

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.