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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 *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."

Violation

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

RE: Renewable Hydrogen consultant/manager selection

On July 31, Director was briefed in detail by the review panel (Maurice Kaya, John Tantlinger, Bill Parks) on solicitation and review process undertaken, proposals received, presentations made and overall review of dynamics of the process. Focus was on bidders' conference, follow-up questions, initial submissions, Q&A on initial submissions, interviews and discussions of BAFO and final submissions.

The Director understands that each proposer had strength and weaknesses relative to the other proposers. Understands that the strengths and weaknesses evolved through the process, including the BAFO process. No proposer was deemed to be strongest relative to the others on all factors. Understands that each proposer was assessed by the panel to be on its own technically qualified and able to perform the requested technical services. Understands that the panel assessed that on an overall basis, taking into account strengths and weaknesses relative, to each other, all proposers were within a very tight and indistinguishable technical range of each other.

The quality and tight range of the technical proposals were a reflection of the quality of the RFP and the process undertaken.

Understands that given the above, the panel had no recommendation to Director as to a ranking of the proposals. Each or any of the proposers were qualified to undertake the work. Preference of each member of the panel for any one of the proposers varied.

Director's assessment and judgment was based primarily on the relative ability to deliver on the promises made in the proposals and the prospects of short-term positive impact on specific projects in the renewable energy and hydrogen sectors.

	Enterprise Honolulu/Ventana Capital	H2Energy (HiBEAM, /Senet Capital/Sentech	Kolohala/HNEI
Strength of Point-of-Interface (POI) with the State	L	M	H
Senior executive back-up/support for POC	L	H	M
Local resources for implementation	M	H	L
Local presence	M	H	L
Federal institutional contacts	L	H	M
Delivery of additional capital	H	L	M

The above assessment was made on a "3-point must" system.

In general, the final assessment and decision was based on a judgment on ability to deliver on the promises made in the proposals and on ability of making the most positive short-term impact on companies and/or projects in the renewable energy and hydrogen sectors in Hawaii. The issue was, relative to each other, which proposer was judged to have the best prospects of delivering on the services and promises made and achieving the goals of this initiative.

Director decided and the panel agreed that the credibility and ability of delivery turned initially on the point-of-interface (POI) between the proposer and the state. EH's POI was, relative to the other proposers, the weakest. Issue also surfaced of an over-representation of renewable projects projects worked on. H2Energy's POI did not have extensive background in energy. She did possess the experience and the authority to deploy the organizations in the consortium. Kolohala's POI, was relatively unknown to the panel and but had the most substantive background. However, she seemed to have been recently brought in specifically for this proposal. Contribution during discussions was not substantive.

Director decided and panel agreed that given the strengths/weaknesses of the POIs, senior executive support and back-up for the POI was critical. In other words: Who would the state resort to should the interface with the POI need improvement? As these are consortium bids, who would back-up the POC with authority/ability to deliver on all promises made? Who would ultimately be accountable? Panel agreed that EH/Ventana's executive support was deemed the weakest, relative to the others. Despite Ventana's promise to establish a local presence, its executive authority was primarily off-shore. Panel agreed that based on the presence of and representations of the principals of both HiBEAM and Senet Capital at the BAFO, H2Energy was deemed strongest. Conversely, based on the lack of presence of Kolohala's principals at the BAFO, panel agreed that this proposer was weak relative to H2Energy's.

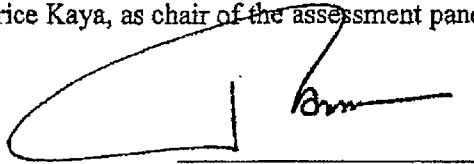
Director decided and panel agreed on the critical importance delivery of services and impact on projects and/or companies in the renewable energy and hydrogen sectors in Hawaii, including support and incubation services, to be made available to Hawaii entities locally. Enterprise Honolulu has a record of delivering services to local technology and other businesses. Ventana and the consortium's mainland based consultant promised to establish a local office, should it be awarded the contract. Questions arose as to the possible long lead-time for such an establishment and on time commitment of Ventana's principals and the consultant to be available in Hawaii. Both HiBEAM and Senet Capital had a track record of providing services, including incubation and private equity investing, locally. That structure, including their respective boards of advisors, would be made available to Hawaii projects and companies. Although very impressive, Kolohala is new in Hawaii relative to the Enterprise Honolulu and H2Energy. Kolohala's principals are well-experienced and known, but the lack of their presence at the BAFO was an issue of concern.

Capital formation was another important driver. Enterprise Honolulu's partner, Ventana Capital, has the strongest track record. Although Ventana's background is life sciences and biotechnology, it promises to raise a new \$150 million private equity fund focused on "clean tech". That fund would look at investments in Hawaii. H2Energy also referenced a 6x leverage for the state's funding. Kolohala Partners promised a \$15 million clean tech fund. Director notes that these references to capital formation are expectational in nature. Decision needs to take into account specific historical track record in actually raising and deploying capital in Hawaii.

Matching funds, primarily from federal sources such as the U.S. Department of Energy, was another driver of the decision. Enterprise Honolulu's mainland-based consultant was known to one of the panelists. The Director's preference is for an entity with institutional relationships and a track record with the federal funding sources. H2Energy's Sentech is well known to the panelists and was deemed to have the best institutional relationship with federal funding sources. Sentech has a record of past activity and commitment to Hawaii and its energy initiatives. Kolohala's partnership with HNEI posed certain initial "conflicts" issues (HNEI is both a beneficiary and a principal). The consortium did remedy the conflict, but at the expense of reducing its access to technical expertise.

On the basis of the above factors and judgments, Director's decision is to select H2Energy as the potential contractor to the state for the renewable hydrogen initiative.

Decision was communicated to Maurice Kaya, as chair of the assessment panel.

A handwritten signature in black ink, appearing to read "M. Kaya", is written over a horizontal line.

August 6, 2007