

Honolulu, Hawaii

OCT 14 2008

RE: S.R. No. 2 (2008)

Honorable Colleen Hanabusa
President of the Senate
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

Madam:

Your Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award, which was established pursuant to S.R. No. 2 (2008), entitled:

"SENATE RESOLUTION ESTABLISHING A SENATE SPECIAL INVESTIGATIVE COMMITTEE TO CONDUCT AN INVESTIGATION OF THE AWARD OF A CONTRACT BY THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM TO H2 ENERGY LLC TO MANAGE THE HYDROGEN INVESTMENT CAPITAL SPECIAL FUND IN 2007, WHICH WAS SUBSEQUENTLY ORDERED TO BE RESCINDED,"

begs leave to report as follows:

The purpose of this Committee was to investigate the award of a contract by the Department of Business, Economic Development, and Tourism (DBEDT) to H2 Energy LLC to manage the Hydrogen Investment Capital Special Fund in 2007, which was subsequently ordered to be rescinded, and to submit its written findings to the Legislature prior to the convening of the Regular Session of 2009.

In order to fulfill its purpose your Committee conducted thirteen hearings lasting over a total of fifty-six hours, received testimony from twenty-two witnesses, and received in excess of twenty-one thousand pages of documents in response to subpoenas. Based on its investigation, your Committee has prepared its report which sets forth its findings, conclusions, and recommendations. Your Committee's findings are based entirely on the evidentiary record before it and its conclusions are based upon the clear weight of the evidence.



The Committee's findings and conclusions that are set forth in its report include:

- (1) 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;
- (2) That the Director had a pre-existing personal relationship with Barry Weinman which he concealed upon questioning by the Committee;
- (3) 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);
- (4) 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 requests for proposals;
- (5) 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;
- (6) 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;
- (7) That even after being directed by the State Procurement Office to award the Hydrogen Fund Management Contract to the top-ranked bidder, the Director continued to resist making the award and instead sought to cancel the entire RFP;



- (8) 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;
- (9) 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";
- (10) That the Hydrogen Fund RFP Evaluation Committee, which included two persons from 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 top-ranked bidder for approval; and
- (11) 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.

Based upon its recommendations and conclusions, your Committee has set forth its recommendations in its report, which are summarized as follows:

- (1) 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;
- (2) 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;

- (3) 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;
- (4) 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;
- (5) That DBEDT adopt comprehensive standardized procedures and forms to ensure its compliance with the state procurement code and rules;
- (6) Finally, that DBEDT report back to the Legislature, no later than 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.

Your Committee notes that there was a legitimate basis for this investigation as evidenced by the Senate's unanimous adoption of S.R. No. 2 (2008). Your Committee further notes that it took its responsibility to investigate this procurement very seriously and, despite the attempts of several parties to impede the discovery of the relevant facts, your Committee uncovered several areas that it finds very troubling. These troubling aspects of this procurement are fully described in the attached report which is unanimously adopted by your Committee and are the basis of the recommendations set forth therein.



Record of Votes
Senate Investigative Committee on the
Hydrogen Investment Capital Special Fund
Management Contract Award

The Committee is considering the issuance of a subpoena.
If so, then the subpoena shall be issued to: _____

The Committee is considering the issuance of a subpoena duces tecum.
If so, then the subpoena duces tecum shall be issued to: _____

The Committee is considering adopting the final report of
the Senate's Special Investigative Committee pursuant to SR 2
(If considering convening in executive session, such action requires a 2/3 majority vote to do so.)

Members	Aye	Aye (WR)	Nay	Excused
KIM, Donna Mercado (C)	✓			
NISHIHARA, Clarence (VC)	✓			
HOOSER, Gary	✓			
IHARA, Jr., Les	✓			
SLOM, Sam		✓		
TOTAL	4	1		

Recommendation: Adopted Not Adopted

Chair's or Designee's Signature: Clarence Nishihara Date: 10-14-08

Distribution: Original File with Committee Yellow Clerk's Office Pink File with document (e.g., subpoena)