APPENDIX E

SEP 24 2008

PRISCILLA C. THOMPSON
4275 Sierra Drive
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September 23, 2008

HAND DELIVER

The Honorable Donna Mercado Kim
Chair, Senate Special Investigative Committee – S.R. No. 2
State Capitol, Room 231
415 South Beretania Street
Honolulu, Hawaii 96813

RE: Draft of the Report of the Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award

Dear Chair Kim,

I am in receipt of the draft of the report of the Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award, exhibits, and appendices dated September 11, 2008. I have read the report, and I would like to provide clarification and written comments on the following items:

Page 12: *"The procedure set forth in paragraph 9 represented DBEDT's standard operating procedure and has always been part of the procurement rules." (footnote: ...Testimony of Priscilla Thompson, 4/30/08...)."*

While I recognize that the first part of the statement is correct, that the procedure described paragraph 9 is standard operating procedure; I do not have adequate length or depth of experience in procurement matters to determine that the procedure has "always" been part of the procurement rules. Therefore, I respectfully request removal of reference to my testimony in footnote 93.

Page 14: *"Even Ms. Thompson, who was primarily responsible for the Hydrogen RFP testified that a question was raised in her mind when she learned of the Director's position that he could select who the successful bidder would be."*

I was not "primarily" responsible for the RFP. I had no decision-making powers, nor was I the manager of the RFP. As staff, I was assigned to compile the first draft of the RFP and distribute it for comments from management. Once I received the comments, I finalized the RFP and sent it to the Contracts Office for review. I subsequently carried out tasks related to the RFP as directed by Maurice Kaya and John Tantlinger. Therefore, I respectfully request substitution of the word "primarily" with "primary staff".

Page 17: *"DBEDT employees Priscilla Thompson and John Chock testified that they knew that there was no basis for the Director's position that he could select a successful offeror other than the highest ranked by the evaluation committee. (Footnote: Testimony of Priscilla Thompson, 3/15/08 and 4/30/08)."*

While I recognize that this statement is correct; I would like to clarify that I did not have the training and experience necessary to fully understand the implications of paragraph 9 of the RFP Procedures (Exhibit 147), i.e., that the Director was required to select the evaluation committee's highest ranked offeror without exception. On August 8, 2007, I became fully aware of the correct procurement procedure through discussion with the Contracts Office and conveyed my concern to Ken Kitamura via email.

Page 23: *"Despite the fact that DBEDT relied on the contracts office to comply with procurement requirements, Mr. Tantlinger was not concerned by an email from Louise Mott...(Footnote: ...Exh. 4-A (8/8/07 email from Thompson to Kitamura...))."*

The email was not from Louise Mott. The email was sent by me, to Ken Kitamura.

Thank you for the opportunity to provide written comments to the draft of the report.

Sincerely,

Priscilla Thompson

Priscilla Thompson
Energy Analyst

SEP 25 2008

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September 24, 2008

The Honorable Donna Mercado Kim, Chair
The Honorable Clarence Nishihara, Vice Chair
Senate Special Investigative Committee on the Hydrogen
Investment Capital Special Management Contract Award
Hawaii State Capitol, Room 231
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Report of Senate Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award

Dear Chair Kim, Vice Chair Nishihara and Committee Members:

Thank you for the opportunity to comment on the draft report of Senate Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award ("Report") in which the Committee informs as to its investigation into the appropriateness of the contract award related to H2Energy's prospective management of the State's Hydrogen Fund. In particular, Barry Weinman appreciates the chance to clarify within the Report that he never sought, and in no way could have personally benefited from H2Energy's prospective management of the State's Hydrogen Fund. To the contrary, Mr. Weinman's involvement has always been simply to assist in this public opportunity to identify and nurture emerging energy opportunities in our State.

H2Energy is not Mr. Weinman's company. Mr. Weinman's involvement with H2Energy was limited to his role as a volunteer board member for the non-profit organization HiBEAM. Furthermore, Mr. Weinman, as is the same for all of HiBEAM's board members, has never been paid for his work with HiBEAM. In fact, Mr. Weinman was amongst the group of HiBEAM's founders that each donated $25,000.00 to finance HiBEAM. As opposed to any motivation for personal financial gain, Mr. Weinman volunteers his services to HiBEAM in order to mentor and assist local technology companies to raise capital and to grow this sector as a locally based industry.

Additionally, as a member of HiBEAM's all-volunteer board of directors, Mr. Weinman likely would have only had limited involvement with H2Energy. This is true because HiBEAM was afforded only two of the five seats on H2Energy's board, and these two seats would have rotated amongst HiBEAM's nine member board of volunteers. Here again

exemplifying that H2Energy has never been, and was never meant to be Mr. Weinman's company.

Moreover, in line with HiBEAM's mission, HiBEAM would not have been compensated for its work assisting in H2Energy's prospective management of the State's Hydrogen Fund. As specified in H2Energy's proposal,[1] the management fees were to be paid to Sennett Capital and Sentech,[2] not HiBEAM. If at all, the only funds going to HiBEAM would have been to reimburse out of pocket expenses, e.g. travel expense.

Thank you again for the opportunity to provide input on the Report. If at all you have any questions regarding the clarifying points raised herein, I would be happy to discuss them with you. I can be reached directly at 547-5617.

Very truly yours,

Joachim P. Cox

JPC:jmd

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1 Please note that Mr. Weinman's limited involvement is further exemplified by his having neither prepared nor signed H2Energy's proposal related to H2Energy's prospective management of the State's Hydrogen Fund.

2 Please also note that Mr. Weinman does not have any ownership interest in, or otherwise receive compensation from, Sennett Capital or Sentech.

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September 30, 2008

The Honorable Donna Mercado Kim
State Senator
Hawaii State Legislature
State Capitol, Room 231
Honolulu, Hawaii 96813

Dear Senator Mercado Kim:

First of all, I appreciate your accommodating my trip to participate in the Joint Civilian Orientation Conference. The conference results can be viewed at http://www.defenselink.mil/home/features/2008/0908_jcoc76/.

Enclosed, please find my written response to the "Draft Report of the Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award."

I note that your cover letter to me transmitting the committee report restricts my ability to share it based on "privacy" of the witness statements. I am both surprised and puzzled by this restriction, as all of your hearings were public, televised and all statements made on the public record. Please be aware that I cannot withhold the committee report from anyone seeking it as a public document under the State's sunshine statute, unless it can be proven that release thereof will frustrate a legitimate government function.

Please let me know if I can answer any question or elaborate on any point contained in my response.

Very truly yours,

Theodore E. Liu

Enclosure

Copies: The Honorable Colleen Hanabusa, Senate President
The Honorable Gary Hooser
The Honorable Les Ihara, Jr.
The Honorable Clarence Nishihara
The Honorable Sam Slom
Mr. Bill Wynhoff, Esq.

WRITTEN RESPONSE

of

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

to

"Draft Report of the
Special Investigative Committee on the Hydrogen Investment
Capital Special Management Contract Award"[1]

Introduction

I serve as the Director of the Department of Business, Economic Development & Tourism (DBEDT) of the State of Hawai'i and I am the principal subject of the above-captioned committee report. I was called as a witness to one committee[2] hearing.

Pursuant to committee Rule 2.8(c) and (d), I am entitled to make this written response to the draft committee report's findings and conclusions and to include it as an appendix to the final report of the committee.

The matters under review by the committee[3] turn on one very straightforward fact: On and prior to August 7, 2007, I and the other DBEDT professionals advising me operated with the good faith belief and understanding that I, as the Director, had the authority to make the final selection of a winning proposer in a request for proposals (RFP) procurement procedure. I acted on that good faith belief and understanding.

Neither I nor the other DBEDT professionals knowingly or intentionally violated the State's procurement code with respect to our belief and understanding of the DBEDT Director's authority to make a final selection on the subject RFP or otherwise.

The committee report attempts to inaccurately jam together after-the-fact second-guessing and distortions; analyses made only with the benefit of hindsight; spurious and

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[1] The title of the committee report is different from the title of Senate Resolution No. 2: "ESTABLISHING A SENATE SPECIAL INVESTIGATIVE COMMITTEE TO CONDUCT AN INVESTIGATION OF THE AWARD OF A CONTRACT BY THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, [sic] AND TOURISM TO H2 ENERGY LLC TO MANAGE THE HYDROGEN CAPITAL SPECIAL FUND IN 2007, WHICH WAS SUBSEQUENTLY ORDERED TO BE RESCINDED."

[2] The "committee" referred to in this written response is the Special Investigative Committee established by Senate Resolution No. 2, on January 25, 2008.

[3] According to the committee report, the committee conducted ***thirteen (13) hearings*** lasting ***over a total of fifty-six (56) hours***, received testimony from twenty-two (22) witnesses and received ***in excess of twenty-one thousand (21,000) pages of documents***. See committee report, page 3 of 33.

irrelevant allegations; unrelated facts and events taken out of context; witness recollections extracted under unfair circumstances; and "testimony" based on speculation and hearsay[4] into a "knowing and intentional" violation of the State's procurement code. This attempt wholly fails.

Having firsthand and direct knowledge of the events and basis for the decision to select a winning proposal[5] for the RFP, I deny any such knowing or intentional violation and reject any notion that the committee report provides evidence of such a violation. Any open- or fair-minded person reviewing the evidence, especially in light of the unfair, repetitive, and one-sided committee questioning, will join me in completely rejecting the findings of the committee report.

This written response contains five parts.

First, in Part I below, I set the record straight on the role of dedicated civil servants who were unnecessarily subpoenaed as witnesses by the committee chair and who have been unfairly maligned.

Second, in Part II below, I discuss my understanding of the procurement code underlying this investigation and show that the law is silent, or at best ambiguous, with respect to the issue being reviewed.

Third, in Part III below, I respond to each specific finding alleged in the committee report. This forms the most extensive portion of this written response.[6]

Fourth, in Part IV below, I set forth how the organization of the committee itself was flawed from the outset. Although the Attorney General of the State of Hawai'i formally pointed out these flaws and illegality to the Senate and the committee, they chose to ignore it. For this reason, the entire process and the committee report is void *ab initio*. The committee compounded this illegality by repeatedly violating its own rules and applicable law during the proceedings, resulting in a fundamentally unfair process for witnesses.

Finally, in Part V below, I question whether this process, involving hundreds of hours of effort by personnel in the legislative and executive branches[7], was set up to validate the committee chair's conclusions predetermined before the hearings even started.

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[4] Including one memorable request from the committee chair for "water cooler gossip".

[5] No contract was ever awarded to H2Energy. H2Energy was notified that it was the "selected bidder" and that a contract was to be negotiated. There was no assurance that a contract would have been successfully negotiated. Before any contract was even drafted, the notice to H2Energy was rescinded.

[6] The committee report is organized in a confusing manner. It seems to contain four principal findings. However, under one principal finding there are what seem to be eleven numbered sub-findings. Under other principal findings there are no such sub-findings. Under yet another principal finding, there seem to be un-numbered sub-findings (which are repetitive of other numbered sub-findings).

[7] Including one extensive hearing held on the Easter weekend after Good Friday.

Discussion

Part I. Dedicated State Civil Servants were Un-necessarily Subpoenaed and Unfairly Maligned Only for the Purpose of Creating a Spectacle.

Since at least the Senate Committee on Tourism and Government Operations' information hearing held on September 4, 2007 – long before the committee was even formed – I have clearly stated that the decisions made in the subject RFP were my responsibility and mine alone.

When the committee was established and it became clear that civil servants would be called to testify, I specifically wrote to the committee chair requesting that she allow the civil servants to voluntarily provide documents and to testify. I believe the committee chair knew full well that the civil servants would voluntarily comply and would truthfully testify without the need of being subpoenaed. [8] The committee chair refused and decided instead to issue subpoenas for no other reason than to paint a false picture that these civil servants were reluctant to appear and to gain the embarrassing public spectacle of them being hauled before her committee.

At the subsequent hearings, those civil servants who answered questions truthfully, but not in line with the committee chair's preferred answers, were demeaned and subjected to hostile and disrespectful treatment. Rather than a process of objective and fair inquiry to develop accurate conclusions, an inquisition-like atmosphere was created against those whose testimony did not support a certain pre-conceived view. The only comparable proceedings I have personally witnessed are trials of political dissidents under authoritarian regimes.

The State of Hawai'i's civil servants are talented and hardworking professionals committed to public service. They deserved better treatment than they were accorded.

The civil servants targeted were several of the longest-serving and most respected professionals within the civil service.[9] Collectively, they represent over 100 years of unblemished service and contribution to the welfare and well-being of the people of the State of Hawai'i. Both Mr. Maurice Kaya and Mr. Ken Kitamura have been nominated for numerous performance awards, including the department's Manager of the Year Award.

The leadership of the Strategic Industries Division (SID) has for many decades been responsible for the State's energy programs, including the State's energy disaster planning and response programs. They have won local and national recognition and awards for their

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[8] Civil servants have voluntarily testified in the numerous hearings the committee chair has called over the years to "investigate" DBEDT.

[9] The targeted professionals include a United States Department of Energy Deputy Assistant Secretary, a 20-year veteran of the federal senior professional civil service. This professional was on loan to DBEDT pursuant to an Intergovernmental Personnel Agreement and had only arrived in October, 2006. The committee report exempts this professional from any charges. However, for the committee report's "knowing" and "intentional" violation of the procurement code to work, exempting one member of the evaluation committee defeats the logic of the allegation.

professionalism, expertise and leadership of what have become internationally exemplary energy programs. It is indeed ironic that these targeted professionals are the same ones who the Legislature, including the Senate leadership, has for decades relied on for advice on energy matters.

Having had the opportunity to work with these talented individuals, I categorically state for the record that I am honored and proud to serve the people of Hawai'i along side these dedicated professionals. Their professionalism and dedication have been the basis of the success of the department.

From the inception of this investigation, I have stated that the decisions made were my responsibility and mine alone. It was unnecessary and unfair for the committee chair to target these civil servants.

Part II. The Procurement Code is Silent or Ambiguous as to the Authority to Award the Contract.

As I testified before the committee, shortly after taking my position in 2003 I was briefed on and personally read the procurement code and rules. Contrary to the committee's conclusion, the procurement code is silent or, at best, genuinely ambiguous as to the procedure in question. The RFP was handled pursuant to the "competitive sealed proposals" sections of the public procurement code. Haw. Rev. Stat. § 103D-303 (Cum. Supp. 2007). Subsection (g) of this section 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.

Nothing in this subsection delineates who has final authority to make the determination of which proposal is "most advantageous." Nothing else in the statute addresses the point. It was reasonable for me, as the department's Procurement Officer, to conclude that final determination authority was mine.

The rules implementing this portion of the procurement code are contained in Hawai'i Administrative Rules, HAR § § 3-122-41 through 3-122-60. HAR § 3-122-45.01 provides that the decision to use an evaluation committee is wholly within the discretion of the procurement officer, in this case, the Director of DBEDT. If the Director chooses to use an evaluation committee, then the committee is charged with evaluating competing proposals pursuant to procedures laid out in HAR § § 3-122-52 through 3-122-54.

The critical concept "Award of contract" is contained in a separate rule. HAR § 3-122-57(a) provides:

> The award shall be issued in writing 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 . . .

Again, this rule conspicuously fails to specify who shall make the award. It certainly does not specify that the award shall be made by an evaluation committee. It was reasonable for me, as the department's Procurement Officer, to conclude that final authority was mine.

This same ambiguity carries over to the DBEDT contract manual, as it is based on the statute and rules. Section V. D. of that portion of the contract manual relating to competitive sealed proposals provides (as do the administrative rules) that upon receipt of best and final offers "the evaluation committee will conduct a final evaluation for an award of the contract."

Again the contract manual treats "Award of Contract" wholly separately, in a different section on a different page. Section VI. A. states that "The award of contract shall be issued in writing to the prevailing offeror and shall also be posted for five (5) days on the SPO website." It was therefore reasonable for me, as the department's Procurement Officer, to conclude that final authority was mine.

Nothing in the procurement code, the administrative rules, or the DBEDT contract manual addresses the key issue under review by the committee.[10] The committee hearings and the committee report goes to great lengths to show what was already known by the time of the hearings: my interpretation based on my reading of the law, regulations, and contract manual and based on the unanimous advice of everyone who advised me on the subject, was in retrospect incorrect.[11] However, neither the committee's hearings nor the committee report sets forth evidence that I knowingly or intentionally made an incorrect interpretation or otherwise violated the law.

Part III. Evidence Cited for the Committee Report's Findings is Non-existent, Incomplete, and Faulty and Does Not Support the Findings.

The committee report seems to have four principal findings, with numerous sub-findings under the first principal finding. I will take each finding and respond to them in the order they appear in the committee report.

The committee report's first principal finding, that *"The Director Sought to Manipulate the Procurement Process and Bypass Procurement Laws and Rules to Steer the*

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[10] I pointed this out in my testimony before the committee. Despite that, and despite the number of staff counsel to the committee, this ambiguity is not addressed or refuted in the committee report.

[11] As soon as the SPO formally advised me on August 25, 2007, that my understanding was incorrect, I formally revised the procurement procedures. See Liu Memorandum to Aaron Fujioka, dated September 17, 2007 (committee Exhibit 7).

Hydrogen Fund Management Contract to his Favored Bidder Involving Barry Weinman," is not supported by any logical review of the facts or circumstances.

The committee report's "theory" necessarily has to be that:

- I was determined from the start to award the contract to H2 Energy LLC; *and*[12]

- In order to accomplish this goal, I appointed an evaluation committee instead of exercising my unfettered discretion simply to make the evaluation and award by myself as I was entitled to do pursuant to HAR § 3-122-45.01; *and*

- I then somehow prevailed upon the members of the evaluation committee to submit an evaluation that, instead of simply ranking H2Energy as the top bidder, instead specifically stated, "Each of these organizations offer differing but competitive proposals" and "were in a competitive range," and that explicitly provided for me to make the final selection; *and*

- I then further prevailed upon these committee members and Mr. Ken Kitamura to lie repeatedly and under oath about their beliefs, actions and statements about the procurement process we allegedly employed.

This "theory" simply makes no sense to any rational and fair-minded person. It seems to employ tortured and convoluted reasoning designed to support, at whatever cost to plausibility, a pre-determined conclusion.

The committee report assumes at an irreducible minimum that I chose to accomplish my alleged goal by ignoring the legally available process that would have enabled me to do so. As mentioned above, the procurement code makes absolutely clear that, as the department's Procurement Officer, I had the unfettered discretion as to whether or not to appoint an evaluation committee. HAR § 3-122-45.01 states:

> Prior to the preparation of the request for proposals, a determination shall be made by the procurement officer that the procurement or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals.

If, indeed, I was determined to award the contract to H2 Energy LLC, I could have done so by the simple expedient of making the evaluation and award myself.

But assume (as the committee report erroneously does) that I ignored this simple path to my goal and appointed an evaluation committee to assist me in this alleged subterfuge.

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[12] For this "theory" to work, each of these elements of the logic need to be in place and proven. If even one element fails, the theory fails.

Assuming (as the committee report erroneously does) that each member of the evaluation committee agreed in advance to dishonestly advance my alleged goal, then the obvious way to do so would be simply to rank H2 Energy LLC first. Clearly the bid criteria are complex and subjective enough to accomplish this with no possibility of challenge or discovery. But, the committee report assumes that I and the evaluation committee members disdain the simple, the obvious, and the foolproof. Instead the evaluation committee members chose to rank other bidders as high as or higher than H2 Energy LLC. And to top it off, the members chose (in the committee report's erroneous view) to prepare a paper trail documenting their alleged violation of the law.

And finally assume (as the committee report erroneously does) that Mr. Ken Kitamura is a willing participant in this alleged manipulation. Like the evaluation committee members, Mr. Kitamura inexplicably refuses to cover the conspirator's tracks. He never advised me to make the evaluation myself. He never tells the evaluation committee members to rank H2 Energy LLC first. Instead, Mr. Kitamura meticulously preserves all evidence of the rankings and selection and faithfully presents this information to the committee. Then (the committee report erroneously assumes), he lies under oath as to his interpretation of the procurement code thereby subjecting himself to hours of repetitive, petty, and ill-spirited questioning by the committee chair.[13]

The committee report's first principal finding that "The Director Sought to Manipulate the Procurement Process and Bypass Procurement Laws and Rules to Steer the Hydrogen Fund Management Contract to his Favored Bidder Involving Barry Weinman", is also not supported by any of its sub-findings 1 though 11.

I hereby respond to each of sub-findings 1 through 11 as follows:

The Committee report's sub-finding 1 and 2 allege that *"The Director had existing business relationship with Barry Weinman" and that "The Director concealed nature of his relationship with Barry Weinman."*

I responded to this assertion by accurately and completely testifying to the committee as to my professional relationship with Mr. Barry Weinman. I had no business dealings with Mr. Weinman. There has been no business conducted, consideration of any kind exchanged and no agreements of any nature, oral or in writing, between myself and Mr. Weinman.

In contrast, I testified that the only hydrogen RFP proposer with whom I had any prior business dealings was that principal of Kolohala Holdings.[14]

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[13] The committee's treatment of Mr. Kitamura was truly shameful. Anyone who doubts it or believes this characterization is too harsh is invited to view his examination, which lasted for hours over three different days. On each of those days the committee scheduled other witnesses, took Mr. Kitamura last, and forced him to sit in the hearing for his turn instead of affording the elementary courtesy of allowing him to be on 5 or 10 minutes call.

[14] Testimony of Director Liu, 3/13/08.

It is correct that I encouraged the organization of DragonBridge, as I have done for other business activities that I believe would be good for Hawai'i. I have no financial or other interest in DragonBridge. DragonBridge was not a party to the subject RFP and stood to gain nothing from it. This is but one example of the spurious allegations contained in the committee report.

DragonBridge's relationships with HTDC and HSDC were direct relationships with those entities and not with me. These relationships were arrived upon through independent decisions by separate boards with independent members with fiduciary duties to those agencies. I was not involved in nor was I even present at HSDC board meetings that decided on the DragonBridge investment.

I did arrange meetings for my son and his classmate who were entering a college business plan competition. Mr. Weinman graciously agreed to such a meeting, as did Professor Rob Robinson, a principal of Kolohala Holdings. This is another example of a spurious allegation. I pointed out to the committee chair that my son also met with Professor Robinson and the committee report's intentional use of only partial information provides insight into its intentions.

The Committee report's sub-findings 3, 4 and 5 allege: *"The Director involved Barry Weinman in matters relating to the hydrogen fund from beginning of the process"; "The Director initiated and directed meetings and preparation of the hydrogen work plan with intent of partnering with Barry Weinman"; and "When it was determined that the management of the hydrogen fund would be awarded through the RFP process, the Director favored Barry Weinman for the contract."*

There is no evidence for these findings. The facts are as follows:

On August 7, 2006, I received an unsolicited email from Mr. Weinman[15] regarding investors from the US mainland interested in energy projects in Hawaii. I responded to Mr. Weinman and a meeting was arranged on September 20, 2006. DBEDT frequently receives unsolicited emails with ideas and it is part of our job to respond, discuss, and meet on good ideas.

The initial internal meetings were idea-generation and brainstorming sessions. The ideas were theoretical and conceptual in nature on how DBEDT might manage the hydrogen fund. The Chief Procurement Officer testified that such conceptual discussions are allowable.[16] Mr. Maurice Kaya testified that many other parties also had ideas for the hydrogen fund.[17]

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[15] Weinman email to Liu, 08/07/06 at page 400325.
[16] Aaron Fujioka's testimony stated that such conceptual discussions may take place. See committee report page 25 of 33.
[17] Testimony of Maurice Kaya, 3/20/08; see committee report, page 7 of 33.

The discussions with Mr. Weinman and HIBEAM not only were conceptual in nature, they did not form or result in the actual RFP. Evidence of this is that the ultimate scope, form and structure embodied in the RFP were radically different from the concepts discussed with Mr. Weinman and HIBEAM.

Only a cursory review is necessary to show that there is very little connection between the concept embodied in the HiBEAM brainstorming (and the "Hydrogen Work Plan"), on the one hand, and the Hydrogen RFP, on the other.

The vastly different concepts include:

	Brainstorming concept	Hydrogen RFP Result
Scope	Review of investment proposals only	Three components: • hydrogen program management • cost share • venture investments
Form	• Advisory Committee only[18] • Appointed members • External and internal participants[19]	• No Advisory Committee • Managed by independent manager • Contract with third party
Structure	Only provide advice to DBEDT or attached agency[20]	Outsourced to outside manager
Decision making	Control with DBEDT or attached agency[21].	Decisions by professional investment manager
Compensation	None	Standard industry fees

The committee report makes much of a discussion of using HSDC's exemption to seek "advisors" for an Advisory Committee to DBEDT. While this was discussed, it was not acted upon. In fact, evidence shows that from the beginning, there was the clear intention to conduct an open solicitation process. This evidence includes:

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[18] See Maurice Kaya's "Renewable Hydrogen Program Work Plan", Draft August 7, 2006, REV August 29, 2006, page 3 (page 3, Exhibit 29, committee report): "DBEDT envisions organizing an advisory committee, established as an investigatory committee under HSDC."

[19] See Maurice Kaya's "Renewable Hydrogen Work Plan" Draft August 7, 2006, REV August 29, 2006 at page 500999: "The committee will number at least five individuals as follows: ..."; See also Liu email to Weinman, 08/07/2006, pages 400323 to 400324: "I would like to establish a subcommittee of the HSDC board ...I envision a subcommittee of 5 with 2 from the HSDC board and 3 private sector members with experience in assessing business plans and proposals."

[20] See Maurice Kaya's "Renewable Hydrogen Program Work Plan", Draft August 7, 2006, REV August 29, 2006, page 3 (page 3, Exhibit 29, committee report): "the committee under HSDC to provide advice to DBEDT..."

[21] See Maurice Kaya's "Renewable Hydrogen Program Work Plan", Draft August 7, 2006, REV August 29, 2006, page 3 (page 3, Exhibit 29, committee report): "committee under HSDC...will not be charged with making any decisions, but will provide recommendations to the DBEDT Director..."; See also "Liu email to Weinman, 8/30/2006, page 400320: "The program may need to be 'housed' within HSDC".

1. Mr. Maurice Kaya's notes from the hydrogen fund "organizational meeting," much referred to by the committee chair as "evidence" of preference for HiBEAM, quotes Director Liu: "To keep it competitive and transparent, maybe HSDC should do an open solicitation for the RHP Partnership."[22]

2. Email from Mr. Maurice Kaya to Ms. Pricilla Thompson, dated 09/25/2006, stating: "Ted feels that the program can be organized by having HSDC go out and competitively select an NGO to run the program, at which time HiBeam will also determine how to submit a formal proposal."[23]

Indeed, these references in the committee report's own exhibits show there was no pre-determined result. HiBEAM was expected to submit a formal proposal to a competitive RFP.

These preliminary, brainstorming discussions occurred in August 2006. Once it was decided in October 2006 that a third party external contract manager structure would be sought, the RFP route was selected to maximize proposals. No outside party was involved in the formation of the RFP.

The committee report offers no evidence that any party was favored in RFP process. Rather, the committee report cites the following emails:

1. Email I sent to Mr. Weinman dated October 11, 2006[24], a full four months before the RFP was actually issued. This email raises the question: If Mr. Weinman was involved in the formulation of the RFP, why did he need to be advised that an RFP would be issued?

   Moreover, the committee report conveniently ignores that I instructed staff to ensure that there was broad notification of the RFP so as to obtain as many competitive proposals as possible. I personally offered over 15 names of potential bidders to be contacted.[25]

   The committee report also conveniently ignores that I personally notified other parties to make proposals, including emails[26] and telephone calls[27] to encourage Kolohala Holding to make a proposal on the RFP.

2. Email from Mr. Weinman to me dated March 14, 2007[28]. The committee report conveniently ignores the fact that I did not initiate or solicit this email. Moreover, I did not even respond to this email.

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[22] Committee report's Exhibit 25.
[23] Committee report's Exhibit 120, page 500976
[24] Committee Exh 169 (page 400751) 10/11/06 email from Liu to Weinman
[25] Liu email to Chock, 1/23/07, page 400547
[26] Liu email to Pfeffer, 10/2/2006, page 400362
[27] Pfeffer email to Liu, 3/6/2007, page 400361

The committee report also ignores that during the period of the RFP, I received and responded to multiple emails from Kolohala Holdings[29] and received unsolicited emails from other proposers[30] regarding the RFP.

The committee report falls far short of substantiating that Mr. Weinman was favored during the RFP.

The committee report's sub-finding 6 alleges: "*The Director deviated from standard procurement practice by taking DBEDT's contracts office off the hydrogen RFP, instructing them not to give advice unless asked, and replacing it with DBEDT's strategic industry division.*"

The fact is that I made this staffing judgment based upon my understanding of the relative workload of contracts and of SID at that time. As early as December 2006, I was concerned at the delays facing this initiative.[31]

DBEDT's contracts office was not "taken off" the RFP in March 2007. Rather, I asked SID to take the lead on the project in an effort to move it as expeditiously as possible. The contracts office was tasked to provide support and advice.

Numerous documents in March and beyond reflect a continuing effort to solicit advice from and involvement by the contracts office.[32] At one point Ms. Harada specifically told Mr. Kaya that she was too busy to assist in the BAFO process. Mr. Kaya acknowledges her "time commitments and work priorities" but continued to ask for her guidance and "feedback."[33] When he received no response, Mr. Kaya followed up, asking for someone else from contracts to participate because "it is critical to have a representative of the contracts office at these interviews in the function as an advisor to the team, and to answer any procedural questions that may come up from the offerors."[34]

The Committee report's sub-findings 7 & 8 allege: *"Director claims past practice allowed him to make final selection among the qualified offerors" and "Since 1997, DBEDT's documented past practices for the RFP process have been that Director has final approval authority, but does not have the authority to select from among qualified bidders."*

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[28] Committee Exh 43; 3/14/07 email from Weinman to Liu

[29] Pfeffer email to Liu, 5/23/07, page 400349 and Pfeffer email to Liu, 3/06/07, page 400361

[30] Guerin-Beresini email to Liu, 6/23/2007, page 400284

[31] I testified to the committee that during the Legislative Session of 2006, legislators criticized DBEDT for not having initiated the hydrogen program. See also Liu email to Weinman, 12/17/06, page 400746.

[32] Examples include page 22589 (3/12/07); pages 20628, 22085, 22093, 22642, 22652, 400597 (3/15/07); page 22036 (3/27/7); 20311 (4/17/07); page 20624 (4/23/07); page 21614 (5/8/07), page 400540 (5/10/07), page 20302 (5/29/07), page 21077 (5/30/07), page 400188 (6/5/07), page 500579 (6/13/07), pages 400170, 400175, 400181 (6/15/07),

[33] Kaya email to Harada, page 20292 (6/21/07).

[34] Kaya email to Kitamura, page 20292 (6/22/07).

It is undisputed that a number of persons advised me that, according to the procurement code and past DBEDT practice, the Director had the authority to make the final selection from among qualified bidders. It is also undisputed that no one told me anything to the contrary. Addendum 2 to the RFP specifically stated in writing what we all believed and understood to be the selection process:

> 16. Q. Please describe the proposal evaluation process with terms, feedback.
> A. Ms. Harada stated that each member of the Evaluation Committee will independently evaluate the proposals based on the criteria contained in pages 16 and 17 of the RFP. Based on the total score of each proposal, the Committee will create a short list and possibly meet each company on the list individually to get clarification. Then the Committee will offer a date for the proposers to submit a best and final offer (BAFO). Such offer will go through the evaluation process again and the DBEDT director will have the ultimate authority to make the final selection.[35]

Although it turned out that Ms. Harada's exact words at the meeting were not accurately transcribed, there is no contention or evidence that I knew or was aware of this error in transcription. I was explicitly "not in the loop re Addendum 2."[36] Moreover, Ms. Harada herself reviewed and approved the written Addendum 2 without objection.[37]

The crux of the entire matter under investigation, however, is that at the time of my selection decision made on August 6 and 7, 2007, I operated upon this belief and understanding that the Director had the authority to make the selection. There is simply no evidence that I operated on any other basis than this good faith belief and understanding that I had the authority to make the selection.

I based this good faith belief and understanding on:

1. My reading and interpretation of the Procurement Code (see Discussion, Part II above).

2. Reliance on specific advice sought and received from professionals I was justified in relying on (see Discussion, Part I above).

3. The exact same understanding of all three members of the Evaluation Committee, as testified by each member and as further evidenced by the committee's

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[35] Addendum 2, page 22258 (3/15/07).
[36] Thompson email to Kaya, page 22652 (3/15/07).
[37] Thompson email to Harada, page 22642 (3/15/07) and Harada email to Thompson, page 22652 (3/15/07). Ms. Harada now testifies that her approval was not of the substance of Addendum No. 2. However, at the time the RFP, this was not notified to any of the parties involved and reliance, at that time, on the substance contained in Addendum No. 2 was reasonable.

> memorandum to the Director, dated July 31, 2007, "inviting"[38] me to make the selection.

I was not at DBEDT in 1997; there is no evidence that I even knew of the existence of the 1997 audit cited by the committee report.

The September 14, 2006, memorandum on procurement deemed by the committee report to be "most compelling" was, as noted by the report itself, sent to "division heads and administrators of attached agencies."[39] The memorandum was not sent to the Director.

The committee report's sub-finding 9 alleges: *"The Hydrogen RFP had a large number of irregularities and is only known RFP with strong pattern of actions inconsistent with DBEDT procurement practices."*

The hydrogen RFP dealt with an emerging area of technical development and expertise. It also set out a process of third party fund and financial management not before undertaken by the state's energy program. It was a complicated RFP, unique in DBEDT's history.

The committee's 56 hours of testimony turned up many after-the-fact second guessing and speculation and statements made with the benefit of hindsight. The committee chair also picked at unrelated and information taken out of context to attack a very complicated RFP process.

The fact is, at the time of the actions under review by the committee, I and the other professionals involved acted on our good faith belief and understanding. The committee's hearings only repeated, in accusatory, unfair and conclusory tones, and with wearying, wholly unproductive repetition, something that was never disputed: that my interpretation based on my reading of the law, regulations, and contract manual and based on the unanimous advice of everyone who ever spoke to me on the subject, was in retrospect incorrect.

The hearings covered and the committee report contains much speculation as to the sequence of RFP selection events. I stand by my written testimony provided to the committee[40] as follows:

> "On July 31, 2007, the evaluation committee, together with Ken Kitamura, met with me to report on their findings. As testified by all three members of the evaluation committee, no recommendation of a final selection was made; this selection was explicitly left with the Procurement Officer.
>
> "July 31, 2007, to August 2, 2007, I gave much thought to the final selection.

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[38] *Quote from Senator Ihara during Liu's testimony*
[39] Committee report, page 12 of 33
[40] Testimony of Director Liu, March 13, 2008, pages 11 to 13, committee report Exhibit 190.

"On August 3, 2007, I had a meeting with Maurice Kaya where I advised him on my preliminary decision selecting H2Energy. See email at 400572.[41]

"After that meeting on August 3, 2007, Maurice Kaya instructed staff to prepare the selection memorandum and notification letters. See email at 400572.

"From August 3, 2007 to August 6, 2007, I worked on-and-off on the August 6, 2007, selection justification memorandum. As this was my decision, I personally drafted, typed and revised the memorandum.

"On August 3, 2007, pursuant to Maurice Kaya's instructions, John Tantlinger sent me drafts of the notification letters and I provided comments thereon. In the same communication with John Tantlinger, I was advised that the "evaluation committee memo" was being processed and sent to me through the departmental Contracts Office. See email at 400570.

"On August 5, 2007, I received comments and feedback from Maurice Kaya to my comments on the August 3, 2007, draft of the notification letters. See email at 400593.

"On August 6, 2007, I received communications from John Tantlinger that the notification letters and the "evaluation committee memo" had been finalized and were being delivered to the Director's Office. See email at 400566.

"On August 6, 2007, anticipating the "evaluation committee memo," I finalized and signed the August 6, 2007, selection justification memorandum.

"On August 7, 2007, I received the "evaluation committee memo" from Maurice Kaya dated July 31, 2007. Please note that the Inter-departmental Routing Slip is dated 8/6/07 and references "RFP Selection Memo". I signed said RFP Selection Memo in the "Director's Selection" line provided therein. On the Inter-departmental Routing Slip, I directed that the original be sent back to Maurice Kaya with a copy to ASO (Ken Kitamura). My assistant, Dawn, corrected the routing to ensure that the original RFP Selection Memo was sent to ASO/Contracts.

"On or about August 7, 2007, I received the final hard copies of the notification letters, dated August 10, 2007, and I signed the notification letters on August 8, 2007. Those were then routed to ASO/Contracts for processing.

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[41] The committee report fails to cite a shred of evidence for its ambiguous statement that the Director selected H2 Energy "within a day following his meeting with the evaluation committee (August 1, 2007)." Committee report page 14.

"Upon immediately upon completing the foregoing, I recall asking Eileen Harada whether the final RFP selection process had been completed. I recall her indicating that upon my signature that it had.

"It is important to note that the key operative documents are the RFP Selection Memo and the notification letters. Once those have been executed, the RFP selection has been made. Those were signed in due course and returned to ASO/Contracts.

"I believed that I attached the August 6, 2007, selection justification memorandum to the RFP Selection Memo, dated July 31, 2007. Regardless, the original of the August 6, 2007, selection justification memorandum was kept in my own working file."

As for the basis of my final decision and selection, I stand by my written testimony provided to the committee[42] as follows:

"Much has been made of my justification, as the Procurement Officer, of H2Energy, contained in the memorandum to files, dated August 6, 2007, regarding "Renewable Hydrogen consultant/manager selection." I have consistently testified that I believed at that time that my selection was based on more general criteria set forth in the RFP.

"In my final selection of a proposer, I intentionally decided not to re-evaluate based on the specific technical criteria used by the evaluation committee members. It was clear that a competent and experienced evaluation committee had utilized that set of technical criteria and resulted in a "competitive range". The technical evaluation had been completed.

"Instead, I intentionally decided to evaluate the proposers on the bases of achieving the state's strategic interests in issuing the RFP. As I testified at the September 4, 2007, hearing, my review and evaluation focused on which proposer was best positioned to deliver the results expected by the RFP. As explicitly stated in the August 6, 2007, memorandum, "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." The facts I used (for example, teamwork, technical competence) were as reported to me by the members of the evaluation committee at the July 31, 2007, meeting.

"As I have consistently testified, I believe this more strategic criterion is based on requirements within the "four corners" of the RFP. Basis for this includes:

- On page 4 and page 14 of the RFP, there is the express statement of the DBEDT's and State's overarching objective: ***"ultimate objective to maximize***

[42] Testimony of Director Liu, March 13, 2008, committee report Exhibit 190.

the prospects of a viable and growing advanced energy technology sector in Hawaii."

- The definition of "Quality," one of the evaluation criteria categories, is "achieving the strategic energy needs of the state and ***the potential for near- and long-term support for private development."***
- Page 9 of the RFP references "innovative management approaches with effective professional investment and ***technical monitoring and support***..."
- Page 13 of the RFP specifies:
  - "high degree of emphasis on innovative management approaches that are supported by or ***can access proven experience in relevant scientific and technical analysis*** and technology investments"; and
  - that "***continued monitoring and venture support for the investment will be necessary.***"
- Page 14 of the RFP refers to "organizational structure that ***best meets the above-stated preferences and objectives, including*** ... ***venture mentoring and support*** ... implementation of Program-directed activities ... ***review, analysis and assessment of proposals*** ..."
- Addendum 2 to the RFP specifies ***innovative ideas, proven experience, and scientific and technical analysis in technology investments*** to maximize the state's ability to achieve a viable and growing advanced energy technology sector in Hawaii..."

"The factors in the August 6, 2007, memorandum's H/M/L matrix, "Strength of Point of Interface (POI) with the State;" "Senior executive back-up/support for POC;" Local resources for implementation;" "Local presence;" "Federal institutional contacts;" and "Delivery of additional capital," were all relevant to the "ability to deliver" and "short term positive impact."

"The foregoing criteria employed in my August 6, 2007, selection justification memorandum, all have a basis in the RFP. It was, however, an intentionally different set of criteria than that employed by the evaluation committee."

The hearings brought forward much after-the fact second guessing and speculation. The fact is that I and the other professionals at the time of the actions under review acted in good faith based on our belief and understanding at the time. There is no evidence to the contrary.

The Committee report's sub-findings 10 & 11 allege: *"The Director sought to cancel the hydrogen RFP rather than award the hydrogen fund management contract to the highest ranked bidder as directed by the state procurement office" and "The Director continued to resist execution of the contract to Kolohala as ordered by the State's chief procurement officer, and it was and only after the adoption of Senate Resolution No. 2, calling for a special investigation of the hydrogen RFP, that DBEDT awarded the awarded the contract to Kolohala, as required."*

The fact is that I rescinded the selection of H2Energy on October 16, 2007,[43] and cancelled the award letter to H2Energy on October 29, 2007.[44]

Rather than the intentional delays as alleged by the committee's report, the record shows an exchange of memoranda between myself and SPO seeking clarifications. The SPO testified that this was his interpretation of the intention behind these memoranda.[45]

As I testified before the committee, there were also personal circumstances in the fall of 2007 which caused me to be absent from work.

I again firmly state that it was within my administrative and management authority to consider changes in circumstances in considering whether to take the RFP forward.

The Committee report's second principal finding, that *"There is Evidence that the Director's Top Management Team (Kitamura, Kaya, and Tantlinger) Knew that the Procurement Code Required Director to Approve the Selection Committee's Highest Ranked Bidder Rather than Allowing the Director to Select from a List of Qualified Bidders"*, is not supported by facts or evidence.

First, there was no "Selection Committee."[46] There was an "Evaluation Committee."

The committee's findings, again, rely on after-the-fact speculation. I believe that Mr. Kitamura, Mr. Kaya and Dr. Tantlinger acted upon their good faith belief and understanding at the time of the actions under review that the Director had authority to make the selection. They so testified under oath. It is important to note that a third member of the evaluation committee, a long-standing federal professional civil servant who had just recently been posted to Hawai'i, held the exact same view of the Director's authority to select. He, too, testified to the committee under oath.[47] Speculation after the fact to the contrary is simply that – speculation after the fact.

There is absolutely no evidence that these dedicated, hard working, and experienced civil servants did anything wrong. Allegations that they deliberately lied to the committee are a sad example of the callous attempt to smear innocent persons in a desperate attempt to validate predetermined conclusions and justify the horrendous waste of time and money expended by this "investigation."

The hearings served only to re-hash, in accusatory and conclusory tones, that Mr. Kitamura, Mr. Kaya and Dr. Tantlinger had an erroneous belief and understanding. There is no evidence that they knowingly or intentionally violated the procurement code.

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[43] Page 10231.
[44] Page 400079.
[45] Testimony of Aaron Fujioka, 3/22/07.
[46] The committee report is replete with errors such as this one; it is not the function of this written statement to correct each and every one of these errors.
[47] Testimony of William Parks (3/7/08).

The Committee report's third principal finding is that *"The Evaluation Committee Disregarded their Own Scoring and Evaluation by Submitting a List of Three Qualified Bidders to the Director for his Selection".*

I believe that at all times throughout the RFP process the members of the evaluation committee acted upon the good faith belief and understanding that the Director had the authority to select from the final proposers.

The evaluation committee did not "disregard their own scoring and evaluation." Rather, as each member testified under oath before the committee, it was exactly on the basis of his own scoring and evaluation that each member of the committee and the committee as a whole concluded that the scores were in a "competitive range." The committee chair may not like this result, but it was nevertheless the result.

The committee report selectively ignores hours of testimony by each member of the evaluation committee. Each member took the committee through his individual evaluation process, scoring and conclusion. Each member testified under oath how he based his and the committee's conclusion on his own score and evaluation.

There is not one shred of evidence that the members of the evaluation committee knowingly and intentionally did anything wrong in submitting a list of three qualified bidders to the Director.[48]

The Committee report's fourth principal finding that *"There is a Reasonable Belief and the Director's Actions Constitute a Knowing and Intentional Violation of the Procurement Code and Rules By the Director and his Top Management Team (Kitamura, Kaya, and Tantlinger)"* is not supported by the facts and evidence.

This finding makes no sense to begin with. The "Director's Actions" neither can nor should in any way be imputed to the "Top Management Team" as to their "Knowing and Intentional Violation of the Procurement Code."

There is no evidence that I knowingly and intentionally violated the procurement code.[49] Rather, the committee's report seeks to jam together unrelated and out-of-context facts and after-the-fact speculation and witness statements, many made in the hostile and unfair environment into a "reasonable belief."

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[48] During the hearing, the committee chair made much of an email from Dr. Tantlinger to Priscilla Thompson, dated 02/27/2007 (Exhibit 148) stating that "the eval committee recommendation can be written such that it provides some flexibility..." This email is nothing more than evidence that Dr. Tantlinger believed that there was flexibility in the selection. In the subject RFP, Dr. Tantlinger merely acted on that belief. That the belief was, in retrospect, incorrect does not provide any evidence that Dr. Tantlinger at that time he held the belief knowingly and intentionally did anything wrong.

[49] The reference to "reasonable belief" admits in so many words that there is not sufficient evidence to substantiate this finding.

The committee report fails to lay out evidence for the serious charge that the Director and four senior officials or former officials of DBEDT knowingly broke the law and then lied and conspired to cover it up. The committee report instead resorts to what it calls "*representative of the facts which justify reasonable belief.*"[50] I refute each such "representative of the facts" as follows:

First, the committee repeats its allegations relating to Mr. Barry Weinman. As explained above, there is no basis for this allegation and no evidence to substantiate it. See pages 7 to 11 above.

Second, the committee report again cites the role of DBEDT's contract office in the RFP. As explained above, I did not "remove[d]" DBEDT's contract office. The contracts office was asked to support SID, which was asked to take the lead. See page 11 above.

Third, the committee report re-visits the issue of the timing of my selection of H2E, and erroneously misstates that the Director made "the selection of H2Energy one day after his meeting... and five days prior to his receipt of the evaluation committee's recommendation."[51] As explained above, page 14, I made the selection by signing the "*Director's Selection*" *section of the evaluation committee memorandum received on* August 7, 2007. Regardless, when that selection memorandum was signed is irrelevant to the determination of whether I acted in good faith held the belief and understanding on August 7, 2007, that I had the authority to make the selection.

Fourth, the committee report alleges that the Director "misstated the historical procurement practice at DBEDT".[52] Again it is undisputed that my understanding at the time was incorrect, in retrospect. The seemingly endless repetition of this point at the hearings and now in the committee's report does not constitute evidence or argument that that I knowingly and intentionally made misstatements or acted improperly.

Fifth, the committee report makes reference to an email from Mr. Ken Kitamura dated August 31, 2007, as a "record" that I and Mr. Kitamura knew there was no substantiation for the position that the Director had the ability to select."[53] This email from me requesting information was made weeks after my selection on August 7, 2007. This email is not evidence that on or prior to August 7, 2007, I held anything but a good faith belief and understanding that I had the authority to make the selection.

The committee, in effect, argues that the mere request for information for a belief or understanding shows that this belief or understanding is insincere. By this absurd logic, the committee's own months-long (and ultimately unsuccessful) after-the fact effort to confirm its preconceived belief that the Director lied, "proves" that the committee's belief is knowingly false.

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[50] Committee Report, page 24 of 33
[51] Committee Report, page 25 of 33
[52] Committee Report, page 25 of 33
[53] Committee Report, page 27 of 33

Sixth, the committee report refers to the September 4, 2007, memorandum from me to SPO[54] in which it is stated that the procurement officer is to "take into consideration the evaluation committee's recommendation, including its numerical scores."[55] In fact, I as the procurement officer, did so. But, as noted in the memorandum (again, selectively not cited by the committee report) the quoted sentence goes on to say that evaluation committee information "does not bind the departmental procurement officer."

In short, this part of the committee report merely reaffirms my statement that my actions were taken in a good faith belief and understanding that these actions were correct.

Seventh, the committee report quotes the same September 4, 2007, memorandum with respect to the "Director's justification."[56] This document was placed in the RFP contracts file. The record does show that I may have forwarded the document later than I possibly should have. However, lateness is not evidence of a knowing or intentional violation of the Procurement Code.

Finally, the committee report alleges that I did not comply with the CPO's order contained in the SPO's final determinations memorandum dated September 25, 2007, "which would have resulted in the rescission of the award to H2Energy."[57] This assertion is simply false. On October 16, 2007, and October 29, 2007, I rescinded both the award to H2Energy and the non-award to Kolohala as directed.[58] As stated above, I believe I was within my authority in considering changes in circumstances in determining the way forward for the hydrogen program and the hydrogen investment fund.[59] Regardless, these activities taking place after the August 7, 2007, selection decision do not provide any evidence of any knowing or intentional violation of the Procurement Code at the time of the selection.

The committee report alleges that "the members of the evaluation committee knowingly ignored their numerical scores of the BAFOs."[60] Again, this is simply false and disregards the sworn testimony of all involved. As noted above, the evaluation committee members did not "ignore" the numerical scores. Instead, they concluded that based on these scores "all three offerors" were in the competitive range" and the Director should make the final selection.[61]

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[54] It is interesting to note that both the current SPO and the former SPO called by the committee indicated that these memoranda from the Director prior to the SPO's final determination memorandum of September 25, 2007, evidenced a normal back-and-forth communications seeking clarifications.
[55] Committee Report, page 27 of 33
[56] Committee Report, page 28 of 33
[57] Committee Report, page 28 of 33
[58] Liu letter to Kolohala, page 400080 (10/29/07); Liu letter to H2 Energy, page 400081 (10/29/07). See fns. 38 and 39.
[59] Indeed, the recent activity and progress brought about by the partnership with the U.S. Department of Energy validate the wisdom of considering that partnership as potentially part of the relationship.
[60] Committee Report, page 28 of 33
[61] Evaluation Committee findings, Exhibit 3 (7/31/7).

Part IV. The committee's constitution was flawed from the start and repeatedly failed to follow applicable law and its own rules thereby creating a fundamentally unfair process

1. The constitution of the committee was flawed from its inception.

Senate Resolution 2, drafted and introduced solely by the committee chair, contains a fundamental flaw that renders the committee's entire process nugatory from its beginning.

The law governing special investigative committees of the type established by Senate Resolution 2 is stated in Haw. Rev. Stat. chapter 21. Haw. Rev. Stat. § 21-3(b) (1993) states:

> (b) The concurrent or single house resolution or statute establishing an investigating committee shall state the committee's purposes, powers, duties and duration, the subject matter and scope of its investigatory authority, and the number of its members.

Emphasis added. By law, the minimum number of members on such a committee is five. Haw. Rev. Stat. § 21-6(a) (1993) ("An investigating committee shall consist of not less than five members.")

Unfortunately the committee chair drafted Senate Resolution No. 2 in direct violation of this statute. The resolution provides that the investigating committee is to be composed of "four members, including the Chair." The exact language of the resolution is:

> BE IT FURTHER RESOLVED that the membership of the Senate special investigative committee to investigate the selection of a manager for the hydrogen investment capital special fund be composed of four members, including the Chair,[62] to be appointed by the President of the Senate

The president of the Senate in appointing members pursuant to the resolution appears to have looked at chapter 21 more carefully than did the chair when she drafted the resolution. In compliance with section 21-6(a), the president appointed the statutorily required five members. Unfortunately by doing so, she came into direct conflict with the plain language of the resolution and section 21-3(b).

Through my attorney (a Deputy Attorney General appointed by the Attorney General to represent me), I pointed out this problem to the committee at its organizational meeting on February 21, 2008. The committee chair explained that the issue had previously been discussed, and it had been concluded that the language in the resolution "composed of four

[62] The resolution specifies that the committee chair was to be the Vice Chair of the Senate Committee on Tourism and Government Operations – Senator Mercado-Kim.

members, including the Chair" would be interpreted to mean "composed of four members, plus the Chair." This interpretation flies in the face of the written document.

My attorney noted this fundamental flaw in a letter to the committee chair (copy to the Senate president) dated February 26, 2008. The Attorney General also pointed out the problem in a letter dated March 11, 2008.

That the committee chair chose to ignore this legal requirement is more troubling in the context of how the hearings themselves were conducted in violation of the committee's own rules.

2. By continuing to violate its own rules during the hearings, the committee created a fundamentally unfair process rendering the findings of the committee report faulty and unreliable.

As the hearings progressed, it became increasingly clear that the committee chair had no intention of complying with applicable law or the committee's own rules, at least where the law and rules impeded the achievement of a predetermined end.

First, Haw. Rev. Stat. § 21-10(b) (1993) provides that hearings may not be televised, filmed, or broadcast except as approved by majority vote of all members. That was never done.[63]

Second, Rule 2.4(d) requires that persons served with subpoenas also be served with "a list or copies of the principal documents about which that witness may be questioned." Each subpoena issued by the committee restated this requirement. Indeed each subpoena asserted that the requirement was met: "Together with this subpoena, you are being served with . . . a list of or copies of the principal documents about which you may be questioned." But this assertion was outright false.

Despite being repeatedly advised of this breach of the rules, the committee chair steadfastly refused to provide any witnesses with documents in advance of their testimony. This illegal procedure prevented witnesses from reviewing the documents in advance so that they might completely and fully respond to questions about the documents.[64] Instead, at each hearing material documents were produced during witness examinations one at a time without prior identification.

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[63] I did not and do not object to televising the hearings. Doing so (unlike other violations) is not fundamentally unfair. The violation is noted for purposes of completeness.

[64] During my testimony, the chair attempted to justify this illegal procedure by stating the witnesses had already seen the documents. First, this was simply not true. The committee had numerous documents other than those provided by DBEDT and steadfastly refused to provide copies of these other documents. Second, DBEDT provided the committee with over 21,000 pages of documents. Previous access to this entire mass of documents in no way substitutes for being provided with "the principal documents about which that witness may be questioned."

The importance of this violation of the committee's own rules cannot be overstated. Over ***twenty-one thousand (21,000) pages of documents***[65] were submitted and were potentially the subject of the committee's inquiry.

Documents were presented to witnesses relating to events stretching sometimes over two years ago. Without the opportunity of seeing these documents in advance, the natural limitations of human memory placed the witnesses at an unfair disadvantage.

Out of the ***twenty-one thousand (21,000) pages of documents*** submitted to the committee, individual documents were presented haphazardly and wholly out of context. In some cases, incomplete documents were presented. Other documents that could put one document presented into context were omitted.

Without seeing these documents in advance, this unfair process prevented witnesses from preparing and from fully explaining the document presented. Without the opportunity of knowing the documents in advance, witnesses were deprived of the opportunity to offer other documents that more fully and properly established its context.

To compound this violation, documents presented often were not identified or described for the record. This prevented members of the public, other witnesses, and counsel from following the questions and from reviewing the documents to present valid explanations. The process established employed not only violated basic mores of fairness to witnesses, it also sacrificed the opportunity to gain a full understanding of the facts and circumstances relating to material documents.

The committee's failure to comply with its own rules deprived witness of the opportunity to adequately prepare and resulted in a fundamentally unfair process. This fundamentally unfair process resulted in misleading conclusions. These misleading conclusions are reflected in the committee report.

Third, witnesses were repeatedly questioned by multiple committee members at the same time in violation of Rule 2.6(b):

> To avoid confusing a witness by being asked questions simultaneously by members, the chair shall preside at all hearings of the committee and shall conduct the examination of witnesses or supervise the examination by other members of the committee, the committee's counsel, or members of the committee's staff who are so authorized.

Anyone watching the proceedings cannot help but be struck by the ***over fifty-six (56) hours*** of disorganized, rambling, repetitive and overlapping questions asked by multiple

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[65] See committee report, page 3 of 33.

committee members in violation of this rule. Again, the effect of this violation was to violate fundamental fairness and impede orderly discovery of the facts.

Fourth, Rule 2.4(a) requires all notices of meetings to be in writing. The notice is to include "a brief statement of the subject matter of the hearing, and the date, time, and place of the meeting." Rule 2.4(b) requires notice to members of the committee be given at least three days in advance. Rule 2.4(c) requires five days notice to the witness. Rule 2.4(e) requires that "[n]otice of public hearings [including subject matter of hearing per Rule 2.4(a)] shall be given by publicly posting the notice at least three days before any public hearing." Each of these rules allows the notice period to be waived by the chair. Subsection (c) requires the witness to agree to waiver. Subsection (e) requires the waiver to be "for good cause shown."

On at least several occasions, the committee violated these rules by adding and questioning an additional witness not properly noticed. No waiver was discussed on the record. The witness did not agree on the record. No good cause was shown.[66]

Part VI. The committee chair's public statements show that the committee's decisions were a foregone conclusion, reached before the hearings even began.

As explained in my testimony before the committee on March 13, 2008, the committee chair has an inexplicable and unfortunate history of leveling accusations at me personally since the very first time I ever met her in February of 2003.[67]

In this investigation, the committee chair drafted and was the sole introducer of Senate Resolution 2. No hearings whatsoever were held on this resolution. No public notice was posted that the Senate was taking up this resolution. On the floor of the Senate, discussions only took place in caucus, behind closed doors. The process predetermined that there would be an "investigative committee" and predetermined its chair. These actions are closer to a conspiratorial effort than anything that can alleged of DBEDT.

Thereafter, the committee chair went public with conclusions in her Spring 2008 Newsletter. In that wholly political publication, the committee chair did not present matters therein as allegations to be explored or investigated. Instead, before the committee hearings even started, the allegations were stated as proven fact:

> In early September, at the first hearing, the TSG committee discovered that a contract for the State of Hawaii's $8.7 million Hydrogen Fund was awarded to a firm that a selection committee rated to be the third best qualified bidder

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[66] All of these violations were pointed out to the committee in writing. None of the violations were remedied or stopped.

[67] I moved to Hawaii in 2000. I never had any appearances before the City Council when the chair was a Council member. I had no dealings with the Legislature or any legislators prior to February, 2003. The chair and I had not, to my knowledge even crossed paths or ever met before February, 2003.

> instead of a firm that had been numerically rated to be the first best qualified bidder in the Request for Proposal (RFP) as required by law. The committee learned that Ted Liu, the Director of DBEDT selected the third rated firm with whom he has a personal relationship.
>
> * * *
>
> These issues are only the latest in recent years where the current administration's department directors awarded contracts that did not comply or were in violation of the State's Procurement Statute.

On February 19, 2008, two days before the committee's first organizational meeting, the committee chair published an opinion piece in the Honolulu Advertiser. The article referred to and presumed "ongoing problems" in and "serious questions" about DBEDT.

On May 27, 2008, the committee chair wrote a letter to the editor published in the Honolulu Advertiser. In this letter, written before the conclusion of the committee process, the chair wrote:

> [The Governor] failed to mention that the Senate voted unanimously to authorize the investigation after Mr. Liu's months-long refusal to comply with the state procurement officer's order to rescind his award of the contract to his friend, Barry Weinman, and instead give it to the rightful highest-ranked bidder, Kolohala.
>
> The governor also neglected to mention that Barry Weinman has been a significant contributor to her campaign. Records show that Barry and Virginia Weinman contributed more than $100,000 to her, Lt. Gov. Duke Aiona, a handful of other candidates and the Republican Party.
>
> She glosses over the fact that Mr. Liu's supposed error clearly violated even the most basis tenets of the procurement code.

The committee chair's public political statements tainted the proceedings from the start.

No true effort at a full and fair inquiry and an independent determination of the facts would appoint the chief accuser as judge and jury – and at that a chief accuser who has publicly announced a pre-conclusion. Doing so violates fundamental principle of fairness and could not conceivably be tolerated in a judicial setting or, indeed, any setting in which truth was the actual goal.

It speaks volumes that this unfortunate charade was allowed to take place. Given the committee chair's demonstrated prejudgment of the issues, it is disappointing but not surprising that the committee's report reflects the exact conclusions stated by the committee chair publicly even before the hearings even began.

Conclusion

For the foregoing reasons, I again unequivocally state that I did not knowingly or intentionally violate the State's procurement code. I further unequivocally state that at all the times under review by the committee, I acted in good faith on the basis of my belief and understanding of the procurement code.

The committee report unsuccessfully attempts to jam together certain after-the-fact second-guessing and distortions; analyses made only with the benefit of hindsight; spurious and irrelevant allegations; unrelated facts and events taken out of context; witness recollections extracted under unfair circumstances; and "testimony" based on speculation and hearsay. None of this rises to level of evidence of a knowing or intentional violation of the procurement code.

Because of a failure to comply with the laws governing its formation, the committee's establishment was flawed from the beginning. Furthermore, because the committee did not comply with its own rules, the proceedings were fundamentally unfair to the witnesses and sacrificed any real search for the truth.

It is sad that this entire ugly episode occurred because of the desire of a self-appointed committee chair to achieve a pre-determined conclusion. In order to do so, the power of government authority was used to conduct hearings. And now, the veil of government authority is sought for a report of findings that are slanted to conform to a view of a conspiracy that simply did not occur. It seems the only "conspiracy" here is the use of a legislative position of power to create and use an investigatory committee to support a predetermined end. It is also sad and unfortunate for the people of the State of Hawai'i that the genesis of these proceedings was the committee chair's longstanding animus towards one person. Our democracy deserves better.

In short, the entire process, involving hundreds of hours of effort by the legislative and executive branches, was hopelessly flawed, faulty and unreliable. The committee report is likewise.

I did not knowingly or intentionally violate the State's procurement code.

Theodore E. Liu
Director, Department of Business,
Economic Development, and Tourism
DATE: September 30, 2008