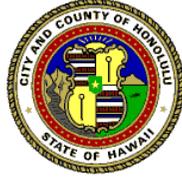


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 768-7786 · Fax: (808) 768-7768 · EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics

KIRK CALDWELL
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

ADVISORY OPINION NO. 2014-01

I. Summary

The Honolulu Board of Water Supply (HBWS) requested an investigation into possible ethical misconduct raised by a member of the public related to three contracts awarded by HBWS. After investigation, the Honolulu Ethics Commission (Commission) finds insufficient information exists to support a finding of probable cause of an ethics violation stemming from the award and performance of three contracts.

The investigation revealed systemic problems that, if not remedied, could lead to future ethical issues. Because the Office of the City Auditor (City Auditor) has been tasked with a management and performance audit of HBWS,¹ we ask both agencies to review the systemic issues.

II. Discussion and Analysis

On November 8, 2013 Ernest Lau, the Manager and Chief Engineer of HBWS, requested the Commission to conduct a review of possible ethics violations arising from certain contract awards. Mr. Lau based his request on a complaint by a member of the public. Commission staff investigated the allegations of ethical misconduct along with additional ethical issues that arose from the facts discovered in the investigation. The detailed investigation included interviewing all persons involved in the selection and award of the contracts, examining the contract procurement files and requirements and the award of the contracts. The Commission appreciates the candor and cooperation of the witnesses and the HWBS.

Brian McKee² was the Chief Information Officer (CIO) at HBWS until May, 2011. His duties there included creating and implementing a strategic information technology plan that would modernize all business systems used by the HWBS. The information technology strategy and modernization plan aided changes in all aspects of HBWS.

¹ Council Resolution 13-201 asks that the City Auditor conduct a comprehensive management and performance audit of HBWS.

² The Commission would usually not identify the subject of a complaint where there is no finding of an ethics violation by the subject. In this case, however, Mr. McKee agreed through counsel to be identified.

A. Contract #C12001B01 – Water Master Plan

This project consists of providing advisory and program management services in the development and execution of a Water Master Plan including consultant procurement, project management, and implementing the capital improvement program.

In January 2012, Mr. McKee formed UTC-10 Consulting, LLC (UTC) and successfully completed all qualifications necessary to bid on projects in the State of Hawaii. Mr. McKee was contacted by a consultant group and asked if UTC would be the lead contractor with the consultant group as subcontractor for purposes of bidding for and implementing the project management contract for the HBWS Water Master Plan. Mr. McKee agreed. UTC's subcontractor had been the contractor to the Kauai County Board of Water Supply (KWBS) to develop a water master plan when HWBS Manager and Chief Engineer Ernest Lau was the director of KCBWS. However, Mr. Lau abided by the procurement law which prohibits a director's involvement in the contract selection process. Two other consultants also bid on the contract. One of the five selection committee members had been supervised by Mr. McKee when he was at the HBWS. However, they did not have a close personal relationship or any business or financial activities together. Each of the members of the selection committee signed declarations stating that they had no personal, business or other relationships with any of the bidders that would influence their independent and objective judgment in selecting the consultant.

UTC won the bid in June 2012. The contract award was for \$1.5 million. Mr. McKee was to serve as the project manager, although he had no direct prior experience in this capacity. As the project manager UTC submitted invoices for the project until November 2012 when the subcontractor completed its state tax clearances and registration. At that point, a change order was approved by the parties to the original contract and Mr. McKee and UTC were effectively removed from any work related to the Water Master Plan project.

1. Allegations of possible conflicts of interest or preferential treatment by HBWS staff.

Revised Charter of Honolulu (RCH) Sec. 11-104 prohibits city personnel from giving an unwarranted benefit to any person or entity.³ The complaint alleged that certain HBWS employees may have given special treatment to Mr. McKee and UTC because of their prior work relationship with him.

The Commission staff independently reviewed the selection process, examined the contract and interviewed all witnesses involved in the selection of the consultant. Only one member of the selection committee had a prior relationship as Mr. McKee's subordinate, but there was no evidence of a conflict of interest or favoritism. The investigation did not find a

³ **Section 11-104. Fair and Equal Treatment --**

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

conflict of interest based on business activity, financial interest⁴ or close personal relationship.⁵ Merely having worked with Mr. McKee is too attenuated a connection alone to create a conflict of interest on the facts presented. Furthermore, all proper procurement policies were followed in posting, review of company qualifications and contract award. There is insufficient evidence to support a finding of probable cause the Mr. McKee or UTC was given preferential treatment for the Water Master Plan contract.

2. Alleged misuse of city position by Mr. McKee when he was an employee of HBWS.

Another question was whether Mr. McKee had, while CIO at HBWS, created the opportunity for himself to contract for the Water Master Plan project management contract. Such conduct could be a violation of RCH Sec. 11-104. This concern was also unsubstantiated upon investigation. The investigation did not find manipulation of specifications for the contract because the purpose of the contract was broad and could have been fulfilled by the other bidders. Commission staff did not find any information was available to Mr. McKee that was not available to the other bidders.

B. Contract # C13003201 – Project Management for Computerized Maintenance Services

In June 2012, UTC won this contract for \$950,000 through competitive procurement against four other consultants. The contract requires UTC to provide evaluation, planning, design, change management, process improvement and project management systems for the computerized maintenance management and related computer systems. These systems provide integrated work order, maintenance and asset management as well as customer billing for HBWS. In his prior position as CIO, Mr. McKee was instrumental in providing the direction for the current computer programs used at the HWBS. Two of the three members of the selection committee for this project were employees who had been under Mr. McKee's supervision at HWBS. All three members of the selection committee executed their declarations of no conflict of interest. The Commission staff examined the contract, the selection process and interviewed the witnesses involved in the selection of this contract.

1. Alleged possible ethics violations of preferential treatment or conflict of interest by HBWS staff.

As with the Water Master Plan contract, the concern for special treatment by HBWS staff was unsubstantiated. All procurement policies were followed in posting, review of company qualifications and award. Although Mr. McKee had supervised two of the employees on the

⁴ Section 11-102. Conflicts of Interest—

1. No elected or appointed officer or employee shall:
(c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

⁵ Advisory Opinions Nos. 2008-1 and 184 note that a close family or personal relationship may create a conflict of interest for a city officer or employee.

selection committee while he was at HWBS, this is an insufficient basis alone to find a conflict of interest or special treatment offered to Mr. McKee.

2. Alleged misuse of city position by Mr. McKee when he was an employee of HBWS.

HBWS has a history of using private consulting firms to assist with information technology (IT) matters. Although Mr. McKee had been instrumental in providing an initial “road map” for IT modernization, there was no evidence that he had created an environment by the time he left HBWS that would place him in at a competitive advantage in providing services for the future needs of HBWS. There were five qualified vendors who bid to provide the services requested. The general nature of the contract requirements and the response by a number of consulting groups tend to show that there was no contract manipulation or over-specification of terms.

Even though the majority of HBWS selection committee staff stated they had little or no formal procurement training, all required procurement policies and laws were followed in posting, review of company qualifications and award of the contract.

C. Contract #C08582001 – Customer Information System Project Management Services

In June 2008, HBWS entered into a professional services contract with EMA, Inc., to manage the contracts with vendors to implement changes to the customer information services technology to support and improve HBWS business processes. Specifically, this contract requires improvement of the automated meter reading system and the current billing system, which have been the subject of public concern about accurate billing.

The contract amount was originally set at \$796,000, but as a result of 11 change orders the contract amount had grown to \$4.2 million as of August 2013. The contract was initially for 18 months, but has been amended to continue to date. All change orders for this contract had supporting documentation and appropriate review and approval by Departments of Budget and Fiscal Services, Corporation Counsel and the Chief Engineer.

Mr. McKee had been employed by EMA Inc., to be the CIO for the HBWS, but became a direct employee of and the CIO for the HBWS in 2003. Although he no longer had a business relationship with EMA, Inc., he recused himself from this contract selection. After Mr. McKee left the HBWS in May 2011, there were at least eight change orders amounting to over \$3 million.

Staff found no evidence of ethical misconduct regarding the selection or award of this contract.

D. Other Issues

1. Disclosure of confidential information

The disclosure of confidential information by city personnel is prohibited in RCH Sec. 11-102.1(b).⁶ In the investigation of the matters above, it appears that confidential contract information (such as consultant proprietary information and federal employer identification number) may have been disclosed along with HBWS documents that were public records. An HBWS forensic security review was unable to positively identify the staff who may have created and printed the specific report(s) or released them without approval. Also, the investigation showed that there were insufficient safeguards to protect confidential information in physical copies of the contracts and related documents, which were available to several employees and were not always properly filed and secured.

2. Application of post employment restrictions

Another issue presented was whether Mr. McKee or UTC violated the post employment restrictions stated in RCH Sec. 11-105 and Revised Ordinances of Honolulu (ROH) Sec. 3-8.3(b).⁷ Generally, these laws prohibit former city personnel from appearing before a city agency for compensation for one year after leaving city service. ROH Sec. 3-8.3(g),⁸ however, allows former city officers and employees to offer to and contract with the city during the one-year period. Therefore, even if Mr. McKee and UTC entered into a contract with HBWS within the one-year period, there would be no violation of ROH Sec. 3-8.3.

3. Lack of training in procurement requirements

Although the majority of the members of the selection committees for the contracts investigated had substantial experience in the selection of contracts for professional services,

⁶ Section 11-102. Conflicts of Interest--

1. No elected or appointed officer or employee shall:
- b) Disclose confidential information gained by reason of such person's office or position or use such information for the personal gain or benefit of anyone.

⁷ Section 11-105. Future Employment --

No person who has served as an elected or appointed officer or employee of the city shall, within a period of one year after termination of such service or employment, appear for compensation before any agency of the city, or receive compensation for any services rendered in behalf of any private interests in relation to any case, proceeding or application with respect to which such person was directly concerned, or which was under such person's active consideration, or with respect to which knowledge or information was made available to such person during the period of said service or employment.

Sec. 3-8.3 Restrictions relative to post employment.

- (a) No former officer or employee of the city shall disclose any information which by law or practice is not available to the public and which the former officer or employee acquired in the course of his or her official duties or use the information for his or her personal gain or the benefit of anyone.
- (b) No former officer or employee of the city shall within a period of one year after termination of city service or employment and for compensation appear before any city agency in relation to any case, proceeding or application with respect to which such person was directly concerned or which was under the person's active consideration while employed or in the service of the city.

⁸ Sec. 3-8.3 Restrictions relative to post employment.

- (g) This section shall not prohibit any city agency from contracting with a former officer or employee to act on a matter on behalf of the city within the period of limitation stated herein and shall not prevent such officer or employee from appearing before any city agency in relation to such employment.

they had not received procurement training. There were no ethics violations resulting from the contracts, but to ensure that the procurement law and best practices in purchasing are followed the Commission recommends that the City Auditor review this issue and advise HBWS.

III. Conclusions and Recommendations

A. Based on the investigation, there is insufficient information to find probable cause of an ethics violation.

B. The Commission requests that the HBWS and the City Auditor review and make reasonable process changes in the following matters:

1. To ensure proper procurement and performance measures have been met where multiple change orders require significant funds, such as the customer information project management services contract;
2. Information technology security and access to the financial software programs in light of the disclosure of confidential information;
3. Protection of and access to physical copies of confidential information;
4. Inform all outgoing HBWS officers and employees of the restrictions on employment after city services, for which the Commission provides a guideline at <http://www1.honolulu.gov/ethics/future.htm>; and
5. Appropriate procurement training for the HBWS staff who are involved in awarding contracts.

APPROVED AS TO FORM
AND LEGALITY:

/s/Charles W. Tutto
CHARLES W. TOTTO
Executive Director and Legal Counsel

/s/Rachael S. Wong
RACHAEL S. WONG, Vice Chair
Honolulu Ethics Commission

Dated: Honolulu, Hawaii, February 19, 2014