SUBJECT: Office of Hawaiian Affairs' (OHA) Contract with Kuauli 'Aina-Based Insights LLC

Contract No. 2879

May 1, 2017

Dear [Name],

Thank you for submitting the documentation related to the subject procurement. This review is a result of your email received on September 30, 2016 requesting a review of the Office of Hawaiian Affairs' (OHA) award to Kuauli 'Aina-Based Insights LLC for the subject contract. The State Procurement Office's (SPO) review is to determine if the subject services were procured in accordance with Hawaii Revised Statutes (HRS) Chapter 103D, the Hawaii Public Procurement Code, and its administrative rules.

PROCUREMENT REVIEW REQUEST

The written correspondence cited the following concerns:

1. Awardee, Kuauli 'Aina-Based Insights LLC was paid $200,000 for a Report on land, in $25,000 increments to avoid procuring these services via Competitive Sealed Proposals (RFP) process.

2. OHA Trustees delegated Procurement Authority to OHA Chief Executive Officer (CEO), Kamana'opono M. Crabbe, Ph.D., as the Procurement Officer as well as the authority to approve any contract or award of $25,000 or under so there's no legal requirement for Trustee approval or posting an RFP for competitive bidding.

SUMMARY OF FINDINGS

From documents received, OHA made the determination that the subject contract's services were exempt from Chapter 103D, Hawaii Revised Statutes (HRS) pursuant to Hawaii Administrative Rules (HAR) 3-120 (1) for research, reference, and education materials. As a result, these services were
procured on May 23, 2013 and OHA's Corporate Counsel approved the exemption procurement on May 24, 2013.

**Contract No. 2879 and Supplemental Contract Nos. 2879.01, 2879.02, 2879.03, 2879.04**

On June 7, 2013, OHA executed Contract No. 2879 with Kuauli ‘Aina-Based Insights LLC for the period June 1, 2013 to May 31, 2014 to render the following scope of services required for the Report on Land, paid to Kuauli ‘Aina-Based Insights, which included:

1. Documenting each sale of former Hawaiian Kingdom Government and Crown Lands sold during the years 1893 through 1959 to provide quantitative data to support Kanaka Maoli claims to land;
2. Quantifying the acreage of lands sold between 1893 through 1959;
3. Developing a Geographic Information System (GIS) database representing all lands sold during the period of 1893 through 1959; and
4. Providing a report that explains the methodology for the data collection, compilation, and presentation of the information as well as an analysis of data gaps and an explanation of the implementation of inventory.

OHA’s intent was for the contractor to conduct research that would examine and compile original source deeds of former Hawaiian Kingdom Government and Crown lands, which are available in print and electronic form to prepare a database that documented each sale of Government and Crown lands. OHA then intended to publish this research in its *Native Hawaiian Data Book*, and also on its publicly accessible database websites, *Papakilo* and *Kipuka*.

During this one-year period, there was one purchase order (PO) 130498 listing six payments totaling $150,000, for the Primary Contract No. 2879, as follows:

<table>
<thead>
<tr>
<th>Contractor Deliverables</th>
<th>Amount Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upon execution of this agreement</td>
<td>$20,000</td>
</tr>
<tr>
<td>Upon completion of services for years 1893 through 1909</td>
<td>$25,000</td>
</tr>
<tr>
<td>Upon completion of services for years 1910 through 1926</td>
<td>$25,000</td>
</tr>
<tr>
<td>Upon completion of services for years 1927 through 1943</td>
<td>$25,000</td>
</tr>
<tr>
<td>Upon completion of services for years 1944 through 1959</td>
<td>$25,000</td>
</tr>
<tr>
<td>Upon completion and OHA's approval of all services</td>
<td>$30,000</td>
</tr>
<tr>
<td><strong>Total Amount Paid for Contract No. 2879 via PO 130498</strong></td>
<td><strong>$150,000</strong></td>
</tr>
</tbody>
</table>

The Contractor's fees were payable based on invoices specifying to the satisfaction of OHA’s Coordinator (the Research Director or Designee) that the services rendered were satisfactorily performed in conformance to this agreement. These invoices were to include a detailed breakdown of the Contractor's time charges attributable to the particular billing period and accompanied by a verbal and/or written activity report as required by OHA that identified the type of work activities, tasks, and/or work product completed.

No supporting documents were submitted showing that OHA validated the Contractor's invoices.

Supplemental Contract No. 2879.01 added $250,000 to the original contract of $150,000 and extended the contract from June 1, 2014 through May 31, 2015. Supplemental Contract No. 2879.02 extended the contract from June 1, 2015 through January 31, 2016. Supplemental Contract No.
2879.03 extended the contract from February 1, 2016 through June 30, 2016. Supplemental Contract No. 2879.04 added $35,000 for services performed during February 1, 2016 through June 30, 2016, for a total contact amount of $435,000.

As of June 30, 2016 this contract has expired and no further work has been submitted or completed.

Award Posting for Contract No. 2879

As stated by OHA Trustee Robert K. Lindsey's letter dated November 7, 2016, "In compliance with OHA's Procedures Manual dated June 2008 for exempt purchase procedure, posting is not required." While there is no HRS or HAR requiring CPO Jurisdictions to post exemption awards, HAR §3-120-4(f) states:

"Purchasing agencies making procurements which are exempt from Chapter 103D, HRS, are nevertheless encouraged to adopt and use provisions of the chapter and its implementing rules as appropriate..."

An incomplete copy of OHA's Fiscal Procedures Manual, was submitted. Therefore, while OHA has developed its own internal policies and procedures for exemptions, the SPO was unable to find any supporting documentation stating that award posting is not required for OHA's exempt purchases.

Purchase Order No. 130498

According to OHA's Purchasing and Procurement Procedures Manual, the purchaser determines if the purchase is exempt from HRS Chapter 103D and will prepare a Purchase Requisition. If the goods or service is over $1,000 the purchaser completes the Procurement Check List (PCL), indicating the appropriate statutory or rule exemption. Once the review process is completed, the item(s) is purchased or in the case of a service, a contract is prepared.

Pursuant to HAR §3-120-4(g), "Purchasing agencies shall cite on the purchase order or on the contract, the authority waiver as "Exempt From Chapter 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number from Exhibit A titled "Procurement Exempt from Chapter 103D, HRS" dated 03/17/2011, located at the end of this chapter), Hawaii Administrative Rules."

Upon SPO's review of OHA's Purchase Order No. 130498, OHA failed to reference the authority waiver as "Exempt from Chapter 103D, HRS, pursuant to section 3-120-4(b) exemption 1" anywhere on Purchase Order No. 130498. As a result, OHA did not comply with its own exemption purchase procedures or HAR §3-120-4(g).

Exemption - Method of Procurement

From the OHA responses received, OHA procured the subject contract as an exemption based on HAR Chapter 3-120's Exhibit A - Exemption 1, which states:
"Research, reference, and educational materials including books, maps, periodicals, and pamphlets, which are published or available in print, video, audio, magnetic, or electronic form, including web-based databases;"

The SPO notified OHA, on December 16, 2016, that Exemption #1 is used for already published research material and not for contracting a vendor to conduct research and create a report, which is a service. The subject contract's scope of work did not fit within the confines of this exemption and therefore the subject contract's award to Kualii 'Aina-Based Insights does not comply with the Procurement Code.

In response to the SPO's emailed determination, OHA's letter dated January 5, 2017, stated "we did not find that the referenced exemption applied only to "already published research material." Accordingly, our staff interpreted the statute to include research materials that would be published and made available in print and electronic form qualified as procurement under HAR ch. 3-120 Exhibit A, Exemption no. 1."

HAR §3-120-5 Procedures for Requesting an Exemption and Amendment

When goods or services are not exempt pursuant to HRS Chapter 103D and whereby procurement by competitive means would be either not practicable or not advantageous to the State, there are procedures through which a request for exemption and amendment may be submitted to the chief procurement officer.

HAR §3-120-5 states these procedures for requesting exemption and amendment that include:

- Prior to procurement, heads of the purchasing agencies shall submit a written request to the chief procurement officer and certify to the best of their knowledge that the information provided is true and correct; and
- The chief procurement officer shall post a copy of the request on an internet site accessible to the public for seven days to allow any objections to the exempted procurement request to be submitted in writing to the chief procurement officer within seven days from the date the notice was posted.

No supporting documents could be found on OHA's website for an initial exemption request or any exemption amendment requests for any of the four supplemental contracts thereafter.

OHA's Delegation of Procurement Authority and Training

Pursuant to HRS §103D-208, procurement authority is centralized to the chief procurement officer (CPO), and allows the CPO to further delegate authority to designees or to any department, agency or official within their respective jurisdictions. This procurement authority may be further delegated to personnel as designated procurement officers or authorized to conduct and participate in procurement activities in accordance with HAR §3-121-16. Participation in procurement activities includes small purchases, developing/drafting a solicitation, reviewing, approving, conducting, managing, and administering the procurement/contract.
HAR §3-120-2 states:

"Procurement Officer" means any person with delegated authority to enter into and administer contracts and make written determination with respect thereto. The term includes an authorized representative acting within the limits of authority. The delegated authority is received from the chief procurement officer directly or through the head of the purchasing agency.

On December 16, 2016, the SPO requested OHA to provide the names of the individuals who participated in the subject contract's procurement, their roles and responsibilities, and documentation showing their delegation and training. OHA responded to the SPO's request on January 5, 2017 stating that 1) delegation and training documentation for the three individuals involved were not on file; and 2) all staff involved with the subject procurement are no longer employees of OHA.

Based on the documents submitted, Mr. Crabbe was not listed as the person who 1) conducted the procurement; 2) reviewed the method of procurement; or 3) approved the method of procurement. Additionally, on the executed contract, it shows that OHA's Chief Operating Officer signed "for" Mr. Crabbe instead of Mr. Crabbe himself. No supporting documentation was submitted regarding Mr. Crabbe's delegation authority or training for the subject contract.

In regards to training, all procurement officers and personnel of a department of the Executive Branch, with written delegated procurement authority to conduct and or participate in the procurement process are required to attend applicable State Procurement Officer (SPO) training workshops to comply with HRS §103D-110(c). Applicable training ensures delegated procurement personnel receive the appropriate training to fulfill their responsibilities, and are in compliance with HRS §103D-110, as amended by Act 194, SLH 2008 for goods, services, and construction.

While the SPO has developed its own internal policies and procedures for delegation and training, the SPO was unable to find any documentation of OHA's internal policies and/or procedures for delegation and training.

CONCLUSION

There are concerns that OHA utilized the HAR §3-120-4(b) – Exemption 1 incorrectly by not adhering to HAR Chapter 3-120’s procedures for requesting an exemption and overstepping its parameters, which ultimately limited competition in acquiring these services. In addition, there appears to be training and delegation inconsistencies.

Based on the information OHA submitted, the SPO recommends that OHA:

1. Establish and maintain internal policies and procedures for training and delegating procurement authority by OHA's chief procurement officer. Delegation of procurement authority to a procurement officer is based on their expertise, knowledge, and proficiency to carry out procurement duties, while seeking economy and efficiency to achieve program operations so careful consideration should have been taken when granting procurement authority. Since the delegation and training records for the personnel involved in this procurement were not on file, OHA should establish oversight of each personnel's delegation and training to maintain compliance with HRS Chapter 103D, the Hawaii Public Procurement Code.
2. Competitively procure these services in the future. Prior to procurement, issue a request for information to see if there are other contractors who could provide these services. It would not be in the best interest of the State to procure the services as an exemption or sole source when competition is possible.

3. Revise OHA's exemption guidelines. Prior to procurement, exemption requests are required to be submitted in writing to the chief procurement officer and the chief procurement officer is then required to post a copy of the request on the internet for any objections to the request to be submitted in writing within seven days of the date the notice is posted.

4. In the future, to prevent similar occurrences, consult with the SPO to assist in determining the applicable exemption limits to HAR Chapter 3-120, Procurement Exempt from Chapter 103D, HRS.

If you have any questions, please contact me at (808)587-4700 or sarah.allen@hawaii.gov, or your staff may contact Mara Smith at (808) 586-0554 or mara.smith@hawaii.gov.

Sincerely,

Sarah Allen
Administrator