarded the advice and concerns from DBEDT's contract office which was responsible for ensuring compliance with procurement laws and rules.

9. The evaluation committee, Maurice Kaya, John Tantlinger, and William Parks, disregarded their evaluations and scoring in an attempt to provide the Director the discretion to select the third ranked offer.
10. Ken Kitamura, DBEDT's Administrative Services Officer, was grossly negligent or was complicit in the violation of the procurement code and rules by "turning a blind eye" to the actions of the Director which allowed the Director to select an offer other than the highest ranked by the evaluation committee.
11. Ken Kitamura was derelict in his duties as the ASO when he disregarded the concerns of his own staff at DBEDT's contract office that the Director's actions violated the requirements of the procurement code and rules which required the selection of the evaluation committee's highest ranked proposal and further disregarded DBEDT's policy as set forth in its "Request for Proposal Procedures" which he circulated on September 14, 2006 to all DBEDT division heads and heads of attached agencies.
12. Maurice Kaya, the Chair of the evaluation committee, was complicit in the violation of the procurement code and rules by providing a competitive list which allowed the Director to select an offer other than the highest ranked by the evaluation committee.
13. The overall effect of the actions taken by the Director, with collaboration by his management team, was to improperly guide the contract to H2 Energy and Barry Weinman by manipulating the procurement process, laws, and rules.
14. It is the belief of the Special Investigative Committee that there was a knowing and intentional violation of the State procurement process, laws, and rules by the Director and his top management team.

IV. RECOMMENDATIONS OF THE SENATE SPECIAL INVESTIGATIVE COMMITTEE

It is the recommendation of your Special Investigative Committee that this report of its findings and conclusions be submitted to the Department of the Attorney General for a determination whether the Director, ASO, and evaluation committee members Maurice Kaya and John Tantlinger, violated applicable procurement laws and rules, and for further appropriate action as provided in section 103D-106, Hawaii Revised Statutes.

Your Special Investigative Committee believes that there is a conflict of interest created with regard to the Attorney General as a result of these hearings. Among other reasons, the conflict exists as a result of the Attorney General being requested to investigate potential criminal violations alleged against persons who were represented over the course of these proceedings by the Office of the Attorney General. Not only were these persons represented by the Office of the Attorney General in the hearings, the representation also included responding to subpoenas of records and advising of witnesses, and now includes the review and response to the report of the Special Investigation Committee.

As a result of this conflict of interest, it is requested that the Attorney General and the Department of the Attorney General be recused from the review of the findings and conclusions of the Special Investigative Committee for the purpose of determining whether or what sanctions and/or penalties are warranted against the Director and other DBEDT employees. Therefore, the Special Investigative Committee formally requests that the Attorney General, within thirty days from the filing of this Special Investigative Committee report with the Senate Clerk's office, initiate the process required to appoint independent legal counsel to carry out the recommendations made by this report and provide the Senate with a written report on the status of the appointment process.

It is further recommended that the independent counsel appointed by the Attorney General be required to provide the Senate with a written report, no later than twenty days prior to the convening of the Regular Session of the 2009 Legislature on the status of its compliance with and enforcement of the recommendations of your Committee.

In addition, it is recommended that this report of your Special Investigative Committee be submitted to the State Ethics Commission for a determination of whether the actions taken by DBEDT's Director, ASO, and evaluation committee members, Maurice Kaya and John Tantlinger, rise to the level of being a violation of the provisions of chapter 84 of the Hawaii Revised Statutes.

It is also the recommendation of your Special Investigative Committee that DBEDT be required to adopt administrative rules requiring the ASO to certify that each procurement made pursuant to the RFP process or competitive sealed bid process has been conducted in compliance with all applicable provisions of the procurement code and rules. Such certification by the ASO shall include that all parties involved in the negotiation, performance, or administration of the applicable contract have acted in good faith, consistent with the requirements of section 103D-101, Hawaii Revised Statutes.

Additionally, it is recommended that each procurement that requires the foregoing certification by the ASO be subject to the mandatory review and oversight of the State Procurement Office to further ensure compliance with all applicable provisions of the procurement code and rules.

Your Special Investigative Committee also recommends that DBEDT be required to adopt a comprehensive standardized set of procedures and forms which are in compliance with all applicable provisions of the procurement code and rules. Furthermore, upon completion of a draft of such procedures and forms, that DBEDT submit them to the State Procurement Office for its approval and acceptance.

Finally, it is the recommendation of your Special Investigative Committee that DBEDT and the State Procurement Office be required to provide the Senate with a written report, no later than twenty days prior to the adjournment sine die of the Regular Session of the 2009 Legislature on the status of DBEDT's compliance with the recommendations of your Committee as set forth in this report.