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DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM


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FAXED
September 4, 2007

TO: Mr. Aaron Fujioka, Administrator
State Office of Procurement

FROM: Theodore E. Liu 

RE: Requests for Proposals No. RFP-07-11-SID
Hydrogen Investment Capital Special Fund and
Renewable Hydrogen Program Management Services

I have received the Memorandum dated August 31, 2007, ("Memorandum") regarding your preliminary review of the subject request for proposals (RFP) and preliminary findings. As requested by the Memorandum, I provide the below comments with regard to points 4 and 5 therein.

In the subject RFP, I believe that I acted within applicable statutes and rules governing procurement and conducted the subject procurement accordingly. I did not, as may be the implication of the last sentence of point 5 in the Memorandum, "act in any other capacity."

It appears from the Memorandum that DBEDT and the State Procurement Office (SPO) have different interpretations of HAR Section 3-122-45.01 ("Evaluation committee") and Section 3-122-57 ("Award of contract"). To clarify this difference in interpretation, I have asked the State's Attorney General for a formal opinion on this matter.

DBEDT's interpretation and practice in effect for several administrations¹ 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 HAR Section 3-122-45.01 ("Evaluation committee"), HAR Section 3-122-52 ("Evaluation of proposals"), HAR Section 3-122-53 ("Discussions with offerors"), HAR Section 3-122-54 (Best and final offers"), and any other applicable rule.

DBEDT's interpretation and practice under the above-referenced rules, explicitly reserves for the departmental procurement officer the authority to award the contract² 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

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.

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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.

Point 4 of the Memorandum states that the evaluation by an evaluation committee "results in" an award of contract to the highest rated offeror. This interpretation seems to be that the determinations and award of contract, governed by HAR Section 3-122-57, vests in the evaluation committee. Point 4 further states that the procurement officer's only inquiry of such an award goes only to whether the evaluation process was "fair, independent and impartial" and whether all rules and statutes were followed.

DBEDT does not interpret any authority in Subchapter 6, Competitive Sealed Proposals, to vest in an evaluation committee the award of contract based on the requirements of HAR Section 3-122-57 or that the procurement officer's review of an evaluation committee's recommendation and/or ranking only goes to the evaluation process.

As the Memorandum's interpretation has important and serious implications for how DBEDT has conducted its competitive sealed proposals, I have asked the Attorney General for an opinion in this matter.

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. In the meantime, I have instructed that no work proceed with the awardee of the subject RFP.

In conclusion, I have the following procurement policy queries for your consideration:

1. Having delegated the procurement authority to the procurement officer, does the procurement officer have the authority and flexibility to design a procurement procedure, provided it is consistent with procurement statute and rules?
2. Is the procurement policy intended to divest the procurement officer of the delegated authority to make a procurement decision merely by the appointment of an evaluation committee, absent any specific delegation of the authority to make such decisions?
3. Wouldn't a policy that answers point 2 above in the affirmative work towards discouraging the use of evaluation committees to review the technical merits of proposals?
4. Is it the procurement policy to make an evaluation committee's numerical rankings the sole determinant of "best value" for the state?

Thank you for your time and attention to this matter.

c: Joy Watari, Acting Chief of Staff
Attorney General Mark Bennett
Comptroller Russ Saito

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