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STATEMENT OF

THEODORE E. LIU
Director, Department of Business, Economic Development & Tourism

before the

SENATE COMMITTEE ON TOURISM AND GOVERNMENT OPERATIONS

Tuesday, September 4, 2007

Chair Nishihara, Vice Chair Mercado-Kim and members of the Senate Committee on Tourism and Government Operations, with regard to the Committee's inquiry on procurement procedures followed for the request for proposals relating to the Hydrogen Investment Capital fund and renewable hydrogen Program Management Services (the "RFP"), the Department of Business, Economic Development & Tourism (DBEDT) respectfully submits the following comments:

1. The RFP was handled pursuant to the "competitive sealed proposals" sections of the Hawaii Administrative Rules, HAR Section 3-122-41 to Section 3-122-60 (the "Rules").

2. DBEDT's interpretation of the Rules and its practice in effect for several administrations has been that the departmental procurement officer may select an independent evaluation committee to evaluate the proposals. If 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.

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3. In the subject RFP, as the departmental procurement officer, I appointed in writing an independent evaluation committee, consisting of Mr. Maurice Kaya, Division Administrator and Chief Technology Officer, DBEDT; Dr. John Tantlinger, Branch Chief, DBEDT; Mr. William Parks, a United States Department of Energy official on temporary assignment to DBEDT; and Mr. Jonathan Kobayashi, Esq., Chairman of the Board of Hawaii Strategic Development Corporation. Mr. Kobayashi resigned from the committee due to his relocation from the State.

4. DBEDT's interpretation and practice under the above-mentioned 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)).

5. In the subject RFP, this reservation of the authority to make the procurement decision and award of contract was explicitly reserved in the DBEDT Director, as the departmental procurement officer. This explicit reservation was acknowledged by the evaluation committee and was contained in the RFP documents and communications to potential bidders.

6. The interpretation and practice in points 4 and 5 above 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, be based on the evaluation criteria in the relevant request for proposal and be included in the contract file as is required by HAR Section 3-122-57 (a). In all instances, the department procurement officer is bound by the duty to act in a fair, independent and impartial manner.

7. In the subject RFP, the evaluation committee and the departmental administrative services officer met with me on July 31, 2007, to formally report on the result of the subject RFP process. The evaluation committee as a whole and each individual member of the evaluation committee did not have a recommendation of a proposal whose overall quality was measurably higher than that of the other proposals. I spent a significant amount of time probing and discussing this position of the evaluation committee.

8. At the July 31, 2007, meeting the evaluation committee was reluctant to even provide any numerical scoring or ranking of the best and final proposals. I spent a significant amount of time probing and discussing this position of the evaluation committee. At the insistence of the departmental administrative services officer present at the meeting, the evaluation committee did provided me with a written ranking of proposals, which I received on August 7, 2007.

9. In light of this result, on the basis of the department's interpretation of HAR Section 3-122-57, as the departmental procurement officer on August 6, 2007, I made a determination of "best value to the State taking into consideration price and the evaluation criteria in the request for proposals", as required by that section. I also documented "basis of selecting the successful offeror" and required by HAR Section 3-122-57 (a).

10. DBEDT is aware that the State Procurement Office may have a different interpretation of HAR Section 3-122-45.01 ("Evaluation committee") and Section 3-122-57 ("Award of contract") as to whether the departmental procurement officer can select any offeror other than an evaluation committee's highest rated offeror.

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

12. 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.

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

Thank you for the opportunity of making these comments.