

Honolulu, Hawaii

JAN 18 2008

RE: DBEDT Procurement Process
on the Hydrogen Investment
Capital Special Fund

Honorable Colleen Hanabusa
President of the Senate
Twenty-fourth State Legislature
Regular Session of 2008
State of Hawaii

Madam President:

Your Committee on Tourism and Government Operations, which held an informational hearing to review procurement procedures of the Department of Business, Economic Development, and Tourism concerning the request for proposals for the administration contract of the hydrogen investment capital special fund,

begs leave to report as follows:

Background

Your Committee held an informational briefing on September 4, 2007, to review the procurement procedures of the request for proposals for the awarding of the contract that was ultimately awarded to H2Energy LLC. The purpose of the informational hearing was to hear testimony from witnesses concerning the awarding of a contract by the Department of Business, Economic Development, and Tourism (DBEDT) (Solicitation No. RFP-07-11-SID) for management services for the hydrogen investment capital special fund and the Hawaii renewable hydrogen program.

The hydrogen investment capital special fund, section 211F-5.7, Hawaii Revised Statutes, was created by Act 240, Session Laws of Hawaii 2006, 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 investment capital special fund was provided with an appropriation of \$8.7 million and was placed under the jurisdiction of the Hawaii Strategic Development Corporation, chapter 211F, Hawaii Revised Statutes, which is administratively attached to DBEDT. Act 240, Session Laws of Hawaii 2006, also established the Hawaii renewable hydrogen



program, codified as section 196-10, Hawaii Revised Statutes, which relates to the hydrogen investment capital special fund.

DBEDT issued a request for proposals for potential managers of the hydrogen investment capital special fund and established an evaluation committee in accordance with procurement procedures required under chapter 103D, Hawaii Revised Statutes, to review bids submitted and to make a recommendation on which bidder should be awarded the contract. The evaluation committee reviewed submitted bids and ranked three bidders, based on criteria established in the request for proposals, from highest to lowest as follows: (1) Kolohala Holdings LLP; (2) Enterprise Honolulu; and (3) H2Energy LLC.

In August 2007, in spite of the evaluation committee's recommendation, the Director of Business, Economic Development, and Tourism selected an entity known as H2Energy LLC to manage the hydrogen investment capital special fund. H2Energy LLC was the lowest ranking bidder for the contract.

The State Procurement Office ordered the selection of H2Energy LLC to be rescinded on or about September 25, 2007, based on its review of the procurement process, which concluded that the contract should have been awarded to the highest-ranking bidder based on the internal evaluation committee's evaluation.

Findings

Based upon the informational briefing and the analysis of documents obtained from DBEDT, your Committee makes the following findings:

- (1) DBEDT contends that it has been their practice to have their procurement officer, the Director of DBEDT, select the final proposal after the evaluation committee submits its findings and rankings;
- (2) The evaluation committee ranked the proposals as described above. The evaluators' written comments were consistent with the numerical scores listed in paragraph (5). Kolohala Holdings LLP scored the highest in almost every category by all three evaluators. Despite this fact, the DBEDT Director selected H2Energy LLC. His justification for selecting the third ranked proposal was based on a "3-point must" system. Your Committee



found that, not only was this criteria previously unheard of by the DBEDT Director's staff, but it is also inconsistent with the criteria established in the request for proposals as required by law;

- (3) The Administrator of the State Procurement Office testified that DBEDT's practice was not in compliance with state procurement laws and rules. When the evaluation committee process is utilized, the final selection should be based upon findings and numerical rankings by the evaluation committee and not by DBEDT's procurement officer, the DBEDT Director, whose only involvement is for the purpose of ensuring the process is fair and that the evaluation committee followed all procurement procedures;
- (4) Despite the contention by DBEDT that the procedure utilized by the DBEDT Director was the usual practice, the DBEDT Director and his staff could not cite to any prior instance when the procedure was utilized for other purchases;
- (5) Internal documentation of DBEDT (letter dated July 31, 2007, to Mr. Ted Liu from Mr. Maurice Kaya) indicates that there were in fact numerical values assigned by the evaluation committee to the three bidders as follows:

(A) Kolohala Holdings LLP	255
(B) Enterprise Honolulu	243
(C) H2Energy LLC	234.5;
- (6) Subsequent to July 31, 2007, the DBEDT Director, at some point expressed his dissatisfaction with the evaluation committee's ranking of the proposals;
- (7) By memorandum dated September 25, 2007, attached hereto, the Administrator of the State Procurement Office rejected the DBEDT Director's selection, ordered the original selection to be rescinded, and ordered a new award based upon the evaluation committee's ranking of the proposals;
- (8) In a letter dated December 28, 2007, from the DBEDT Director to the Chair of your Committee, three months after the Administrator of the State Procurement



Office's September 25, 2007, memorandum, the DEBET Director reports that he had complied with all of the Administrator of the State Procurement Office's corrective actions with one exception. The DBEDT Director stated that he conducted a review of his evaluation committee's evaluation and at the informational hearing, he raised concerns over the members of the evaluation committee having conflicts of interest. As a result, the DBEDT Director is considering cancelling the Request for Proposal, after the fact; and

- (9) There appears to be a procurement process manipulation by the DBEDT Director to award a lucrative \$8.7 million contract to H2Energy LLC. The DBEDT Director has admitted (memorandum of November 13, 2007, to the Administrator of the State Procurement Office) to be engaging in discussions anew to negotiate a new contract relating to hydrogen investment with an unnamed third-party, based upon changed circumstances, which is highly irregular.

Conclusion

Section 103D-303(g), Hawaii Revised Statutes, relating to competitive sealed proposals, provides:

"(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made."

The DBEDT Director testified that he utilized a "3-point must" system consisting of quality, anticipated benefits, and ability to deliver. However, the Administrator of the State Procurement Office testified that this procurement evaluation procedure is not standard and such a procurement evaluation system does not exist under the State's procurement law. The Administrator of the State Procurement Office stated that, in order to be in compliance with the State's procurement law to award this contract, there needs to be a numerical value to make the decision. Your Committee further



concludes that the "3-point must" system evaluation criteria used by the DBEDT Director did not conform to the criteria set out in the request for proposals, which deserves further investigation.

It was clear to your Committee, based upon the statements of DBEDT's staff and all documentation, that the DBEDT Director may have manipulated the process to select H2Energy LLC. Your Committee could not decipher any rationality or reasonableness, whether in testimony or documentation, for the DBEDT Director's justification to award the contract to the least qualified bidder.

Your Committee further concludes that there may exist procurement improprieties that warrant legislative investigation in order to determine whether administrative malfeasance or misfeasance occurred and whether proposed legislation is necessary therefor. What was to have been a normal Request For Proposal process has turned into a quagmire of irregularities, conflicts, and inconsistencies that undermine the integrity, fairness, and consistency of the procurement process, which strikes at the basis of the public procurement law.

Recommendation

In view of the findings and what appears to be an unwarranted violation of state procurement laws, your Committee recommends that a special senate investigative committee be convened in the Regular Session of 2008 to obtain further information to ascertain the nature and extent of any improprieties in procurement on this matter.

Respectfully submitted on
behalf of the members of the
Committee on Tourism and
Government Operations,


CLARENCE NISHIHARA, Chair



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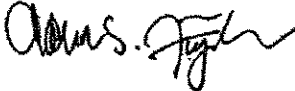
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SPO 08-0068

September 25, 2007

TO: The Honorable Theodore E. Liu, Director
Department of Business, Economic Development & Tourism

FROM: Aaron S. Fujioka 

SUBJECT: Administrator's Final Review and Determinations on
Request for Proposals No. RFP-07-11-SID for
Hydrogen Investment Capital Special Fund and
Renewable Hydrogen Program Management Services

Thank you for your September 17, 2007 response to our August 31, 2007 preliminary review of the subject solicitation. Having reviewed the contract file, I hereby render the following final review and determinations.

The award of subject solicitation was brought to the attention of this office. In my capacity as Chief Procurement Officer for DBEDT, and having delegated procurement authority to the Director of DBEDT as Procurement Officer (PO) for your department, pursuant to HRS §103D-208, this review of the subject procurement conducted by DBEDT is within the authority of the State Procurement Office (SPO). These findings are based on the Hawaii Public Procurement Code, HRS Chapter 103D, and its implementing Hawaii Administrative Rules.

SUMMARY OF FINDINGS

1. March 23, 2007 memo to the PO on the "Request for Approval of Evaluation Committee for Solicitation No. RFP-07-11-SID, Hydrogen Investment Capital Special Fund and Hawaii Renewable Hydrogen Program Management Services", and the June 4, 2007 memo to the PO to revise the Evaluation Committee (EC) due to the resignation of an EC member.

Findings: PO granted approval on April 3, 2007 and June 6, 2007 respectively for the two documents requesting approval of the EC members based on the members' qualifications, expertise, and knowledge to assess and evaluate the proposals. The March 23, 2007 memo included for the PO's information, a copy of the EC rating form. Based on these documents, the PO granted approval for the EC to conduct the evaluations with full knowledge of the evaluation criteria and scoring of the proposals.

2. RFP Page 16, Evaluation Criteria states "An evaluation committee shall be appointed by the DBEDT Director. The committee shall evaluate responsive proposals in accordance with the section entitled 'Proposal Requirements' and based on the following general criteria." The criteria identified in the RFP are Quality (30 points), Approach and Capabilities (30 points), Anticipated Benefits (20 points), and Cost and Budget (20 points), totaling a possible 100 points.

Findings: This provision is in compliance with HAR §3-122-45.01 governing evaluation committees, which requires the PO to make a written determination that either the PO or an EC shall evaluate the proposals; and also HAR §3-122-52 governing the evaluation of proposals, which states that evaluation factors shall be in the RFP.

3. RFP Page 23, Evaluation of Proposals states "The evaluation will be based solely on the evaluation criteria set out in this RFP."

Findings: This provision is in compliance with HAR §3-122-52 governing the evaluation of proposals, that evaluation criteria shall be set out in the RFP and the evaluation based only on these factors. Evaluation factors not specified in the RFP may not be considered. See also, HRS §103D-303.

4. RFP Addendum No. 2, response to Question 16 states in part, "...each member of the Evaluation Committee will independently evaluate the proposals based on the criteria contained in pages 16 and 17 of the RFP."

Findings: This provision is in compliance with HAR §3-122-52 governing the evaluation of proposals, requiring that each EC member explain and document the ranking, in writing, for the procurement file; the evaluation criteria to be set out in the RFP and the evaluation based only on these factors; and a numerical rating system be used.

5. RFP Addendum No. 2, response to Question 16 states in part, "...Such offer will go through the evaluation process again and the DBEDT director will have the ultimate authority to make the final selection."

Findings: This provision may have resulted in your determination that the final selection was within your authority. Best and final offers (BAFO) from offerors shall be evaluated using the criteria stated in the RFP by the designated EC. The evaluation of the BAFO by the EC then results in an award to the highest rated offeror, based on the RFP evaluation criteria. The PO delegation is authorized to enter into and administer contracts, and make written determinations with respect to the authority granted. The PO is tasked to ensure all offers were evaluated in accordance with the proposal evaluation criteria established in the RFP. The PO may review the solicitation, including the evaluation process to determine if all EC members were fair, independent and impartial in their evaluations of the offers, and to determine that the solicitation was conducted in accordance with all rules and statutes. When the PO determines that the evaluation process was proper, the PO would proceed to make the award to the highest ranked proposal.

6. Evaluation Rating Forms of the EC members includes evaluator's comments and recommendations, with details and specific comments of the rated proposal.

Findings: The EC worksheets substantiate the EC review and analysis of the proposals based on the RFP criteria. EC comments on the proposals support the individual EC ratings of each proposal.

7. July 31, 2007 DBEDT memo (attached as Exhibit B) on subject 'Evaluation Committee Findings for RFP-07-11-SID' and its attachment (attached as Exhibit A) upon which the Director's selection is contrary to the Evaluation Committee's findings.

Findings: This action on the part of the PO is not in compliance with HRS §103D-303 and HAR §3-122-52 governing the evaluation of proposals, which state in part, award shall be based on price "and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation" and "Evaluation factors not specified in the RFP may not be considered," respectively. The EC findings, as stated in the July 31, 2007 memo, results in a putative award, and the PO is tasked to ensure the procurement was conducted in accordance with the RFP and the rules and statutes, to enable the issuance of the Notice of Award.

Procurement delegation provided to department heads involves the responsibility to apply all applicable statutes and rules governing procurement, to conduct procurements for the department accordingly. This delegation does not authorize a department head, as the PO, to act in any other capacity.

8. September 17, 2007 DBEDT letter under your signature memorializing DBEDT's understanding of SPO's concerns regarding this RFP.

Findings: DBEDT's letter reflects SPO's interpretation of the applicable statutes and rules that when a PO appoints an evaluation committee, the conclusions of the evaluation committee control unless the PO, in the PO's review of the overall procurement process of the RFP at issue, determines that the procurement process was not conducted in accordance with the law, including actions such as, but not limited to, the evaluation was not conducted in a fair, independent, and impartial manner, or in accordance with the evaluation criteria in the RFP.

9. September 11, 2007 memo from HiBEAM attached to your September 17, 2007 memo stating in part, "H2E has reluctantly decided to rescind our proposal and offer, and we will not be a candidate to manage the Hydrogen Fund."

Findings: HiBEAM has not justified its decision to rescind its offer, and thus does not present an acceptable basis for the withdrawal of offer. The offer once made by the offeror, and accepted by the State, cannot be unilaterally withdrawn. Additionally, the HiBEAM memo is not considered to be a valid communication from HiBEAM, as it was not signed by an authorized representative of the company.

HiBEAM's offer possibly could be properly withdrawn if it claimed it committed a mistake and was able to support that claim. However, under the circumstances, HiBEAM's rescission of its offer is somewhat moot because HiBEAM is now the third ranked offeror, and would not be likely to be awarded a contract. In any event, HiBEAM's letter of rescission is unacceptable, and HiBEAM must abide by its offer.

DETERMINATIONS

Pursuant to HRS § 103D-701(f), no further action shall be taken on the RFP or the award of any contract resulting from this RFP, including the corrective action below, until the protest received from Kolohala Holdings LLP, is addressed and resolved pursuant to HRS chapter 103D, Part VII.

Based on these findings and upon review of DBEDT's proposed corrective actions described in the letter referenced in item 8 above, the following corrective action is required:

- The PO shall rescind the August 6, 2007 "Re: Renewable Hydrogen consultant/manager selection" memo (attached as Exhibit A);
- The PO shall rescind the August 7, 2007 Director's Selection portion of the July 31, 2007 DBEDT memo from Maurice H. Kaya (attached as Exhibit B);
- The PO shall rescind the August 10, 2007 award letter to H2Energy LLC (attached as Exhibit C), and the August 10, 2007 letters of notification to the other two offerors; and
- The PO shall validate the EC's initial evaluation ranking of July 31, 2007 DBEDT memo from Maurice H. Kaya (attached as Exhibit B), if the EC's evaluation is in compliance with the applicable procurement law and issue a new award based on the initial EC ranking.

Please provide the SPO with copies of all correspondences or documents when issued related to the above determinations. If you have any questions on this matter, please call me at 587-4700. Thank you for your cooperation in this matter.

attachments